

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
  
1997

*Volume I*

*Summary records  
of the meetings  
of the forty-ninth session  
12 May-18 July 1997*

---

UNITED NATIONS



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook...*, followed by the year (for example, *Yearbook...* 1994).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

\*

\* \*

This volume contains the summary records of the meetings of the forty-ninth session of the Commission (A/CN.4/SR.2474-A/CN.4/SR.2518), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/1997

UNITED NATIONS PUBLICATION
<i>Sales No.</i> E.99.V.7 ISBN 92-1-133613-9
<i>Complete set of two volumes:</i> ISBN 92-1-133616-3
ISSN 0082-8289

## CONTENTS

	Page		Page
<b>Members of the Commission</b> .....	viii	<b>2477th meeting</b>	
<b>Officers</b> .....	viii	<i>Thursday, 15 May 1997, at 10.05 a.m.</i>	
<b>Agenda</b> .....	ix	Nationality in relation to the succession of States ( <i>continued</i> )	
<b>Abbreviations</b> .....	x	Third report of the Special Rapporteur ( <i>continued</i> ) .....	22
<b>Multilateral instruments cited in the present volume</b> .....	xi	General presentation of the draft articles, preamble and definitions ( <i>continued</i> ) .....	22
<b>Check-list of documents of the forty-ninth session</b> .....	xvi	Organization of work of the session ( <i>continued</i> ) .....	28
SUMMARY RECORDS OF THE 2474th TO 2518th MEETINGS			
<b>2474th meeting</b>		<b>2478th meeting</b>	
<i>Monday, 12 May 1997, at 3.30 p.m.</i>		<i>Friday, 16 May 1997, at 10 a.m.</i>	
Opening of the session .....	1	Nationality in relation to the succession of States ( <i>continued</i> )	
Election of officers .....	1	Third report of the Special Rapporteur ( <i>continued</i> )	
Programme, procedures and working methods of the Commission, and its documentation .....	2	General presentation of the draft articles, preamble and definitions ( <i>continued</i> ) .....	29
Adoption of the agenda .....	2	<b>2479th meeting</b>	
Organization of work of the session .....	2	<i>Tuesday, 20 May 1997, at 10 a.m.</i>	
<b>2475th meeting</b>		Nationality in relation to the succession of States ( <i>continued</i> )	
<i>Tuesday, 13 May 1997, at 10.05 a.m.</i>		Third report of the Special Rapporteur ( <i>continued</i> )	
Organization of work of the session ( <i>continued</i> ) .....	3	General presentation of the draft articles, preamble and definitions ( <i>concluded</i> ) .....	37
Nationality in relation to the succession of States		Organization of work of the session ( <i>continued</i> ) .....	44
Third report of the Special Rapporteur .....	4	<b>2480th meeting</b>	
General presentation of the draft articles, preamble and definitions .....	8	<i>Wednesday, 21 May 1997, at 10.10 a.m.</i>	
Part I (General principles concerning nationality in relation to the succession of States)		Nationality in relation to the succession of States ( <i>continued</i> )	
Article 1 (Right to a nationality) .....	9	Third report of the Special Rapporteur ( <i>continued</i> ) .....	44
Article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness) .....	10	Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )	
Article 3 (Legislation concerning nationality and other connected issues) .....	11	Articles 1 to 3 .....	44
Article 4 (Granting of nationality to persons having their habitual residence in another State) .....	12	<b>2481st meeting</b>	
Article 5 (Renunciation of the nationality of another State as a condition for granting nationality) .....	12	<i>Thursday, 22 May 1997, at 10.05 a.m.</i>	
Article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State) .....	12	Nationality in relation to the succession of States ( <i>continued</i> )	
Article 7 (The right of option) and article 8 (Granting and withdrawal of nationality upon option) .....	12	Third report of the Special Rapporteur ( <i>continued</i> ) .....	51
Article 9 (Unity of families) .....	13	Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )	
Article 10 (Right of residence) .....	13	Articles 1 to 3 ( <i>concluded</i> ) .....	51
Article 11 (Guarantees of the human rights of persons concerned) .....	14	<b>2482nd meeting</b>	
Article 12 (Non-discrimination) .....	14	<i>Friday, 23 May 1997, at 10.35 a.m.</i>	
Article 13 (Prohibition of arbitrary decisions concerning nationality issues) .....	14	Nationality in relation to the succession of States ( <i>continued</i> )	
Article 14 (Procedures relating to nationality issues) .....	15	Third report of the Special Rapporteur ( <i>continued</i> )	
<b>2476th meeting</b>		Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )	
<i>Wednesday, 14 May 1997, at 10.05 a.m.</i>		Articles 4 to 6 .....	58
Nationality in relation to the succession of States ( <i>continued</i> )		<b>2483rd meeting</b>	
Third report of the Special Rapporteur ( <i>continued</i> )		<i>Tuesday, 27 May 1997, at 10.05 a.m.</i>	
Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )		Nationality in relation to the succession of States ( <i>continued</i> )	
Article 15 (Obligation of States concerned to consult and negotiate) .....	15	Third report of the Special Rapporteur ( <i>continued</i> )	
Article 16 (Other States) .....	16	Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )	
Composition of the Drafting Committee .....	22	Articles 7 and 8 .....	63
		Organization of work of the session ( <i>concluded</i> ) .....	67

	<i>Page</i>		<i>Page</i>
<b>2484th meeting</b>		Section 3 (Dissolution of a State) ( <i>continued</i> ).....	109
<i>Wednesday, 28 May 1997, at 10.05 a.m.</i>		Cooperation with other bodies	
Nationality in relation to the succession of States ( <i>continued</i> )		Statement by the Observer for the Inter-American Juridical Committee.....	112
Third report of the Special Rapporteur ( <i>continued</i> )			
Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )		<b>2491st meeting</b>	
Articles 7 and 8 ( <i>concluded</i> ) .....	68	<i>Wednesday, 11 June 1997, at 10 a.m.</i>	
Articles 9 to 14 .....	71	Cooperation with other bodies ( <i>continued</i> )	
		Statement by the Observer for the European Committee on Legal Cooperation .....	116
<b>2485th meeting</b>		Statement by the Observer for the Inter-American Juridical Committee ( <i>concluded</i> ).....	121
<i>Thursday, 29 May 1997, at 10.05 a.m.</i>		Nationality in relation to the succession of States ( <i>continued</i> )	
Nationality in relation to the succession of States ( <i>continued</i> )		Third report of the Special Rapporteur ( <i>continued</i> )	
Third report of the Special Rapporteur ( <i>continued</i> )		Part II (Principles applicable in specific situations of succession of States) ( <i>continued</i> )	
Part I (General principles concerning nationality in relation to the succession of States) ( <i>continued</i> )		Section 3 (Dissolution of a State) ( <i>continued</i> ).....	121
Articles 9 to 14 ( <i>concluded</i> ) .....	73		
Articles 15 and 16 .....	78	<b>2492nd meeting</b>	
		<i>Thursday, 12 June 1997, at 10.05 a.m.</i>	
<b>2486th meeting</b>		Nationality in relation to the succession of States ( <i>continued</i> )	
<i>Friday, 30 May 1997, at 10.05 a.m.</i>		Third report of the Special Rapporteur ( <i>continued</i> )	
Nationality in relation to the succession of States ( <i>continued</i> )		Part II (Principles applicable in specific situations of succession of States) ( <i>continued</i> )	
Third report of the Special Rapporteur ( <i>continued</i> )		Section 3 (Dissolution of a State) ( <i>concluded</i> ).....	124
Part I (General principles concerning nationality in relation to the succession of States) ( <i>concluded</i> )		Section 4 (Separation of part of the territory)	
Articles 15 and 16 ( <i>concluded</i> ) .....	79	Article 22 (Scope of application)	
		Article 23 (Granting of the nationality of the successor State)	
<b>2487th meeting</b>		Article 24 (Withdrawal of the nationality of the predecessor State) and	
<i>Tuesday, 3 June 1997, at 10.05 a.m.</i>		Article 25 (Granting of the right of option by the predecessor and the successor States) .....	128
Reservations to treaties			
Second report of the Special Rapporteur.....	87	<b>2493rd meeting</b>	
		<i>Friday, 13 June 1997, at 10.05 a.m.</i>	
<b>2488th meeting</b>		Nationality in relation to the succession of States ( <i>continued</i> )	
<i>Thursday, 5 June 1997, at 10 a.m.</i>		Third report of the Special Rapporteur ( <i>continued</i> )	
Nationality in relation to the succession of States ( <i>continued</i> )		Part II (Principles applicable in specific situations of succession of States) ( <i>continued</i> )	
Third report of the Special Rapporteur ( <i>continued</i> ) .....	93	Section 4 (Separation of part of the territory) ( <i>continued</i> ) .....	131
Part II (Principles applicable in specific situations of succession of States).....	93		
Section 1 (Transfer of part of the territory)		<b>2494th meeting</b>	
Article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) .....	99	<i>Tuesday, 17 June 1997, at 10.10 a.m.</i>	
		Welcome to participants in the International Law Seminar.....	136
<b>2489th meeting</b>		Cooperation with other bodies ( <i>continued</i> )	
<i>Friday, 6 June 1997, at 10.05 a.m.</i>		Statement by the Observer for the Asian-African Legal Consultative Committee .....	136
Nationality in relation to the succession of States ( <i>continued</i> )		Nationality in relation to the succession of States ( <i>continued</i> )	
Third report of the Special Rapporteur ( <i>continued</i> )		Third report of the Special Rapporteur ( <i>concluded</i> )	
Part II (Principles applicable in specific situations of succession of States) ( <i>continued</i> ) .....	102	Part II (Principles applicable in specific situations of succession of States) ( <i>concluded</i> )	
Section 1 (Transfer of part of the territory) ( <i>concluded</i> ).....	102	Section 4 (Separation of part of the territory) ( <i>concluded</i> ) .....	140
Section 2 (Unification of States)			
Article 18 (Granting of the nationality of the successor State) .....	106	<b>2495th meeting</b>	
Section 3 (Dissolution of a State)		<i>Wednesday, 18 June 1997, at 10.05 a.m.</i>	
Article 19 (Scope of application)		Cooperation with other bodies ( <i>continued</i> ) .....	142
Article 20 (Granting of the nationality of the successor States) and		Nationality in relation to the succession of States ( <i>continued</i> )	
Article 21 (Granting of the right of option by the successor States).....	107	Draft articles proposed by the Drafting Committee .....	143
		Part I .....	144
<b>2490th meeting</b>		Article I (Right to a nationality).....	148
<i>Tuesday, 10 June 1997, at 10.05 a.m.</i>			
Nationality in relation to the succession of States ( <i>continued</i> )		<b>2496th meeting</b>	
Third report of the Special Rapporteur ( <i>continued</i> )		<i>Thursday, 19 June 1997, at 10.05 a.m.</i>	
Part II (Principles applicable in specific situations of succession of States) ( <i>continued</i> ) .....	109	International liability for injurious consequences arising out of acts not prohibited by international law	

	<i>Page</i>		<i>Page</i>
Report of the Working Group.....	150	<b>2502nd meeting</b>	
Nationality in relation to the succession of States ( <i>continued</i> )		<i>Tuesday, 1 July 1997, at 10.10 a.m.</i>	
Draft articles proposed by the Drafting Committee ( <i>continued</i> ).....	156	Reservations to treaties ( <i>continued</i> )	
Part I ( <i>continued</i> )		Second report of the Special Rapporteur ( <i>continued</i> ) .....	197
Article 2 (Use of terms).....	156	<b>2503rd meeting</b>	
Article 3 (Prevention of statelessness) .....	156	<i>Wednesday, 2 July 1997, at 10.05 a.m.</i>	
Article 4 (Presumption of nationality) .....	156	Reservations to treaties ( <i>continued</i> )	
<b>2497th meeting</b>		Second report of the Special Rapporteur ( <i>concluded</i> ).....	207
<i>Friday, 20 June 1997, at 10.05 a.m.</i>		Cooperation with other bodies ( <i>concluded</i> )	
Nationality in relation to the succession of States ( <i>continued</i> )		Visit by a member of the International Court of Justice.....	212
Draft articles proposed by the Drafting Committee ( <i>continued</i> ).....	157	<b>2504th meeting</b>	
Part I ( <i>continued</i> )		<i>Thursday, 3 July 1997, at 10.05 a.m.</i>	
Article 4 (Presumption of nationality) ( <i>concluded</i> ) .....	157	State responsibility	
Article 5 (Legislation concerning nationality and other connected issues).....	158	Report of the Working Group.....	215
Article 6 (Effective date).....	160	Nationality in relation to the succession of States ( <i>continued</i> )	
Article 7 (Attribution of nationality to persons concerned having their habitual residence in another State).....	162	Draft articles proposed by the Drafting Committee ( <i>continued</i> ).....	218
<b>2498th meeting</b>		Part II .....	219
<i>Tuesday, 24 June 1997, at 10.05 a.m.</i>		Article 19 (Application of Part II).....	220
Nationality in relation to the succession of States ( <i>continued</i> )		Section 1 (Transfer of part of the territory)	
Draft articles proposed by the Drafting Committee ( <i>continued</i> ).....	163	Article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State).....	222
Part I ( <i>continued</i> )		Section 2 (Unification of States)	
Article 7 (Attribution of nationality to persons concerned having their habitual residence in another State) ( <i>concluded</i> ).....	163	Article 21 (Attribution of the nationality of the successor State).....	224
Article 8 (Renunciation of the nationality of another State as a condition for attribution of nationality)..	163	<b>2505th meeting</b>	
Article 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State) .....	163	<i>Friday, 4 July 1997, at 10.05 a.m.</i>	
Article 10 (Respect for the will of persons concerned)	163	Nationality in relation to the succession of States ( <i>continued</i> )	
Article 11 (Unity of a family).....	166	Draft articles proposed by the Drafting Committee ( <i>continued</i> )	
Article 12 (Child born after the succession of States)	168	Part II ( <i>continued</i> )	
Article 13 (Status of habitual residents).....	169	Section 2 (Unification of States) ( <i>concluded</i> ) .....	225
Article 14 (Non-discrimination).....	169	Section 3 (Dissolution of a State).....	226
Article 15 (Prohibition of arbitrary decisions concerning nationality issues).....	169	Article 22 (Attribution of the nationality of the successor States).....	227
Article 15 (Prohibition of arbitrary decisions concerning nationality issues).....	169	Article 23 (Granting of the right of option by the successor States).....	230
<b>2499th meeting</b>		<b>2506th meeting</b>	
<i>Wednesday, 25 June 1997, at 10.05 a.m.</i>		<i>Friday, 4 July 1997, at 3.05 p.m.</i>	
Nationality in relation to the succession of States ( <i>continued</i> )		Closure of the International Law Seminar.....	231
Draft articles proposed by the Drafting Committee ( <i>continued</i> ).....	171	Visit by the Secretary-General.....	233
Part I ( <i>concluded</i> )		<b>2507th meeting</b>	
Article 15 (Prohibition of arbitrary decisions concerning nationality issues) ( <i>concluded</i> ).....	171	<i>Tuesday, 8 July 1997, at 10.05 a.m.</i>	
Article 16 (Procedures relating to nationality issues)	172	Nationality in relation to the succession of States ( <i>continued</i> )	
Article 17 (Exchange of information, consultation and negotiation).....	173	Draft articles proposed by the Drafting Committee ( <i>continued</i> )	
Article 18 (Other States).....	173	Part II ( <i>continued</i> )	
Reservations to treaties ( <i>continued</i> )		Section 4 (Separation of part of the territory).....	235
Second report of the Special Rapporteur ( <i>continued</i> ) .....	175	Article 24 (Attribution of the nationality of the successor State).....	236
<b>2500th meeting</b>		Article 25 (Withdrawal of the nationality of the predecessor State).....	236
<i>Thursday, 26 June 1997, at 10.05 a.m.</i>		<b>2508th meeting</b>	
Reservations to treaties ( <i>continued</i> )		<i>Wednesday, 9 July 1997, at 10.05 a.m.</i>	
Second report of the Special Rapporteur ( <i>continued</i> ) .....	177	Nationality in relation to the succession of States ( <i>continued</i> )	
<b>2501st meeting</b>		Draft articles proposed by the Drafting Committee ( <i>continued</i> )	
<i>Friday, 27 June 1997, at 10.05 a.m.</i>			
Reservations to treaties ( <i>continued</i> )			
Second report of the Special Rapporteur ( <i>continued</i> ) .....	189		

	Page
Part II ( <i>concluded</i> )	
Section 4 (Separation of part of the territory) ( <i>concluded</i> )	
Article 26 (Granting of the right of option by the predecessor and the successor States) .....	241
New article (Cases of succession of States covered by the present draft articles) .....	243
<b>2509th meeting</b>	
<i>Thursday, 10 July 1997, at 10.05 a.m.</i>	
Nationality in relation to the succession of States ( <i>concluded</i> )	
Draft articles proposed by the Drafting Committee ( <i>concluded</i> ) .....	247
Titles of Parts I and II .....	248
Preamble .....	248
Reservations to treaties ( <i>continued</i> )	
Draft preliminary conclusions on reservations to normative multilateral treaties including human rights treaties proposed by the Drafting Committee .....	250
Draft resolution	
Preamble .....	252
Operative part .....	252
<b>2510th meeting</b>	
<i>Friday, 11 July 1997, at 10.10 a.m.</i>	
Appointment of special rapporteurs .....	253
Reservations to treaties ( <i>continued</i> )	
Draft preliminary conclusions on reservations to normative multilateral treaties including human rights treaties proposed by the Drafting Committee ( <i>continued</i> ) .....	254
Draft preliminary conclusions .....	254
<b>2511th meeting</b>	
<i>Monday, 14 July 1997, at 10.05 a.m.</i>	
Reservations to treaties ( <i>concluded</i> )	
Draft preliminary conclusions on reservations to normative multilateral treaties including human rights treaties proposed by the Drafting Committee ( <i>concluded</i> ) .....	259
Draft preliminary conclusions ( <i>concluded</i> ) .....	259
<b>2512th meeting</b>	
<i>Monday, 14 July 1997, at 3.10 p.m.</i>	
Unilateral acts of States	
Report of the Working Group .....	265
Draft report of the Commission on the work of its forty-ninth session	
Chapter IV. Nationality in relation to the succession of States .....	269
A. Introduction .....	269
B. Consideration of the topic at the present session .....	269
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	
2. Text of the draft articles with commentaries thereto	
Commentary to article 1 .....	270
Commentary to article 2 .....	270
Commentary to article 3 .....	271
Commentary to article 4 .....	271
Commentary to article 5 .....	271
Commentary to article 6 .....	272
<b>2513th meeting</b>	
<i>Tuesday, 15 July 1997, at 10.05 a.m.</i>	
Diplomatic protection	
Report of the Working Group .....	272

	Page
Draft report of the Commission on the work of its forty-ninth session ( <i>continued</i> )	
Chapter IV. Nationality in relation to the succession of States ( <i>continued</i> )	
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 ( <i>continued</i> )	
2. Text of the draft articles with commentaries thereto ( <i>continued</i> )	
Commentary to article 7 .....	278
<b>2514th meeting</b>	
<i>Wednesday, 16 July 1997, at 10.10 a.m.</i>	
Draft report of the Commission on the work of its forty-ninth session ( <i>continued</i> )	
Chapter IV. Nationality in relation to the succession of States ( <i>continued</i> )	
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 ( <i>continued</i> )	
2. Text of the draft articles with commentaries thereto ( <i>continued</i> )	
Commentary to article 7 ( <i>concluded</i> ) .....	279
Commentary to article 8 .....	279
Commentary to article 9 .....	280
Commentary to article 10 .....	280
Commentary to article 11 .....	280
Commentary to article 12 .....	280
Commentary to article 13 .....	280
Commentary to article 14 .....	285
<b>2515th meeting</b>	
<i>Wednesday, 16 July 1997, at 3.15 p.m.</i>	
Draft report of the Commission on the work of its forty-ninth session ( <i>continued</i> )	
Chapter IV. Nationality in relation to the succession of States ( <i>continued</i> )	
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 ( <i>continued</i> )	
2. Text of the draft articles with commentaries thereto ( <i>continued</i> )	
Commentary to article 14 ( <i>concluded</i> ) .....	286
Commentary to article 15 .....	286
Commentary to article 16 .....	286
Commentary to article 17 .....	287
Commentary to article 18 .....	287
Commentary to article 19 .....	288
Commentary to article 20 .....	288
<b>2516th meeting</b>	
<i>Thursday, 17 July 1997, at 10.05 a.m.</i>	
Draft report of the Commission on the work of its forty-ninth session ( <i>continued</i> )	
Chapter IV. Nationality in relation to the succession of States ( <i>continued</i> )	
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 ( <i>continued</i> )	
2. Text of the draft articles with commentaries thereto ( <i>continued</i> )	
Commentary to article 21 .....	290
Commentary to articles 22 and 23 .....	290
Commentary to articles 24 to 26 .....	291
Commentary to article 27 .....	292
Commentary to the preamble .....	295
Commentary to article 2 ( <i>continued</i> ) .....	296

	<i>Page</i>
<b>2517th meeting</b>	
<i>Thursday, 17 July 1997, at 3.05 p.m.</i>	
Draft report of the Commission on the work of its forty-ninth session ( <i>concluded</i> )	
Chapter IV. Nationality in relation to the succession of States ( <i>concluded</i> )	
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 ( <i>concluded</i> )	
2. Text of the draft articles with commentaries thereto ( <i>concluded</i> )	
Commentary to article 2 ( <i>concluded</i> )	296
Commentary to article 16 ( <i>concluded</i> )	297
Commentary to article 10 ( <i>concluded</i> )	298
1. Text of the draft articles	298
Chapter V. Reservations to treaties	298
A. Introduction	298
B. Consideration of the topic at the present session	298
<b>2518th meeting</b>	
<i>Friday, 18 July 1997, at 10 a.m.</i>	
Draft report of the Commission on the work of its forty-ninth session ( <i>concluded</i> )	
Chapter V. Reservations to treaties ( <i>concluded</i> )	
B. Consideration of the topic at the present session ( <i>concluded</i> )	302

	<i>Page</i>
C. Texts of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission	302
Chapter X. Other decisions and conclusions of the Commission	302
A. Programme, procedures and working methods of the Commission, and its documentation	302
B. Appointment of special rapporteurs	305
C. Long-term programme of work	306
D. Cooperation with other bodies	306
E. Date and place of the fiftieth session	306
F. Representation at the fifty-second session of the General Assembly	306
G. Contribution to the Decade of International Law	306
H. International Law Seminar	307
Chapter VI. State responsibility	307
Chapter VII. International liability for injurious consequences arising out of acts not prohibited by international law	307
Chapter VIII. Diplomatic protection	307
Chapter IX. Unilateral acts of State	307
Chapter I. Organization of the session	
A. Membership	
B. Officers and the Enlarged Bureau	
C. Drafting Committee	
D. Working groups	
E. Secretariat	307
F. Agenda	307
Chapter II. Summary of the work of the Commission at its forty-ninth session	307
Chapter III. Specific issues on which comments would be of particular interest to the Commission	307
Closure of the session	308

## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Emmanuel Akwei ADDO	Ghana	Mr. Mauricio HERDOCIA SACASA	Nicaragua
Mr. Husain AL-BAHARNA	Bahrain	Mr. Jorge ILLUECA	Panama
Mr. Awn AL-KHASAWNEH	Jordan	Mr. Peter KABATSI	Uganda
Mr. João Clemente BAENA SOARES	Brazil	Mr. James Lutabanzibwa KATEKA	United Republic of Tanzania
Mr. Mohamed BENNOUNA	Morocco	Mr. Mochtar KUSUMA-ATMADJA	Indonesia
Mr. Ian BROWNLIE	United Kingdom of Great Britain and Northern Ireland	Mr. Igor Ivanovich LUKASHUK	Russian Federation
Mr. Enrique CANDIOTI	Argentina	Mr. Teodor Viorel MELESCANU	Romania
Mr. James CRAWFORD	Australia	Mr. Václav MIKULKA	Czech Republic
Mr. Christopher John Robert DUGARD	South Africa	Mr. Didier OPERTTI BADAN	Uruguay
Mr. Constantin ECONOMIDES	Greece	Mr. Guillaume PAMBOU-TCHIVOUNDA	Gabon
Mr. Nabil ELARABY	Egypt	Mr. Alain PELLET	France
Mr. Luigi FERRARI BRAVO	Italy	Mr. Pemmaraju Sreenivasa RAO	India
Mr. Zdzislaw GALICKI	Poland	Mr. Víctor RODRÍGUEZ CEDEÑO	Venezuela
Mr. Raul GOCO	Philippines	Mr. Robert ROSENSTOCK	United States of America
Mr. Gerhard HAFNER	Austria	Mr. Bernardo SEPÚLVEDA	Mexico
Mr. Qizhi HE	China	Mr. Bruno SIMMA	Germany
		Mr. Doudou THIAM	Senegal
		Mr. Chusei YAMADA	Japan

---

### OFFICERS

*Chairman:* Mr. Alain PELLET  
*First Vice-Chairman:* Mr. João BAENA SOARES  
*Second Vice-Chairman:* Mr. Peter KABATSI  
*Chairman of the Drafting Committee:* Mr. Pemmaraju Sreenivasa RAO  
*Rapporteur:* Mr. Zdzislaw GALICKI

---

*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.*

## **AGENDA**

The Commission adopted the following agenda at its 2474th meeting, held on 12 May 1997:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consequences arising out of acts not prohibited by international law.
4. Reservations to treaties.
5. Nationality in relation to the succession of States.
6. Diplomatic protection.
7. Unilateral acts of States.
8. Programme, procedures and working methods of the Commission, and its documentation.
9. Cooperation with other bodies.
10. Date and place of the fiftieth session.
11. Other business.

## ABBREVIATIONS

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNHCR	Office of the United Nations High Commissioner for Refugees
WHO	World Health Organization
WTO	World Trade Organization

\*

\* \*

<i>I.C.J. Reports</i>	ICJ, Reports of Judgments, Advisory Opinions and Orders
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40-80: beginning in 1931)

\*

\* \*

### NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

**MULTILATERAL INSTRUMENTS  
cited in the present volume**

*Source*

HUMAN RIGHTS

- |  |   |
|--|---|
| Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)   | United Nations, <i>Treaty Series</i> , vol. 78, p. 277.   |
| Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)   | Ibid., vol. 213, p. 221.  |
| Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994) | Council of Europe, <i>European Treaty Series</i> , No. 155.   |
| International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)   | United Nations, <i>Treaty Series</i> , vol. 660, p. 195.  |
| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)  | Ibid., vol. 993, p. 3.  |
| International Covenant on Civil and Political Rights (New York, 16 December 1966)  | Ibid., vol. 999, p. 171.  |
| Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)   | Ibid.   |
| Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989)                  | <i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, resolution 44/128, annex.</i> |
| American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, Costa Rica, 22 November 1969)   | United Nations, <i>Treaty Series</i> , vol. 1144, p. 123.   |
| Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)  | Ibid., vol. 1249, p. 13.  |
| African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)   | Ibid., vol. 1520, p. 243.   |
| Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981)  | Council of Europe, <i>European Treaty Series</i> , No. 108.   |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)  | <i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51, resolution 39/46, annex.</i>  |

- Convention on the Rights of the Child (New York, 20 November 1989) *Ibid.*, *Forty-fourth Session, Supplement No. 49*, resolution 44/25, annex.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) *Ibid.*, *Forty-fifth Session, Supplement No. 49 A*, resolution 45/158, annex.
- European Convention on the Exercise of Children's Rights (Strasbourg, 1996) Council of Europe, *European Treaty Series*, No. 160.
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo, 1997) *Ibid.*, No. 164.

#### ENVIRONMENT AND NATURAL RESOURCES

- Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997) *Official Records of the General Assembly, Fifty-first session, Supplement No. 49*, resolution 51/229, annex.

#### NATIONALITY AND STATELESSNESS

- Convention on Private International Law (Havana, 20 February 1928) League of Nations, *Treaty Series*, vol. LXXXVI, p. 111.
- Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930) *Ibid.*, vol. CLXXIX, p. 89.
- Protocol relating to a Certain Case of Statelessness *Ibid.*, p. 115.
- Protocol relating to Military Obligations in Certain Cases of Dual Nationality United Nations, *Legislative Series, Laws concerning Nationality (ST/LEG/SER.B/4)* (Sales No. 1954.V.1), p. 572.
- Special Protocol concerning Statelessness *Ibid.*, p. 577.
- Convention relating to the Status of Stateless Persons (New York, 28 September 1954) United Nations, *Treaty Series*, vol. 360, p. 117.
- Convention on the Reduction of Statelessness (New York, 30 August 1961) *Ibid.*, vol. 989, p. 176.
- Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (with annex) (Strasbourg, 6 May 1963) *Ibid.*, vol. 634, p. 221.

## PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) *Ibid.*, vol. 500, p. 95.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, p. 261.

## LAW OF THE SEA

- Geneva Conventions on the Law of the Sea (Geneva, April 1958)
- Convention on the Continental Shelf (Geneva, 29 April 1958) *Ibid.*, vol. 499, p. 311.
- Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) *Ibid.*, vol. 516, p. 205.
- Convention on the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 450, p. 11.
- Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 559, p. 285.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

## LAW APPLICABLE IN ARMED CONFLICT

- Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919) *British and Foreign State Papers, 1919*, vol. CXII (London, H. M. Stationery Office, 1922), p. 1.
- Treaty between the Principal Allied and Associated Powers and Poland (Versailles, 28 June 1919) *Ibid.*, p. 225.
- Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919) *Ibid.*, p. 317.
- Treaty between the Principal Allied and Associated Powers and Czechoslovakia (Saint-Germain-en-Laye, 10 September 1919) *Ibid.*, p. 502.

- Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State (Saint-Germain-en-Laye, 10 September 1919) Ibid., p. 515.
- Treaty of Peace between the Allied and Associated Powers and Bulgaria (Neuilly-sur-Seine, 27 November 1919) Ibid., p. 781.
- Treaty between the Principal Allied and Associated Powers and Roumania (Paris, 9 December 1919) League of Nations, *Treaty Series*, vol. 5, p. 335.
- Treaty of Peace (together with declarations and protocols relative thereto) [between Finland and Soviet Government of Russia] (Dorpat, 14 October 1920) Ibid., vol. 3, p. 5.
- Treaty of Peace [between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State and Turkey] (Lausanne, 24 July 1923) Ibid., vol. XXVIII, p. 11.
- Treaty of Peace with Italy (Paris, 10 February 1947) United Nations, *Treaty Series*, vol. 49, p. 3.
- Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) Ibid., vol. 75, pp. 31 et seq.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Ibid., p. 31.
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Ibid., p. 85.
- Geneva Convention relative to the Treatment of Prisoners of War Ibid., p. 135.
- Geneva Convention relative to the Protection of Civilian Persons in Time of War Ibid., p. 287.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977) Ibid., vol. 1125, pp. 3 and 609.

## LAW OF TREATIES

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) Ibid., vol. 1155, p. 331.
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10).

*Source*

- Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983) United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) Document A/CONF.129/15.

GENERAL INTERNATIONAL LAW

- Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992) Council of the European Communities/Commission of the European Communities (Office for Official Publications of the European Communities, Luxembourg, 1992).
- Inter-American Convention against Corruption (Caracas, 29 March 1996) Document E/1996/99.

## CHECK-LIST OF DOCUMENTS OF THE FORTY-NINTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/479 and Add.1	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-first session of the General Assembly	Mimeographed.
A/CN.4/480 and Add.1 [and Add.1/Corr.1]	Third report on nationality in relation to the succession of States, by Mr. Vaclav Mikulka, Special Rapporteur	Reproduced in <i>Yearbook</i> . . . 1997, vol. II (Part One).
A/CN.4/481 and Add.1	International liability for injurious consequences arising out of acts not prohibited by international law: comments and observations received from Governments	<i>Idem.</i>
A/CN.4/482	Provisional agenda	Mimeographed. For agenda as adopted, see p. ix above.
A/CN.4/L.535 [and Corr.1] and Add.1	Nationality in relation to the succession of States. Titles and texts of draft articles adopted by the Drafting Committee: articles 1 to 18 (Part I), articles 19 to 26 (Part II), text of preamble and revised title of Part I	See summary records of the 2495th meeting (para. 4) and 2504th meeting (para. 28).
A/CN.4/L.536	Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law	Mimeographed.
A/CN.4/L.537	Report of the Working Group on diplomatic protection	<i>Idem.</i>
A/CN.4/L.538	Report of the Working Group on State responsibility	<i>Idem.</i>
A/CN.4/L.539 and Add.1-7	Draft report of the International Law Commission on the work of its forty-ninth session: chapter IV (Nationality in relation to the succession of States)	<i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-second session, Supplement No. 10 (A/52/10)</i> . The final text appears in <i>Yearbook</i> . . . 1997, vol. II (Part Two).
A/CN.4/L.540	Reservations to treaties. Texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading	Mimeographed.
A/CN.4/L.541	Draft report of the International Law Commission on the work of its forty-ninth session: chapter VI (State responsibility)	<i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-second session, Supplement No. 10 (A/52/10)</i> . The final text appears in <i>Yearbook</i> . . . 1997, vol. II (Part Two).
A/CN.4/L.542	<i>Idem</i> : chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.543	Report of the Working Group on unilateral acts of States	Mimeographed.
A/CN.4/L.544 and Add.1-2 [and Add.2/Corr.1]	Draft report of the International Law Commission on the work of its forty-ninth session: chapter V (Reservations to treaties)	<i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-second session, Supplement No. 10 (A/52/10)</i> . The final text appears in <i>Yearbook</i> . . . 1997, vol. II (Part Two).

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.545 [and Corr.1]	<i>Idem</i> : chapter I (Organization of the session)	<i>Idem</i> .
A/CN.4/L.546	<i>Idem</i> : chapter II (Summary of the work of the Commission at its forty-ninth session)	<i>Idem</i> .
A/CN.4/L.547	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem</i> .
A/CN.4/L.548	<i>Idem</i> : chapter VIII (Diplomatic protection)	<i>Idem</i> .
A/CN.4/L.549	<i>Idem</i> : chapter IX (Unilateral acts of States)	<i>Idem</i> .
A/CN.4/L.550	<i>Idem</i> : chapter X (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.551	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/SR.2474-A/CN.4/SR.2518	Provisional summary records of the 2474th to 2518th meetings	<i>Idem</i> . The final text appears in the present volume.



# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FORTY-NINTH SESSION

*Held at Geneva from 12 May to 18 July 1997*

---

### 2474th MEETING

*Monday, 12 May 1997, at 3.30 p.m.*

*Acting Chairman:* Mr. Robert ROSENSTOCK

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Thiam, Mr. Yamada.

#### Opening of the session

1. The ACTING CHAIRMAN declared open the forty-ninth session of the International Law Commission and welcomed members to Geneva. The Commission had just completed an extraordinarily productive quinquennium which, he hoped, would set a standard for the future.

#### Election of officers

*Mr. Pellet was elected Chairman by acclamation.*

*Mr. Pellet took the Chair.*

2. The CHAIRMAN expressed his thanks for the honour conferred upon him and said he hoped that he would prove worthy of the confidence placed in him.

Extending a warm welcome to members, both old and new, he observed that, once again, there was not a single woman among the entire 34 members. Indeed, there had never been one throughout the 49 years of the Commission's existence, a regrettable state of affairs which contrasted with the situation at ICJ and which would need to be remedied before too long.

3. He paid tribute to his predecessor in the Chair, Mr. Mahiou. That the forty-eighth session had been so fruitful had been due in large part to his efforts. Mr. Mahiou's decision not to seek a new mandate had deprived the Commission of one of its wisest and most respected members.

4. The Commission was at a turning point. On the eve of its fiftieth anniversary, the time had come to take stock and to prepare for new challenges. As he saw it, the task of the current session would be to give fresh impetus to the Commission's work.

5. It was customary for the outgoing Chairman to brief members on the discussion of the Commission's report in the Sixth Committee. In the absence of Mr. Mahiou, he invited Mr. Rosenstock, as first Vice-Chairman at the forty-eighth session, to make that presentation.

6. Mr. ROSENSTOCK, noting that communication between the Commission and the Sixth Committee was an area in which there was much room for improvement, said that the debate in the Sixth Committee during the fifty-first session of the General Assembly in 1996 had touched upon most of the main issues and was summarized in the topical summary (A/CN.4/479 and Add.1).

7. As to the topic of State responsibility, the issues which had divided the Commission had also split the Sixth Committee (A/CN.4/479/Add.1, sect. A). On delicts and crimes, some in the Sixth Committee had thought that the distinction was well-founded and had supported its retention, whereas others had felt that it required further consideration and still others that it was unhelpful and should be deleted. With regard to countermeasures, some had agreed with the Commission's position, others had taken the view that the Commission had placed too many limitations and constraints on the notion,

while still others had implicitly or explicitly questioned the Commission's recognition of their legitimacy. Lastly, some had endorsed the provisions on dispute settlement in their current form, whereas others had found them too rigid and still others had had reservations about the need to include any provisions in that regard, urging instead reliance on Article 33 of the Charter of the United Nations. It was to be hoped that States would submit written comments on that important topic over the next six or seven months.

8. With reference to the draft Code of Crimes against the Peace and Security of Mankind, the Sixth Committee had welcomed the achievement of the Special Rapporteur and the draft Code adopted by the Commission on second reading.<sup>1</sup> A decision on further action had been deferred to the fifty-third session of the General Assembly, but there had been widespread recognition of the draft Code's relevance to the work on an international criminal court.

9. Concerning the topic of State succession and its impact on the nationality of natural and legal persons (A/CN.4/479, sect. B), the Commission's recommendations and proposals had all been approved with regard to scope, form and substance, subject to a few matters of detail well covered in the exhaustive second report of the Special Rapporteur, Mr. Mikulka.<sup>2</sup> The sound foundation for the work contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1)<sup>3</sup> could not have been made more clear.

10. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/479, sect. C), some representatives in the Sixth Committee had favoured the basic approach underlying the Commission's draft, whereas others had not thought it feasible to establish a single liability regime for all parties. Some of those holding the latter view had urged that the focus should be limited to ultrahazardous activities. The United States of America, and Sweden on behalf of the Nordic countries, had responded to an invitation for comments, and it was to be hoped that other countries would follow suit in order to help the Commission decide how to proceed with its work on the subject.

11. As to the topic of reservations to treaties (A/CN.4/479, sect. D), the Sixth Committee, endorsing the draft resolution the Special Rapporteur, Mr. Pellet, had proposed in his second report,<sup>4</sup> supported his approach of not destabilizing the "Vienna regime" and his view that the regime did and should apply to all treaties. Different opinions had been expressed on whether treaty bodies should have the authority to determine the acceptability of reservations. Once again, a sound basis existed for pursuing work along the lines proposed by the Special Rapporteur at the forty-eighth session, in 1996.

12. In respect of future activities, the Commission had been invited by the General Assembly to examine the top-

ics of diplomatic protection and unilateral acts of States (A/CN.4/479, sect. E). In sum, the Commission had received a positive response from the Sixth Committee.

13. The CHAIRMAN suggested that the meeting should be suspended in order to give members more time for consultations concerning the membership of the Bureau.

*The meeting was suspended at 3.50 p.m. and resumed at 4.10 p.m.*

*Mr. Baena Soares was elected first Vice-Chairman by acclamation.*

*Mr. Kabatsi was elected second Vice-Chairman by acclamation.*

*Mr. Sreenivasa Rao was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Galicki was elected Rapporteur by acclamation.*

### **Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/479, sect. E, and A/CN.4/L.551)**

[Agenda item 8]

#### **MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU**

14. The CHAIRMAN said that the Enlarged Bureau proposed that the Planning Group should be composed as follows: Mr. Baena Soares (Chairman of the Planning Group), Mr. Bennouna, Mr. Crawford, Mr. Ferrari Bravo, Mr. Goco, Mr. He, Mr. Lukashuk, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sepúlveda, Mr. Simma, Mr. Thiam and, as an ex officio member, Mr. Galicki.

*It was so agreed.*

#### **Adoption of the agenda (A/CN.4/482)**

15. The CHAIRMAN suggested that the provisional agenda (A/CN.4/482) should be adopted on the understanding that it would in no way prejudice the order in which the various items were taken up.

*It was so agreed.*

*The agenda was adopted.*

#### **Organization of work of the session**

[Agenda item 1]

16. The CHAIRMAN said that the Commission must make the best of a new and unique situation. Much had been accomplished.

17. During its previous term, the Commission had completed the second reading of the draft articles on the law of the non-navigational uses of international water-

<sup>1</sup> For the text of the draft articles adopted on second reading, see *Yearbook . . . 1996*, vol. II (Part Two), para. 50.

<sup>2</sup> *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/474.

<sup>3</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>4</sup> *Yearbook . . . 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

courses,<sup>5</sup> which he understood was to be adopted very soon as a convention, and the draft statute for an international criminal court,<sup>6</sup> and he believed there was a good chance that it too would become a draft convention by the end of the century. During the very productive forty-eighth session, it had adopted on second reading the draft Code of Crimes against the Peace and Security of Mankind.<sup>7</sup> In addition, the draft articles on State responsibility, a text of exceptional importance despite its imperfections, had been adopted by the Commission on first reading,<sup>8</sup> and the Commission was duty-bound to finalize it, regardless of the difficulties posed. There would be no detailed report on the subject at the current session, but opinions should be voiced on how to proceed with the second reading. Lastly, the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been the subject of a comprehensive report produced by the Working Group on the topic at the forty-eighth session of the Commission, in 1996.<sup>9</sup> The Commission might want to consider where to take the topic from there.

18. The two remaining topics formally on the agenda, namely nationality in relation to the succession of States and reservations to treaties, were not enough to keep the Commission busy for the entire session. However, two other projects lay close at hand. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further should examine the topics “Diplomatic protection” and “Unilateral acts of States” and indicate their scope and content. The Commission might wish to create a working group to that end. It would also need to consider whether to hold split sessions in the future.

*The meeting rose at 4.35 p.m.*

<sup>5</sup> See *Yearbook . . . 1994*, vol. II (Part Two), p. 88, para. 219.

<sup>6</sup> *Ibid.*, p. 26, para. 90.

<sup>7</sup> See footnote 1 above.

<sup>8</sup> See *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

<sup>9</sup> *Ibid.*, annex I.

## 2475th MEETING

*Tuesday, 13 May 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan,

Mr. Pambou-Tchivounda, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### Organization of work of the session (continued)

[Agenda item 1]

1. The CHAIRMAN, reporting to the Commission on the proposals made by the Enlarged Bureau, said that, with regard to the topics “Nationality in relation to the succession of States” and “Reservations to treaties”, the Enlarged Bureau had unanimously agreed that high priority should be given to the consideration of the third report of the Special Rapporteur on nationality in relation to the succession of States (A/CN.4/480 and Add.1)<sup>1</sup> in order to adopt the part of the draft articles on first reading relating to the nationality of natural persons, if possible by the end of the current session. That meant that, for at least two weeks, all plenary meetings would be devoted to examining the text of the draft articles proposed by the Special Rapporteur and that the Drafting Committee would also be able to start work very soon. However, given the technical nature of the subject, it was proposed that, once the Commission had exhausted the discussion in plenary of the first part of the third report, namely, the preamble, the definitions and articles 1 to 16, it should defer its work on the topic and turn to the second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478)<sup>2</sup> under the chairmanship of one of the Vice-Chairmen. As the Enlarged Bureau was also of the view that the draft resolution annexed to the second report on reservations to treaties should also be referred to the Drafting Committee, it was suggested that the latter should take up the draft once it had completed its work on part I of the draft on nationality in relation to the succession of States. After spending some time on reservations to treaties, the Commission in plenary and the Drafting Committee might then go on to part II of the draft articles on nationality in relation to the succession of States.

2. As to the draft articles on State responsibility, the Enlarged Bureau proposed that a working group should be set up not to review the drafting of the text, but, pending reactions by States, to hold an exchange of views to determine the main areas of disagreement and possibly to seek ways and means of overcoming them, thereby facilitating the work of the Special Rapporteur, whom the Commission must appoint by the end of the session.

3. For the topics “Diplomatic protection” and “Unilateral acts of States”, the Enlarged Bureau also suggested the establishment of a working group which would, pursuant to paragraph 13 of General Assembly resolution 51/160, help indicate their scope and content, thereby enabling future special rapporteurs to set out on a well-marked path and would be in keeping with the spirit of the

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1996*, vol. II (Part One).

proposals made by the Commission on its working methods, of which the General Assembly had taken note with appreciation in the above-mentioned resolution.

4. On the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Enlarged Bureau had noted that only two States, namely, the United States of America, and Sweden on behalf of the Nordic countries, had sent the comments and observations referred to in paragraph 6 of General Assembly resolution 51/160. The Commission must decide by the end of the session on the manner in which it intended to reply to the Assembly's question on how it would proceed with its work on the topic, but, in the current circumstances, such a decision was premature. The Enlarged Bureau did not rule out the possibility of establishing a working group at a later stage.

5. For its part, the Planning Group had three tasks: the drafting of the Commission's long-term programme of work for the forthcoming quinquennium; the discussion of new topics for the future; and in accordance with paragraph 10 of General Assembly resolution 51/160, the consideration of whether to split the Commission's sessions in two. In keeping with past practice, the Planning Group would set up a working group on the long-term programme of work.

6. Mr. BENNOUNA, supported by Mr. ROSENSTOCK and Mr. CRAWFORD, said that, in connection with the topic of State responsibility, it was unusual for the Commission to establish a working group after having sent States a draft adopted on first reading in order to ask for their comments. The working group's terms of reference therefore had to be clearly defined. There was no problem if the working group was to be entrusted with a task of pure reflection in the strict framework of the Commission, but, if those reflections were to be meant for the General Assembly, an objection on methodological grounds would be in order.

7. The CHAIRMAN said that, in the view of a number of members of the Enlarged Bureau, the working group should proceed with the greatest caution and should not forward its reflections to the General Assembly. However, there was no fundamental disagreement on the principle of establishing the working group.

8. With regard to the arrangements for the establishment of the various working groups, he said that, as the Drafting Committee and the Planning Group were complementary, those members who did not sign up for the Drafting Committee automatically became part of the Planning Group. In view of the limited number of topics on the agenda of the Commission at its forty-ninth session, he suggested that the Commission should discontinue for the time being the recent practice of changing the composition of the Drafting Committee according to topic.

9. Working groups were established according to their own procedures, each member of the Commission being free either to participate in one or two of them or not to take part at all.

10. Replying to a question by Mr. Hafner, he said that, theoretically, the working groups were limited in size. In reply to Mr. Ferrari Bravo and Mr. Goco, he said that the sole purpose of the Drafting Committee was, as its name indicated, to draft; in principle, it was unnecessary for each of its members to be a specialist on the topic under consideration.

11. Replying to a question by Mr. Thiam, he said that the former chairmen of the Commission who were members of the Planning Group *ex officio* were not necessarily excluded from the Drafting Committee.

12. He said that, if he heard no objection, he would take it that the Commission approved the proposals of the Enlarged Bureau.

*It was so decided.*

**Nationality in relation to the succession of States (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,<sup>3</sup> A/CN.4/L.535 and Corr.1 and Add.1)**

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

13. Mr. MIKULKA (Special Rapporteur) said that, on the basis of his first and second reports on State succession and its impact on the nationality of natural and legal persons,<sup>4</sup> the Commission had completed a preliminary study of the question and had set out to undertake a substantive study of the topic. To do so, it had separated the question of the nationality of natural persons from that of the nationality of legal persons and given priority to consideration of the former question. It had also proposed modalities concerning the form of the results of its work and the timetable for examining the redefined topic. In particular, it had considered that draft articles with commentaries should be prepared, without prejudice to the final decision, in the form of a declaration to be adopted by the General Assembly and that they should be completed on first reading at the forty-ninth or, at the latest, fiftieth session of the Commission.

14. Those choices of the Commission, which the General Assembly had approved in its resolution 51/160, had had direct consequences for the content and dimensions of his third report (A/CN.4/480 and Add.1). For example, the need to complete the first reading at the current session had meant that he had had to submit to the Commission all the requisite elements, namely, a complete set of 25 draft articles and a draft preamble covering the entire question of the nationality of natural persons in relation to the succession of States, which read:

<sup>3</sup> See footnote 1 above.

<sup>4</sup> First report: *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/467; second report: *Yearbook* . . . 1996, vol. II (Part One), document A/CN.4/474.

**DRAFT ARTICLES ON NATIONALITY IN RELATION  
TO THE SUCCESSION OF STATES\***

*Considering* that, in connection with recent cases of succession of States, problems concerning nationality have again become a matter of concern to the international community,

*Emphazing* that, while nationality is essentially governed by internal law, international law imposes certain restrictions on the freedom of action of States in this field,

*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 and strengthening respect for human rights,

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

(. . .)

PART I

GENERAL PRINCIPLES CONCERNING NATIONALITY IN  
RELATION TO THE SUCCESSION OF STATES

*Article 1. Right to a nationality*

1. Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, has the right to the nationality of at least one of the States concerned.

2. If a child born after the date of the succession of States whose parent is a person mentioned in paragraph 1 of this article has not acquired the nationality of at least one of the States concerned, or that of a third State, such child has the right to acquire the nationality of the State concerned on whose territory or otherwise under whose jurisdiction (hereafter "on the territory") he or she was born.

*Article 2. Obligation of States concerned to take all reasonable measures to avoid statelessness*

The States concerned are under the obligation to take all reasonable measures to avoid persons who, on the date of the succession of States, had the nationality of the predecessor State becoming stateless as a result of the said succession of States.

\* For the purposes of the present draft articles:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "Third State" means any State other than the predecessor State or the successor State;

(f) "Nationality" means nationality of natural persons;

(g) "State concerned" means the predecessor State(s) or the successor State(s), as the case may be;

(h) "Person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, and whose nationality or the right thereto may be affected by the succession of States.

*Article 3. Legislation concerning nationality  
and other connected issues*

1. Each State concerned should enact laws concerning nationality and other connected issues arising in relation to the succession of States without undue delay. It should take all necessary measures to ensure that persons concerned will be apprised, within a reasonable time period, of the impact of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

2. When providing for the *ex lege* acquisition of nationality in relation to the succession of States, the legislation of the States concerned should provide that such acquisition of nationality takes effect on the date of the succession of States. The same would apply for the acquisition of nationality following the exercise of an option, if the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

*Article 4. Granting of nationality to persons having their habitual residence in another State*

1. A successor State does not have the obligation to grant its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that State.

2. A successor State shall not impose its nationality on persons who have their habitual residence in another State against the will of such persons, unless they would otherwise become stateless.

*Article 5. Renunciation of the nationality of another State as a condition for granting nationality*

When the person concerned entitled to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the acquisition of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

*Article 6. Loss of nationality upon the voluntary acquisition of the nationality of another State*

1. The predecessor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. Each successor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession of States or the entitlement thereto.

*Article 7. The right of option*

1. Without prejudice to their policy in the matter of multiple nationality, the States concerned should give consideration to the will of a person concerned whenever that person is equally qualified, either in whole or in part, to acquire the nationality of two or several States concerned.

2. Any treaty between States concerned or, as the case may be, the legislation of a State concerned should provide for the right of option for the nationality of that State by any person concerned who has a genuine link with that State if the person would otherwise become stateless as a consequence of the succession of States.

3. There should be a reasonable time limit for the exercise of any right of option.

*Article 8. Granting and withdrawal of nationality upon option*

1. When persons entitled to the right of option have exercised such right, the State whose nationality such persons have opted for shall grant them its nationality.

2. When persons entitled to the right of option in accordance with these draft articles have exercised such right, the State whose nationality such persons have renounced shall withdraw its nationality from them, unless they would thereby become stateless.

3. Without prejudice to any obligation deriving from a treaty in force between States concerned, the State concerned other than the State whose nationality the persons concerned have opted for does not have the obligation to withdraw its nationality from them on the basis of the mere fact that they have opted for the nationality of the latter State, unless those persons have clearly expressed their will to renounce its nationality. This State may, nevertheless, withdraw its nationality from such persons when their acquiescence to the loss of its nationality may be presumed in the light of legislation in force on the date of the option.

*Article 9. Unity of families*

Where the application of their internal law or of treaty provisions concerning the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, the States concerned shall adopt all reasonable measures to allow that family to remain together or to be reunited.

*Article 10. Right of residence*

1. Each State concerned shall take all necessary measures to ensure that the right of residence in its territory of persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on the territory of such State, is not affected as a result of such absence. That State shall take all necessary measures to allow such persons to return to their habitual residence.

2. Without prejudice to the provisions of paragraph 3, the successor State shall preserve the right of residence in its territory of all persons concerned who, prior to the date of the succession of States, were habitually resident in the territory which became the territory of the successor State and who have not acquired its nationality.

3. Where the law of a State concerned attaches to the voluntary loss of its nationality or to the renunciation of the entitlement to acquire its nationality by persons acquiring or retaining the nationality of another State concerned the obligation that such persons transfer their residence out of its territory, a reasonable time limit for compliance with that obligation shall be granted.

*Article 11. Guarantees of the human rights of persons concerned*

Each State concerned shall take all necessary measures to ensure that the human rights and fundamental freedoms of persons concerned who, after the date of the succession of States, have their habitual residence in its territory are not adversely affected as a result of the succession of States irrespective of whether they have the nationality of that State.

*Article 12. Non-discrimination*

When withdrawing or granting their nationality, or when providing for the right of option, the States concerned shall not apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain or acquire a nationality or would deny those persons their right of option, to which such persons would otherwise be entitled.

*Article 13. Prohibition of arbitrary decisions concerning nationality issues*

1. No persons shall be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, which they were entitled to retain or acquire in relation to the succession of States in accordance with the provisions of any law or treaty applicable to them.

2. Persons concerned shall not be arbitrarily deprived of their right of option to which they might be entitled in accordance with such provisions.

*Article 14. Procedures relating to nationality issues*

Each State concerned shall ensure that applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States are processed without undue delay and that relevant decisions, including those concerning the refusal to issue a certificate of nationality, shall be issued in writing and shall be open to administrative or judicial review.

*Article 15. Obligation of States concerned to consult and negotiate*

1. The States concerned are under the obligation to consult in order to identify any detrimental effects that may result from the succession of States with respect to the nationality of individuals and other related issues concerning their status and, as the case may be, to seek a solution of those problems through negotiations.

2. If one of the States concerned refuses to negotiate, or negotiations between the States concerned are abortive, the State concerned the internal law of which is consistent with the present draft articles is deemed to have fully complied with its international obligations relating to nationality in the event of a succession of States, subject to any treaty providing otherwise.

*Article 16. Other States*

1. Without prejudice to any treaty obligation, where persons having no genuine link with a State concerned have been granted that State's nationality following the succession of States, other States do not have the obligation to treat those persons as if they were nationals of the said State, unless this would result in treating those persons as if they were de facto stateless.

2. Where persons who would otherwise be entitled to acquire or to retain the nationality of a State concerned become stateless as a result of the succession of States owing to the disregard by that State of the present draft articles, other States are not precluded from treating such persons as if they were nationals of the said State if such treatment is in the interest of those persons.

## PART II

PRINCIPLES APPLICABLE IN SPECIFIC SITUATIONS  
OF SUCCESSION OF STATES

## SECTION I

## TRANSFER OF PART OF THE TERRITORY

*Article 17. Granting 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 grant 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 18. Granting of the nationality of the successor State*

Without prejudice to the provisions of article 4, 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 merged, the successor State shall grant its nationality to all persons who, on the date of the succession of States, had the nationality of at least one of the predecessor States.

#### SECTION 3

##### DISSOLUTION OF A STATE

###### *Article 19. Scope of application*

The articles of this section apply 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.

###### *Article 20. Granting of the nationality of the successor States*

Subject to the provisions of article 21, each of the successor States shall grant its nationality to the following categories of persons concerned:

- (a) Persons having their habitual residence in its territory; and
- (b) Without prejudice to the provisions of article 4:
  - (i) Persons having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last permanent residence in what has become the territory of that particular successor State; or
  - (ii) Where the predecessor State was a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

###### *Article 21. Granting of the right of option by the successor States*

1. The successor States shall grant a right of option to all persons concerned covered by the provisions of article 20 who would be entitled to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right of option to persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 20, paragraph (b), irrespective of the mode of acquisition of the nationality of the predecessor State.

#### SECTION 4

##### SEPARATION OF PART OF THE TERRITORY

###### *Article 22. Scope of application*

The articles of this section apply 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.

###### *Article 23. Granting of the nationality of the successor State*

Subject to the provisions of article 25, the successor State shall grant its nationality to the following categories of persons concerned:

- (a) Persons having their habitual residence in its territory; and
- (b) Without prejudice to the provisions of article 4, where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

###### *Article 24. Withdrawal of the nationality of the predecessor State*

1. Subject to the provisions of article 25, the predecessor State shall not withdraw its nationality from:

- (a) Persons having their habitual residence either in its territory or in a third State; and
- (b) Where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

2. The predecessor State shall withdraw its nationality from the categories of persons entitled to acquire the nationality of the successor State in accordance with article 23. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State, unless they have the nationality of a third State.

###### *Article 25. Granting of the right of option by the predecessor and the successor States*

The predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 23 and 24, paragraph 1, who would be entitled to have the nationality of both the predecessor and successor States or of two or more successor States.

15. The content of the third report had also been determined by the Commission's latest decisions on its working methods, including the role of special rapporteurs and their reports. That was one of the reasons why all the draft articles had commentaries. The draft articles also incorporated the conclusions of the Working Group on State succession and its impact on the nationality of natural and legal persons, which had met during the past two sessions,<sup>5</sup> relating to the main principles or rules which constituted the subject of the draft articles and the overall structure. The draft articles were divided into two parts. Part I (General principles concerning nationality in relation to the succession of States) dealt with the general principles which applied to all cases of State succession and Part II (Principles applicable in specific situations of succession of States) dealt with the principles governing specific cases of State succession: transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory.

16. He recalled that, two years previously, the Commission had decided to follow, in that respect, the approach in the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter

<sup>5</sup> See *Yearbook 1995*, vol. II (Part Two), annex; and *Yearbook 1996*, vol. II (Part Two), paras. 78 to 87.

referred to as the “1983 Vienna Convention”) rather than that in the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the “1978 Vienna Convention”) and, in view of the current requirements of the international community and the completion of the decolonization process, to leave aside the category of newly independent States that had emerged from decolonization. On no account did the latter point mean that the abundant practice of newly independent States in the area of nationality would be ignored. On the contrary, it was of great importance for the formulation of general principles in that field, so much so that such practice had served as a source of inspiration, and as practical examples, in the articles of Part I and Part II.

#### GENERAL PRESENTATION OF THE DRAFT ARTICLES, PREAMBLE AND DEFINITIONS

17. Before referring to the articles of Part I (draft articles 1 to 16), he pointed out that the four paragraphs of the preamble were designed simply to make a number of points which had emerged from the Commission’s discussions of the topic in the past two years, but did not lend themselves to the formulation of a rule or principle in the strict sense. The question of definitions was more complex, not so much in terms of their content in most instances, for which the wording of article 2 of the 1978 and 1983 Vienna Conventions ensured uniformity, but rather in terms of form, namely, the declaratory nature of the instruments being drafted. Special rapporteurs often began their work by drafting definitions, but their objective was to produce a draft convention, whereas, in the case of a draft declaration, definitions were rarely the subject of a separate article. Given that, in any event, working definitions were needed for future work to avoid any misunderstanding about the meaning of the terms used, he had eventually decided to include those definitions as a footnote to the title of the draft, on the understanding that it would be for the Commission to decide whether it was desirable to include them in the draft articles and how to go about doing so.

18. In the footnote to the title of the draft articles, the definitions in subparagraphs (a) to (e) were identical to those contained in article 2 of the 1978 and 1983 Vienna Conventions, whereas those contained in subparagraphs (f) to (h), which dealt with the expressions “nationality”, “State concerned” and “person concerned”, had been prepared for the purposes of the draft articles under consideration.

