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**Summary record of the 2516th meeting**

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## 2516th MEETING

Thursday, 17 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

### Draft report of the Commission on the work of its forty-ninth session (*continued*)

#### CHAPTER IV. *Nationality in relation to the succession of States (continued)* (A/CN.4/L.539 and Add.1-7)

#### C. Text of the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading (*continued*) (A/CN.4/L.539/Add.1-7)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.539/Add.2-7)

*Commentary to article 21* (Attribution of the nationality of the successor State) (A/CN.4/L.539/Add.5)

1. The CHAIRMAN, speaking as a member of the Commission, suggested that the verb in the first sentence of paragraph (6) should be changed from the past to the present tense: "The Commission is of the view that article 21 embodies a rule of customary international law". He also suggested that the French version should be amended to read: *La Commission voit dans l'article 21 l'expression d'une règle de droit international coutumier*.

*It was so agreed.*

2. Mr. HAFNER proposed that the last sentence of the last footnote to paragraph (2) should be replaced by: "The Commission notes that the concept of citizenship of the European Union does not correspond to the concept of nationality as envisaged in the present draft articles".

*It was so agreed.*

*The commentary to article 21, as amended, was adopted.*

*Commentary to articles 22 and 23* (Attribution of the nationality of the successor States) (Granting of the right of option by the successor States) (A/CN.4/L.539/Add.6)

3. Mr. HAFNER asked the Special Rapporteur to explain the footnote at the end of paragraph (4) concern-

ing the criterion of habitual residence, which referred to article 64 of the Peace Treaty of Saint-Germain-en-Laye. As the Special Rapporteur had made clear in his first report,<sup>1</sup> the concept of *pertinenza* did not necessarily correspond to that of habitual residence, he was unsure how to interpret the footnote.

4. Mr. MIKULKA (Special Rapporteur) said that most writers referred to *pertinenza* as something resembling habitual residence, but he had drawn attention to the ambiguities of the concept in the last sentence of the footnote.

5. Mr. HAFNER said that he was prepared to accept the footnote at the end of paragraph (4) with that clarification.

6. Mr. ECONOMIDES proposed that the following personal view should be added at the end of paragraph (10): "In the view of one member of the Commission, the persons referred to in article 22, subparagraph (b), should acquire the nationality of the successor State only if they so desire". He also noted with satisfaction that paragraph (11) reflected his point of view rather than that of the Commission regarding article 7, namely that a State was prohibited from attributing its nationality to persons against their will.

7. Mr. MIKULKA (Special Rapporteur) said that he could not agree to the proposed addition to paragraph (10) because it implied that the other members of the Commission interpreted article 22, subparagraph (b), as meaning that nationality could be imposed on persons against their will.

8. The CHAIRMAN asked whether the addition would be acceptable if "In the view of one member of the Commission" was replaced by "In the Commission's view".

9. Mr. MIKULKA (Special Rapporteur) said that the rest of the sentence should in that case be amended to read: "the nationality of the successor State should not be imposed on the persons referred to in article 22, subparagraph (b), against their will".

10. Mr. ECONOMIDES said that a successor State could fulfil its obligation under article 22 either by automatically attributing its nationality on an *ex lege* or general basis or by providing for an individual right of option. He wished to rule out the former eventuality so that nationality was acquired only on an individual and voluntary basis. When a State was accorded the right to attribute its nationality *ex lege*, the underlying assumption was that the recipients were consenting, which was not always the case.

11. Mr. MIKULKA (Special Rapporteur) drew attention to paragraph (11) of the commentary, which explicitly referred to the provision in article 7, and added that the obligation of a State under article 22, subparagraph (b), was to be implemented either through an "opting-in" procedure or by *ex lege* attribution of its nationality with an "opting-out" procedure. He saw no difference between the proposed addition by Mr. Economides and that interpretation of the Commission's view.