19. The definition of the term “nationality” gave rise to a substantive problem which the Commission had already identified and which he had taken up in his first report, namely, that the function and, hence, the definition of nationality differed depending on whether the problem was approached from the perspective of internal or international law. All the aspects of that problem had been summarized in the commentary to that definition contained in the third report of the Special Rapporteur, but it should be pointed out that the numerous definitions of nationality given in writings, while intellectually stimulating, were of limited significance for the purpose of the draft articles. As an example, when ICJ defined national-

ity in the *Nottebohm* case,<sup>6</sup> it appeared to focus more on the sociological aspect than the strictly legal aspect of the concept and in fact to define an effective nationality rather than nationality as such. Clearly, it would not be easy to provide an entirely satisfactory definition of nationality; that was perhaps not necessary in the current case, especially since even conventions regulating questions of nationality or statelessness did not always define the term. However, if it was deemed necessary, such a definition should probably specify that the problems of nationality dealt with in the draft articles were those relating to natural persons and not to legal persons, the point being to avoid any confusion to which the original wording of the topic might give rise. That was the purpose of the definition contained in subparagraph (f).

20. The term “State concerned” (subparagraph (g)) meant the States which, depending on the type of the territorial change, would be involved in a particular case of “succession of States”, that is to say, the predecessor State and the successor State in the case of a transfer of part of the territory; the successor State alone in the case of a unification of States; two or more successor States in the case of a dissolution of States; and the predecessor State and one or more successor States in the case of a separation of part of the territory. In all the cases in question, the term “State concerned” had nothing to do with the concern that any other State might have about the outcome of a succession of States in which its own territory was not involved.

21. The term “person concerned” was more difficult to define. The definition in subparagraph (h) encompassed all individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality might, accordingly, be affected by that succession. It meant all individuals who might lose the nationality of the predecessor State or, conversely, might acquire the nationality of the successor State. The uncertainty noted by O’Connell<sup>7</sup> as to which categories of persons were susceptible of having their nationality affected in that way was largely attributable to the fact that the question was often posed *in abstracto*, as if there could exist a unique and simple response which would apply to all types of territorial change. One thing was certain: the term “person concerned” included neither nationals of third States nor stateless persons who were present on the territory of any of the “States concerned” unless they fell into the category of persons who, on the date of the succession, were entitled to acquire the nationality of the predecessor State, in accordance with its legislation (and of course persons having two nationalities when one of them was the nationality of the predecessor State).

22. To some extent, the definitions also determined implicitly the scope of the draft articles. The terms “State concerned” and “person concerned” delimited the scope *ratione personae*, but the latter term also determined the scope *ratione materiae*. Accordingly, the draft articles dealt both with the loss and acquisition of nationality and with the right of option between the nationalities of the States involved in the succession, although exclusively in

<sup>6</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at page 23.

<sup>7</sup> D. P. O’Connell, *The Law of State Succession* (Cambridge, United Kingdom, Cambridge University Press, 1956), p. 245.

relation to a succession of States. In that latter respect, the definition also determined the scope of the draft articles *ratione temporis*.

## PART I (General principles concerning nationality in relation to the succession of States)

### ARTICLE I (Right to a nationality)

23. Article 1 was a key provision of the draft articles and concerned the right to a nationality in the exclusive context of State succession. Paragraph 1 conferred on every person concerned the right to the nationality of at least one of the States concerned. However, the text did not use the term “person concerned”, but its *in extenso* definition, which must therefore be reproduced word for word in the French version. The technical term was used in all the other relevant articles. The other element which was stated expressly only in article 1, although it was implicit in all the other articles in which reference was made to “persons concerned”, was that the mode of acquisition of the predecessor State’s nationality had no effect on the scope of the rights of the persons concerned: they might have acquired such nationality at birth by *jus soli* or *jus sanguinis* or by naturalization or even as a result of a previous succession of States.

24. Nevertheless, the crucial element of paragraph 1 was the assertion of the right of the person concerned to the nationality of at least one of the States concerned. It was accordingly the very foundation of the draft articles or, in other words, the principle from which other rules would logically and inevitably be derived. The principle was not a new one. The Working Group had already concluded at the Commission’s forty-seventh session that in situations resulting from State succession every person whose nationality might be affected by the change of international status had the right to acquire the nationality of at least one of the States concerned. And that idea had found broad support both in the Commission and in the Sixth Committee of the General Assembly.

25. The use of the phrase “at least one of the States concerned” meant that the principle did not operate independently, except in the case of a unification of States—that is to say, the formation of a single successor State—when the subjective right of a person concerned could be derived directly from the unification, since the State on which such an obligation fell could be directly identified. In other cases of territorial change, the principle could not have an immediate effect on the persons concerned. It could operate satisfactorily only in conjunction with the obligation of the States concerned to take all reasonable measures to avoid statelessness, an obligation which itself gave rise to an even more specific obligation of the States concerned, namely, the obligation to negotiate so that the persons concerned could actually acquire a nationality. Such an obligation was envisaged later, in article 15 (Obligation of States concerned to consult and negotiate).

26. In substance, paragraph 1 applied to the particular case of the succession of States the general concept of the “right to a nationality” contained in article 15 of the Universal Declaration of Human Rights,<sup>8</sup> a provision whose

positive character was nevertheless widely disputed in the doctrine. Even the members of the Commission, in their discussion of the topic to date, had not all interpreted the provision in the same way. One of the objections, without doubt the major objection against the recognition of the positive character (*lex lata*) of the “right to a nationality”, was that it was not possible to identify the State from which such nationality should be requested, that is to say, the addressee of the obligation corresponding to such a right.

27. It was certainly possible to identify that State in the case of a succession of States. A “person concerned” could either acquire the nationality of the successor State, or of one of the successor States if there were several, or retain the nationality of the predecessor State if it survived the territorial changes. Of course the “right to a nationality”, stated very generally in paragraph 1, must be spelt out even more concretely. In order to identify from among the “States concerned” the one which was required to grant its nationality, it was thus also necessary to take into consideration the type of succession in question as well as the nature of the links which the person concerned might have with one or more of the States concerned.

28. That approach was in harmony with the position of some members of the Commission, who felt that, for a right to a nationality to be recognized, there was a need to identify an effective link between the person concerned and the State obligated to recognize that person as one of its nationals. In other words, the best way of determining within the context of State succession whether a person could claim the nationality of one of the States was to apply the criterion of an effective link.

29. It should also be noted that, in most cases of a succession of States, individuals had links with only one of the States concerned. That was precisely the consideration motivating those who pointed out that the successor State was under an obligation to grant its nationality to a core body of its population. For example, when there was a dissolution, separation or transfer of territory, most of the inhabitants of the territory concerned in the succession of States were both residents and natives of that territory, to which they were also bound by many other links, including family ties and profession. It was thus possible to counter the main argument against the “right to a nationality” in the narrow sense, that is to say, the argument that it was not possible to identify the State which was the addressee of the corollary obligation to grant its nationality. There was no reason to deny the right to a nationality to most of the persons concerned just because for some others the identification of the State upon which such obligation fell was difficult, especially on the pretext that some categories of person could have links with two or more States. Moreover, even in that particular case, it would—in principle—be perfectly conceivable to recognize the right to several nationalities of a person falling in this category, while leaving to the States concerned their discretionary power to impose on the person the obligation to choose only one of the nationalities.

30. Paragraph 2 dealt with children born to persons referred to in paragraph 1 after the date of State succession, but before the nationality of their parents had been established. The first question to be answered was why

<sup>8</sup> General Assembly resolution 217 A (III).

such a provision should be included in the draft articles. From a purely theoretical standpoint, the answer was that it should not. The Commission was required to study the question of nationality solely in relation to State succession. It should exclude from its deliberations all matters connected with the acquisition or loss of nationality after the date of the succession of States unless such acquisition or loss was directly connected with the succession of States.

31. But, as was often the case in practice, the reality conflicted with the theory. It was not always easy to establish the precise date of a succession of States. Furthermore, the successor States took time to adopt their laws on nationality; in the interim, human life continued. There might therefore be problems concerning nationality which, although they did not result directly from the change of sovereignty as such, nevertheless deserved the Commission's attention. That was the *raison d'être* of paragraph 2.

32. The Working Group had already recognized the need for an exception from the rigid criterion *ratione temporis* contained in the draft articles, in order to cover those children born shortly after the State succession, during the interim period when the personal status of their parents had not yet been determined. Given the fact that, in laws on nationality, the nationality of children often depended on that of their parents, the fact that their parents' nationality remained uncertain for some time could have a direct impact on the nationality of children born during that period, for example if a parent died in the meantime.

33. It had been noted at the Commission's forty-seventh session that international law, as established in international instruments, seemed more inclined to recognize a right to a nationality in the case of a child than in the case of an adult and that element must be kept in mind.

34. He was aware that the examples cited in the commentary to paragraph 2, for example article 9 of the Draft Convention on Nationality prepared by the Harvard Law School<sup>9</sup> or article 20 of the American Convention on Human Rights (hereinafter referred to as the "Pact of San José"), were not very convincing, since they emanated from States whose legislation was based on the principle of *jus soli*. But paragraph 2 was also supported by other instruments such as the Declaration of the Rights of the Child<sup>10</sup> (principle 3) and the International Covenant on Civil and Political Rights (art. 24, para. 3), as well as by the Convention on the Rights of the Child, in particular article 7, paragraph 1, which, when read in conjunction with article 2, paragraph 1, of the Convention, allowed the conclusion that a child had the right to the nationality of the State in whose territory it had been born, unless it had acquired the nationality of another State.

35. Paragraph 2 drew its inspiration from the above-mentioned instruments, but it covered only children born in the territory of one of the States concerned and not children born in a third State, for such cases were beyond the scope of the draft articles, which should deal solely with

the problems arising when there was a legal relation between a person concerned and a State concerned.

#### ARTICLE 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness)

36. Article 2 imposed on the States concerned the obligation to take all reasonable measures to prevent persons having the nationality of the predecessor State on the date of the succession of States from becoming stateless as a result of the succession. That obligation was a corollary of the right of the persons concerned to a nationality. It applied only to the "persons concerned", that is to say, the persons who, on the date of the succession of States, had been nationals of the predecessor State, and it excluded persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State certainly had a discretionary power to grant its nationality to such stateless persons. But the problem would be qualitatively different if it were envisaged that the State had an obligation to do so.

37. In his first report,<sup>11</sup> he had stated that, in view of the recent development of human rights standards, including a number of obligations regarding nationality, it was no longer possible to maintain without any reservation the traditional opinion expressed by O'Connell that

Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality.<sup>12</sup>

That conclusion, which had contradicted an author for whom he had much respect and admiration, had received immediate support in several circles, including the Council of Europe<sup>13</sup> and UNHCR.<sup>13</sup>

38. Whatever the merit of O'Connell's evaluation of *lex lata* at the time, he had already been stressing the urgent need for codification in that field, in particular because "it is undesirable that, as a result of change of sovereignty, persons should be rendered stateless against their wills".<sup>15</sup>

39. In 1930, the Hague Codification Conference had adopted a number of provisions aimed at reducing the possibility of statelessness and had unanimously recommended that, in regulating questions of nationality, States should make every effort to reduce insofar as possible cases of statelessness. Among the multilateral treaties relating to that problem, mention should be made of the Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter referred to as the "1930 Hague Convention"), its Protocol relating to a Certain Case of Statelessness, and its Special Protocol concerning Statelessness, as well as the Convention relating to the

<sup>11</sup> See footnote 4 above.

<sup>12</sup> D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. 1 (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 503.

<sup>13</sup> *Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation* (Council of Europe, Strasbourg, 2 April 1996), para. 25.

<sup>14</sup> *The Czech and Slovak Citizenship Laws and the Problem of Statelessness* (UNHCR, Regional Bureau for Europe Division of International Protection, European Series, vol. 2, No. 4, September 1996).

<sup>15</sup> O'Connell, *op. cit.* (footnote 7 above), p. 258.

<sup>9</sup> Harvard Law School, *Research in International Law*, I. Nationality (Cambridge, Mass., Harvard Law School, 1929), p. 13.

<sup>10</sup> General Assembly resolution 1386 (XIV)

Status of Stateless Persons and the Convention on the Reduction of Statelessness. It was true that only very few provisions of those Conventions directly addressed the issue of nationality in the context of State succession, but they provided useful guidance to the States concerned by offering solutions which could *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change.

40. There was a growing awareness among States of the compelling need to fight the plight of statelessness in general, and more particularly in the case of State succession. One of the techniques used by successor States had been to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. That had been the case in Burma, the Czech Republic, Slovakia and even Yugoslavia, as indicated in the commentary to the article. The most effective measure the States concerned could take was to conclude an agreement by virtue of which the occurrence of statelessness would be precluded, as provided for in article 10 of the Convention on the Reduction of Statelessness.

41. The seriousness of the problem of statelessness in situations of State succession had generally been recognized by the Commission, which had considered that the solution to that problem should take priority over the consideration of other problems of conflicts of nationality. The assumption that the States concerned should be under the obligation to prevent statelessness was one of the basic premises on which the Working Group had based its deliberations. It had received clear support in the Commission.

42. In the commentary to article 2, the Special Rapporteur had drawn a parallel between a territory and its population, both of which were constituent elements of statehood. There was no precedent of a succession of States in which even a small part of the territory of the predecessor State was left as *terra nullius* by the States concerned. In such circumstances, why should those States be allowed to leave some persons concerned stateless as a result of a succession?

43. In the Sixth Committee, statelessness had also been generally recognized as a serious problem deserving the primary attention of the Commission. No delegation to the Committee had challenged the Working Group's premise regarding the obligation not to create statelessness as a result of State succession. Other international bodies had also placed the problem of statelessness at the top of the list of ills to be combated in connection with a State succession: he had in mind the Council of Europe and UNHCR.

44. The text of article 2 laid down an obligation not of result, but of conduct. Obviously, nobody could consider each particular State concerned to be responsible for all cases of statelessness resulting from the State succession. A State could be asked only to take measures within the scope of its competence, as delimited by international law. Accordingly, not every State concerned had the obligation to grant its nationality to every single person concerned. That obligation ceased at the point where the limits to the competence of the State lay. The draft articles thus pro-

vided for a number of means, including the conclusion of agreements between the States concerned to eliminate statelessness.

#### ARTICLE 3 (Legislation concerning nationality and other connected issues)

45. Article 3 presupposed that nationality was essentially an institution of the internal laws of States and, accordingly, the international application of the notion of nationality in any particular case had to be based on the internal law of the State in question. That principle had been confirmed in article 1 of the 1930 Hague Convention, article 13 of the Code of Private International Law (Code Bustamante), contained in the Convention on Private International Law, PCIJ in its advisory opinion concerning the *Nationality Decrees Issued in Tunis and Morocco*<sup>16</sup> and in its advisory opinion on the question concerning the *Acquisition of Polish Nationality*,<sup>17</sup> and it had been reiterated by ICJ in the *Nottebohm* case<sup>18</sup> and by several writers.

46. The main focus of article 3 was on one special problem, the moment when internal legislation was adopted. In some cases, the legislation concerning nationality was enacted at the time of the succession of States or even before it; but in other cases it was enacted after the date of succession, sometimes even much later. Naturally, it would not be realistic to request the States concerned to enact the relevant legislation at the time of succession. In that particular case, it was merely a matter of requiring States to enact laws concerning nationality and other connected issues arising in relation to State succession "without undue delay". That was the purpose of paragraph 1. It might seem, at first sight, to be self-evident, but in fact it was not, given State practice.

47. The main concern the Working Group had in mind when discussing the problem was that the persons concerned should be apprised, within a reasonable time, of the effect of a State's legislation on their nationality, of any choices they might have under such legislation, as well as of the consequences that the exercise of such choices would have on their status. That idea was reflected in the last sentence of paragraph 1.

48. Paragraph 2 addressed another problem. During the discussion of the first report, some members of the Commission had suggested that the possibility of creating a set of "presumptions" should be studied, one presumption being that the acquisition of nationality upon succession was deemed to take effect from the date of such succession. The Working Group had hesitated to go that far, but had decided it would be useful to recommend that the States concerned should provide in the legislation concerning the *ex lege* acquisition of nationality in relation to the succession of States that such acquisition took effect on the date of the succession. That idea was set out in paragraph 2, although that provision went further by extending that requirement to the exercise of an option in circumstances where the persons concerned would other-

<sup>16</sup> *Advisory Opinion, 1923, P.C.I.J., Series B. No. 4.* pp. 23-24.

<sup>17</sup> *Ibid., No. 7,* p. 16.

<sup>18</sup> See footnote 6 above.

wise have been stateless during the period between the date of succession and the date of the option.

ARTICLE 4 (Granting of nationality to persons having their habitual residence in another State)

49. Articles 4 and 5 were to be seen as an exception to the basic premise concerning the granting of nationality. The exceptions concerned were well established in international practice and recognized in the legal literature.

50. Paragraph 1 of article 4 placed clear limits on any obligation on the part of the successor State to grant its nationality. Paragraph 2, which dealt with another aspect of the matter, stipulated that a successor State could not impose its nationality on persons who had their habitual residence in another State against the will of such persons, unless they would otherwise become stateless.

51. Traditional doctrine dealt with the question of granting nationality to persons having their residence in another State mainly as a problem of the potentially improper exercise of the legislative powers of the State granting the nationality, whereas the discussion on the obligation of the successor State to grant its nationality to certain categories of people was based on a relatively new idea. It was therefore not surprising that there were doctrinal views as to possible limits to such an obligation to grant nationality. Some limits were necessary a fortiori. The draft articles, which declared the right of the persons concerned to a nationality (in connection with a succession of States) was bound to indicate the limits to an obligation that was the corollary of such a right. That was the very object of paragraph 1.

52. Paragraph 2 of article 4 had a different aim: it indicated the limits of the competence of the successor State and thus constituted a guarantee against the improper exercise of the competence of the successor State in the matter of nationality. It also reflected a traditional view, one that was well established in practice, while introducing a new element at the end which implied that, where there was a risk that the person concerned might become stateless, the power of the State to grant its nationality to that person, even if he or she did not consent, was subject to no limit. The prevention of statelessness thus took precedence over the need to respect the wishes of the person concerned.

53. In its report to the Commission at the forty-seventh session, the Working Group had concluded, in connection with unification and dissolution, that a successor State did not have the obligation to grant its nationality to the persons concerned who had their habitual residence in a third State and who also had the nationality of a third State, but that the State concerned could do so with the consent of those persons. In the case of other types of succession of States, such as a transfer of a part of territory or separation, the Working Group had concluded that that category of persons should retain the nationality of the predecessor State. The main difference between the existing draft of article 4 and the wording used by the Working Group consisted in the replacement of the expression "third State" by the expression "another State", for there was no reason not to apply that rule in the same way regardless of whether the person had his habitual residence in a "third

State" or in another "State concerned". Also, the categories of persons covered by paragraphs 1 and 2 were not the same: paragraph 2 related to persons, apart from the persons referred to in paragraph 1, who resided in a State other than in the successor State and who possessed the nationality of a third State.

ARTICLE 5 (Renunciation of the nationality of another State as a condition for granting nationality)

54. Article 5 dealt with a "classical" problem of the right to nationality, the scope of which went beyond State succession. While it was not for the Commission to suggest which policy States should pursue in the matter of dual/multiple nationality, its concern should be the risk of statelessness related to the requirement of prior renunciation by the person concerned of his or her current nationality as a condition for the granting of the nationality of the successor State. That was also the opinion of the Experts of the Council of Europe.<sup>19</sup> Accordingly, in article 5, the "classical" rule was combined with a new element, namely, that renunciation of nationality could not, however, be required if it made the person concerned stateless, even if only temporarily. Article 5, it should be noted, related only to State succession. That was why it referred only to the legislation of a successor State. Similarly, it referred only to renunciation of the nationality of another State concerned.

ARTICLE 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State)

55. Article 6 dealt with another "classic" problem, namely, loss of nationality upon the voluntary acquisition of the nationality of another State, transposing it into the context of a succession of States. The commentary to the article contained some references to State practices illustrative of the application of that policy, though not all of them derived from the field of State succession. The Working Group had nevertheless deemed it useful to indicate clearly that States could have recourse to that condition so as to grant their nationality both in ordinary situations and when resolving nationality questions in relation to the succession of States. Its main concern had been to specify clearly that the withdrawal of nationality as a consequence of a voluntary acquisition of nationality must be clearly established by the nationality law at the time when the voluntary act had taken place. The formulation of that rule in two separate paragraphs made it easier to encompass the elements of the withdrawal of nationality and of the refusal to grant nationality, in the case of the predecessor State and the successor State, respectively.

ARTICLE 7 (The right of option) and

ARTICLE 8 (Granting and withdrawal of nationality upon option)

56. Article 7 established the general framework of the right of option and article 8 set forth the consequences of

<sup>19</sup> *Report of the Experts . . .* (footnote 13 above), para. 56.

the exercise of that right. The function which contemporary international law attributed to the will of individuals in the resolution of problems concerning nationality in cases of State succession was among the issues on which views diverged considerably. For that reason, the Commission had considered that the role of the will of individuals in matters of nationality and, in particular, the concept of the right of option in contemporary international law in cases of State succession should be studied in greater depth, having regard to the practice of States. Articles 7 and 8 were based on a number of treaties regulating nationality questions in relation to the succession of States, as well as on national laws that had provided for the right of option or an analogous procedure, but they were drafted without prejudice to the policy of the States concerned in matters of dual nationality, as the only way in which the Commission could usefully tackle that problem.

57. It was in that spirit that paragraph 1 of article 7 had been drafted: its wording reflected the conclusion of the Working Group, which first envisaged the resolution of a "positive" conflict of nationality by means of option. Paragraph 2 emphasized that the granting of the right of option was one of the ways of eliminating the risk of statelessness in cases of succession of States. Paragraph 3 provided that there should be a reasonable time limit for the exercise of any right of option, whether that right was provided for in a treaty between the States concerned or in the legislation of one of those States. The "reasonable" character of the time limit could depend on the circumstances of the succession of States, but also on the categories of individuals concerned; international practice varied considerably in that regard.

58. As the Working Group had indicated in its report, the term "right of option" was used in a broad sense, covering both the possibility of "opting in", that is to say, making a positive choice, and the possibility of "opting out", that is to say, renouncing a nationality acquired automatically.

59. Article 8 spelt out the consequences of the exercise of the right of option and its provisions, particularly paragraphs 1 and 2, were largely self-explanatory. Paragraph 3 emphasized the autonomy of the legislation of the two States concerned, as it provided that the optional acquisition of the nationality of one State by a person concerned did not inevitably imply the obligation of the other to withdraw its nationality therefrom. Such obligation existed only if it was based on a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounced the nationality of the other in accordance with the provisions of the latter's legislation.

#### ARTICLE 9 (Unity of families)

60. The problem dealt with in article 9 was not confined to the context of State succession, and also arose in relation to questions of nationality generally. It had long been thought that the solution to the problem consisted in granting the same nationality to all members of the family. A number of treaties provided that women and children acquired the same nationality as their husbands and

fathers, respectively. The main deficiency of the treaties or national legislation providing for that solution was the fact that they placed the woman in a position of subordination. Article 4 of the Resolutions adopted by the Institute of International Law on 29 September 1896<sup>20</sup> had attempted to overcome that problem by providing for the right of the wife to recover her former nationality by a simple declaration and the right of option of the children for their former nationality, at majority or on their emancipation. Moreover, neither the draft European Convention on Nationality<sup>21</sup> nor the Declaration on the consequences of State succession for the nationality of natural persons (hereinafter referred to as "the Venice Declaration")<sup>22</sup> contained any specific provision concerning the preservation of a family's unity in the event of a succession of States. However, the right to family unity was the subject of a wealth of case law in the European Court of Human Rights. In its report to the Commission at the forty-eighth session, the Working Group had considered that one of the fundamental principles to be observed by the States concerned was the obligation to adopt all reasonable measures to enable a family to remain together or to be reunited.<sup>23</sup> That was the salient idea of article 9, which imposed an obligation of a very general nature: the States concerned were not obliged to enable all members of a family to acquire the same nationality, but, so as not to impair the unity of a family, they must make it possible for the families of persons concerned to live together and, consequently, must eliminate the legislative obstacles that might prevent them from doing so. The words "reasonable measures" were intended to exclude unjustified demands.

#### ARTICLE 10 (Right of residence)

61. Problems relating to the right of residence of the persons concerned, namely, persons whose nationality might change as a consequence of the succession of States, were among the most serious problems posed by territorial changes. Voluntary changes in nationality had often had direct consequences on the right of residence of persons concerned. In the past, treaties between States concerned or national legislation had quite often provided that persons concerned were under the obligation to transfer their residence out of the territory of the State concerned whose nationality they had voluntarily renounced. That had been the case with, *inter alia*, the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) and the Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye), as well as the treaties concluded with a number of successor States after the First World War, the Treaty of Peace between the Allied and Associated Powers and Bulgaria (Peace Treaty of Neuilly-sur-

<sup>20</sup> J. B. Scott, ed., *Resolutions of the Institute of International Law. Dealing with the Law of Nations*, Carnegie Endowment for International Peace, Division of International Law (New York, Oxford University Press, 1916), p. 133.

<sup>21</sup> Council of Europe, Parliamentary Assembly, working papers, vol. IX (Strasbourg, 1996), doc. 7665, appendix.

<sup>22</sup> Adopted by the European Commission for Democracy through Law, Venice, 13-14 September 1996 (Council of Europe, Strasbourg, 10 February 1997, document CDL-INF (97) 1, pp. 3-6).

<sup>23</sup> See *Yearbook . . . 1996*, vol. II (Part Two), para. 86 (j).

Seine), the Treaty of Peace (Treaty of Lausanne), of 1923, and the Treaty of Peace with Italy, of 1947. However, other treaties, such as the Treaty of Peace between Finland and the Soviet Government of Russia (Treaty of Tartu), of 1920, did not make transfer of residence an obligation, but simply a possibility, or, like the Treaty of cession of the territory of the Free Town of Chandernagore of 1951 between India and France,<sup>24</sup> were silent on the matter. Similarly, during the successions of States that had recently taken place in Central and Eastern Europe, national legislation had not required the transfer of residence of individuals who had voluntarily acquired the nationality of another successor State.

62. In practice, however, the persons concerned had often had to leave their place of habitual residence long before they had been able to express themselves on the question of the choice of a nationality following the succession of States. The place of habitual residence was often a determining factor in the resolution of problems of nationality. It was sometimes even a fundamental criterion in the granting of nationality, as would be seen from Part II of the draft articles. That was why the problem was referred to at the outset in article 10, paragraph 1, the purpose of which was to safeguard the right of residence of persons who at some point had been forced to leave a territory because of events relating to the succession of States.

63. Paragraphs 2 and 3 dealt with the problem of the possible consequences of the change of nationality with regard to the right of residence. Paragraph 2 covered the situation where a person concerned acquired a nationality other than that of the State of his or her habitual residence *ipso facto*, merely by virtue of a treaty or the legislation of the States concerned. In such cases, the right of that person to maintain his or her habitual residence must be protected. That was how the draft European Convention on Nationality regulated the problem.

64. The question was more problematic if the change of nationality was the result of a voluntary act of the person concerned. In the *Acquisition of Polish nationality* case,<sup>25</sup> the Arbitrator had held that the successor State normally had the right to require the emigration of such persons as had opted against the nationality of the successor State. On the other hand, provision 16 of the Venice Declaration provided that

The exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State . . .<sup>26</sup>

He had preferred to confine himself to the principle, sanctioned by international practice, whereby States were permitted to require that persons who had voluntarily acquired the nationality of another State should transfer their residence to that State. That was the idea expressed in paragraph 3, which did, however, offer a guarantee of fair treatment by obliging the State of residence to allow a reasonable time limit for the persons concerned to comply with their obligation. That obligation must of course exist by virtue of the legislation of the State concerned or

of the treaty concluded between the States concerned and the persons concerned must be aware of it.

#### ARTICLE 11 (Guarantees of the human rights of persons concerned)

65. Article 11 was based on the conclusions of the Working Group, but he had broadened its scope, shifting its focus from the problem of the rights of persons concerned during the period before their nationality was determined to the more general problem of respect for the human rights and fundamental freedoms of all persons concerned who, after the date of the succession of States, had retained their habitual residence in the territory of the State concerned. The broadening of its scope of application was in conformity with the practice of a number of multilateral treaties, such as the Treaty between the Principal Allied and Associated Powers and Czechoslovakia, the Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, the Treaty between the Principal Allied and Associated Powers and Roumania and the Treaty between the Principal Allied and Associated Powers and Poland. It was obvious that, once a person concerned became a national of a State concerned other than that of his or her habitual residence, such person enjoyed in the latter those rights to which aliens were entitled, but not all the rights reserved to nationals. The principle set forth in article 11 did not call into question the legitimacy of that kind of distinction.

#### ARTICLE 12 (Non-discrimination)

66. The principle of non-discrimination set forth in article 12 did not call for a long commentary. It was obvious that States concerned must not, when withdrawing or granting their nationality or when providing for the right of option, apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain, acquire or choose a nationality. But the forms of discrimination might vary considerably. Some examples drawn from practice and studied in relation to recent successions were given in the commentary to article 12.

#### ARTICLE 13 (Prohibition of arbitrary decisions concerning nationality issues)

67. The principle of prohibition of arbitrary decisions concerning nationality issues had first been included in article 15, paragraph 2, of the Universal Declaration of Human Rights and had been reaffirmed in several other instruments, such as the Convention on the Rights of the Child and the draft European Convention on Nationality. The Working Group had considered that the prohibition of arbitrary decisions concerning the acquisition and withdrawal of nationality or the exercise of the right of option should be included among the general principles applicable in all cases of State succession. Several texts on which those provisions were based were cited in the commentary.

<sup>24</sup> United Nations, *Treaty Series*, vol. 203, p. 155.

<sup>25</sup> See footnote 17 above.

<sup>26</sup> See footnote 22 above.