<sup>1</sup> See 2475th meeting, footnote 4.

12. Mr. ECONOMIDES said that, under article 22, a successor State was required, subject to the provisions of article 23, to attribute its nationality to two categories of persons. His objection to the *ex lege* attribution of nationality concerned the persons falling under subparagraph (b). The act of attribution would presumably take effect on the date of succession and the granting of a right of option might be left until later. Paragraph (10) mentioned two cases: acquisition of nationality automatically and acquisition on an individual basis upon option. Paragraph (11) contradicted that approach and was even slightly at variance with the provision in article 22. But the third sentence reflected his personal position on article 7. Although such inconsistency was regrettable, he did not wish to hold up the proceedings. His concerns might be allayed following the discussion of his proposal concerning article 2 which had been left in abeyance, and he might then be in a position to waive the inclusion of the proposed sentence in paragraph (10).

13. The CHAIRMAN suggested that Mr. Economides' problem might be solved by stating after the third sentence of paragraph (11) that "One member noted that, in his view, that interpretation did not correspond to the content of article 22".

14. Mr. MIKULKA (Special Rapporteur) warned that the addition might create confusion. Mr. Economides had his own interpretation of article 7 which had been reflected in an amendment adopted the previous day and which he was trying to impose on the Commission. But even when the other members maintained that their interpretation was the same as his, he was still not satisfied.

15. Mr. BENNOUNA said that he supported the Special Rapporteur for procedural reasons and for the sake of the Commission's work code. It was unacceptable and unprecedented to have one member with a divergent interpretation of a provision. Members might fail to agree on questions of content or approach, but there should be general agreement on the commentary, and commentaries within the commentary were to be shunned. He appreciated Mr. Economides' erudition on the topic under discussion, but urged him to show more democratic open-mindedness.

16. Mr. ECONOMIDES said his individual view concerned the substance of the article itself, since it could lead to attribution of nationality *ex lege* to persons who should acquire their nationality only by choice. His proposed addition contained no interpretation nor did he wish to impose an interpretation on anybody.

17. The CHAIRMAN pointed out that paragraph (11) closely reflected the content of the sentence that Mr. Economides wished to insert at the end of paragraph (10).

18. Mr. BROWNLIE said he supported Mr. Bennouna's observations regarding the general approach. If the Commission was not careful, its behaviour would begin to resemble that of delegates who, unless they entered an explicit reservation, were assumed to be individually bound by a text, which was not the case in the Commission. Individuals should not feel the need to insert what amounted to private reservations.

19. Mr. DUGARD said he shared the views of Mr. Bennouna and Mr. Brownlie. He had difficulties with references in the commentaries to "one member" whose identity was unknown to outsiders. He assumed that it had never been the Commission's practice to permit dissenting opinions and he felt it would be undesirable to move in that direction. He urged Mr. Economides to show restraint in expressing individual views.

20. The CHAIRMAN said it was inaccurate to say that it was not the Commission's practice to reflect dissenting opinions. It had always done so on the first reading when members held firm views on a subject. Individual views were not reflected, however, on the second reading. He nevertheless asked Mr. Economides and everybody else to show restraint where they held isolated individual opinions. In any case, he felt that Mr. Economides' view had been fully reflected in the amendment to the commentary to article 7.

21. Mr. ECONOMIDES said that his opinion regarding the definition in article 2 largely addressed his concern regarding article 22. He therefore withdrew his proposal.

22. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the commentary to articles 22 and 23 with a minor amendment to footnote 5.

*The commentary to articles 22 and 23, as amended, was adopted.*

*Commentary to articles 24 to 26 (Attribution of the nationality of the successor State) (Withdrawal of the nationality of the predecessor State) (Granting of the right of option by the predecessor and the successor States)*

23. Mr. ECONOMIDES, referring to article 26, said he had previously raised the question of whether a predecessor State was obliged under international law to organize a right of option. He had pointed out that the predecessor State, following the separation of part of its territory, remained outside the succession process and was under no obligation to organize a right of option. He wished to have that view included at some point in the commentary and suggested the following wording: "In the view of one member of the Commission, the predecessor State should not be subject to the obligation to grant a right of option, particularly because in the case in point it would not be a matter of succession of States."

24. Mr. ROSENSTOCK said that the inclusion of references to individual opinions which had not received significant support or formed the subject of an indicative vote should be avoided, as it merely eroded the difference between commentaries and summary records.

25. The CHAIRMAN, speaking as a member of the Commission, said he disagreed. The commentaries being considered represented a special case in that, thanks to the Special Rapporteur's exceptional diligence, they had been made available at the same time as the draft articles themselves. Their consideration therefore called for an open-minded approach on the part of all concerned. To exclude views which had not been put to an indicative vote would encourage members to ask for such a vote on future occasions even if their proposals had little chance of being

accepted. While he was personally less than enthusiastic about the proposal by Mr. Economides, he felt that, in the absence of strong objections, it should be accepted.

26. Mr. BENNOUNA said that he agreed with the view expressed by Mr. Rosenstock.

27. Mr. MIKULKA (Special Rapporteur) said that he recognized Mr. Economides' right to have his view reflected in the commentary if he so wished, but was quite unable to agree with the substance of the proposal. If no succession of States had taken place, how was it possible to speak of predecessor and successor States? International practice in all cases of succession of territory, such as those involving Poland and Germany or Italy and other States after the Second World War, showed that a succession of States had indeed occurred.

28. So far as the placing of the proposed new paragraph was concerned, he suggested that it should appear in the commentary as paragraph (14) *bis*.

29. Mr. ECONOMIDES said that, as he had explained during the debate on article 26, he did not believe that a succession of States occurred in respect of that part of the territory of the predecessor State which had not been ceded to the successor State.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new paragraph proposed by Mr. Economides.

*It was so agreed.*

31. Mr. PAMBOU-TCHIVOUNDA said he was surprised to note that the commentary failed to reflect the important discussion which had taken place on the subject of the expression "appropriate legal connection" used in subparagraph (b) of article 24. He was not proposing any amendment, but merely wished to place on record his disagreement with the Special Rapporteur's somewhat expeditious method.

32. Mr. MIKULKA (Special Rapporteur) agreed that the reference to the commentary to article 22 in the second sentence of paragraph (8) was perhaps a little too terse. He should have explained that the criterion of "an appropriate legal connection" was explained in paragraph (7) of the commentary to article 22.

33. The CHAIRMAN said he thought the reference in the footnote to paragraph (8) was sufficient.

34. Mr. LUKASHUK said that, as he listened to the discussion, the curtailment of the time allocated for the work of the Commission began to strike him as entirely justified.

35. Mr. PAMBOU-TCHIVOUNDA said that he had no desire to waste the Commission's time, but felt bound to point out that paragraph (7) of the commentary to article 22 failed to reflect the Commission's extensive debate on the introduction of the entirely new criterion of an appropriate legal connection.

36. Mr. ECONOMIDES, referring to the French version of the commentary questioned the use of the words *faire*

*le départ* in paragraph (3) and the phrase *le même genre de raisons* in paragraph (8).

37. The CHAIRMAN suggested that the words *le départ* in paragraph (3) should be replaced by *la distinction*. The phrase in paragraph (8) seemed to be acceptable.

*The commentary to articles 24 to 26, as amended, was adopted.*

*Commentary to article 27 (Cases of succession of States covered by the present draft articles)*

38. Mr. BENNOUNA, referring to paragraph (3), said that in deciding to adopt the opening clause of article 27, namely "Without prejudice to the right to a nationality of persons concerned", the Commission had intended to indicate that, whatever the particular circumstances of a succession of States, the human rights of the persons concerned were to be respected. The second sentence of paragraph (3) did not, as it stood, fully reflect that intention. He therefore proposed that it should be replaced by a sentence reading: "The Commission felt it desirable to recall the need to protect the rights of persons concerned irrespective of the circumstances in which the succession of States took place."