## ARTICLE 14 (Procedures relating to nationality issues)

68. Article 14 required States concerned to process applications relating to the acquisition, retention, renunciation or the exercise of the right of option of nationality without undue delay and to issue decisions taken in that regard, including those concerning the refusal to issue a certificate of nationality, in writing; it also provided that such decisions must be open to administrative or judicial review. Similar rules were set forth in chapter IV of the draft European Convention on Nationality. Article 14 followed the Working Group's recommendation on that subject, which had been approved by the Sixth Committee.

*The meeting rose at 12.55 p.m.*

---

## 2476th MEETING

*Wednesday, 14 May 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.*

---

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

#### PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

#### ARTICLE 15 (Obligation of States concerned to consult and negotiate)<sup>2</sup>

1. Mr. MIKULKA (Special Rapporteur) said that the first conclusion reached by the Working Group on State

succession and its impact on the nationality of natural and legal persons, when it had tried to formulate the consequences to be drawn from the existence of the right to a nationality in the context of State succession, was that States concerned should have the obligation to consult in order to determine whether State succession had had any undesirable consequences with respect to nationality, and, if so, that they should have the obligation to negotiate in order to resolve such problems by agreement. The Commission and the Sixth Committee had expressed satisfaction with the Working Group's position, *inter alia*, because negotiations should be aimed, in particular, at the prevention of statelessness.

2. Paragraph 1 set forth that principle in the most general terms, without indicating the precise scope of the questions which were to be the subject of consultations and negotiations between States concerned. Nevertheless, the aim was to provide for the obligation to consult and seek a solution, through negotiations, of a broader spectrum of problems, not only statelessness. The Working Group's suggestion to extend the scope of the negotiations to such questions as dual nationality, the separation of families, military obligations, pensions and other social security benefits, and the right of residence, had generally met with the approval of members of the Commission.

3. One of the main issues discussed in relation to that paragraph had been the legal nature of the obligation to negotiate. It had been recalled that that obligation had been considered to be a corollary of the right of every individual to a nationality or of the obligation of States concerned to prevent statelessness. But it had also been argued that such obligation could be based upon the principles of the law of State succession, including those embodied in the 1983 Vienna Convention which provided for the settlement of certain questions relating to succession by agreement between States concerned. Another view had been that, however desirable the obligation to negotiate might be, it was not incumbent upon States concerned under positive general international law.

4. The debate was no doubt extremely useful in clarifying the current state of international law in that area. But whatever the outcome, it should not alter the decision to include in the draft articles a provision requiring States concerned to consult and negotiate on the issue of nationality and related questions. In any case, if such an obligation did not yet exist in positive law, the Commission should study appropriate ways of promoting the development of international law in that direction.

5. Another, qualitatively different, question was whether the simple obligation to negotiate, particularly when it did not entail the legal duty to reach an agreement, would be sufficient to ensure that the relevant problems would actually be resolved. Clearly, that was not the case. But the Working Group had not confined itself to highlighting the obligation of States concerned to negotiate; it had also formulated a number of principles to be retained as guidelines for the negotiations. They were the subject of Part II of the draft and related to the questions of the withdrawal and granting of nationality, the right of option and the criteria applicable in various types of State succession. The chief aim of those principles was to facilitate negotiations or to inspire the States concerned in their leg-

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> For the text, see 2475th meeting, para. 14.

islative efforts. They offered States concerned some "technical" solutions to the problems that arose, on which they could base their agreement. Nevertheless, in the course of their negotiations, States concerned might find more appropriate solutions that corresponded more closely to the needs of the specific situation and, by agreement, base their respective legislation thereon. If those solutions were in conformity with the principles of Part I, it would be difficult to object to them.

6. Paragraph 2, addressed the problem which arose when one of the States concerned refused to negotiate, or when negotiations between States concerned were abortive. Since nationality was principally a matter of internal law, international law's possibilities for reaction were fairly limited. Nevertheless, one observation came immediately to mind: it was not possible to treat the behaviour of two States concerned on an equal footing if the failure of the negotiations and the resulting problems for the individuals concerned were due, in principle, to only one of those States. Hence the wording adopted in paragraph 2.

7. The aim of the provision was to indicate that even the refusal of one party concerned to consult and negotiate did not confer complete freedom of action on the other party. In such a situation, compliance with the provisions of the draft articles meant avoiding a possible conflict with international law, although it was not intended to imply that all the provisions of the draft articles were strict legal obligations for States concerned.

#### ARTICLE 16 (Other States)<sup>3</sup>

8. Article 16, the last article of Part I, was concerned with the problem of the attitude of other States where a State concerned did not cooperate with the other State(s) concerned and where the effects of its legislation conflicted with the provisions of the draft articles.

9. As already recognized in article 1 of the 1930 Hague Convention, while it was for each State to determine under its own law who were its nationals, such law should be recognized by other States only insofar as it was consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.

10. Paragraph 1, the aim of which was to ensure compliance by States concerned with the rules of international law regarding restrictions on the delimitation of their competences, was based on one of the preliminary conclusions of the Working Group, that a third State should not have to give effect to the decisions of the predecessor or successor State regarding, respectively, the withdrawal of, or refusal to grant, its nationality in breach of the principles formulated by the Group. Paragraph 1 thus merely set out the principle of non-opposability vis-à-vis third States of nationality granted in disregard of the requirement of a genuine link, a principle whereby international law permitted a certain degree of control over unreasonable attributions by States of their nationality.

11. The problem of which criteria could be regarded as "genuine" would be discussed later. It was the subject of the recommendations appearing in Part II of the draft. The important thing regarding article 16 was that the discussion both in the Commission and in the Sixth Committee led to the conclusion that, even if the primary context for the application of the principle of effective nationality was the law of diplomatic protection, it also had some role to play in the determination of the principles applicable to the withdrawal or granting of nationality in situations of State succession.

12. A number of writers on the topic of State succession who were in favour of limiting the power of the successor State to grant its nationality to persons lacking a genuine link with the territory concerned based their argument on the decision of ICJ in the *Nottebohm* case, in which the Court had stated that

a State cannot claim that the rules [pertaining to the acquisition of its nationality] that it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.<sup>4</sup>

13. The Court had indicated some elements on which the genuine connection between the person concerned and the States whose nationality was involved could be based. As the Court had said:

Different factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.<sup>5</sup>

14. Such a link could have special characteristics in cases of State succession. In practice, different tests for determining the competence of the successor State to impose its nationality on certain persons had been considered or applied, such as domicile, residence or birth. Thus, for example, the peace treaties after the First World War, as well as other instruments, often used habitual residence as a basic criterion. But, as had often been pointed out, although habitual residence was the most satisfactory test for determining the competence of the successor State to impose its nationality on specified persons, it could not be stated with assurance to be the only test admitted in international law.

15. Paragraph 2, dealt with another problem that might confront third States in the case of a State succession: the problem resulting from a "negative" conflict between the legislation of the States concerned. The assumption in that instance was that the successor State refused to grant its nationality to certain persons normally entitled to acquire such nationality or the predecessor State withdraw its nationality from persons normally entitled to retain its nationality. Once again, international law could not correct the insufficiencies of the internal law of the States concerned, even if they resulted in statelessness. But that did not mean that third States were simply condemned to a passive role.

<sup>4</sup> *Nottebohm* case (see 2475th meeting, footnote 6), p. 23.

<sup>5</sup> *Ibid.*, p. 22.

<sup>3</sup> *Ibid.*

16. Whenever persons who would otherwise have been entitled to acquire or to retain the nationality of a State concerned became stateless as a result of the succession of States because of disregard by that State of the basic principles contained in the draft articles, other States should not be precluded from treating such persons as if they were nationals of the said State. That seemed to him also to accord with the idea put forward by some members that the Commission should try to formulate some “presumptions” as to the nationality of persons concerned, an idea also followed by the Working Group. Hence the wording adopted in paragraph 2.

17. As the intention was to alleviate, not to further complicate, the fate of those stateless persons, the possibility of such a “presumption of nationality” by third States was subject to the requirement that such treatment should be in the interest, and not to the detriment, of those persons. In practical terms, that meant that a third State might extend to those persons favourable treatment reserved, for example, under a treaty, to nationals of the State in question. On the other hand, it could not, for instance, deport to that State persons who were not in fact nationals of the said State, or, in other words, who were only “presumed” nationals under the terms of paragraph 2.

18. The CHAIRMAN invited members to comment on the general structure of the draft articles, the definitions, and the preamble.

19. Mr. BROWNLIE expressed warm appreciation for the careful work done by the Special Rapporteur over the previous two years. He was in substantial agreement with many of the specific solutions proposed. Nevertheless, the existing draft had certain drawbacks which could almost certainly be remedied without a significant change in the existing structure.

20. First, the draft appeared to ignore the rule of customary law whereby the population followed the change of sovereignty in matters of nationality. That silence could create the unfortunate impression that the Commission did not accept the existence, or denied the importance, of that source of legal stability.

21. Secondly, the form of the draft made it appear that, in the absence of internal legislation, the population of the territory concerned had no clear status after a change of sovereignty. That was clear from the provisions of article 3, article 16, paragraph 2, and also from articles 17 to 24 as a whole.

22. The key to those questions was to be found in the first sentence of article 3, which stated that “Each State concerned should enact laws concerning nationality [...] without undue delay”. Yet suppose there was no legislation or that, as would be very probable in the circumstances, legislation was delayed? A policy problem then emerged: the draft sought to avoid statelessness, but its approach might actually increase the incidence of statelessness and of uncertainty as to status.

23. The proper role of internal law must be appreciated if the draft articles were to have firm foundations. At the current time, they assumed the paramount role of internal law—the Special Rapporteur had said as much at the previous meeting, and article 3 made the matter clear. More-

over, the Working Group had decided that there was no presumption of a change of nationality. What, then, was the proper role of internal law? It was not a question of paramountcy, but one of determining its appropriate role.

24. In his submission, the analytical position should be the following: the case of the territorial sea of coastal States provided a paradigm. Only the coastal State could establish a territorial sea. But the conditions for establishing it were set by general international law. It was a widely recognized constitutional division of powers reflected, for example, by ICJ in the *Fisheries* case (*United Kingdom v. Norway*).<sup>6</sup> That analytical position also applied in the case of nationality, as the Court had recognized in the *Nottebohm* case.

25. The draft articles adopted a position, not of monism, or even of dualism, but a sort of super-dualism: the role of international law was reduced to a set of duties of the State to enact legislation and to grant nationality. And yet the sources did not support the position that internal law was paramount. In the footnote to the first sentence of paragraph (1) of the commentary to article 3, contained in his third report (A/CN.4/480 and Add.1), the Special Rapporteur cited *Oppenheim’s International Law*.<sup>7</sup> However, that passage in *Oppenheim’s International Law* had been carefully qualified; editors through the 1930s had then dislodged an extreme, unqualified statement from the qualification that had originally followed it. Oppenheim’s view had never been as dogmatic as it had subsequently been made to appear.

26. The outcome was that the draft articles appeared to give an exclusive role to internal law, subject to duties to grant nationality; the evidence for the existence of a principle of customary law on change of nationality was ignored. Paradoxically, the draft provided for a right to a nationality in article 1, but the modalities of the provisions that followed provided no substance for that right. Thus, article 2 was stated in programmatic form, and represented an obligation of means and not one of result.

27. Such were his first impressions of the Special Rapporteur’s third report. He had not been very positive. He was not yet prepared—and might not be required—to offer specific proposals. His own modest objective would be to have at least some saving clause relating to existing principles of customary law concerning succession in that area, so as to remove an apparent vacuum in the draft articles.

28. Mr. BENNOUNA said that Mr. Brownlie’s comments had thrown light on some of his own concerns regarding the draft articles. Like Mr. Brownlie, he trusted that the decision to discuss only the general framework of the draft articles at the current stage did not rule out the possibility of referring to the substance of individual articles within that general context.

29. In paragraph (4) of the commentary to article 16, the Special Rapporteur stated that the theory of effective nationality was intended to

<sup>6</sup> *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116.

<sup>7</sup> R. Jennings and A. Watts, eds., *Oppenheim’s International Law*, 9th ed., vol. 1, *Peace* (London, Longman, 1992), p. 852.

draw a distinction between a nationality link that was to be *opposable vis-à-vis* other sovereign States and one that was not, notwithstanding its validity within the sphere of jurisdiction of the State concerned.<sup>8</sup>

That posed an important problem, which also to some extent affected the topic of diplomatic protection. In that regard, Mr. Brownlie's citing of the *Fisheries case (United Kingdom v. Norway)* was very pertinent. It must be made clear that the right to grant nationality was the exclusive prerogative of a specific State—a right that no one disputed, and one which could not be tampered with, as was sometimes the case in the draft articles.

30. What might be the effect of such competence at the international level? The Special Rapporteur had said certain States might consider a person to be a national of a given State even if that State did not grant him nationality. That might be quite dangerous. The theory of opposability must be taken in a negative sense: it meant refusing to regard someone as a national. But it could not then be said that certain States could consider someone to be a national even if he met certain criteria and it was in his interest to preclude his becoming stateless, as the Special Rapporteur maintained in article 16. He did not know what that idea was based upon, whether monism or dualism. The Convention on the Rights of the Child contained provisions aimed at protecting a child's nationality as part of his or her identity. If a country did not meet that commitment, its international responsibility was incurred, because it breached the Convention. When the State had the right to do something, but failed to do so, no one else was entitled to act in its stead. If the State did effectively do something, it must do so in conformity with international law. Yet the theory of effectiveness was not a given: it must be taken with great caution. Probably in the framework of a single nationality, the theory of effectiveness was not accepted in international law. It could perhaps be accepted in a plurality of protections and a plurality of nationalities.

31. Mr. MELESCANU said that Mr. Brownlie had raised a fundamental point, namely the role of internal law in the succession of States and the effects on nationality. The Special Rapporteur was correct in saying that States had a sovereign right to establish conditions for nationality. But when dealing with a change in nationality in connection with State succession, the problem was somewhat different. The analogy with coastal waters was a good one. Principles of international law were required in cases where nationality was related to State succession, though needless to say, internal law must retain the possibility to act. States had sovereignty over nationality in normal cases, such as when an individual applied for the nationality of another State, but when changes in nationality were due to State succession, clear rules must be established under international law whereby each State could decide its own procedures and principles.

32. Mr. MIKULKA (Special Rapporteur) said that the problem being raised was not that of a State having a right to grant nationality, but that of a State being competent to do so. International law imposed restrictions on that competence. A State could not exercise its competence to such

an extent that it interfered with the competence of other States. It was international law which defined where the competence of one State ended and another's began. If a State issued a decree on nationality, that decree could not be rendered invalid by international law, the sole basis for nationality being internal law. International law could not offer a legal basis for nationality; for example, it could not find that a given person was a Czech citizen, but only that, in a given framework, the Czech State had the right to say who its nationals were.

33. Of course, international law provided responses in certain cases. He agreed with Mr. Brownlie that there were certain effects that stemmed directly from international law, but they were mainly negative. Thus when a State had ceased to exist, international law had stopped recognizing its citizenship. Positive effects, on the contrary, such as determining who were the nationals of a successor State, fell within the competence of internal law, whereas international law made sure that States did not exceed that competence. When they did so, international law was powerless to alter the effects of such acts in the internal legal order of a State. International law had no influence over that matter at the internal level, but it could give other States the possibility to react. When a State took a decision which exceeded its national competence, under international law other States were not compelled to respect that decision.

34. Mr. SIMMA said that he supported the Special Rapporteur's view with regard to the division of labour between internal and international law in matters of nationality. As he saw it, the objective of the Special Rapporteur's draft was to use international legal principles to fill the gap in cases in which domestic order disappeared following State succession.

35. Mr. CRAWFORD said that the debate on the relation between internal and international law had been dogged by abstractions. It would be wrong to place excessive reliance on pre- or post-war doctrine to confront problems of nationality today. Under normal circumstances, everyone accepted that the State had a cardinal role. But it could not be categorically asserted that, for example, international law had never attributed nationality to a person, contrary to the law of a State. Only recently, international law had found that certain persons were South Africans, thereby overriding South African law. That had helped in resolving the conflict in question, rather than interfering with its settlement. At a time when internal law was becoming more open to international law, it was important to avoid a priori dogma.

36. Mr. Sreenivasa RAO said that Mr. Brownlie's point was well-taken. There was merit in stating simple incontrovertible principles at the outset. To deal with the problems associated with the subject, modern concepts were needed. First, the ground rules must be clearly restated, but not refashioned.

37. Mr. ECONOMIDES said Mr. Brownlie was quite right to say that there was a basic customary law pursuant to which every State succession, to the extent that it involved territorial change, also inevitably affected the nationality of populations. That rule had been applied for centuries. He had examined all the cases of State succes-

<sup>8</sup> J. F. Rezek, "Le droit international de la nationalité", *Collected Courses of The Hague Academy of International Law, 1986-III* (Dordrecht, Martinus Nijhoff, 1987), vol. 198, p. 357.

sion in his country, and in every instance they had entailed specific treaty rules; the role of internal law had been complementary and involved implementing international obligations, notably treaty obligations. Thus, in cases of State succession, the role of international law was paramount. The sole exception related to questions which were settled entirely by internal law.

38. Mr. FERRARI BRAVO said he agreed that it was a matter for internal law to take positive decisions on who had nationality and who did not. But he had reservations about the phrase in article 16, paragraph 2, that stated "other States are not precluded from treating such persons as if they were nationals of the said State if such treatment is in the interest of those persons". That appeared to be postulating a nationality that did not exist. While he understood the desire to avoid statelessness, he did not think the Special Rapporteur's approach was borne out in international law.

39. Mr. PAMBOU-TCHIVOUNDA applauded Mr. Brownlie's wise and timely resurrection of the rule of customary law, which the report apparently had failed to take into account. It must also be borne in mind, however, that that rule had certain limits: every example of State succession was different, and it was necessary to examine each particular case to see whether the rule of customary law applied.

40. Mr. HE said it was generally recognized that identification of a State's nationals was a matter for internal law. In his view, that also included cases of State succession. Article 1 of the 1930 Hague Convention, as well as other treaties, made reference to customary law. The restrictions on the freedom of a State to grant nationality were limited. In that regard, he endorsed the relevant paragraphs of the preamble to the draft articles.

41. Mr. THIAM reminded members that the respective roles of international law and internal law had been the subject of long debate during the discussion of the Special Rapporteur's first report<sup>9</sup> and virtually the same two tendencies had emerged as had today. It was at the current time up to the Commission to move ahead and try to find a response. He did not think that either the competence of international law or of internal law could be ruled out entirely; it depended on the case.

42. Mr. OPERTTI BADAN said that, obviously, each State was competent to decide who its nationals were. The point was to agree on how far international law could go in determining that State obligation. In his view, article 3 offered the right solution, which was compatible with the other principles. The Commission must decide whether the obligation of States to approve laws on nationality was something upon which international law could impose standards.

43. Mr. HERDOCIA SACASA said it might be better for the Commission not to argue whether international law or internal law was to be paramount but instead to take the view that the two were complementary.

44. The CHAIRMAN said that the discussion on Mr. Brownlie's comments seemed to have shed light on

two basic problems, on the one hand, the respective role of internal law and of international law, an issue that lay at the core of the topic, and on the other, whether or not the draft should be preceded by a reference to certain general principles of customary law.

45. Mr. HAFNER said that several years previously, when the 1978 and 1983 Vienna Conventions had been drafted, it had been assumed that there would be no urgent need for those instruments. Recent history had shown that assumption to be false, and there was currently an overwhelming number of cases involving State succession. For the moment he wished to single out two general issues of the regulation of the effect of State succession.

46. The third report illustrated that the topic could be approached from two different perspectives resulting from the different character of the relations governed by the rules: nationality could be dealt with either as a matter of relations among States or of relations between individuals and the relevant State or States. How far then were the Special Rapporteur's rules conceived as human rights rules and could they be described in such a way as to leave no doubt about their nature? Article 1, paragraph 2, could be identified as a rule of such a kind.

47. The two different perspectives also had different impacts on the issue of reaction to non-compliance with the rules and the mechanism for enforcing them. The question was relevant even though the draft articles were formulated as a pre-normative or "soft-law" instrument, for a distinction must be drawn between the legal nature of the instrument and the content of the rules. The more concrete the provisions, the more authoritative the instrument would be.

48. He asked how one State could react to non-compliance by another. The State responsibility approach would not work, and even the sanction envisaged in article 16 could have only a negative effect of non-recognition of a nationality and perhaps never the positive effect of recognition of a nationality which another State had not granted. Even a mandatory international jurisdiction would not help. The human rights approach needed, of course, a mechanism whereby an individual or another State could ensure compliance.

49. Although nationality could normally be acquired only by virtue of national law, some devices were needed to enable individuals to invoke rules of international law: use of an international organ, for example, or the right to invoke such rules before national authorities. He asked if it would be advisable to insert in the draft articles a provision obliging States to provide adequate judicial instruments to which individuals could resort. Article 14 seemed to go in that direction. Individuals must be able to invoke such rules directly before national courts. Therefore, he asked if the text could or should state the self-executing nature of some of the rules or should the rules be so formulated as to leave no doubt about their direct applicability. Unless that was done, article 14 would be of only limited effect.

50. He was also concerned about the language employed in the draft articles, which sometimes used the mandatory "shall" and sometimes the weaker "should". There was no need to keep the softer option, and in some

<sup>9</sup> See 2475th meeting, footnote 4.

cases "should" could easily be replaced by "shall". Perhaps the Special Rapporteur could explain the reason for the differing usage.

51. It was unusual for the Commission to furnish the General Assembly with a preamble to a set of draft articles. He could concur with that approach, but thought that the second paragraph raised more problems than it solved. However, there was no need to discuss the point at the current time.

52. The Commission would have to return to the question of definitions at the end of its consideration of the draft articles, but it was already apparent that the failure to provide a definition of "genuine link", as used in article 16, might give rise to problems. He asked if there was any specific reason for the omission or would an attempt be made to define the term at a later stage.

53. Mr. GOCO said that the main purpose of the draft articles appeared to be to prevent statelessness arising as a result of State succession. However, there were many other causes of statelessness. He asked if the Commission intended to produce solutions for such other cases. It should also be noted that the question of a person's true allegiance might be more important than his formal nationality.

54. The CHAIRMAN pointed out that the title of the topic made it clear that the Commission was concerned only with nationality in relation to State succession.

55. Mr. LUKASHUK said that the Special Rapporteur had done well to support each part of his text by references to actual practice. The structure of the draft was fully justified at the current stage and formed a good basis for the Commission's work. It might, of course, have to be changed later in the light of that work. He endorsed Mr. Hafner's comments regarding the second paragraph of the preamble. While he understood the Special Rapporteur's purpose, the paragraph was nonetheless unacceptable in its current wording.

56. Some members considered that the Special Rapporteur had departed from the accepted rules of the relationship between national and international law. He did not agree. Like Mr. He, he thought that the relationship was sufficiently reflected in the draft. Rather, he would reprove the Special Rapporteur for not paying sufficient attention to the progressive development of international law. He was also troubled that insufficient attention had been paid to the changes resulting from the assertion and consolidation of human rights. In the case of the basic principle of the right to a nationality, for example, a person could only take advantage of what was granted by the State. The principle must be presented more firmly, perhaps by saying that, in all cases, the wishes of the person concerned must be taken into account. That might be followed by a provision to the effect that, without the agreement of the person concerned, a State was not entitled to impose its nationality on him. It must also be made clear that a State was not entitled arbitrarily to deprive a person of his nationality. Indeed, to revert to the question of the structure of the draft, articles 11 and 13, which were of fundamental importance, could be placed immediately after article 1, thereby strengthening the provisions on the right to a nationality.

57. Mr. BENNOUNA said that the discussion initiated by Mr. Brownlie had brought out more clearly the structure and aims of the draft articles, and the Commission must establish those points before proceeding further. What was lacking in the text was a few simple principles; there were in fact too many articles. Such principles should include the notion of simple presumption. A succession of States entailed a number of presumed consequences, in particular that further to a change of sovereignty over a territory its inhabitants were presumed to have the nationality of the new sovereign. The notion of presumption had already been applied in international law, for example with respect to problems of decolonization, but subject, of course, to a right of option. The Special Rapporteur should reflect more fully on Mr. Brownlie's criticisms, for by seeking to avoid statelessness he created statelessness and uncertainty pending adoption of detailed legislation following a succession of States. That could be avoided by a simple principle of presumption.

58. The Special Rapporteur distinguished between principles of general and specific application. The commentary to Part I began by stating that the principles formulated therein were "general" and added that the adjective "general" was without prejudice to the question as to which of those principles might be considered as forming part of general international law. The Special Rapporteur had also referred to "common rules of international law", and reference had been made in the Commission to "customary rules of international law". All those rules must be spelled out in the draft. The Chairman had, in fact, said that it might be useful initially to identify some of the relevant general rules of international law.

59. In his commentary to the footnote to the title of the articles referring to the definition of nationality, the Special Rapporteur said that the term "nationality" might be defined in widely different ways depending on whether the problem was approached from the perspective of internal or international law. As he had stated earlier, he disagreed with that position: there could not be two different definitions. Nor could he accept the distinction made by the Special Rapporteur between right and competence. The right existed in itself, and competence meant personal competence, as opposed to territorial competence, and consisted of the link of allegiance, that is to say, the link of nationality invested a State with competence to intervene by virtue of that link.

60. With regard to the right to a nationality the Special Rapporteur put forward the hypothesis of a person's already having one or more nationalities. But a distinction must be made between the case in which the person concerned had the nationality of one of the States concerned and the case of a conflicting nationality of a third State.

61. Reference had been made to the principle of a "genuine link", but other relevant principles, such as the right of peoples to self-determination, also came into play. At the current time, "genuine link" was a question of opposability in some cases but not a question of the definition of nationality.

62. The CHAIRMAN pointed out that he had not said certain relevant general rules should be identified but

merely that that was one of the points the Commission had questioned.

63. Mr. THIAM said he was not sure the Special Rapporteur had been right to exclude questions of decolonization from the scope of the draft. Decolonization did give rise to questions of the succession of States. Perhaps the Special Rapporteur could explain the reasons for his decision.

64. Mr. MIKULKA (Special Rapporteur) said he had divided the draft articles into two parts: Part I (General principles concerning nationality in relation to the succession of States) which laid down certain general principles and could be used to deal with all types of State succession, and Part II (Principles applicable in specific situations of succession of States), which dealt with certain types only. Part I could, however, also be used to clarify nationality problems that had originated at the time of decolonization. The purpose of Part II, which was concerned with the future, was not to codify or develop international law or impose obligations but rather to offer States confronted with problems of nationality certain criteria, or standard rules, by which they might wish to be guided in their future negotiations. The Commission earlier agreed that since the process of decolonization is practically over, there is no need for the inclusion of the category of "newly independent States". He would also urge members to read in particular the commentary to the draft articles on separation of part of the territory, in which connection he had referred much more to decolonization than to some few examples of separation in Europe and elsewhere.

65. Mr. FERRARI BRAVO said that, despite the Special Rapporteur's explanation, his doubts regarding the question of decolonization remained. He trusted that the matter would be further clarified by the Drafting Committee or the Commission itself.

66. In the modern day and age he also doubted the wisdom of seeking to avoid statelessness at all costs, as the draft seemed to do. Article 1, paragraph 2, for instance, stated that a "child has the right to acquire the nationality of the State ... on whose territory ... he or she was born". But a child's place of birth might often be a matter of pure chance, for instance, where a segment of the population migrated upon a succession of States.

67. Again, he wondered whether it was really necessary to include article 9 and the notion of unity of families in the draft. The concepts of the family in Western society and, for example, in Islamic countries differed. He asked whether article 9 was meant to apply to all such concepts.

68. Mr. KABATSI said that, while a presumption of transfer of nationality following a territorial change could be useful, it should be made clear that the right to nationality had to be balanced against the right of the successor State. Care should be taken to avoid imposing more obligations on the successor State than on the predecessor State.

69. Mr. PAMBOU-TCHIVOUNDA said that, on the whole, he endorsed Mr. Bennouna's points, particularly about the need to rearrange the articles and prune those provisions that were unduly long. For example, a more

concise form of wording could be found for article 1; and the terms of its paragraph 2 could perhaps be incorporated in the commentary or a footnote.

70. He agreed that the presumption of transfer of nationality must be subject to the right of option and that it was necessary to draw a distinction between definition and opposability. Also, as Mr. Bennouna had rightly observed, the notion of effectiveness had manifold functions.

71. Mr. MIKULKA (Special Rapporteur) said that the omission in the French text of the word "concerned" from the expression "State concerned" perhaps went some way to explaining Mr. Ferrari Bravo's difficulty in regard to paragraph 2 of article 1. As the commentary made quite clear, there had been no intention of suggesting that third States could be involved in any way. The rule in question had in fact been taken from the corresponding provision in the Convention on the Rights of the Child. As he had already explained, moreover, the correct translation into French of the word "genuine", as used in the English term "genuine link" was *effectif*. There were a number of other errors in the French translation which had slipped through owing to lack of time to check all the texts in detail.

72. He planned to issue a corrigendum at least to the draft articles. In the meantime, he would appeal to members for a little patience.

73. Mr. HAFNER said that he would be grateful for Mr. Bennouna's clarification on two points. First, he asked if there already existed a body of practice which gave rise to a presumption as to a principle of nationality in the event of a succession of States. Secondly, while such a principle would have effect for third States, he asked if it would also have effect for individuals. In other words, could an individual invoke a presumption of nationality?

74. Mr. BENNOUNA, referring first to the points raised about decolonization, said he noted from the second footnote to paragraph 11 of the introduction to the third report that the Commission had decided to consider issues of nationality which arose during the process of decolonization, insofar as their consideration sheds light on nationality issues common to all types of territorial changes. Yet the Special Rapporteur had just explained that a large part of his draft could apply to decolonization. The matter required further consideration, particularly since it was not only countries that could be decolonized but also parts of countries or enclaves. There were many throughout the world. Indeed, Morocco had two Spanish enclaves which might possibly revert to Morocco one day, when a problem of succession in the matter of nationality would arise.

75. As to the points raised by Mr. Hafner, the principle of presumption was one of those best known to international law. What a State wanted to reject in such instances was any element that did not fit into the homogeneous whole, such as minorities. It seemed to him that the principle of presumption actually provided most protection for minorities and that they must therefore receive attention in the context of succession of States.

76. Mr. ECONOMIDES said that practice, both past and present, favoured automatic acquisition of the nationality of the successor State, but there were two exceptions. On the one hand, the States concerned, within the defini-

tion laid down by the Special Rapporteur, could decide by treaty to adopt some other solution and, on the other, the right of option could be exercised by groups not wishing to acquire the nationality of the successor State. In such instances human rights dictated that the nationality of that State could not be imposed on those who did not want it.

77. There was also the important question of the consequences for those who exercised the right of option in favour of a predecessor State or of a successor State other than one on whose territory the person concerned was living. In such cases the persons involved were obliged to liquidate their assets and leave the country. Indeed, the Treaty of Peace with Italy, of 1947, had been based on that solution. Such a practice was no longer in keeping with the standards of human rights. That was why the European Commission for Democracy through Law (hereinafter referred to as "the Venice Commission")<sup>10</sup> had proposed a recommendation to the effect that States must not act to the detriment of persons who opted for the nationality of the predecessor State or another successor State. The Venice Declaration<sup>11</sup> might prove a useful working tool and he would therefore ask the secretariat to circulate copies of it to members, together with the explanatory report thereto.<sup>12</sup>

78. Mr. ROSENSTOCK said that he agreed with the Special Rapporteur regarding the question of decolonization and would suggest it be borne in mind that the taxonomy of the topic had been agreed, in particular by the General Assembly. It would be unwise to revert to the matter in an attempt to raise the question of decolonization as a subset meriting special attention.

### Composition of the Drafting Committee

79. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that, following consultations, the Drafting Committee would be composed of the following members: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Melescanu, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Yamada, Mr. Galicki as Rapporteur and Mr. Mikulka as Special Rapporteur.

*The meeting rose at 1.05 p.m.*

<sup>10</sup> See Council of Europe, Directorate of Legal Affairs, *Information bulletin on legal activities within the Council of Europe and in member States*, No. 31 (January 1991).

<sup>11</sup> See 2475th meeting, footnote 22.

<sup>12</sup> Explanatory report on the Declaration on the consequences of State succession for the nationality of natural persons (*ibid.*), pp. 7-13.

## 2477th MEETING

*Thursday, 15 May 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue the debate on the Special Rapporteur's third report (A/CN.4/480 and Add.1), in particular, on the structure or general presentation of the draft articles, the preamble and the definitions.

#### GENERAL PRESENTATION OF THE DRAFT ARTICLES, PREAMBLE AND DEFINITIONS (*continued*)\*

2. Mr. SIMMA congratulated Mr. Mikulka on his excellent third report, which clearly showed that the right choice of special rapporteurs on specific topics could yield very good results.

3. While broadly endorsing both the form and the substance of the draft articles, he considered that it would be useful if they included references to other relevant principles, such as those mentioned by Mr. Bennouna (2476th meeting). In his view, those principles should be formulated as such, rather than in the form of a presumption, which might always be contested by a State. Perhaps the simplest course would be to add a paragraph to the preamble in which reference would be made to customary law on the matter and to other principles governing nationality and the succession of States, to constitute a sort of saving clause.

\* Resumed from the 2475th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

4. The draft articles were based on the concept of the right to a nationality, which meant that human rights considerations were in a sense their foundation, as was demonstrated by the fact that the Universal Declaration of Human Rights<sup>2</sup> was cited in the preamble. While he entirely favoured that new approach, he nonetheless thought that a proper balance should be established between the rights and interests of individuals, on the one hand, and the legitimate interests and concerns of States, on the other. More stress was sometimes placed on the rights of individuals, as in article 16 (Other States), paragraph 2, in which very little attention was accorded to the legitimate concerns of States. In other cases, it was the interests of States that took precedence. That, for instance, was the idea that emerged from paragraph 12 of the introduction to the third report, in which it was stated that the draft articles related only to cases of succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

5. He had two comments to make in that regard. First, it was very difficult to determine whether a succession of States was lawful or unlawful, in accordance with international law or not in accordance therewith, particularly in cases of secession, which, at the current time, did not take place peaceably, as had been seen in the former Yugoslavia. Secondly, as the articles had been drafted from a human rights perspective, it was important to take account of unlawful forms of State succession, for it was in precisely such cases that it was essential to ensure the protection of individuals. Consequently, he considered that no explicit reference should be made to that limitation.

6. He was not sure what the corresponding obligation of States was with regard to the right to a nationality. Mention was made thereof in some articles, such as article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness), in which it was referred to specifically, and article 7 (The right of option), in which, however, it was stated that States concerned "should" give consideration to the will of a person concerned. In other articles, the obligation imposed on States was to negotiate with other States. Consequently, he asked whether one could really speak of a genuine right to a nationality for individuals if there was no clearly defined obligation for States in that regard.

7. As to the interaction between the "hard" rules of international law and rules without binding legal force, it could again be seen from article 16, paragraph 2, that failure to comply with "soft" law could have quite specific "hard" legal consequences, as that paragraph provided that, if a State disregarded the draft articles, other States could treat certain persons as though they were nationals of the said State if such treatment was in the interest of those persons. Furthermore, it was clearly stated in paragraph 10 of the introduction to the third report that while the principles in Part I cannot all be regarded as forming part of positive law (*lex lata*), the States concerned should be invited simply to observe them. He therefore wondered whether the amalgam of "hard" rules of international law and non-binding rules was not likely to have adverse

effects on the few "hard-law" norms that existed in respect of nationality.

8. Turning to the question of definitions, he noted that the term "State concerned" resulted in some awkward and confused formulations in some articles, and in particular in the first phrase of article 5 (Renunciation of the nationality of another State as a condition for granting nationality), and that the use of the term could be relaxed in such cases. He also considered that it would be better to have the definitions set out, not in a footnote, but in the main body of the text. The Special Rapporteur had been right to use the terms "should" and "shall" to distinguish between already established rules and the rules he was proposing.

9. Mr. Sreenivasa RAO said that he fully endorsed Mr. Simma's comments, particularly with regard to the inclusion of a saving clause on customary law. He suggested that the scope of application of that clause should be broadened to include already existing agreements so as to ensure the stability of relations between States. Furthermore, given the naturally debatable character of the presumption of nationality, he thought that it should be assigned a less significant role, which would certainly be possible with such a clause. In his view, in nationality matters the presumption perhaps had less importance than the simple application of established principles.

10. The CHAIRMAN invited the Special Rapporteur to take note of that suggestion. The question could be considered very rapidly in the Drafting Committee.

11. Mr. CRAWFORD said that he did not share Mr. Simma's view about article 16, paragraph 2. As to the substance, it was an essential provision which brought balance to the text. It was important to ensure that the interests of the State that disregarded the obligations imposed on it by the draft articles should not have priority over the interests of other States. The stress in that paragraph was thus not on the interest of the individual, although that was a condition for the application of the paragraph.

12. Mr. HAFNER, referring to Mr. Simma's comment that the scope of application of the draft articles should implicitly be broadened to include the case of unlawful successions of States, asked whether it might not be possible to settle the question by including a general provision in the text like that of article 3 common to the Geneva Conventions of 12 August 1949, setting forth basic principles applicable to cases not referred to directly in the draft articles. It might also be possible to draw on article 3 of the 1978 and 1983 Vienna Conventions, which was applicable to all cases not dealt with in the Conventions themselves.

13. As to the distinction drawn between "hard" and "soft" law and between the words "shall" and "should", he would like to know on what criteria the Special Rapporteur had based his choices. In some cases he could envisage a certain justification for using "should" whereas in some others, such as in draft article 3 (Legislation concerning nationality and other connected issues), he preferred "shall" to the existing "should".

14. Mr. MIKULKA (Special Rapporteur) explained that, in cases where, in his view, the rule set forth was

<sup>2</sup> See 2475th meeting, footnote 8.

already part of customary law, he had used the word "shall". In cases where it had seemed to him that there was a legal vacuum in positive law, but that it was possible to propose that States should follow a certain policy in the area in question, he had opted for the word "should". For example, in article 3, paragraph 1, he had chosen to say that "each State concerned should enact laws concerning nationality [...] without undue delay" because, in his view, international law did not impose on the State concerned the obligation to enact laws, but the State was nevertheless obliged to ensure the exercise of its sovereign functions over its territory. On the other hand, when he said in article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 2, that a successor State shall not impose its nationality on persons who have their habitual residence in another State against the will of such persons, he was simply repeating a unanimous opinion of the doctrine, namely, that there was a rule of customary law prohibiting a State from taking such a course of action. Lastly, in some cases, such as article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), he had used the word "may" to indicate that the act in question fell essentially within the discretionary power of the State concerned and that the State could therefore decide to take a different course of action. Those, in substance, had been the criteria that had guided him in his choices.

15. Mr. BENNOUNA said that the expression "in conformity with international law" used in paragraph 12 of the introduction to the third report created a dilemma which the Commission would encounter again in the context of the topic of diplomatic protection, the core of which was to determine whether it was possible to invoke rules of law when one was oneself in breach of the law. In human rights matters, it could be justifiable to give priority to protecting the dignity of the human person rather than to the lawfulness of a situation, which could in any case always be contested. On the other hand, it might seem unacceptable to apply rules to a State that, to take one example cited by the Special Rapporteur, had just annexed another State. The solution was to be found neither in retaining the current wording nor in simply deleting it and the Commission must adopt an imaginative approach to the problem. It might, for example, refer, in the proposed saving clause, to customary international law, agreements already concluded and the general principles of international law: in other words, those peremptory norms violation of which would result in the unlawfulness of the situation.

16. Mr. ECONOMIDES said that he was astonished by the turn that the debate had taken. Whereas the 1978 and 1983 Vienna Conventions contained an express rule providing that they were not applicable unless the State succession was lawful, the text which the Commission would propose must a fortiori be even stricter because it dealt not with treaties or archives, but with human beings. The Charter of the United Nations placed an absolute prohibition on the use of force and it would therefore be outrageous for the Commission to agree, on the pretext of respect for human rights, that a State might acquire a territory by conquest and give its nationality ex officio to the population of that territory, thereby providing the aggressor State with a legal foundation. Moreover, it was erro-

neous to invoke human rights because, by definition, the population concerned did not want the occupation. In order to make explicit the intention to prohibit the use of force, he proposed that the provision contained in the 1978 and 1983 Vienna Conventions should be incorporated in the body of the draft articles or, at the very least, in the preamble.

17. The CHAIRMAN, speaking in his capacity as a member of the Commission, pointed out that the question raised by Mr. Simma is analogous to the one deriving from the fact that the violation of *jus ad bellum* did not prevent the existence of *jus in bello* and said that he wondered whether it was warranted, on the pretext that a succession of States had not taken place in conformity with the principles of international law, to deprive the inhabitants of the territory concerned of nationality while declining to establish rules applicable to them.

18. Mr. LUKASHUK said that, notwithstanding the praiseworthy intentions which might have prompted some persons to advocate the deletion of the clause contained in paragraph 12 of the introduction to the third report, as jurists, the members of the Commission must bear in mind the reality of the situation, the construction proposed by the Special Rapporteur being very difficult and complex. He feared that extending the rules to poorly defined cases might make the draft less reliable.

19. Mr. MIKULKA (Special Rapporteur) said that that discussion had already taken place during the consideration of his first report.<sup>3</sup> He had inserted such a clause in paragraph 12 of the introduction to the third report, at first avoiding its inclusion in the draft itself, for the sole purpose of indicating that the basic principle on which he had drawn was that the exercise which he had asked the Commission to carry out must serve situations in which State succession had occurred in conformity with international law. That did not mean that some much more general implementing provisions relating, for example, to the protection of individuals against abuses of State power were not applicable to situations in which territorial change had not taken place in conformity with international law. The main idea was, however, that the rules under consideration must not serve as an excuse for legalizing an unlawful state of affairs. There was no need to dwell on the problem; if necessary, the Commission might attempt to formulate a saving clause, but only at a much later stage of work.

20. Mr. GOCO said that the Commission was not called on to legislate and that, in the area under consideration, internal law, based on the constitution of each State, took precedence. While not minimizing the human rights which individuals affected by a State succession should enjoy, he stressed that the Commission could not disregard the right of the State to define the conditions to which it was prepared to subordinate the granting of its nationality.

21. Mr. ECONOMIDES, thanking the Special Rapporteur for his very thorough work and complete draft, said that he would refer to three aspects relating to the preamble, the definitions and the structure of the draft.

<sup>3</sup> Ibid., footnote 4.

Beginning with the preamble, he endorsed the four paragraphs of the proposed text, but felt that the second paragraph might be worded in a more diplomatic way so as to stress the sovereignty of internal law while ensuring respect for international law and that, in the third paragraph, a more substantial content would have to be given to the concepts of the codification and progressive development of the law by referring, *inter alia*, to the wealth of nearly two centuries of practice. With regard to the last part of the preamble, he noted that, contrary to what was stated at the end of the third paragraph, the purpose of the text was not to promote respect for human rights in a general and overall manner, but to regulate the situation of persons concerned by successions of States. The Commission must therefore state, if necessary in a separate paragraph of the preamble, that it was anxious for the States concerned to respect the rights and interests of the persons affected in such cases. If the clause was deleted from paragraph 12 of the introduction to the third report, it might be incorporated in the preamble. In reply to a comment by the Chairman, he pointed out in that connection that, in accordance with the predominant modern-day opinion, the unlawful use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations could have no *de jure* effect. It would therefore be dangerous for the Commission to set out on a path which would be tantamount to granting *de jure* effects to an occupying or aggressor State.

22. The definitions did not belong in the commentary and it was in the Commission's interest to retain them in the body of the text for reasons of order and logic, the objective being to draft a declaration and not a treaty. The definitions themselves seemed acceptable, apart from minor drafting problems in subparagraphs (g) and (h).

23. As to the structure of the draft as a whole, he agreed with the Special Rapporteur's method of having one part to deal with general principles and one with the rules for specific application.

24. On the other hand, in respect of the structure of Part I (General principles concerning nationality in relation to the succession of States), he agreed with other members of the Commission that the text would need to be simplified and clarified further to make it more incisive, particularly by underscoring with greater clarity the three principles or objectives of the Commission's work.

25. The first principle had to do with the need to grant everyone the right to a nationality. That universally accepted rule of international law did not admit of any exception and allowed the Commission, on the basis of both conventions and case law, to establish a categorical rule containing an obligation of result. That was the point of article 1 (Right to a nationality), paragraph 1. However, he did not agree that, following a statement of that very forceful principle, a paragraph 2 should be included to cover the specific and extreme case of a child born after a particular date, which most often could be settled by referring to the internal law of the State concerned. If the Commission insisted on providing for the case of children, it should give consideration to a more general clause covering, for example, the possibility of parents exercising their right of option differently. It would be wiser, however, not to provide for anything in the text and to

leave the question to the internal law of the States concerned.

26. The second principle, which also enjoyed general support, referred to the need to avoid cases of statelessness as much as possible. As to whether it should be stated in the form of an obligation of result or an obligation of conduct he thought that the flexibility shown by the Special Rapporteur was the wisest approach because, even if States took the most comprehensive measures, statelessness often resulted from the inertia of the persons concerned. Such an obligation of conduct was set forth very well in draft article 2. The first and second principles thus were closely linked.

27. The third principle, although also fundamental, nevertheless constituted an exception to the first principle in that it required upon the successor State to grant a right of option to persons who, manifestly and for reasons of their own, did not want to take its nationality and preferred either to retain the nationality of the predecessor State or to acquire the nationality of another successor State. That principle, which raised the most difficult question in the draft, was based on a very old practice which could be traced back more than 150 years. Historically, the right of option had been accorded above all to members of national minorities in the three meanings of the term, namely, ethnic, linguistic or religious minorities. The Greek practice offered several examples of the creation of such a right of option. For instance, following the transfer of sovereignty over the Dodecanese in 1947, a right of option had been granted to the Italian-speaking minority of these islands, that is to say, persons who had become Greek following the transfer of sovereignty. The right of option was generally subject to respect for a "reasonable time limit" of about one or sometimes even two years.

28. The Venice Commission had followed the same principle on that question, that is to say, it had provided for a general right of option, but had made the exercise of that right conditional on the existence of effective links, in particular ethnic, linguistic and religious, as well as allowance for the former citizenship of the person concerned. The draft which the Commission had set out to produce must therefore be clearer on the question of granting the right of option. In general, the three above-mentioned fundamental principles must be given a sharper focus in the draft.

29. As to the mechanisms of State succession, the rule in all cases of State practice in that area was that of a virtually automatic attribution of the nationality of the successor State. That rule was part of customary law, but it was necessarily residual in nature in the sense that States could always decide otherwise and it allowed two exceptions: States, regardless of their decision, must respect the human rights of the persons concerned and there was an obligation to grant the right of option, which gave rise to the problem of the consequences of the exercise of that right. However, current practice in that regard was still very strict because persons who opted for the nationality of the predecessor State or that of another successor State were very often told to leave the territory of the successor State in which they were resident and even had to forfeit their property. The Venice Commission had sought to

temper that very severe practice by stipulating that the exercise of the right of option should have no prejudicial consequences,<sup>4</sup> but that provision unquestionably went well beyond the current state of international law. The Special Rapporteur had therefore been well advised to approach that question from the viewpoint of a recommendation and not of an obligation.

30. Mr. HERDOCIA SACASA said that the right of option really was a fundamental element of the protection of human rights and was even connected to the protection of the right to a nationality. The need to ensure respect for human rights therefore meant doing everything possible to prevent the right of option from being voided of its content by the threat of harmful consequences.

31. Mr. Sreenivasa RAO, referring to the problem of the applicability of the rules governing the situation of foreigners in general when the exercise of the right of option rendered the person concerned a foreigner, said that the imperatives of action to combat statelessness and to promote human rights, valid though they were, should not lead to total disregard of the specific circumstances of the exercise of the right of option.

32. Mr. DUGARD said that it was necessary to spell out exactly what was meant by the right to a nationality. In some countries, nationality corresponded to full citizenship, while, in others, it amounted to no more than a right to diplomatic protection. It could therefore happen that a person having full citizenship in the predecessor State "inherited" a nationality with a much more limited content in the successor State, which meant that the right to a nationality lost some of its content. The text should therefore state clearly whether the right in question was simply the right not to be stateless, or something more. Perhaps it would be useful to supplement articles 11 (Guarantees of the human rights of persons concerned) and 12 (Non-discrimination) with a provision prohibiting discrimination based on the sole fact that the person had been "imposed" on the successor State as a national. That would of course mean moving beyond the sphere of codification as such, but perhaps international law had already moved on, under the influence of human rights law, from the traditional view of nationality limited to diplomatic protection.

33. Mr. ROSENSTOCK said that the topic which the Commission had to deal with was not nationality, but the succession of States in its effects on nationality. He wondered whether Mr. Dugard's suggestion was not well covered in the two following propositions: there should not be any discrimination based on the preceding nationality; and when a territory in which nationality had been accompanied by a number of civil rights was transferred to a State in which nationality was accompanied by fewer rights, there should not be any loss of rights for the former nationals of the transferred territory.

34. Mr. DUGARD replied that the first proposition was true, but that it would be difficult to say the same of the second.

35. Mr. GALICKI said that the lack of a clear definition of nationality made it even more difficult to understand

the right to a nationality. What was more, there was a shift between paragraph 1 and paragraph 2 of article 1 from the right to a nationality to the right to acquire a nationality. The practice of States, for its part, contained the notions of nationality, citizenship and even allegiance. It was thus impossible to evade the task of producing a definition, one dealing at least with the distinction between the right to a nationality and the right to acquire a nationality.

36. Mr. BROWNLIE said he agreed that, while the draft articles had implications for human rights, they did not address human rights as such. What could logically be deduced from Mr. Dugard's argument was that the right to a nationality was very difficult to formulate in terms which could invest it with practical effects. Article 1, which stated the right, depended in its practical application on articles 2 and 3, and article 2 represented the most which could be done in the matter, that is to say, to provide States with a somewhat programmatic rule to avoid statelessness.

37. Mr. ECONOMIDES said he agreed with Mr. Rosenstock that nationality was not the topic under consideration. Any attempt to produce a definition of nationality would inevitably become bogged down and fail. It would be better to adhere to the specific objective of ensuring that the persons concerned could acquire the nationality of the successor State. The principle of non-discrimination must operate first among all the persons who must be able to acquire the nationality of the successor State and then among all those persons and the State's existing nationals. The Venice Declaration stipulated that the two categories must be treated on an absolutely equal footing,<sup>5</sup> but that rule had not really been followed in recent practice. The Commission had a duty to reflect upon the issue.

38. Mr. THIAM said that he agreed with the members of the Commission who wished to avoid drafting a definition of nationality. He also thought that it would be better not to use the terms "citizenship" and "nationality" indiscriminately, for they were not identical.

39. Mr. GOCO said that, if the successor State was accorded the right to grant its nationality, whatever the causes of the succession of States, the problem would be simplified in the sense that the Commission would have no need to provide such detailed provisions as, for example, article 4, paragraph 1. In other words, the right of the persons concerned would not be automatic.

40. On the other hand, if the purpose was to induce the successor State to grant its nationality to the persons concerned of the predecessor State, that should be made an obligation, regardless of the causes of the succession of States. He agreed with Mr. Dugard that in such a case the persons concerned in the State which had been absorbed by the successor State must not be subjected to any discrimination.

41. There was indeed a distinction between nationality and citizenship and it had consequences, for instance on the right to vote and the right to be freely elected. In some countries, only native-born citizens could hold the post of president or of senator or deputy, for example.

<sup>4</sup> See Venice Declaration (*ibid.*, footnote 22), provision 16.

<sup>5</sup> *Ibid.*, provision 8 (c).

42. The CHAIRMAN pointed out that the modalities for exercise of the obligation for States to grant a nationality were set out in greater detail in Part II of the draft articles (Principles applicable in specific situations of succession of States).

43. Mr. MELESCANU said that the definition of "nationality" given in the draft articles did not entirely satisfy him and that the very interesting discussion of the point should be continued.

44. He agreed with Mr. Thiam that in many countries "nationality" and "citizenship" did not cover exactly the same notion. In his own country, Romania, for example, the distinction between the two terms was very clear: nationality merely indicated the ethnic or cultural origin (for example, German, Ukrainian) of Romanians and it existed in parallel with Romanian citizenship.

45. If the Commission tried to define "nationality" precisely, it would inevitably fall into a trap from which it would be almost impossible to escape. Accordingly, the definition proposed by the Special Rapporteur, although imperfect, was useful in that it would help the Commission to overcome the difficulty. In establishing the scope of application of the draft articles, it was sufficiently flexible to allow States the possibility of applying and interpreting the concept in question. In short, as many members had emphasized, the Commission's mandate was to consider only questions of nationality in relation to the succession of States; it did not have to define "nationality".

46. The CHAIRMAN said that he wondered whether the definition given for "nationality" was properly speaking a definition of that term or rather a definition of the scope of the draft articles, more specifically of Part I.

47. Mr. Sreenivasa RAO said that the question raised by Mr. Dugard concerning the granting of nationality in relation to the succession of States gave rise, in various countries, to many practical problems affecting large population groups, either religious or racial minorities or persons who suffered discrimination by reason of their association with the predecessor State and who, having acquired the citizenship of a State, did not enjoy that status in full. It was just as much a human problem as a problem connected with the elimination of statelessness itself, which must be settled, in one forum or another.

48. Like other members of the Commission, he believed that the scope of the issue under discussion must be restricted, for otherwise its consideration would be unduly prolonged.

49. Mr. PAMBOU-TCHIVOUNDA said that he wished first of all to associate himself with the tribute paid to the Special Rapporteur for the quality and comprehensiveness of his work. The Special Rapporteur had certainly worked diligently, and not without reason. The need to equip the international community with a regulatory framework concerning such vital matters as the status of populations in the event of a succession of States—or rather the law concerning the status of natural persons in relation to the succession of States, as the topic ought to be titled—was a reminder that States, whatever their size,

were giants with feet of clay. The current situation of upheaval in Africa was a perfect illustration of the point.

50. It was the events in Eastern Europe which had prompted the Commission to include the topic in its agenda. At the current time, it was the possible implosion of Zaire which haunted people's minds. In Zaire, quite apart from the interests at stake, it was the status of the people which should be seen as a vital requirement in the configuration of the new entities which would emerge from the situation. The timeliness of the exercise undertaken by the Commission constituted a kind of signal or message, which had not escaped the Special Rapporteur's attention.

51. At the current stage, he would limit himself to a few general comments about the scheme of the draft articles and the preamble. To begin with, the division of the draft articles into two parts was somewhat artificial and seemed to lack a common thread. It gave the impression that the report dealt with two different questions. Might the Special Rapporteur have been influenced by the 1983 Vienna Convention? While Part I certainly stated general principles, Part II was concerned instead with rules—which had nothing to do with those principles—except when it was dealing with other principles. In the circumstances, there was every reason to wonder whether the topic had been dealt with only in Part I. If so, what would then be the purpose of Part II? The option proposed by the Special Rapporteur, that is to say a declaration of principles, might explain that approach. But he was not convinced, for the possibility of going further must not be ruled out.

52. Because of that option, the draft articles had been wholly lacking in precision and had been reduced to the level of a means for simply preventing statelessness or of an instrument for combating statelessness. In his view, the Commission had not received a mandate to that effect. The obsession with avoiding statelessness prevented the draft articles from taking account of other matters such as the actual background to State succession, which could vary and could give rise to problems relating, for instance, to the security and even the survival of the populations concerned. Yet the role of international law in looking after and managing victims of State succession, which created more unhappy than happy people, did not seem to be without links with nationality. Similarly, a succession of States could confront the parties with the obligation to respond to consequences that could come about because of the conduct of a particular population group. Did that kind of obligation not presuppose an obligation of prior identification? Would it hide the idea of nationality? There were thus, so to speak, subtle, indirect and arcane relationships between State succession and State responsibility.

53. The restrictive effect of the obsession with preventing or combating statelessness limited the scope of the draft articles itself; and, curiously and paradoxically, that restriction was reflected in the strung-out and scattered distribution of the provisions relating to the scope of application. That was true of Part II in which those provisions were proposed in the event of certain cases of State succession.

54. He also wondered whether the method adopted by the Special Rapporteur was appropriate, for example, whether a preamble was necessary. Would it not have been better to provide, at the beginning of the draft articles, for a few general provisions relating, among other things, to the scope of application not only *ratione personae*, but also *ratione loci* and *ratione temporis*? It was perhaps just a question of style, but such general clauses would probably have the advantage of incorporating important elements such as the proposed definitions in the body of the draft articles, thereby restoring their full operative value, rather than relegating them to a footnote.

55. He doubted whether the preamble was advisable or of interest. So far as the substantive problems it raised were concerned, the first paragraph would have to be rewritten to make it more general in scope, to take account not only of recent cases of State succession, but also of cases likely to occur in the near future. The scope *ratione loci* of the draft articles would have to be expanded, even though he did not go along with the Special Rapporteur, who considered, in paragraph (1) of the commentary to the preamble, contained in the third report, that the elements to be included should, where appropriate, be the corollary of the substantive problems dealt with in the draft articles. The second paragraph of the preamble could be a source of misunderstanding about the respective roles of internal law and international law in respect of nationality. As the question had been debated at length at the preceding meeting, he would simply underline the essential role of the consent of the State in international law, both according to the theory of dualism and according to that of monism. In the first place, the limitations international law imposed on the State in the exercise of its competence, albeit general, in the matter of the award or loss of its nationality, were valid only because the State had consented thereto. Secondly, contrary to the Special Rapporteur's statement in paragraph (6) of the commentary to the preamble, international law did not, in the matter of nationality, delimit the competence of the predecessor State or, moreover, of the successor State. That competence was inherent in the State by virtue of the territorial situation of the populations concerned. The claim by the State, whether predecessor or successor, that certain categories of individuals were its nationals fell squarely within the framework of its territorial competence. And, under international law, those categories could be restricted, even in peacetime, only with the consent of the State and then only to the extent that the rules of international law were compatible with its legislation. In that connection, he referred to the famous arbitral award handed down by Judge Max Huber in the *Island of Palmas* case.<sup>6</sup> With regard to that question, therefore, since the population was a constituent element of the State, all the powers that the State exercised over its population belonged to it as of right: there was a consubstantial link between State and population and, hence, between State and nationality.

56. Lastly, the law on the status of natural persons in relation to the succession of States could not be codified

by disregarding the fundamental principles of international law.

57. Mr. KABATSI said that Mr. Pambou-Tchivounda's comments concerning the situation in Zaire were pure speculation even if there was no doubt that the problems in that country were certainly serious.

58. Mr. Sreenivasa RAO said that he shared Mr. Pambou-Tchivounda's doubts about the suitability of the preamble and certainly about its existing wording.

59. Mr. MIKULKA (Special Rapporteur) said that he would refer the members of the Commission to the preambles to the 1978 and 1983 Vienna Conventions.

60. If there was indeed an obsession with avoiding statelessness, it was one shared by the Commission and many other international bodies which regarded statelessness as the main problem in the case of State succession. He would ask those who were concerned about that obsession whether a succession of States could be allowed to give rise to statelessness or, in other words, whether the nationals of the predecessor State should become stateless in the successor State. If so, the Commission should not dodge the issue.

61. The CHAIRMAN, referring to a comment made by Mr. Pambou-Tchivounda, pointed out that the 1978 and 1983 Vienna Conventions had the same structure as the proposed draft articles with, on the one hand, general provisions and, on the other, provisions applicable to each case of State succession.

62. Mr. GALICKI said that it was his pleasure, as Vice-Chairman of the Committee of experts on nationality of the Council of Europe, to announce that the European Convention on Nationality had just been adopted<sup>7</sup> and would soon be open for signature. He proposed that the secretariat should be asked to circulate copies of it to the Commission.