39. The CHAIRMAN, speaking as a member of the Commission, said that he entirely endorsed that proposal.

40. Mr. MIKULKA (Special Rapporteur) said that, since he failed to share or even to understand the point of view expressed by Mr. Bennouna, he could have no objection to any amendment to the paragraph reflecting that point of view. The opening phrase of article 27 quite clearly referred to the right to a nationality. To imply that it meant more than that was simply to obscure the situation and to confess that the Commission lacked the courage to tell the Sixth Committee what it had actually meant to do.

41. Mr. ROSENSTOCK said that Mr. Bennouna's proposal captured the spirit of what most members would wish the article to say. While agreeing with the Special Rapporteur that the proposed sentence was not a precise reflection of what was stated in the opening clause, he was in favour of inserting it in the commentary more or less in the form proposed.

42. Mr. ECONOMIDES said he, too, supported the amendment proposed by Mr. Bennouna, but suggested that the new sentence should be followed by a further sentence reading: "It is, of course, understood that the nationality may in no case be that of the State which has acted unlawfully." Such a proviso went without saying, but it would be useful to include it as a means of removing any possible ambiguity.

43. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, having the nationality of the aggressor State was preferable to having none at all.

44. Mr. PAMBOU-TCHIVOUNDA said he supported Mr. Bennouna's proposal and suggested that it should be considered separately from the one made by Mr. Economides.

45. Mr. THIAM and Mr. SIMMA said they also endorsed Mr. Bennouna's proposal.

46. Mr. MIKULKA (Special Rapporteur) said that he would be happy to accept the proposal if it corresponded to the actual contents of the article.

47. Mr. BROWNLIE said that, while not actively opposing Mr. Bennouna's proposal, he wished to register what amounted to an abstention in regard to it. He had not been in favour of the original amendment and thought that the commentary concerning it should remain as vague as possible.

48. Mr. GOCO said he supported Mr. Bennouna's proposal, but the words "The Commission felt" were not strong enough. The sentence should make it clear that the Commission had taken a stand on the issue.

49. Mr. GALICKI (Rapporteur) said he sympathized with Mr. Goco's position, but the wording proposed by Mr. Bennouna was a reasonably close reflection of what had taken place. If a more forceful turn of phrase were adopted, Mr. Brownlie might feel obliged to oppose the proposal as a whole.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the amendment proposed by Mr. Bennouna.

*It was so agreed.*

51. Mr. ECONOMIDES said that since Mr. Bennouna's amendment had been adopted, his own proposal became indispensable. The amendment indicated that human rights should be respected no matter what the circumstances in which the succession of States took place. He asked whether that meant that an aggressor State should be allowed to extend its nationality to the inhabitants of an illegally annexed territory. He categorically opposed such an eventuality, and thought the amendment should be followed by the sentence: "It is, obviously, understood that the nationality in question can in no circumstances be that of a State which has acted illegally". The purpose was to reinforce the interpretation already given in the second sentence of paragraph (2), that namely, "it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law".

52. Mr. RODRÍGUEZ CEDEÑO said he endorsed the comments made by Mr. Economides: the proposed addition was absolutely indispensable following the adoption of Mr. Bennouna's amendment and was fully in line with the spirit and the letter of article 27.

53. Mr. ROSENSTOCK said he was not convinced that Mr. Bennouna's amendment necessitated the proposal by Mr. Economides. The amendment referred in general terms to human rights, which clearly encompassed the prohibition on imposing a nationality on someone against his will. He did agree, however, that the opening phrase of article 27, which referred to nationality rather than to human rights in general and to nationality in particular, could lead to misinterpretation.

54. Mr. BROWNLIE suggested that a subamendment should be made to Mr. Bennouna's amendment, by adding the phrase "in accordance with the principles stated by ICJ in its advisory opinion concerning Namibia".<sup>2</sup> In that striking instance of usurpation of administration, the Court had adopted an opinion clearly indicating that South Africa had no right whatsoever to administer Namibia, but that it still had responsibilities in matters of basic human rights. That addition should meet Mr. Economides' concerns. He was concerned himself that the proposal by Mr. Economides would unnecessarily underline the negative side of the issue.

55. Mr. SIMMA, referring to the comments by Mr. Rosenstock, pointed out that article 27 spoke, not of nationality as such, but of the right to a nationality, using the same language found in article 1 in order to emphasize the fact that the draft dealt with nationality in a human rights context. It was odd that a reference to a human right to a nationality could lead to the inference that an aggressor State that attributed its nationality to persons living in an annexed territory could do so in conformity with human rights. He therefore favoured Mr. Brownlie's formulation over the proposal by Mr. Economides.

56. Mr. THIAM said the Commission could not deny one of its members the right to have the commentary reflect an opinion duly expressed in plenary. He for one had been impressed by Mr. Brownlie's reasoning during the discussion in plenary and saw no reason why Mr. Brownlie's proposal should not be adopted. Perhaps, to delineate it more clearly, it should be incorporated in a separate paragraph. Mr. Economides, too, had set out his views during the plenary discussion and they should be included in the commentary as well.

57. The CHAIRMAN, speaking as a member of the Commission, said he absolutely and categorically opposed the inclusion of the proposal by Mr. Economides and considered that it would be utterly lamentable. The victims of aggression would be punished twice over: first, by the annexation of the territory in which they lived, and secondly, by depriving them of a nationality. If the proposal, which was tantamount to a travesty of human rights, was indeed adopted, he demanded that it be prefaced by words such as "According to some members . . ." and followed by a sentence like "According to other members, this amounts to dual punishment of the population of a territory that was the victim of aggression or illegal annexation." Mr. Brownlie's proposal highlighted the fact that, in the advisory opinion concerning Namibia, ICJ had been anxious to prevent Namibians from having to suffer twice over from the machinations of South Africa. The impression must not be conveyed that the opinion expressed in the proposal by Mr. Economides was the opinion of the Commission as a whole.

58. Mr. THIAM said a substantive debate on the positions taken by members was not appropriate. He demanded that Mr. Economides' opinion, expressed during the debate, should be reflected in the commentary, as was the Commission's custom. Procedures had to be respected.

<sup>2</sup> See 2502nd meeting, footnote 6.

59. Mr. BENNOUNA pointed out that article 27 dealt with the very substance of the topic of nationality and the commentary should therefore reflect a consensus view within the Commission. He appealed to Mr. Economides to withdraw his proposal, which only obscured the issue and added nothing to the text. As Mr. Rosenstock had pointed out, one of the human rights was the right not to have a nationality imposed on one against one's will. During times of war or conflict, humanitarian law was in effect and rights were protected: *jus in bello* had been in existence since time immemorial. In the case of Namibia, ICJ had clearly indicated that, even though the situation was illegal, South Africa remained responsible for ensuring the observance of human rights. Hence there was nothing to be gained by adding the proposal by Mr. Economides. He agreed with Mr. Brownlie that the commentary should be kept fairly general, and that the main consideration should be that it had an internal logic.

60. Mr. ROSENSTOCK pointed out that, if the proposal by Mr. Brownlie was adopted, Mr. Economides might agree to withdraw his amendment, and the Chairman, as a member of the Commission, might no longer feel that the clarification he had formulated was necessary. He suggested that a decision be taken on the proposal by Mr. Brownlie.

61. Mr. THIAM said there was no question but that opinions expressed in plenary could be reflected in the commentary, and should be if the member concerned so desired. If Mr. Economides wanted to withdraw his proposal, all well and good, but that was entirely a matter for him to decide.