#### Organization of work of the session (continued)\*

[Agenda item 1]

63. Mr. BAENA SOARES (Chairman of the Planning Group) informed the Commission that the informal working group appointed to consider the question of the division of the split session would be composed of Mr. Mikulka, Mr. Operti Badan, Mr. Pellet and Mr. Sreenivasa Rao. The working group would, of course, be open-ended.

64. The CHAIRMAN announced that membership of the Working Group on diplomatic protection had been settled. Its members would be: Mr. Bennouna, Mr. Brownlie, Mr. Crawford, Mr. Goco, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Sepúlveda and Mr. Simma and, of course, the Rapporteur of the Commission,

\* Resumed from the 2475th meeting.

<sup>6</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829 (arbitral award of 4 April 1928).

<sup>7</sup> Council of Europe, Committee of Ministers, 592nd meeting of the Ministers' Deputies, decision 592/10.2, appendix 17 (May 1997).

as an ex officio member. He proposed that the Working Group should be chaired by Mr. Bennouna, who had shown considerable interest in the question. The task of the Working Group on diplomatic protection had been clearly defined by the Sixth Committee.

65. Mr. BENNOUNA said that the task of the Working Group on diplomatic protection would be to define the scope and content of the subject. It would thus be one of genuine codification and it would therefore be useful if he could have more information about what had been said in that connection in the Sixth Committee. The only observations from Governments that were currently available came from the United States of America, which supported the idea of codification. All proposals and suggestions on the subject would be welcome and he would himself submit a working document. He invited members to forward to him any observations and information they might have on the question.

66. The CHAIRMAN announced that the Working Group on unilateral acts of States, whose task had also been well defined by the General Assembly, would be composed of the following: Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño and Mr. Sepúlveda. Mr. Galicki would be an ex officio member and Mr. Candioti would be Chairman.

67. He also announced that the Working Group on State responsibility was composed of the following: Mr. Brownlie, Mr. Dugard, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Melescanu, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Yamada and Mr. Galicki would be an ex officio member and Mr. Crawford would be Chairman.

68. He took the opportunity of the presence of the Under-Secretary-General for Legal Affairs, the Legal Counsel, whom he welcomed, to express his dissatisfaction at the fact that the secretariat had refused to provide him with a French-keyboard computer, as he had requested, in the office made available to him as Chairman of the Commission, on the pretext that the United Nations had only English keyboards. He strongly protested against such an outrageous situation, which was, in his view, evidence of the domination the Anglo-Saxons exercised in the United Nations. He asked for his comments to be reflected in the summary record of the meeting.

69. Mr. PAMBOU-TCHIVOUNDA said that he joined in the Chairman's protest.

70. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that he had taken due note of the Chairman's comments.

*The meeting rose at 1.05 p.m.*

## 2478th MEETING

*Friday, 16 May 1997, at 10 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.*

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

#### GENERAL PRESENTATION OF THE DRAFT ARTICLES, PREAMBLE AND DEFINITIONS (continued)

1. Mr. GALICKI said that he endorsed the Special Rapporteur's approach in dividing the draft principles pertaining to nationality in relation to the succession of States into two main groups. It should be borne in mind that the outcome of the Commission's work would be a declaration, setting forth draft articles, which would be submitted to the General Assembly for adoption. A declaration had undoubted advantages over a treaty, and for one thing provided more freedom of action, but it created certain doubts as to the need for and form of definitions. For the sake of clarity, it would be useful to have a set of definitions from the outset, even in a declaration, and they should preferably be incorporated in a separate article rather than a footnote.

2. A comparison between the draft articles and the recently adopted European Convention on Nationality,<sup>2</sup> in which he had had a hand, was enlightening. Chapter VI of that Convention laid down certain principles on States succession and nationality which underlined the need for the States parties concerned to endeavour to regulate matters relating to nationality by agreement among themselves. The proposed draft articles, however, simply emphasized the need for enactment of internal laws and did not pay sufficient attention to the importance of direct

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

<sup>2</sup> See 2477th meeting, footnote 7.

international agreements. Nor did those articles fully reflect the principles concerning non-nationals, as set forth in article 20 of the Convention. Although the Special Rapporteur considered that the subject was fully covered by draft article 11 (Guarantees of the human rights of persons concerned), the draft contained a loophole in regard to equality of treatment for non-nationals in social and economic matters, for which the Convention made provision in article 20.

3. The general principles could perhaps also be rearranged in line with the European Convention on Nationality. In particular, draft articles 11, 12 (Non-discrimination) and 13 (Prohibition of arbitrary decisions concerning nationality issues), which stated the most general of the general principles, should occupy a more prominent place in the draft.

4. The word "nationality" should be more precisely defined, bearing in mind that other terms such as "citizenship" and "allegiance" could be used. In some legal systems, nationality and citizenship were treated separately. For some States, like his own, where nationality and citizenship meant the same, the scope of the obligations under the draft articles would be much wider than for States that did not equate nationality with citizenship. Also, the definition of succession of States did not cover all the cases of "practical succession" that had occurred in recent years and had had a marked effect on nationality. The Baltic States, for instance, did not regard themselves as successors of the former predecessor State. In all such cases, individuals should be accorded protection under the draft articles rather than being deprived of certain rights.

5. The relationship between international law and internal law in the sphere of nationality was a delicate matter having regard to the traditional concept of the exclusive competence of the State and the ever increasing role of international law. While the formula proposed by the Special Rapporteur in the preamble was acceptable, the European Convention on Nationality went further where international law was concerned.

6. There were certain structural problems in Part I of the draft articles (General principles concerning nationality in relation to the succession of States). In particular, article 1 (Right of nationality) failed, in both paragraph 1 and paragraph 2, to place due emphasis on the obligations of States. Those obligations must be spelt out.

7. The need for a balance between the rights of individuals and the legitimate interests of States could perhaps be dealt with in the preamble in clearer terms than was currently the case in the third paragraph of the preamble. The European Convention on Nationality, for instance, contained an express provision to that effect. In that connection, he too opposed the terms of article 16 (Other States), paragraph 2. Again, it seemed that article 1, paragraph 2, imposed an obligation upon States to apply the *ius soli*, which they would find hard to accept.

8. Mr. HE said that all the issues brought up in the discussion must be taken into account when thrashing out a satisfactory set of draft articles.

9. He agreed that, as in the past, the definitions of terms, which were essential for a clear understanding of the text as a whole, should be set forth in a separate article. In view of the difficulties in arriving at a definition of nationality, and since there was no immediate need for such a definition, the Special Rapporteur's existing formulation would serve the purposes of the draft.

10. It had been suggested during the discussion that the second paragraph of the preamble should be deleted, since it would create more problems than it would solve. It would, moreover, divest the preamble of its value. He would therefore propose that the preamble should be deleted and that the Commission should, as was its usual practice, leave it to the General Assembly to elaborate a suitable text when it came to adopt the resolution embodying the draft articles. However, if the preamble were retained but in an amended form, as had also been suggested, he wondered whether there was any need for the words, "strengthening respect for human rights", in the third paragraph of the preamble, which were far broader in scope than the right to nationality covered by the draft articles.

11. He had grave doubts about the acquisition of dual or multiple nationality, a question that came up in at least two draft articles, since it could give rise to serious disputes that might adversely affect relations between the States concerned and even influence international or regional stability and security. Statelessness and multiple nationality were detrimental to the individual, to States and to relations between States. The main aim of the exercise, therefore, should be to reduce and eliminate, on the one hand, statelessness, and on the other hand, dual and multiple nationality.

12. Mr. BENNOUNA, agreeing with Mr. He, said that, while the preamble should perhaps not be deleted, it certainly should not be discussed at the outset. The matter could be left to the General Assembly or the Commission could itself propose a suitable text when it concluded its work on the rest of the draft.

13. Mr. Sreenivasa RAO said that, as with most conventions, the question of a preamble could be discussed after the Commission had decided on the basic text. He had an open mind about the need for a preamble, though it might help to avoid further discussion in the General Assembly. At all events, in the case of the draft articles on the law of the non-navigational uses of international watercourses, the preamble had in fact been drafted not by the Commission but by a working group of the Sixth Committee of the General Assembly.

14. The question of dual or multiple nationality called for careful attention. There were two separate issues: on the one hand, children could acquire dual or multiple nationality and, on the other, persons might acquire such nationality by operation of the law. The existing law might therefore have to be preserved, bearing in mind that the Commission was concerned not with nationality as such but with succession and its impact on nationality.

15. Mr. HAFNER said that he was in full agreement with the views expressed by Mr. Bennouna and Mr. Sreenivasa Rao.

16. The CHAIRMAN, speaking as a member of the Commission, said his personal view was that it might be very useful to do away with a certain number of general principles concerning nationality which there was no reason to discuss in a draft on nationality in relation to succession of States. The main interest of the preamble was the considerable merit of its second paragraph, which spelt out one of the most fundamental of the general principles in the matter of nationality.

17. Mr. ROSENSTOCK said that he agreed in large measure with what the Chairman had said. He remembered well why it had been decided not to have a definition of nationality; nor, in his view, should the Commission pretend to have one. There was something risible in a definition which stated that nationality meant the nationality of natural persons. Either there should be a proper definition, which in his opinion was unnecessary, or the problem should be solved by incorporating a reference to natural persons in the title of the draft.

18. The CHAIRMAN observed that it would be very difficult to change the title at that point. It was, in any event, premature to take a final decision in the matter.

19. Mr. ECONOMIDES, agreeing with the Chairman, said that he favoured a preamble, as it was a useful tool for interpreting a legal text. The preamble should be examined on completion of the work, when the Commission would have an overall picture of the situation.

20. Mr. BROWNLIE said he would have thought, as a matter of practicality, that the preamble would be dealt with after the substantive articles were settled.

21. The CHAIRMAN said that, as he understood it, that solution commanded the widest support.

22. Mr. MIKULKA (Special Rapporteur) said it would be recalled that his own initial reaction had been that the preamble should be debated at the end of the exercise. However, when drafting the instrument, he had obviously not been able to place the preamble at the end of the text. Had he done so, he would have laid himself open to accusations that he had said nothing about the question of the relationship between internal and international law. Admittedly, there was no allusion thereto in the articles, but he had at least been able to point to the existence of the problem in the preamble.

23. He would draw attention to the bracketed ellipsis after the fourth paragraph of the preamble, which was intended to indicate his awareness that further preambular provisions were needed. In his view, the Drafting Committee would have its work cut out if it began by considering the definitions. Mr. Rosenstock's proposal regarding the question of natural and legal persons was an innovative one, and he himself had been thinking along similar lines. The problem could finally be resolved, perhaps even in the preamble, by a wording along the lines of "wishing to settle the question of the nationality of natural persons". Then there would be no need for a definition of nationality, or for a reference thereto in the title.

24. Mr. ROSENSTOCK said that the title of the item under consideration and the title of the instrument the Commission was preparing were two very different mat-

ters. He had absolutely no doubt that the instrument related to natural persons and he could not conceive of any procedure whereby material concerning legal persons could be grafted on to it.

25. The CHAIRMAN said he took it that the Drafting Committee wished to defer consideration of the preamble for the time being. It would revert to the matter at the end of the drafting exercise, unless it was decided to delete the preamble in the meantime.

26. Mr. ADDO said that both the preamble and the general structure of the draft articles were well founded. It was clear that the second paragraph of the preamble posed problems for some members, and that others even regarded it as unnecessary. In his view, however, the paragraph set the tone for what followed in the main body of the draft; its purport was to highlight the fact that standards or rules existed in public international law governing the right of States to determine who were and who were not their nationals. In other words, it posed the question whether public international law imposed any limitations on the competence of States to draft laws and regulations determining acquisition and loss of the State's nationality. If the issue was approached from that angle, there might be no need to quibble about whether it was internal law or international law that had primacy of place, for both had a role to play. Traditional international law—by which he meant international law as developed in the nineteenth and early twentieth century by Europeans—had left the determination of national status to the sole competence of internal authorities. At the current time, however, on the eve of the twenty-first century, much had changed, so that unfettered exercise of the right to formulate nationality laws could lead to conflict with the corresponding right of another State. Such conflicts must be avoided, and that was where international law came in.

27. A conflict of rights might emerge in several ways. For instance, nationality might be imposed on persons already possessing the nationality of another State. The imposition of such nationality might be the subject of a protest from the State of which the individual was already a national. A conflict might also arise where a person had at birth acquired original nationality in more than one State by operation of the law. Such cases of dual or plural nationality might ultimately render certain individuals stateless, a situation that the draft articles sought to avoid. International law had a vital role to play in curbing the excesses that might result from national competence. It might be asked, for instance, whether the change of sovereignty and the nationality connected with it made the persons concerned automatically become nationals of the successor State. Some members had asserted that assumption of the nationality of the successor State was indeed automatic, and that there was a presumption in that regard. His own view was that, if there was such a presumption, it must be a rebuttable presumption.

28. He asked if the change of nationality as a result of State succession was effective at the moment of acquisition of sovereignty, or was the successor State bound in any way to recognize the predecessor State's national status. In other words, were any limitations imposed under international law on the State's unfettered discretion to enact nationality laws? He saw some limitations in that

regard. In the first place, the successor State might be under an obligation not to impose its nationality on the nationals of the predecessor State without some form of consent from that State, the individuals involved, or both. Secondly, it might have obligations vis-à-vis third States if it expelled the inhabitants or denied its nationality to nationals of the predecessor State, who were in a third State at the critical date of the transfer of territory. For those reasons, he entirely agreed with the Special Rapporteur on the need for the second paragraph of the preamble.

29. It had been alleged that the draft articles were obsessed with the task of avoiding statelessness at all costs. If so, that did not detract from them in any way, as statelessness was a deplorable situation for any individual. It was worth noting, for example, that nationality, with whatever implication of political influence attaching thereto, was still a criterion in the nomination and appointment of judges to ICJ, and indeed of members of the Commission; that possession of nationality was required for the exercise of such civil and political rights as the right to vote in national elections and the right to own land; and that continuous nationality might also be essential for the enjoyment of a pension and other social security benefits. Thus, if the draft articles succeeded in avoiding situations of statelessness, it would be an important achievement.

30. The definitions must be set out in a separate article. As to the ultimate form of the draft, the Special Rapporteur had indicated his preference for a declaration accompanied by commentaries. He would be grateful for some indication of the reasons for that preference. The importance of the topic justified the choice of an instrument binding on States parties. As for the argument that a convention might not attract sufficient ratifications to enter into force, most conventions had started life with that disadvantage but had nevertheless become operative in time. The United Nations Convention on the Law of the Sea, regarding which many developed countries had initially expressed scepticism, was a case in point. Furthermore, as the instruments governing succession of States in respect of treaties and in respect of State property, archives and debts had taken the form of conventions, in the interests of consistency, consideration should be given to also adopting the current draft in the form of a convention. Surely, human beings were more important than the property they acquired. Last but not least, if the Council of Europe had been able to adopt a convention on the topic of nationality, he could see no reason why the larger international community could not do the same.

31. The CHAIRMAN requested members not to reopen the debate on the form the draft articles should take when adopted. He invited the Special Rapporteur briefly to summarize the position in that regard.

32. Mr. MIKULKA (Special Rapporteur) said that, when introducing the draft articles, he had pointed out that their ultimate form was not one of the questions open for discussion at the current stage. That was not because he personally favoured a declaration, but because the General Assembly, on the recommendation of the Commission, had so decided. The Commission's mandate was to work on a set of draft articles to take the form of a declaration. If his own preference was for a declaration, it

was because of the difficulty often encountered in securing the requisite number of ratifications for a convention to enter into force, a difficulty sometimes used as a pretext to deny the value of an instrument as a codification exercise. A declaration adopted by the General Assembly by consensus, on the other hand, would immediately enjoy great authority within the international community. Some elements thereof might subsequently be adopted in the form of a convention: the Commission could make a proposal to the General Assembly to that effect if it thought fit.

33. Mr. GOCO said he hoped members would bear with him if he adopted a deliberately simplistic approach. On the assumption that the successor State failed to enact any legislation, would the citizens of the predecessor or absorbed State retain their nationality? Of course, in the absence of any legislation, that State might still feel itself obliged to treat all citizens of the absorbed or subsumed State as its citizens. But, on the other hand, the successor State might pass legislation determining who were its citizens.

34. His assumption was that, in the absence of legislation, citizens of the predecessor State would retain their citizenship. But if the successor State felt it to be politically necessary, then it would enact legislation including all such citizens as nationals of the successor State. The Commission's provisions were intended as a guide to the successor State. Of course, there were many possible variations to that pattern: for instance, citizens of the predecessor State might wish not to be absorbed as citizens of the successor State; and that option must be left open to them.

35. The CHAIRMAN said it should be borne in mind that Part I of the draft articles needed to be read in conjunction with Part II (Principles applicable in specific situations of succession of States), in which the Special Rapporteur endeavoured to answer the question that Mr. Goco had raised.

36. Mr. Sreenivasa RAO said he respected the Chairman's request that members should not reopen the debate on the form the draft was to take when finally adopted. Nevertheless, new members of the Commission had a right to voice their opinions on the question and the matter might have to be discussed at some point.

37. The CHAIRMAN said that there was a time and place for everything. His immediate concern was to provide material on which the Drafting Committee could work.

38. Mr. PAMBOU-TCHIVOUNDA said that Mr. Addo had usefully pointed to the influence a change of nationality following State succession might exert on the social security benefits to which citizens of the predecessor State had been entitled at the time of the succession. That raised the whole question of acquired rights. It might have been useful if the Commission had tackled the topic from the standpoint of preservation of the inherent advantages of nationality.

39. The CHAIRMAN said that the question of acquired rights had long been a sticking point.

40. Mr. MELESCANU said that there were also situations in which it would be impossible for nationals of a country to retain that nationality, even if they so wished. Two examples were the absorption of the former German Democratic Republic into the Federal Republic of Germany, and the dissolution of the former Czechoslovakia. It was clearly impossible to retain the nationality of a State that had vanished from the face of the earth.

41. Mr. CRAWFORD said that, although it might be premature to form a judgement as to the success of the 1978 and 1983 Vienna Conventions on the matter, it was nevertheless already possible to draw three general conclusions from a study of the history of the codification and progressive development of the law of State succession. First, as ICJ had decided in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*<sup>3</sup> State succession was a distinct modality for the transmission of rights, whatever the particular context. Secondly, broadly speaking, the policy of the law favoured continuity: there was at least a presumption that rights duly acquired would continue, or that, if modification was needed, the modification would be an appropriate response to the situation and would not involve a massive break with the past. Thirdly, the 1983 Vienna Convention, in particular, had shown that, although the role of national law was significant, there was always more than one national law involved, and that no priority should be given a priori to the national law of any one State in respect of matters also dealt with by international law.

42. Those points contained a number of lessons. First, although there was a strong tradition of giving priority to internal law in the field of nationality, the Commission should avoid doing so excessively where State succession was at issue, because the successor State was not the only State engaged, and its interests, while important, were not the only ones involved. Internal law often sought solutions from international law which the latter should not deny, if possible. In internal law, terminology was often confusing owing to the rush of events, and international law might provide guidance. He took the example of the right to nationality, which, according to legislation in one of the Baltic States, meant a *de lege* right as of the date of succession, unless disavowed, whereas in another, it denoted the right to acquire a nationality subject to a lengthy process in which there were *de facto*, if not *de jure*, elements of discretion. Hence, a term which appeared to be unequivocal could be employed very differently, depending on the practice of particular States. It was generally agreed that the States concerned could agree upon their own arrangements, subject to certain minimum standards. But the Commission should not fail to provide guidance out of undue deference to provisions of internal law which themselves might be confused and poorly thought through.

43. The second lesson was that in the Commission's texts, succession to nationality should be treated as a distinct modality of the acquisition of nationality in the event of succession, and language should be avoided in the text which equated nationality upon succession with other

forms of the acquisition of nationality. It was a distinct form, just as succession to treaties was a distinct way of becoming a party to a treaty. It followed that the Commission should avoid any wording which could be misconstrued as equating the recognition of nationality upon succession with a particular form of naturalization, which it was not. In that respect, much as he agreed with the general thrust of the Special Rapporteur's draft, he was worried about the word "should" in article 3 (Legislation concerning nationality and other connected issues), paragraph 2, in the context of retrospectivity. It seemed that in ordinary circumstances, recognition of the status of a person as a national upon succession dated in principle from the event of succession, even if various procedures had to be gone through later on to confirm that situation and to deal with its consequences. In that connection, Mr. Benouna was right in saying that there was room in that field for presumptions, as in the field of succession in general.

44. The third lesson was that the Commission should not be afraid, in an area in which States were able to make their own arrangements, to stipulate fall-back rules of international law which would apply if they did not. That was another form of what he would describe as excessive deference to internal law, some deference admittedly being appropriate. In that context, he firmly supported article 16, paragraph 2, which allowed States to act subject to the rights of the individuals concerned but to act as if a particular State had complied with its obligations under international law with respect to nationality. They were not, as it were, unilaterally disarmed by the improper conduct of another State in failing to recognize its responsibilities. The Commission should not confine itself to the gesture of merely introducing a savings clause for unspecified rules of international law. If it could identify rules of international law, it should put them in the text.

45. Lastly, he had two specific observations to make. He was in favour of inserting in the fourth paragraph of the preamble a reference not only to the Universal Declaration of Human Rights,<sup>4</sup> but also to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Again, he was opposed to drafting an extensive definition of nationality, because the Commission should not go into issues which were essentially a matter for the State to regulate. Differences could be drawn in each State within the field of the rights of citizenship. Some of the problems could be resolved by an appropriately formulated prohibition against discrimination. If the Commission attempted to draft a definition of nationality, perhaps all that members would be able to agree upon was that nationality was something which had distinct international consequences. It would be ironical if, in a text in which the Commission defined nationality by reference to its international consequences, it adhered to an outmoded nostrum that nationality fell exclusively within the internal jurisdiction of a single State.

46. Mr. BENNOUNA said he agreed with Mr. Crawford's comments. Emphasis should be placed not on nationality but on State succession, the acquisition of nationality being a special process which flowed therefrom. He also endorsed the comments concerning continuity, which was a principle that protected human rights.

<sup>3</sup> *Judgment, I.C.J. Reports 1996*, p. 595.

<sup>4</sup> See 2475th meeting, footnote 8.

Perhaps the second paragraph of the preamble in the draft should be inverted to say that the succession of States was governed by international law and that, as a consequence, the problems of nationality in relation to State succession were governed by the principles of international law, subject to the exercise by the State of its traditional competence in matters of nationality. The Special Rapporteur seemed to have overemphasized State legislation and neglected principles of international law which governed State succession in relation to nationality. Something seemed to be missing. Rules should first be established, and the legislation of the State should serve to ensure that there was no legal vacuum, which would be prejudicial to human rights. The Special Rapporteur should provide the necessary articles in that regard.

47. While he understood Mr. Crawford's position on draft article 16, paragraph 2, he did not see the practical interest in treating such persons as if they were nationals of the said State.

48. Mr. CRAWFORD said that there had been a case in Great Britain which, although it had not involved State succession, reflected the same principle: a court had attributed German nationality to a person who was Jewish and who for that reason had been deprived of nationality by virtue of a Nazi denationalization decree. The court had refused to give effect to that law on the ground that it had been contrary to public policy; in other words, it had attributed a nationality to a person which was in the person's interest. There were other examples in a succession context where it would be appropriate to treat a person as having a nationality which he ought to have, and would have had, if the State had complied with its obligations. In that respect, article 16, paragraph 2, left such a possibility open. Another example was that of the attribution of South African nationality to Bantustan citizens, whom the international community had continued to treat as South Africans although they had not been so treated under South African legislation.

49. The CHAIRMAN said that another possibility was to proceed by referring to peremptory norms of general international law: nationality could not be granted or refused if it was contrary to peremptory norms.

50. Mr. Sreenivasa RAO said Mr. Crawford had made an important point in arguing that internal law must conform with international norms and standards and that provision must be made for international disapproval when States failed to enact legislation, adopted improper legislation or acted improperly. But he still wondered whether it was not an exception to a normal rule. If the general impression was given that national laws were imperfect and that it was necessary to legislate at international level, then the whole exercise would take on an entirely different tone. He was not sure that there should be strong disapproval at international level with regard to a matter as flexible as granting and recognizing citizenship. In the example concerning Great Britain, national law and policy were involved and contained an element of protection.

51. Mr. SIMMA said that he endorsed Mr. Crawford's proposal to include a reference in the preamble to the International Covenant on Civil and Political Rights and

the Convention on the Rights of the Child. As to Mr. Bennouna's point about the second paragraph of the preamble, that provision restated the principle of what applied in normal circumstances; it did not apply to cases of State succession. Perhaps that should be the occasion to state the exception to the rule. There might be a stronger need *de lege ferenda* to refer to international legal principles correcting internal law, which might be in need of such support in the event of State succession.

52. The CHAIRMAN, speaking as a member of the Commission, said that he did not see how an act in law such as State succession could be an exception to a rule.

53. In respect of article 3, Mr. Crawford had said that the State must enact legislation, whereas the draft article said "should". If a State must enact legislation by virtue of international law, he asked what the point of legislation was. The rule existed in any case, and the State had no choice but to apply it. It would be sufficient to state in article 3, paragraph 2, that "the acquisition of nationality shall take effect on the date of the succession of States".

54. Mr. CRAWFORD said that the Commission was striking a delicate balance between the requirements of international law and the practical fact that, unless a State recognized a person as a national, his nationality would be of little use to him. Mr. Brownlie had already spoken of what he perceived as the vacuum in respect of the duty to legislate. The conception underlying the draft articles was not a vacuum. Perhaps drafting improvements could make that clearer. But over the years, there had been growing recognition that legislation was needed, that international law did not, however, prescribe in detail what that legislation should be, in view of the variety of circumstances, but that international law did have certain requirements in that field.

55. Mr. OPERTTI BADAN said that State succession was a legal situation, not a mere fact. It originated in a factual situation, but obviously had a legal formulation, and it was therefore possible to ascertain what the consequences of its legal situation were. That situation might serve as a particular framework for a case of protection of nationality, and the Commission must deal with that matter.

56. Again, nationality was a subject for constitutional law, which was usually enshrined in the higher rules of law; at any rate, that was the case in Latin America. Therefore, the area of international law under consideration could only be viewed in the light of the relationship with constitutional law. In that regard, it was important to take a position on the question of primacy as between international law and internal law. Giving the work a declaratory character would not resolve the question of hierarchy, because in the final analysis, States could make use of a device to avoid complying with the principle being set forth by the Commission. It was not enough to speak of adapting internal law to international law. It must also be decided whether that type of law was *jus cogens*, in other words, was of such a nature as to be inevitable. Otherwise, a situation would arise in which any elaboration of international law would remain subordinate to the particular domestic position of each State.

57. Mr. MIKULKA (Special Rapporteur) said that he wanted to comment on a point repeatedly raised throughout the debate: the relation between internal law and international law. It might be useful for the secretariat to distribute to the members of the Commission the reports of the Working Group at the forty-seventh and forty-eighth sessions.<sup>5</sup> They would see that he had faithfully reflected the Working Group's conclusions in the draft. He was somewhat surprised, because at the previous session he had been criticized for overemphasizing international law, whereas he was currently being taken to task for minimizing its importance. Indeed, comments made outside the Commission were to the effect that it was the first time sufficient emphasis was being placed on international law in the field under consideration.

58. He fully agreed with Mr. Crawford's observations on the difference between the acquisition of nationality upon State succession and the naturalization process. The same thing was said in paragraph (1) of the commentary to Part II of the draft, contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1). With reference to draft article 16, paragraph 2, he drew attention to the article by H. Lauterpacht,<sup>6</sup> copies of which would be distributed by the secretariat, on the subject of German Jews living abroad who had been denationalized in the 1930s under a Nazi decree. The article concluded that the abolition by the Allied Control Council for Germany of that decree could not have the retroactive effect of restoring their German nationality, but merely introduced the presumption of such nationality. This presumption, however, may not be invoked to the detriment of such persons because if it had, an absurd situation would have arisen in which such persons, who had already been persecuted by the Nazi regime, would again suffer by virtue of the fact that they would then be considered enemy aliens and, as such, subject to confiscation of their property and other disadvantages.

59. Mr. BROWNLIE said that he wished to make two basic points of pure policy. First, it was unhelpful for the Commission to discuss particular issues within the framework of a choice between monism and dualism or the paramountcy of internal law or international law. The real issue was to find an appropriate role for international law. There might be a problem of balance, but the relationship between internal and international law was not an antagonistic one.

60. His second point was addressed to the Special Rapporteur in particular: it was possible that the draft did not successfully reflect the Special Rapporteur's concepts and, in particular, did not really achieve his objective of avoiding or reducing the incidence of statelessness following a succession of States. It was absolutely clear from article 3 that, unless and until the successor State put legislation in place, there was a legal vacuum; that might not be the Special Rapporteur's intention, but it was the effect of his text. His own problem was not so much what was in the draft but what was not in the draft. As Mr. Crawford had pointed out, article 16, paragraph 2, was important and did move in a positive direction, but it too assumed

that there was some kind of vacuum. That was very troubling.

61. There was also the related question of what actually happened when a State succession took place. There was an incredible lack of realism in the Commission on that point. He had been sorry, in particular, to hear Mr. Simma argue that "continuities go", for that was not true and had not happened even in the more dramatic instances of State succession involving real political upheavals. The question of nationality was in fact only one aspect of life on the ground, that is to say the social and legal situation, after a succession of States. Did everything change, did everything become suspended? By no means: there was a continuity, and the incoming sovereign had all its rights under international law. Nationality could not be isolated from the whole question of the status of the population, legal stability, and so on. It was, therefore, not very radical to suggest that an automatic change of nationality took place at the time of a State succession.

62. He felt intuitively that it was impossible to have a definition of nationality and he doubted the value of such a definition. Again as Mr. Crawford had pointed out, there was no one status existing all the time for individual nationals. There might be nationality for one purpose under international law and for another purpose under internal law. Unquestionably, individual status might depend on international rather than internal law, as demonstrated, for example, by decisions of the Mixed Claims Commission after the First World War,<sup>7</sup> decisions that had never been criticized in the literature.