62. Mr. SIMMA said that, if what Mr. Thiam said was correct, he would later have a long list of amendments to be made to the commentary to the draft articles on reservations.

63. Mr. HAFNER said he fully endorsed the procedure suggested by Mr. Rosenstock. The proposal by Mr. Economides would have the unfortunate effect of suggesting that some members of the Commission thought that an aggressor State was entitled to impose its nationality on the inhabitants of an annexed territory.

64. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the proposal by Mr. Brownlie, on the understanding that the secretariat would supply the exact reference to the advisory opinion of ICJ.

*It was so agreed.*

65. Mr. ECONOMIDES said that his proposal had been exclusively interpretative in character. There appeared to be no disagreement among members on the substance of the issue, namely, an aggressor State could in no case give its nationality to persons from an illegally annexed territory. Accordingly, further to the adoption of Mr. Brownlie's proposal, he withdrew his own.

66. Mr. GALICKI (Rapporteur) said that, for the sake of clarity, the sentence "It is obvious, however, that article 27 is not included in section 4 of Part II" should be added at the end of paragraph (4).

*It was so agreed.*

67. Mr. ECONOMIDES proposed a minor drafting amendment to the final sentence in paragraph (2), namely, "The Commission did not consider" should be replaced by "It was not for the Commission to consider". The Commission's objective had not been to deal with questions that might arise in situations of military occupation or illegal annexation.

68. Mr. BENNOUNA said the only reason the sentence was included was that the 1978 and 1983 Vienna Conventions mentioned in the preceding sentence referred to such situations. The proposed amendment should be prefaced by the words "In contrast to those Conventions", or the entire sentence could be deleted.

69. Mr. MIKULKA (Special Rapporteur) said that deletion of the sentence would be unfortunate as it would remove certain elements that were not mentioned elsewhere. The Commission had made a thorough, academic study solely of cases of succession occurring in conformity with international law. It had not addressed illegal succession at all, and it was important to point that out. The sentence was also important in that it contained a footnote citing the provision in the 1969 Vienna Convention indicating that the Convention "shall not prejudice" questions arising from the military occupation of a territory.

70. Mr. SIMMA said the sentence was fairly ambiguous and he would be in favour of a small amendment to make it clear the Commission did not consider such questions to be within the ambit of the topic. Moreover, the Commission had in fact discussed the impact of illegal annexation—even at the current meeting.

71. Mr. MIKULKA (Special Rapporteur) said abstract discussion was not the same as a serious study of the legal practice and doctrine on illegal cases of State succession.

72. The CHAIRMAN suggested that the sentence might read "The Commission's point of departure was that questions of nationality related to military occupation or illegal annexation of territory did not fall within the scope of its study".

73. Mr. SIMMA said the sentence should be deleted, as any revision would only create problems. The related footnote could replace the deleted sentence.

74. Mr. MIKULKA (Special Rapporteur) said the Chairman's suggestion was a good one and he did not see how it would create problems.

75. Mr. BENNOUNA said the Special Rapporteur's position was not necessarily that of the Commission. The sentence was superfluous, merely made for ambiguity and conflicted with the sentences that followed. It should be deleted. The footnote, however, could be retained.

76. Mr. MIKULKA (Special Rapporteur) said that, if the sentence was truly superfluous, and the idea it conveyed was obvious from the remaining text, he would have no objection to deleting it.

77. Mr. ECONOMIDES said the sentence was useful and he maintained his proposal, which was the first to have been made.

78. The CHAIRMAN said that his own suggestion might be altered to read: "The Commission did not consider that it was incumbent on it to examine . . .".

79. Mr. BROWNLIE said that, if reference was made to the Commission's mandate, it would look as though the Commission was excluding cases of military occupation from the carefully formulated language of article 27 and it would be seen as a proviso to the proviso. He was not willing to accept the Chairman's formulation as such because of its other possible implications.