63. Mr. Bennouna had raised the question of the relationship between State succession and the protection of minorities. Once more from a policy standpoint, if the presumption was of a legal vacuum and not of a continuity, then the successor State was given a clean slate. Although much of the Special Rapporteur's work focused on what kind of legislation should be put in place, the successor State could have a wide range of choices in some cases and there would be legal uncertainty as to status; minorities, in particular, would feel threatened until legislation was adopted.

64. With regard to the question of opposability raised by Mr. Hafner, the issue should perhaps be segregated and form the subject of a savings clause. It was difficult to deal effectively with opposability in a codifying draft. The overriding concern was still to keep in place what some members regarded as an existing rule of customary law. Of course, the Commission was not just a codifying body, being also concerned with progressive development, but it must not engage in decodification by acting as though well-understood rules did not exist.

65. As to the question of illegal succession, the notion might be an oxymoron: an illegal succession could not be

<sup>5</sup> Ibid., footnote 5.

<sup>6</sup> "The nationality of denationalized persons", *Jewish Yearbook of International Law*, 1948 (Jerusalem, Rubin Mass, 1949).

<sup>7</sup> Mixed Claims Commission, United States and Germany, established in pursuance of the Agreement between the United States and Germany of 10 August 1922 (Mixed Claims Commission, United States and Germany, *Administrative Decisions and Opinions of a General nature and Opinions and Decisions in Certain Individual Claims from October 1, 1926, to December 31, 1932 with Orders of March 25 and May 7, 1925 and Appendices* (U.S. Government Printing Office, 1933), p. xxiii).

a case of State succession. He doubted whether the Commission should try to address the issue.

66. Mr. SIMMA said that he largely agreed with Mr. Brownlie's comments. He could not in fact recall the context in which he had said that "continuities go" in cases of State succession, but he certainly had not meant that that was true of nationality. There was always at least a presumption of continuity of nationality. Although he had been impressed by Mr. Economides' statement (2477th meeting) on illegal succession, he thought that there might be a place in the draft articles for dealing with the issue, especially if the draft took the form of a declaration with a commentary.

67. Mr. Sreenivasa RAO said that, in his introductory statement, the Special Rapporteur had explained his treatment of the question of illegal succession. However, the Commission would need to look deeper into the matter at a later stage. The legal consequences of South Africa's occupation of South-West Africa might give some guidance as to which consequences had to be recognized in such cases. As Chairman of the Drafting Committee, he was anxious to see to what extent the treatment of the issue could be refined to the satisfaction of the Special Rapporteur and the other members of the Commission.

68. The CHAIRMAN said that that would certainly be a task of the Drafting Committee. He concluded from the discussion that everyone was in agreement that the Commission should not attempt to define nationality. Therefore, the only problem posed by the Special Rapporteur's proposal was to decide whether nationality was simply an element of the definition of the scope of the topic.

69. Mr. HAFNER said that he did not entirely agree with Mr. Brownlie that the question of opposability could be isolated from the convention itself. The point was whether a person's nationality could be derived directly from the convention only by means of national law. That would depend on the wording of the rules contained in the text. Perhaps the issue was one for the Drafting Committee.

70. Mr. BROWNLIE said the problem was that the draft was not to take the form of a convention. If it was a multilateral convention, then issues of opposability would of course be governed by the treaty relations. Unless the Commission wished to propose certain principles *jus cogens*, it would not be easy to deal with the problem of opposability.

71. Mr. BENNOUNA said that the protection of minorities was covered to some extent by article 12 (Non-discrimination). The wording of article 12 was better than the corresponding wording in the European Convention on Nationality, which spoke only of granting nationality. By speaking of withdrawing nationality, article 12 implied a continuity. The Special Rapporteur's system therefore contained an implicit continuity, so that there was no vacuum and nationality was treated as a kind of acquired right. That point must be made clear in a provision regulating what happened before national legislation was adopted.

72. Mr. GOCO said that he had made the same point as Mr. Brownlie in his earlier statement: he feared a vacuum

prior to the enactment of legislation by the successor State, for there was a possibility that it might vacillate in regard to the status of citizens of the predecessor State. On the other hand, if continuity meant automatic acquisition of nationality, he asked what the point was of the subsequent legislation. Even with the presumption of retention of the nationality of the predecessor State a problem still arose, for that State had ceased to exist. He therefore supported Mr. Brownlie's position.

73. The CHAIRMAN, speaking as a member of the Commission, said that he disagreed entirely with Mr. Brownlie. Draft articles 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State), 18 (Granting of the nationality of the successor State), 20 (Granting of the nationality of the successor States) and 23 (Granting of the nationality of the successor State) covered the point fully. There was no vacuum, and the successor State had an obligation to grant its nationality.

74. Mr. ROSENSTOCK said that he wondered whether Mr. Brownlie's concern would be met if article 3 was linked to article 2 and began "To this end each State". There might, of course, be some justification for refusing to read the two articles together. On the other hand, the problem might be merely one of presentation and could be solved by a little redrafting of articles 2 and 3.

75. Mr. MIKULKA (Special Rapporteur) said that he agreed with the Chairman: if all the articles were read together, the answers to some of the questions raised became obvious.

76. One meaning of continuity was the continuity of the nationality of the predecessor State, for example, in the case of the separation of Bangladesh from Pakistan, persons that remained citizens of Pakistan were not "persons concerned" by the succession of States. There was a second meaning to continuity. For instance, when Czechoslovakia had ceased to exist, there had been no continuity of Czechoslovak nationality and continuity had meant that Czechoslovak nationality was immediately replaced by one of two new nationalities. His purpose in the draft, in article 3, paragraph 1, in particular, was precisely to ensure continuity by requiring each State concerned to adopt legislation on nationality as soon as possible, and under paragraph 2 the States must clearly establish that nationality had retroactive effect, in other words, as from the date of the State succession. Furthermore, article 16, paragraph 2, provided that when a person became stateless owing to disregard of the articles, third States were free to treat such persons as having the nationality which they would have acquired by application of the articles.

77. The notion of presumption was not stated expressly in his text but it was implicit. Mr. Rosenstock was probably right: it was quite possible that substantial difference of views on the point could easily be resolved by redrafting.

*The meeting rose at 1 p.m.*

## 2479th MEETING

Tuesday, 20 May 1997, at 10 a.m.

Chairman: Mr. João Clemente BAENA SOARES

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

##### GENERAL PRESENTATION OF THE DRAFT ARTICLES, PREAMBLE AND DEFINITIONS (*concluded*)

1. Mr. CANDIOTI, congratulating the Special Rapporteur on the quality of his third report (A/CN.4/480 and Add.1), said that he would confine himself to brief comments on the general economy of the draft articles, the proposed definitions and the preamble.

2. With regard to the economy of the draft articles, he agreed with the Special Rapporteur's approach of dividing the draft into two parts, the first dealing with principles applicable in all cases of State succession and the second with principles applicable in specific cases which were meant as a guide for States in their negotiations and the elaboration of their legislation in the matter. Like other members of the Commission, he believed that Part I (General principles concerning nationality in relation to the succession of States) should set forth and develop the general principles and customary rules of international law governing nationality in the context of State succession and, in particular, the rule—or presumption—whereby, in principle, individuals who passed to the jurisdiction of the successor State acquired its nationality at the actual moment of succession; the principle whereby everyone had a right to a nationality; the obligation of all the States concerned to avoid statelessness; and the recognition of the right of the persons concerned, where applicable, freely to opt for a nationality, according to the circumstances, without constraint or discrimination. When the

Commission took up the draft article by article, it should ascertain whether it would not be advisable to clarify or improve the wording of those principles and general rules.

3. With regard to the question of decolonization, which had been raised in the Commission when the economy of the draft articles had been analysed, the Special Rapporteur had explained that the proposed articles could, in many cases, also apply to State succession following decolonization. In paragraph 11 of the introduction to his third report, the Special Rapporteur noted that the Commission had decided in view of the current requirements of the international community and the completion of the decolonization process, to leave aside the category of newly independent States that emerged from decolonization. That statement, which was to a large extent true, was, however, not wholly justified. There were still Non-Self Governing Territories throughout the world where decolonization had not yet taken place and the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples was dealing with the situation of several of them. That statement also presupposed that decolonization was achieved only by attaining independence. That of course was the most frequent way, but it was not the only way. The transfer of a colonial territory to the jurisdiction of another State, the reintegration of the territory into that jurisdiction and unification and reunification were all possible means of decolonization which could also give rise to problems of nationality. He would therefore ask the Special Rapporteur to bear those considerations in mind should the Commission decide to refer to the question of decolonization in its commentary on the scope of the draft articles.

4. In principle, he favoured the inclusion of definitions in a set of draft articles, particularly in the case of such a complex and technical matter as the one under consideration. However, the Special Rapporteur's proposed definition of the term "nationality" merely specified the scope of application of the draft articles and restricted it just to natural persons, as the Commission had in fact rightly decided. That delimitation of the scope of application should eventually be reflected in the actual title of the draft articles or even, in general terms, in a separate article at the beginning of Part I.

5. The Special Rapporteur and other members of the Commission had emphasized the difficulty of defining the concept of nationality and had even maintained how pointless such a definition was in practical terms. The Commission should perhaps therefore revert later to the question whether it was advisable and possible to include a definition of "nationality" for the purposes of the draft articles so as to facilitate understanding and interpretation, having regard to the fact that in certain legal systems concepts such as "nationality" and "citizenship" differed in significance and content.

6. The Spanish translation of the terms "State concerned" and "person concerned"—*Estado interesado* and *interesado*, respectively—was ambiguous since the meaning of the word *interesado* was very broad. It would be advisable if the Spanish-speaking members of the Commission could in due course consider the question

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

and try to find a better translation of those terms in Spanish—*Estado involucrado* and *persona afectada* perhaps.

7. He agreed with the inclusion of a preamble in the draft articles, as well as with the wording proposed by the Special Rapporteur, on the understanding that, as the latter had explained and as indicated by the ellipsis at the end, that wording could even be expanded.

8. He endorsed the general economy and content of the draft articles and reserved the right to make any further comments when the draft was considered article by article.

9. Mr. RODRÍGUEZ CEDEÑO said that he wished, first and foremost, to pay a tribute to the Special Rapporteur for his constructive work. So far as the Commission's highly relevant debate on the relationship between international law and the internal law of States in the matter of nationality was concerned, he fully endorsed the idea that, in elaborating the draft articles, a balance must be maintained between the two branches of the law to ensure the acceptance and implementation by States of the future instrument and, hence, its legal status. Of course, as he had already stressed, questions of nationality were a matter for the internal jurisdiction of States, but they also bore a relationship to international law insofar as they affected human rights and, more specifically, the right to nationality enshrined in a number of universal instruments and insofar as the object of the exercise was to avoid statelessness.

10. As to the economy of the draft articles, he endorsed the Special Rapporteur's proposal that the draft should be divided into two parts, one dealing with general principles and the other with principles applicable in specific situations of State succession. He also considered, like other members, that the draft articles should relate specifically only to cases of succession of States occurring in conformity with international law. In particular, he agreed with the Special Rapporteur's statement in paragraph 12 of the introduction to the third report that the draft articles do not apply to questions of nationality which might arise in cases of annexation of the territory of a State by force.

11. He also agreed with the incorporation in the draft of a preamble consisting of specific provisions that had a precise relationship with the other provisions. As the Special Rapporteur had left open the possibility of elaborating the proposed text, he himself would propose that it should also refer to matters relating to statelessness and the rights of the child.

12. The Special Rapporteur's proposed definitions should appear in the body of the text and should follow the definitions adopted in the 1978 and 1983 Vienna Conventions. Those definitions should include a definition of nationality, which would determine the scope of application of the draft articles and would be assimilated to the term "citizenship", borrowing from that term its legal dimension, which would be grafted on to its own sociological dimension. For the purposes of the draft articles, the term "nationality" should be understood to mean the legal link between a person, who was, in the event, a natural person, and a State and should be based on the defi-

inition given by ICJ<sup>2</sup> and the definition laid down in article 2 of the European Convention on Nationality.<sup>3</sup>

13. The draft articles should, in his view, relate to all the situations that could arise in the case of State succession, but should not be cumbersome or unduly detailed. In that connection, in article 1 (Right to a nationality)—one of the most important in the draft articles perhaps, since it set forth the right to a nationality in a specific context—paragraph 2 dealt with the question of the right to a nationality of children born after the date of the succession of States, the link being based solely on the territorial criterion. It might be advisable to broaden that basic criterion in order to avoid statelessness: in other words, the aim should be to envisage all possible situations so that the draft articles could achieve their main objective of guaranteeing the acquisition of a nationality in the event of a succession of States and avoiding statelessness.

14. He reserved the right to revert to the articles when they were considered article by article.

15. Mr. SEPÚLVEDA said that, by his perspicacity, scholarship and knowledge of the international realities with all their implicit limitations, the Special Rapporteur had made a major contribution to the systematization of the law on nationality in relation to the succession of States, thereby proving himself to be worthy of the best traditions of the Commission in respect of the codification and progressive development of international law.

16. He noted that the topic, which had originally been entitled "State succession and its impact on the nationality of natural and legal persons" was henceforth to be entitled "Nationality in relation to the succession of States", by analogy with the topics of State succession in respect of treaties and State succession in respect of State property, archives and debts. He wondered whether that subtle change introduced a nuance aimed at favouring the consideration of the question of nationality, as compared to the consideration of the effects of a change in sovereignty on the nationality of individuals. General Assembly resolution 51/160, in which the Commission had been requested to undertake the substantive study of the topic "Nationality in relation to the succession of States", did not entirely answer his question. The Commission should make it quite clear whether it wished to lay more emphasis on nationality or, on the contrary and as originally planned, to continue its work on the general theme of State succession and to determine its effects in particular areas.

17. Definitions should, in his view, be incorporated in the actual body of the text being drafted, which should be focused on individuals and not territories. It followed that the Special Rapporteur's proposed definition of the expression "succession of States", which was modelled on the definition in the 1978 and 1983 Vienna Conventions, was not suitable in that case, as the situation was different, since the draft dealt with persons, not territories, save of course in the extreme case of a succession of States involving an uninhabited territory. Perhaps, there-

<sup>2</sup> *Nottebohm* case (see 2475th meeting, footnote 6), p. 23.

<sup>3</sup> See 2477th meeting, footnote 7.

fore, the notion of “population” should be added in that definition to the notion of “territory”.

18. As indicated in the third report, regulation of questions of nationality was basically a matter for internal law, but international law imposed some limitations on States’ freedom of action in that area. Consequently, it would be necessary to determine whether the draft articles set forth a set of rules entailing international obligations for States. They set forth the right to a nationality in the context of State succession, but it would perhaps be necessary to decide whether a corollary obligation existed for the States concerned to grant their nationality and whether the provisions of the draft articles were sufficient to establish that new obligation; and also to define with precision the obligations incumbent on the State in accordance with international law. It would thus be important to determine whether it was simply the will of the States concerned that established the existence of an obligation and, consequently, whether the codification and progressive development of international law on the matter lent themselves to the enunciation of guiding principles.

19. The question of the impact of State succession on the nationality of natural persons called for substantive decisions on all those problems. While it was true that the Commission had accepted at previous meetings that it would be better, for the time being, not to consider the question of the type of legal instrument to be prepared, the fact remained that it must define the scope of application and the legal nature of the obligations imposed and must therefore specify whether it intended simply to draw up guiding principles for the benefit of States, in the form of a declaration—in which case the scope of the obligations imposed would be extremely limited—or whether, on the contrary, it intended to go further and to consider drafting a convention that would set forth all the obligations and rights deriving therefrom.

20. Mr. OPERTTI BADAN congratulated the Special Rapporteur on having succeeded in striking a harmonious balance between internal and international law in his third report, particularly in article 3 (Legislation concerning nationality and other connected issues)—irrespective of whether the draft articles were ultimately to take the form of a binding instrument or merely of a declaration. That being said, he noted with regard to article 3, paragraph 2, that the acquisition of nationality was undoubtedly an aspect of international law that involved both public and private law. Nationality was still a common factor linking the regulation of a whole set of related rights. It was thus possible that the general rule stated in the paragraph in question affected the emerging right of nationality vis-à-vis individual and family rights.

21. Noting that Mr. Ferrari Bravo had expressed doubts about the desirability of article 9 (Unity of families) in view of the fact that it would be difficult to apply a univocal or universal concept of the family because the definition of the family varied according to the cultural systems of States, he nonetheless thought that it would be useful to retain article 9 and to add a reference at the end to the need to enable members of a family to remain together or to be reunited in accordance with their original legal status.

22. He had some doubts as to whether paragraph 3 of article 10 (Right of residence) was compatible with other international instruments, in particular, the Pact of San José. He feared that the provision might entail the corollary obligation to leave the territory of a State. While it was true that the proposed rule fell within the broader framework of the succession of States and nationality in relation to the succession of States, the fact remained that regulation of that question must not be detrimental to other established principles, such as the right of every individual to choose his or her residence. He looked forward to hearing further comments from the Special Rapporteur in that regard.

23. In conclusion, he said he endorsed the scheme of the draft articles and the solutions proposed. Lastly, noting that article 2, paragraph 3, of its statute permitted a candidate for membership of the Commission to hold dual nationality, he expressed the hope that, in regulating the question of nationality in relation to the succession of States, the Commission would recognize the possibility of holding dual nationality.

24. Mr. KABATSI congratulated the Special Rapporteur on producing, in just one year, a complete set of draft articles and commentaries for submission to the Commission, which would thus be able to make rapid progress in its consideration of the topic. The draft articles set out principally to reaffirm the right of every individual to a nationality and the need to avoid statelessness, particularly in cases of the succession of States, and he fully endorsed their general structure and the division into two separate parts. He also supported the fundamental ideas set forth in the preamble and the definitions proposed.

25. With regard to the final form of the draft articles, he did not see why it must necessarily be a declaration. He was personally in favour of drafting a treaty or a convention. In that connection, he noted that, contrary to what was stated by the Special Rapporteur in paragraph 4 of the introduction to his third report, the General Assembly had not expressly requested the Commission to prepare draft articles with commentaries in the form of a declaration to be adopted by the Assembly. While it was true that many representatives in the General Assembly had indicated their preference for a declaration, a substantial number had considered it premature to decide on the form that the final result of the work should take, while others had even favoured drafting a binding instrument, as could be seen from paragraphs 11 and 12 of the topical summary of the discussion in the Sixth Committee (A/CN.4/479, sect. B). In his opinion, there was thus nothing to prevent the Commission from opting for a binding instrument of that type.

26. As to the question of the automatic granting of the nationality of the successor State to the persons concerned, he thought that, contrary to what he had initially felt, that idea was not given sufficient emphasis in the draft articles and that it was in fact very important, as other members of the Commission had said, to formulate it explicitly. That would avoid the risk of statelessness to which the persons concerned and, in particular, the members of minorities were exposed between the date of the succession of States and the date of the promulgation of an internal law on the question.

27. Mr. HERDOCIA SACASA congratulated the Special Rapporteur on his remarkable work on the question of nationality in relation to the succession of States. He supported the general structure of the draft articles and their division into two separate parts. The decision to divide them was a wise one, given that territorial changes had differing consequences and that it was necessary to treat some particular cases separately. In view of the importance it had for the interpretation of the text, the preamble was not merely useful, but indispensable, and he shared the Special Rapporteur's view that it was for the Commission, not for a diplomatic conference, as was generally the case, to draft it. He also supported the Special Rapporteur's idea of leaving the Commission the possibility of adding other paragraphs to the preamble. The definitions were essential for an understanding of the draft articles and they should consequently appear in the text as a separate article, even though that was not the general practice in declarations.

28. He thought that, in order to improve the balance of the draft articles, the relationship between international law and internal law should be spelled out and more emphasis should be placed on the new dimension that the principles of nationality acquired in the exceptional context of the succession of States, bearing in mind the general principles applicable in that regard. The State's obligations corresponding to those rights should also be spelled out more clearly. The Venice Declaration,<sup>4</sup> for example, provided that, in all cases of State succession, the successor State must grant its nationality to all nationals of the predecessor State who had habitually resided in the territory of that State. It was thus important to give more thought to that question so as to ensure that any gaps in the law that might become apparent in that regard were filled.

29. He also thought that the text should stress the development of international law. The Special Rapporteur had not retained certain concepts, on the grounds that insufficient precedents existed. However, international law was developing much more rapidly in the sphere of the protection of human rights than in other spheres and there was a close link between human rights and the effects of State succession. That question should therefore be reviewed, for nothing could justify the incompatibility of an internal law with that body of rules for the protection of human rights.

30. Lastly, he welcomed the inclusion in the text of the concept of the fundamental right to a nationality. In that context, further thought should be given to the related right to choose one's nationality, a right that must not have detrimental effects on the right of residence, which was recognized in the European Convention on Nationality.

31. Mr. GOCO noted that, in his commentaries, the Special Rapporteur stressed the primacy of internal law in matters of nationality and reaffirmed that it was for each State to determine who its nationals were. That was not simply a prerogative, but a right, of the State. Most national constitutions contained an article on the granting, loss or acquisition of citizenship. The fact that the topic under consideration was nationality in relation to the suc-

cession of States gave the question a new dimension calling for a different treatment, bearing in mind, *inter alia*,<sup>5</sup> the fact that the Universal Declaration of Human Rights<sup>5</sup> proclaimed the right of every individual to a nationality.

32. Be that as it might, even if it were possible, in accordance with international law, to invite each State, as did article 3, to "enact laws concerning nationality . . . without undue delay", the fact remained that that legislation must be compatible with the Constitution or basic law of the State concerned. It was impossible to promulgate laws contrary to the Constitution. Furthermore, even if the law adopted was in conformity with the Constitution, it would certainly establish the modalities or conditions to be fulfilled with regard to the acquisition of nationality by the persons concerned in the event of a succession of States. That was the idea implicit in the phrase "other connected issues arising in relation to the succession of States", in article 3, paragraph 1.

33. Lastly, in view of the requirements of the law, a certain period of time would inevitably elapse between the date of the succession and the completion of the administrative or judicial process of granting nationality. The problem then arose of the status of the person concerned during that period. That problem remained unsolved, although article 3 stipulated that the legislation of the State concerned should provide that acquisition of nationality should take effect on the date of the succession of States and that the persons concerned should be apprised of the choices they might have under that legislation. It was essential to solve that problem, for during the transition period, the person concerned might be called upon to perform certain obligations or to exercise certain rights linked with citizenship, such as the right to vote or military service. The concept of a presumption, referred to by the Special Rapporteur, was interesting, but might conflict with several other provisions that appeared in the general principles, particularly those dealing with habitual residence or the right of option.

34. He therefore wondered whether, in the case of an actual succession of States, namely, when the predecessor State had disappeared entirely, it might not be preferable to stipulate that the nationality of the successor State was automatically granted to all the persons concerned. That would not prevent the successor State from subsequently promulgating legislation setting the conditions under which that nationality might be withdrawn or lost, for example, in the case of opting for another nationality or rendering services to an enemy State. In general, citizenship was considered to be a privilege conferred by the State.

35. Article 4 (Granting of nationality to persons having their habitual residence in another State) dealt only with persons who had their habitual residence in another State and also had the nationality of that State. That meant that, in other cases, the successor State might have the obligation to grant its nationality to any individual who, according to article 1, "had the nationality of the predecessor State . . . or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State". It followed from paragraph 2 that the

<sup>4</sup> See 2475th meeting, footnote 22.

<sup>5</sup> *Ibid.*, footnote 8.

successor State might impose its nationality against their will on persons who had their habitual residence in another State if it appeared that they might otherwise become stateless.

36. By stipulating that the nationality of the successor State was to be granted to the person concerned automatically, it might be possible to do without many provisions which dealt with situations already referred to in the general principles. Certain articles were too detailed and set conditions which were covered in most national legislation on citizenship. That was the case of article 5 (Renunciation of the nationality of another State as a condition for granting nationality) or article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State). Those articles dealt with basic conditions and it would be better to formulate the general ideas expressed in the articles as precepts or principles to guide the States parties to the future declaration.

37. Article 12 (Non-discrimination) should be reworded because, as it stood, it gave the impression that the application of criteria based on ethnic, linguistic, religious or cultural considerations was not prohibited. That might be admissible in internal law, but not in international law.

38. Mr. MIKULKA (Special Rapporteur) pointed out that Mr. Goco had made comments on a number of specific articles and not on the general structure of the draft, its title, its preamble and the proposed definitions, as had been agreed. He regretted that misunderstanding and hoped that the debate would remain organized as planned so that he could reply to the questions asked.

39. Mr. DUGARD said he hoped that the Special Rapporteur might indicate to the members of the Commission whether a final decision had been taken on the form—declaration or convention—that the instrument being drafted would take because that would have an impact on the wording of the draft articles.

40. Mr. MIKULKA (Special Rapporteur) said that he was obliged to remind members that, pursuant to General Assembly resolution 51/160, the Commission was requested to draw up draft articles with commentaries in the form of a declaration, but without prejudice to a different decision which the General Assembly might take at a later stage in its work, on the recommendation of the Commission. He stressed, nevertheless, that the question of the form of the instrument had an impact on the content of the draft. Contrary to a declaration, a convention would allow the parties the possibility to derogate from rules of customary law.

41. Mr. PAMBOU-TCHIVOUNDA said that, since General Assembly resolution 51/160 did not prejudge the final decision, account would need to be taken of the very firm positions already taking shape in the Commission in favour of one or the other alternative. He therefore proposed that, at the end of the general debate on the overall question of the structure of the text, the secretariat should summarize the various positions which emerged from the comments by the members of the Commission.

42. Mr. ECONOMIDES said that the question of the nature of the draft was of overriding importance and that the idea of a declaration was still only a hypothesis. It

would be premature at the current stage for the Commission to open the debate on that point, but it should decide to return to it later when the draft had been more or less completed, because the Commission would choose one of the alternatives on the draft's own merits. Every member of the Commission should therefore bear in mind that the text could take the form of either a declaration or a convention.

43. Mr. FERRARI BRAVO said that, if the Commission produced a declaration, it must respect general international law as much as possible, assuming that the content of that law was exactly known. He nevertheless had the feeling that the area under consideration was somewhat special in that it related to the internal law of States and the way in which the latter interpreted and applied, in internal law, certain general rules of the law of nationality in relation to the effects of State succession. Consequently, a kind of model law or a set of principles might instead serve as a guide for future legislation; that was most necessary, given the emergence of new States and new entities lacking the necessary expertise in the field of international law. He therefore agreed that the Commission should return later to the form of the instrument, but was opposed to the idea of immediately drawing a distinction between declaration and convention because there might be grey zones between the two owing to the fact that, in that area more than in others, international law must serve the internal law of States and must not remain isolated in its own context.

44. Mr. OPERTTI BADAN said he was of the view that the Commission might exhaust the question of principles and the structure of the text without having to decide once and for all about the nature of the instrument being drafted, but, once it started its consideration of Part II (Principles applicable in specific situations of succession of States), it would be difficult to make headway in the absence of such a decision. He therefore proposed that, when it had completed the study of Part I, including perhaps the article-by-article consideration, the Commission should take a position on the form of its draft before beginning Part II. Without such a decision, its work might be limited and that would be prejudicial to its validity.

45. Mr. ADDO said that he was puzzled because, when he had raised the question of form (2478th meeting), the Chairman had replied and had ruled out any reopening of discussion on the subject. In his opinion, the Commission must decide whether or not it intended to take a position on the question of form before starting the detailed consideration of the draft.

46. Mr. YAMADA said that, having taken part in the activities of the Working Group on State succession and its impact on the nationality of natural and legal persons over the past two years, he had only a few comments to make at the current stage of the general consideration of the topic. First of all, he would prefer the definitions to be the subject of a separate article rather than a footnote to the title, although that was not an essential aspect of the draft. He agreed with the Special Rapporteur that it was not necessary to have a substantive definition of nationality, but thought that the definition in subparagraph (f) covered not so much the terminology, but the scope of the

draft articles. He therefore wondered whether the definition might not be placed in a separate article.

47. As to the preamble, drawing on the lessons of his recent experience in the General Assembly with regard to the drafting of a convention on the law of the non-navigational uses of international watercourses, he agreed with the Special Rapporteur that it was preferable for the Commission itself to prepare a draft, even if that departed somewhat from practice. Concerning the idea set out in the second paragraph of the preamble, he thought that the Commission should not discuss the question of the relationship between internal law and international law in the area of nationality in general because the topic under consideration related only to the impact of State succession on nationality. The laws on nationality in force in the various States permitted the acquisition of nationality either through the application of the principles of *jus soli* or *jus sanguinis* or through naturalization, which came under the discretionary power of the State, but they did not take account of the possibility of State succession. When the latter occurred, the question of nationality was settled by agreement between the States concerned or through the adoption of special retroactive internal legislation. The Commission thus had to decide on the relationship between the draft articles and the particular legislative rules which would be adopted to settle questions of nationality following State succession. Hence the question whether, when it adopted its own legislative rules, the State would have an obligation to comply strictly with the principles laid down in the draft articles or whether it could depart from them. That was the basic problem which the Commission must deal with candidly, if necessary in the framework of a specific article, and which tied in with the question of the nature and form of the instrument to be drafted.

48. Mr. LUKASHUK said he agreed with other members that the Commission must first prepare a draft before tackling the question of the status and form of the future instrument. As to the link between internal law and international law in respect of nationality, he proposed that the Commission should use the perfectly satisfactory wording of article 1 of the 1930 Hague Convention, on which the European Convention on Nationality had already been modelled.

49. Mr. Sreenivasa RAO, paying a tribute to the Special Rapporteur's exemplary work, said that the Commission had set itself a first limit by deciding to consider problems of nationality solely in the context of the succession of States. Moreover, it had decided to confine itself for the time being to the nationality of natural persons, while reserving the possibility of studying the question of legal persons at a later stage. It was in that framework that the Special Rapporteur's proposed definition of "nationality" should be examined.