80. Mr. BENNOUNA said he was troubled by the phrase "questions relating to the present topic".

81. The CHAIRMAN said the Commission had already agreed to replace the phrase with "questions of nationality relating to military occupation or illegal annexation of territory".

82. Mr. BENNOUNA said he was opposed to that suggestion for politico-legal reasons. It added nothing and could lead to confusion. He would, however, go along with the majority.

83. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt his suggestion.

*It was so agreed.*

84. Mr. HE said the "without prejudice" clause unduly enlarged the scope of article 27, and he therefore reserved his position on the article. He also had difficulty in accepting the amendments to the commentary, which went against his wish that the main purpose of the article should be to address questions of nationality in relation to State succession.

85. Mr. LUKASHUK said the article freed aggressors from the obligation to respect international law. It did contain a reference to the 1978 and 1983 Vienna Conventions, but the matters covered by the article were quite different. With regard to human rights, the Special Rapporteur should have expressed a reservation to the effect that, even in unlawful cases, the State was not freed from its obligation to respect human rights.

*The commentary to article 27, as amended, was adopted.*

*Commentary to the preamble (A/CN.4/L.539/Add.7)*

86. Mr. PAMBOU-TCHIVOUNDA said he had a reservation with regard to the function assigned to the draft articles by the commentary, even though it recalled General Assembly resolution 51/160. The Commission's exercise would have gained in clarity and depth if it had consisted of a draft convention. He was opposed to the idea of a draft declaration.

87. The CHAIRMAN said the problem was one of form. A paragraph (2) *his* should be added to the commentary to the preamble, indicating that in the current state of affairs, the Commission had agreed to submit its draft to the General Assembly in the form of a draft Declaration. Such a paragraph, which would refer to the

report of the Commission on the work of its forty-eighth session, would fill a serious gap in the commentary.

88. Mr. MIKULKA (Special Rapporteur) said it was the function, not of a commentary to a preamble, but of a report by the Special Rapporteur, to state that the Commission had fulfilled its mandate, which was to develop the draft articles, accompanied by commentaries, in the form of a declaration, without prejudice to the final decision. It was for the Assembly to take that decision.

89. Mr. BENNOUNA said he failed to see why the commentary did not say anything about the final form to be taken by the preamble when the preamble itself began with the words, "The General Assembly". Perhaps the reference to the Assembly should be deleted.

90. The CHAIRMAN said there was no question of amending either the commentary or the preamble. Paragraph 3 of document A/CN.4/L.539 stated that the Commission had acted in accordance with its proposed plan of action; and according to subparagraph (b) contained in the footnote to that paragraph, the result of the work "should take the form of a declaratory instrument consisting of articles with commentaries". He was, however, troubled by the absence of any commentary on the use of the expression, "The General Assembly".

91. Mr. MIKULKA (Special Rapporteur) suggested replacing "The General Assembly" with an ellipsis.

92. Mr. ROSENSTOCK said that, in view of subparagraph (b) of the plan of action, the Commission was currently meant to be working on a declaration, which had to be made by somebody, and it would look foolish to remove the reference. It was all too obvious that the Commission was preparing a declaration for the General Assembly.

93. Mr. FERRARI BRAVO said he would have liked to see "The General Assembly" between brackets. If the Commission did not wish to go back on previous decisions, however, it should at least add a footnote to the phrase, explaining that, for the time being, it had prepared the declaration but was awaiting comments on it and that its final form would be decided during the Commission's second reading.

94. Mr. THIAM, supported by Mr. HAFNER, said that, if the words "The General Assembly" were deleted, the words "*Declares* the following" would have to be deleted as well.

95. The CHAIRMAN suggested a new paragraph (2) *his* to the effect that, in accordance with the plan of action adopted at the forty-eighth session, the Commission was submitting the draft articles in the form of a draft declaration, it being understood that the final decision on the form would be taken on second reading.

96. Mr. MIKULKA (Special Rapporteur) said the Chairman's suggestion would result in the idea appearing twice in the report to the General Assembly.

97. The CHAIRMAN said the commentary and the report had different functions and hence there was no difficulty.

98. Mr. LUKASHUK said the Russian translation of the phrase in paragraph (4), "in respect of matters which in principle were not regulated by international law", should be corrected, as it gave the impression that relations which could not at all be regulated by international law were nonetheless regulated by international obligations. He wondered whether the French text also corresponded to the English.

99. The CHAIRMAN said that the secretariat would check whether the other language versions corresponded to the English, which was the authentic text.

*The commentary to the preamble, as amended, was adopted.*

*Commentary to article 2 (Use of terms) (continued) (A/CN.4/L.539/Add.2)\**

100. The CHAIRMAN invited the Commission to consider the proposal by Mr. Economides for paragraph (13), which read:

"(13) One member of the Commission expressed reservations about the definition contained in subparagraph (f), particularly on the grounds that it is inaccurate. In his view, 'persons concerned' are, in accordance with international law, either all nationals of the predecessor State, if it disappears, or, in the other cases (transfer and separation), only those who have their habitual residence in the territory affected by the succession. The successor State may, of course, expand the circle of such persons on the basis of its internal law, but it cannot do so automatically, since the consent of those persons is necessary."

101. Mr. MIKULKA (Special Rapporteur) said he saw no difference between the existing text and the proposed replacement. Mr. Economides had said the element of habitual residence was missing from the definition, but he had never specified how it should be incorporated in the definition. He was simply providing an explanation of what he understood by the notion of "persons concerned", and that understanding did not differ from his own, which was set out in paragraph (8) of the commentary.

102. Mr. ECONOMIDES said that, under article 2, persons concerned were defined as every individual who had the nationality of the predecessor State and whose nationality "may" be affected by the succession of States. That "may" was ambiguous. Under international law, those persons were determined in all cases of State succession and, where a predecessor State disappeared, those persons were all of its nationals. In cases of the continuation of a predecessor State, they were only those nationals having their habitual residence on the territory of the State subject to succession. His definition therefore differed from that of the Commission. He knew that his proposal opened the door to other persons, but under internal law, not under international law. The nuance was that internal law had the right to make such determinations, but it must do so voluntarily, individually, and not *ex lege* or automatically.

\* Resumed from the 2512th meeting.

103. Mr. SIMMA said that if Mr. Economides insisted on the insertion of his view, the word "particularly" should be deleted, as it implied that Mr. Economides had other reservations as well.

104. Mr. ECONOMIDES said that, since his proposal was expressed as a reservation he would ask Mr. Simma to respect the way in which it was formulated.

*The meeting rose at 1.05 p.m.*

## 2517th MEETING

*Thursday, 17 July 1997, at 3.05 p.m.*

*Chairman: Mr. Alain PELLET*

later: Mr. João Clemente BAENA SOARES

*Present: Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.*

### **Draft report of the Commission on the work of its forty-ninth session (continued)**

CHAPTER IV. *Nationality in relation to the succession of States (concluded) (A/CN.4/L.539 and Add.1-7)*

C. **Text of the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading (concluded) (A/CN.4/L.539/Add.1-7)**

2. **TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded) (A/CN.4/L.539/Add.2-7)**

*Commentary to article 2 (Use of terms) (concluded) (A/CN.4/L.539/Add.2)*

1. The CHAIRMAN pointed out that the Commission had postponed the adoption of the commentary to article 2 until it had the proposal by Mr. Economides for paragraph (13) in written form. The proposal had been circulated, at the current time, in a working paper (ILC(XLIX)/Plenary/WP.5).<sup>1</sup>

<sup>1</sup> For the text, see 2516th meeting, para. 100.