50. Most of the definitions contained in the draft were simple and acceptable, although it might be better to incorporate them in the text rather than in a footnote. The idea of a preamble had not prevailed at first, but, after more thorough consideration and reflection, he was convinced of the need for it, as it would make work all the easier at a later stage, when the draft articles were taken

up in the General Assembly or in the framework of any other appropriate body.

51. Since the proposed draft articles concentrated mainly on the problem of the dissolution of a State, although other cases were in fact dealt with in Part II, they did refer to recent situations in which a State had totally disappeared, leaving several successor States. It would be wrong to give too much emphasis to specific problems of a particular era. For where nationality was concerned no instrument could claim to have an absolutely uniform, universal and rigid character. Experience showed that the problems received different solutions depending on the region, the countries and the time. The application through internal legislation of the great principles of *jus soli* and *jus sanguinis* sometimes led to the creation of dual or multiple nationalities. In view of that complexity and diversity, the Commission ought to propose a set of draft articles in the form of a declaration of a general nature which could be applied by States according to their needs and their particular situation.

52. In such a framework, the Commission would not be able to deal with the question of the substance of nationality, although it was of particular interest in the context of human rights in general and of the problems of minorities and other categories of person in particular.

53. The complexity of the situations which had emerged over recent years showed that, apart from the obvious case of the annexation of a territory by force, it was not always easy to apply the yardstick of the legitimacy of the succession. The principle of continuity and the presumption derived therefrom ought to provide a safe solution of many of the problems considered by the Special Rapporteur. The Special Rapporteur had dealt very well with the right of option, a fundamental individual right. However, it must be stressed that option was a right which all persons were held to possess and that States were required to grant rather than a right afforded by internal law.

54. It would be wrong to set internal law against international law systematically and proclaim the primacy of one over the other. The two components were both equally useful and mutually complementary. Rather than stating a general principle on that point, as was done in the draft preamble, it would be better to indicate in the body of the draft articles the restrictions or limitations regarded as essential or desirable in that regard. Lastly, the regime to be instituted would gain in stability and continuity from the reaffirmation of the importance of customary law and the value of any treaty provisions regulating the problems of nationality in relation to the succession of States.

55. Mr. MIKULKA (Special Rapporteur), summing up the general debate on the title of the draft articles and their scope and on the preamble and the definitions, said that, as other members of the Commission had pointed out, the title of the draft articles did not have to be the same as the title of the topic. The topic was "Nationality in relation to the succession of States", which always covered both natural and legal persons and it had to be left unchanged so that the Commission could later take up the question of the nationality of legal persons without having to request approval for a new agenda item. However, the draft articles under consideration were limited at the current stage

to the nationality of natural persons and that limit could be stated in the title or equally well in an article on the scope of the text or even in a paragraph of the preamble. The Drafting Committee was in any event the best place for that point to be decided. The title of the topic had itself evolved, for initially it had referred, in the English version at least, to the “impact” of the succession of States on nationality. The Commission had decided that such a formulation was restrictive and excluded certain problems of nationality which were connected with State succession without being a direct consequence thereof. In order to avoid doctrinal debates as to what was a direct consequence of the succession of States and what already fell within the jurisdiction of the successor State, the Commission had opted for the more neutral current wording: “Nationality in relation to the succession of States”.

56. Some members had argued that the scope of the draft articles should not exclude questions of nationality, but that it did not strictly relate to nationality as such. The draft articles already contained some provisions dealing with such related questions. The obligation to negotiate, for example, related not only to nationality, but also to problems of pensions, social security, and so on. It was for the Commission to determine the right balance.

57. Turning to the general scheme of the draft articles, he said that the Commission seemed in agreement on the proposed structure, which had been taken from the 1978 and 1983 Vienna Conventions, that is to say one part devoted to general principles (and not to “absolute” principles, as stated in the French text of the commentary preceding article 1) and a second part on the principles to be applied in specific cases of State succession. He would return to some of the questions raised about the structure of Part II when the Commission began its consideration of the draft, article by article.

58. Lastly, with regard to the ultimate form of the draft instrument, the formulas of a declaration or a convention were not mutually exclusive. The General Assembly had requested the Commission to prepare at the current stage a draft declaration, which was a useful approach, since a declaration could be adopted relatively more quickly than a convention and did not give rise to the same problems of ratification, but there was nothing to prevent the Commission from considering other possibilities, which might well include the preparation of a draft convention or the drafting of some parts of the declaration in treaty form, or even the production of a draft additional protocol to the Convention on the Reduction of Statelessness. It was in any event too early to try to draw a line, a somewhat artificial one indeed, between the two formulas.

59. Where the definitions were concerned, the ones taken from the 1978 and 1983 Vienna Conventions had not prompted any comment and the Commission seemed to see in them, as he did, a factor promoting the uniformity of instruments, which were in the end all the work of the Commission. Of the three new definitions proposed, the definitions of “person concerned” and “State concerned” had not prompted any comment either and it was perhaps a task for the Drafting Committee to add the finishing touches, with a view to the Commission’s revisiting the definitions once the whole draft had been considered.

60. In contrast, the third new definition, of “nationality”, had caused a heated discussion. The formulation proposed in the draft was in fact not really a definition, but the same comment could be made about all the instruments of the same type. The European Convention on Nationality defined nationality as the legal link between a person and a State, but did not spell out the nature of the link in any greater detail and the definition was in fact defective in that a debt, for example, was also a legal link. Indeed, all the definitions of nationality described what nationality was not rather than what it was. Therefore it might well be possible to delete the definition proposed in the draft and include its content in the title or the preamble, just as it would be possible, although difficult, to try to give a positive definition, that is to say to combine the elements common to all concepts of nationality or even to offer a descriptive definition in the commentary. If the Commission chose that route, the Drafting Committee, with the help of the Special Rapporteur, could take up the task.

61. Some members of the Commission had proposed defining other concepts, those of population and right to a nationality, for example. But the first concept was not used in the draft and there thus seemed no point in defining it. The second was used only in the title and at the end of paragraph 1 of article 1; the rest of the draft described exactly what that right consisted of, that is to say retention of the nationality of the predecessor State, acquisition of the nationality of the successor State or exercise of the right of option between the nationalities of the predecessor State and of the successor State or States, as the case may be. It was thus a concept which would be better explained in the commentary than defined in the body of the text.

62. The preamble was based largely on the similar provisions of the 1978 and 1983 Vienna Conventions; its first paragraph did not refer only to the situation in Central and Eastern Europe, for recent cases of State succession had also led to the birth of Eritrea and the reunification of Yemen. Since the 1978 and 1983 Vienna Conventions mentioned possible future cases of succession of States, a similar provision might be added in the draft preamble. The second paragraph, dealing with the relationship between internal law and international law, had prompted a lively discussion, but the Drafting Committee currently had all the elements which it needed for establishing an appropriate link between the two types of law.

63. In any event, the proposed text did not conflict in any way with article 3 of the European Convention on Nationality or with the 1930 Hague Convention, which both emphasized internal law, but stated that international law imposed certain limits in the matter. The Treaty on European Union (Maastricht Treaty) gave even more priority to internal law, specifying that the question whether a person possessed the nationality of a State member of the European Union was exclusively a matter for the internal law of that State. It was therefore necessary in the current exercise to bear in mind the realities and study the various relevant instruments in order not to be accused of giving undue priority to international law. The third paragraph was similar to the provision in the 1978 and 1983 Vienna Conventions and the fourth paragraph, which referred to the Universal Declaration of Human Rights,

had been included because, unlike those Conventions, the current draft concerned relations between the State and individuals; hence the need to mention the question of human rights in the preamble.

64. He stressed, in conclusion, that the Working Group had always been kept informed of the progress of the work done on the topic in other bodies. He proposed that the title, the definitions and the preamble of the draft articles should be referred to the Drafting Committee. Of course, the Drafting Committee would not be able to undertake anything more than preliminary work until the whole of the draft had been considered, but such an exercise would be very useful, especially with regard to the definitions.

65. Mr. SEPÚLVEDA said that he had not proposed that the Commission should define the notion of population, but had simply commented that, since the Commission was dealing with questions of nationality, it should not restrict itself to the notion of territory alone, for a territory could be unpopulated.

66. The CHAIRMAN said that the question whether the draft articles should take the form of a declaration or a convention had been clearly settled in paragraph 8 of General Assembly resolution 51/160, which referred to paragraph 88 of the Commission's report on the work of its forty-eighth session.<sup>6</sup> Paragraph 88 (b) stated "For present purposes—and without prejudicing a final decision—the result of the work on the question . . . should take the form of a declaration of the General Assembly...". He therefore proposed that the title, the definitions and the preamble of the draft should be referred to the Drafting Committee and that its consideration, article-by-article, should begin at the next meeting, starting with articles 1, 2 and 3.

*It was so decided.*

#### **Organization of work of the session (continued)\***

[Agenda item 1]

67. The CHAIRMAN announced that the Working Group on State responsibility, established at the 2477th meeting, would meet later that day.

*The meeting rose at 1.05 p.m.*

\* Resumed from the 2477th meeting.

<sup>6</sup> *Yearbook . . . 1996*, vol. II (Part Two).

## **2480th MEETING**

*Wednesday, 21 May 1997, at 10.10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

#### **THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. The CHAIRMAN invited the Commission to consider the first three articles of Part I of the draft articles on nationality in relation to the succession of States contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1).

#### **PART I (General principles concerning nationality in relation to the succession of States) (continued)\***

##### **ARTICLES 1 TO 3**

2. Mr. MIKULKA (Special Rapporteur) said that he wished to re-emphasize some of the points made in his initial introduction of Part I (General principles concerning nationality in relation to the succession of States). However, he must first point out that the French version of article 1 (Right to a nationality), paragraph 1, was incorrect. He read out the correct French text and also noted that in paragraph 2, "concerné" should be inserted after "État", in the last part of the paragraph.

3. The main purpose of article 1, paragraph 1, was to ensure that all persons in a successor State ended up with the nationality of at least one of the States concerned. However, that rule did not function in isolation from the other draft articles: other rules were needed to cover particular cases. As to whether the provision stated only the subjective right of individuals concerned or a more gen-

\* Resumed from the 2475th meeting.

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

eral obligation of States, two hypotheses could be maintained. In some situations when the State that would be obliged to grant its nationality could be identified, for example after the unification of States, then the subjective right of the individual came into play. In other cases, the right to a nationality had as a corollary an obligation of the State concerned to take measures to ensure exercise of the right of the individual. If several States were concerned, an agreement might be needed between them. In most cases it was easy to identify the State concerned that was obliged to grant its nationality. However, there was a category of persons who had links to two States, a situation that was dealt with in article 7 (The right of option).

4. Article 1, paragraph 2, concerned the right of children and was based on provisions of the Convention on the Rights of the Child. As Mr. Galicki had noted (2478th meeting), like the Convention, it gave some priority to the criterion of *jus soli*. The basic assumption was that, in the absence of any link other than birth, the State of birth must grant its nationality. The Convention did not say expressly that it was the territorial State which had that obligation, but the rule was implicit. It required a State party to ensure that, from the moment of birth, a nationality was granted to every child born within its jurisdiction, which must mean territorial jurisdiction, for any other jurisdiction or personal competence would have to be based on nationality itself. That rule had now been incorporated in much internal legislation.

5. When article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness) was compared with article 1, it could be seen as the other side of the coin: the obligation of the State concerned to avoid statelessness in the case of persons having only the nationality of a predecessor State. The Working Group on State succession and its impact on the nationality of natural and legal persons had agreed that the point had to be stated expressly in the article. However, the obligation was one of means rather than of result, because a State was responsible only for what happened within its territorial jurisdiction and not for statelessness caused by the conduct of another successor State.

6. As to article 3 (Legislation concerning nationality and other connected issues), paragraph 1, although international law did not impose an obligation on States to have written legislation, it had been felt useful to say that States should enact legislation concerning nationality as quickly as possible, for they would thus avoid many potential problems. Such legislation should also clearly establish the effects of certain behaviour of individuals on their status, for example in the case of voluntary acquisition of the nationality of another State concerned.

7. Article 3, paragraph 2, imposed on States the obligation to make their legislation retroactive, in keeping with the assumption of continuity of nationality. Although the Working Group had not included the point, his text also covered the case of the acquisition of nationality upon the exercise of the right of option, which must also be retroactive.

8. Mr. HAFNER said that article 1 was a key provision, but posed a number of problems. He was not sure, for example, that the structure of paragraph 1 was in

conformity with the general direction of the other draft articles. It gave the impression of being based on the human rights concept that an individual could have rights enforceable against a State, but it was not clear which State, and it was certainly not within the discretionary power of an individual to choose between States. However, the article became clearer in the context of Part II of the draft (Principles applicable in specific situations of succession of States), which indicated which State had the primary obligation to grant nationality in certain cases of State succession. Yet the obligations set out in Part II could not be enforced by individuals but only by other States. In any event, Part II was unequivocally based on the assumption that nationality could be derived only from national law, and not from international law, as suggested by article 1, paragraph 1. Hence there was a discrepancy which needed clarification.

9. It was also possible to proceed on the assumption that article 1, paragraph 1, itself imposed an obligation on States, even though the wording created some difficulties regarding such an assumption. Again it was not clear on which State the obligation was imposed. The possibility of a shared responsibility of all the States concerned could be ruled out, since Part II identified the obligated States. But what then was the purpose of article 15 (Obligation of States concerned to consult and negotiate), other than simply the subsidiary purpose of dispute settlement? Another problem was that article 1 used the formulation "right to the nationality" in paragraph 1 but "right to acquire the nationality" in paragraph 2. Perhaps the Special Rapporteur could explain the reason for the difference. His own preference would be for article 1 to invest individuals with a direct right of action in order to avoid any interruption of nationality. But practice and also the views expressed in the Sixth Committee seemed to exclude such a possibility. The Commission should therefore proceed on the assumption that paragraph 1 imposed a clear obligation on States and that it should be linked to the other parts of the text by the phrase "as provided for in these draft articles".

10. Article 1, paragraph 2 was much more explicit and firmly grounded, but he could not understand the reason for the formulation "one of the States concerned, or that of a third State". Would it not be sufficient to use wording such as "not having acquired any nationality"? Nor did he understand how long the right to acquire a nationality should exist; in other words, when did a person cease to be a child? At the age of 14, at the age of 18? There did not seem to be any reason to preserve the exclusive character of the provision, for the right appeared to be unconditional; at least it did not depend on the absence of any nationality of the child. Perhaps the paragraph should be read in conjunction with article 5 (Renunciation of the nationality of another State as a condition for granting nationality), which offered some response to the problem. There was also the risk of a contradiction between the unconditional right stated in paragraph 2 and the principle of unity of families contained in article 9 (Unity of families). Lastly, paragraph 2 made good sense only on the assumption that children necessarily took the nationality of their parents, but that principle was not spelled out.

11. In his general comments at an earlier meeting he had drawn attention to the differing use of "shall" and

“should” in formulating the obligations. Mr. Simma had said (2477th meeting) that the difference was justified. However, that was not true of article 3, because Part II imposed strict obligations on certain States in accordance with the principle *pacta sunt servanda*. In its current wording, article 3 reduced the obligations spelled out later in the text to no more than programmatic norms. The obligation to apprise persons, including those living outside the State’s territory of the legislation enacted, as provided for in the second sentence of paragraph 1, should certainly be expressed by “shall”, even though the obligation would be difficult to carry out. Similar arguments applied to paragraph 2: since the aim was to avoid statelessness, the wording must provide for uninterrupted possession of a nationality. The obligation to grant a nationality must therefore have a compulsory effect retroactive to the date of the succession, even though the commentary gave the impression that the Working Group had preferred a recommendatory approach.

12. Mr. MELESCANU said that the Commission could adopt either a theoretical approach to article 1, as recommended by Mr. Hafner, or a practical one. Other conventions certainly took Mr. Hafner’s human rights approach to the justification of rights of the individual. However, the merit of the current draft articles was that they addressed practical problems: the keynote of article 1 was the notion of continuity of nationality and the impossibility of a person’s losing his nationality as a result of a succession of States. As to the relationship between paragraph 2 and article 9, paragraph 2 should be regarded as providing a safety net for children who had not acquired the nationality of some other State. In his opinion, most of the problems raised by Mr. Hafner could be resolved by the Drafting Committee.

13. Mr. GALICKI said that he agreed with most of what Mr. Hafner had said, but it had to be recognized that the right to a nationality, as a global concept, was appearing for the first time in the draft under consideration, thus placing a considerable burden of responsibility on the Commission. Admittedly, the Convention on the Rights of the Child dealt with a child’s right to acquire nationality in certain circumstances, but that was something slightly different. The draft did not, however, answer the main question—what was the substance of the right to a nationality—and it gave no indication of the entity from which that right could be claimed. A partial answer to the question was given later in the draft, particularly in Part II, but it was not immediately apparent. The right to a nationality, as proclaimed in paragraph 1 of the article, and the right to acquire a nationality, as set forth in paragraph 2, could reasonably be regarded as qualified forms of the general right to a nationality laid down in the Universal Declaration of Human Rights.<sup>2</sup> Perhaps it would be advisable for the sake of clarity for paragraph 2 of article 1 to form the subject of a separate article. It should also be made clear that the issue was not one of the right to a nationality in general but rather of the right to a nationality in cases of succession, when the position of individuals could be prejudiced.

14. Mr. OPERTTI BADAN said that article 6 (Acquisition of nationality) of the European Convention on Nationality<sup>3</sup> drew a clear distinction between the acquisition of nationality *ex lege* in certain specific situations as detailed in that Convention, and the acquisition of nationality by children born on the territory of a State party who did not acquire at birth another nationality. As the Commission’s draft covered both cases, it should suffice.

15. Mr. PAMBOU-TCHIVOUNDA suggested that any proposals made during the discussion should be submitted to the secretariat or to the Chairman of the Drafting Committee in writing.

16. The CHAIRMAN said he agreed that, in the case of drafting proposals, that could indeed save time. Proposals involving points of substance should, of course, first be discussed in plenary.

17. Mr. LUKASHUK said that the right to a nationality laid down in article 1 was a recognized principle of international law and was embodied in many legal and para-legal instruments. As such, it should be included in the draft. The subject had, however, already been debated at length at the Commission’s forty-eighth session and there was no need to prolong the discussion. There was another question he would commend for attention although it was perhaps of a purely theoretical nature, namely, whether an individual had a right to be stateless.

18. It was important not only to declare the right to a nationality but also to spell out its content in cases of statelessness. That content, as determined in the light of international instruments—in other words the content *de lege lata*—was the following. In particular, in cases of State succession, the interest not only of States but also of individuals must be taken into account; States must respect the will of the person concerned; every State must permit a renunciation of its nationality; no one should be arbitrarily deprived of his or her nationality; States must ensure that decisions relating to the acquisition, retention and loss of nationality were open to review in conformity with their respective internal laws; and, most important of all, a successor State should grant its nationality to all nationals of the predecessor State who resided permanently on the transferred territory.

19. Mr. MIKULKA (Special Rapporteur) said that Mr. Hafner seemed to believe article 1 should resolve all the questions that arose in connection with the subject. But, if that were so, what then was the point of the other articles? Rather, article 1 had to be understood as forming a whole together with the articles: it could not be read in isolation. It laid down a starting principle that could be implemented only via the provisions that followed.

20. As to whether article 1 should be understood as declaring a subjective right of the person vis-à-vis the State or whether it should be interpreted as referring to the relationship between States, he, for one, saw no reason why such a subjective right could not be recognized for the person concerned, when the State upon which the obligation is incumbent correspondingly could easily be determined, as, for example, in the case of unification.

<sup>2</sup> See 2475th meeting, footnote 8.

<sup>3</sup> See 2477th meeting, footnote 7.

However, a wide range of different situations could arise. In some cases it would be difficult for a person to claim the right to a nationality as a subjective right and the States concerned would have to agree among themselves on certain rules to ensure that all those involved would end up at least with the nationality of one of the successor States.

21. He had been asked why he spoke of a right to a nationality without specifying whether that right also included a right to acquire nationality. The answer was that article 1, paragraph 1, laid down a general formula which covered all situations. In some cases, the right to a nationality signified a right to keep the nationality of the predecessor State. In others, it signified the right to acquire the nationality of one of the successor States. In yet others, it meant a right of option between acquisition of the nationality of the successor State and maintenance of the nationality of the predecessor State or between acquisition of the nationality of one or other of the successor States. In the other articles he had, however, endeavoured to be as specific as possible.

22. He could not agree that the concept of the right to a nationality was very broad, nor that it was being broached for the first time in the draft. Its scope of application was in fact limited to the specific case of persons who had the nationality of the predecessor State at the outset. And its purpose was to ensure either that that person kept the nationality of the predecessor State or that he acquired the nationality of the successor State. Mr. Galicki had referred to the European Convention on Nationality, which, in article 4 (Principles), stated that the “rules on nationality of each State Party shall be based on the following principles: (a) everyone has the right to a nationality; . . .”. That was a far wider concept than his own restrictive provisions, whereby a person who had once had the nationality of the predecessor State had the right either to keep that nationality or, if that was out of the question for some reason, to acquire one of the nationalities of the successor States, and the whole process was made subject to negotiation between States.

23. Part II of the draft did not, contrary to what Mr. Hafner had said, impose strict obligations. As he had explained in his oral introduction (2475th meeting), whereas Part I declared principles of law and principles as to the policy States were invited to adopt—and which it was assumed they would—the purpose of Part II was to provide the States concerned with guidance. To that end, Part II set forth principles that States were free to use if they saw fit and which, if they did so, would avoid statelessness and discrimination. The States concerned remained free to conclude any other agreements or arrangements.

24. Mr. FERRARI BRAVO, agreeing with the Special Rapporteur’s analysis, said that article 1 was not unusual in enacting rules without providing for their implementation, since that would depend on the internal law of the States concerned. Criteria would be laid down for that purpose in other articles, which States would be free to follow or not. It was also quite normal for article 1 to assert, in the present tense, that every individual “has the right to the nationality”, without specifying how that right would be achieved. Possibly, however, there might be

some gaps because of the interplay between internal law and international law.

25. Paragraph 2 of article 1 dealt with the specific case of a child born at a certain moment and it also introduced the element of a third State, neither which had anything to do with the general statement in paragraph 1. Paragraphs 1 and 2 should therefore be separated to form the subject of two distinct articles, one dealing with nationality and the other with the specific case of the rights of children.

26. Mr. ECONOMIDES said that the draft should start with a general provision defining its character. As already stated, the draft was of a residual nature in that the States concerned could settle otherwise the question of the nationality of individuals involved in a case of State succession. They must, however, be under an obligation to respect the treaty obligations they entered into in connection with the rights of the persons concerned and any existing customary obligations in the matter. Such a provision was indispensable to the draft and should be placed right at the beginning or at the end or, if need be, in the preamble.

27. He fully agreed with Mr. Hafner about paragraph 1 of article 1. Wherever possible, more emphasis should be placed on the succession of State aspect and less on the nationality aspect. In other words, nationality should always be approached via State succession and that principle should govern the underlying approach to the draft as a whole.

28. Paragraph 1 in its current formulation set forth a right of the individual. In that connection, it would be useful to adopt the same formula as in articles 2 and 7, referring to “the States concerned . . .”, which would not only make the obligation incumbent upon the States concerned but would also bring the relevant provisions of the draft into line. It would also be useful to link Parts I and II by stating, at the end of paragraph 1 of article 1, “as provided for in Part II”, which would govern how nationality would be allocated in each case. The Venice Commission had adopted the same method by specifying that the States involved in succession respected the principle whereby each person had a right to a nationality.<sup>4</sup>

29. The words “irrespective of the mode of acquisition of that nationality”, in paragraph 1, were superfluous, and should be deleted. That detail could be given in the commentary.

30. On a point of drafting, the words “had” and “was”, which appeared in the imperfect tense in paragraph 1, should be replaced by the present tense, as was customary in all legislative texts. Paragraph 1 used the expression “States concerned”. Such States were, however, generally successor States. A solution to the problem could perhaps be found by linking paragraph 1 with the rest of the draft and particularly with Part II.

31. Paragraph 2 of article 1 had no place in the draft. In the first place, it dealt more with nationality than with State succession and it was manifestly lacking in precision. Secondly, it covered an entirely isolated case of

<sup>4</sup> See 2475th meeting, footnote 22.

nationality which was of little practical interest and would be more appropriately regulated in a nationality code. If paragraph 2 were retained, however, it should be incorporated in a special provision towards the middle or end of Part I.

32. Draft article 2 had his full support, although he would have liked the wording, which stated an obligation of means and not of result, to be strengthened.

33. As to substance, article 3 should begin by setting forth the general principle that in all cases of State succession the parties concerned must, as an obligation of an international character, settle by agreement or other means, the question of the nationality of the individuals involved in the succession. Only after that general principle was set forth should the article address the question of national legislation.

34. The major issues to be addressed by national legislation were acquisition and loss of nationality as a result of State succession. The wording of article 3, paragraph 1, however, also introduced a number of additional issues which the Drafting Committee should consider deleting. Paragraph 2 of article 3 set forth the important principle of automatic *ipso jure* acquisition of the nationality of the successor State on the date of State succession. However, that principle should be safeguarded by means of an independent provision in the draft explicitly stating that nationality must be accorded at the date of succession, rather than through the indirect channel of imposing that obligation on national legislation.

35. The same was true of the second issue raised in paragraph 2. The practice was that, on the date of the succession of States, the successor State automatically granted its nationality to all individuals who had previously had the nationality of the predecessor State. It might subsequently give some categories of individuals the option of selecting the nationality of the predecessor or the successor State; and those who did not exercise that option would automatically retain the nationality of the successor State. The second provision of article 3, paragraph 2, would, however, be of value in avoiding cases of statelessness where States failed to follow that practice.

36. Mr. GOCO agreed that the right to a nationality proclaimed in the Universal Declaration of Human Rights could not be fully equated with the right to a nationality set forth in the draft, since States were subject to different constraints in situations of State succession. He also agreed with Mr. Economides on the need for automatic conferral of citizenship on citizens of the predecessor State by the successor State, subject to certain conditions, for in the absence of such automatic conferral, many problems would arise. Paragraph (6) of the commentary to article 3, contained in the third report of the Special Rapporteur, alluded to the problem of the timeliness of internal legislation. What would be the status of the individuals affected by State succession pending the enactment of such legislation? Did the principle of continuity already referred to mean that such persons should continue to be nationals of the predecessor State, or that they became nationals of the successor State immediately upon succession? As to the question of obligations, on which State were those obligations incumbent?

37. Mr. GALICKI said he wished to defend article 1, paragraph 2. Although he had criticized various aspects of the paragraph, he strongly favoured its inclusion as a very important provision for the progressive development of international law, one that went even further than article 6 of the European Convention on Nationality. In the interests of clarity, however, consideration should perhaps be given to incorporating it in revised form as a new paragraph 2 of article 2, since article 2 concerned the obligation to take all reasonable measures to avoid statelessness and article 1, paragraph 2, illustrated one such measure. Article 1 would gain in clarity as a result of such redrafting.

38. The formulation "has not acquired the nationality of at least one of the States concerned, or that of a third State," in article 1, paragraph 2, might be better expressed in the form: "has not acquired any nationality at birth or later". He wished to draw the Special Rapporteur's attention to the danger that, in practice, the provision might result in children having a different nationality to that of their parents. Could a way be found of avoiding that outcome?

39. Mr. PAMBOU-TCHIVOUNDA said that articles 1, 2 and 3 constituted the three pillars on which the entire edifice of the draft articles rested and highlighted the rights and obligations of the various States and individuals concerned. One possible shortcoming of those articles, however, was their failure to place sufficient emphasis on the role accorded, as a customary rule of general international law, to geographical territory as an underlying factor in the presumption of nationality. Furthermore, the assumption behind the draft articles, reflecting their title and that of the third report, should perhaps be embodied in an article 1 of a general introductory nature, setting forth the full scope of the impact of State succession on the nationality of natural persons of the predecessor State, having regard to all the possible forms State succession could assume.

40. As to article 1, paragraphs 1 and 2 should be dissociated and, in an amended form, paragraph 2 should make up a separate article, in view of its very specific subject matter. Paragraph 1 of the article also failed sufficiently to stress that, at the date of that State succession, there were many categories of individuals who might not have lost the nationality of the predecessor State. If the predecessor State still existed, the individuals living on its territory remained its nationals. Thus, in order to be fully significant, paragraph 1 must address the plight of those individuals who had lost their territorial link with the predecessor State. That aim could be achieved by adopting the wording: "Every individual who, on the date of the succession of States, has lost the territorial link with the predecessor State . . .", followed either by the formulation: ". . . may avail himself of the nationality of at least one of the States concerned" or by the formulation: ". . . shall possess the nationality of the successor State on the territory of which he is located".

41. Article 2 called for no comment, subject to the possible incorporation of article 1, paragraph 2, therein, as previously proposed. Article 3, however, prompted three comments. First, he endorsed Mr. Economides' remarks concerning the tenses of the verbs: in the interests of con-

sistency and of asserting States' obligations in direct terms, the conditional tense of article 3 should be brought into line with the present tense used in articles 1 and 2. Secondly, the allusion to "undue delay" left the field open for subjective and biased interpretations. Those words posed more problems than they solved. Similarly, the notion of "connected issues" could give rise to ambiguity unless further specification was provided in the text itself, rather than in the commentaries. It was a question of substance, not merely one of form.

42. He agreed with Mr. Economides' suggestion that article 3, paragraph 1, was in need of some pruning. The words "the effect of", for instance, were redundant and should be deleted. There were also problems of substance: access to a State's legislation was a luxury not available to those who, for instance, were unable to read. How, then, were all the persons concerned to be apprised of the information referred to in paragraph 1? States would need guidance on ways of securing application of the measures referred to in that paragraph. Lastly, he endorsed the view that the date to be taken into consideration for the purposes of paragraph 2 was, of course, the date of the succession of States.

43. Mr. MELESCANU said he had reservations about the advisability of obliging States to adopt legislation on nationality in relation to the succession of States. Many countries already had nationality laws that could also be applicable in cases of State succession. It thus seemed somewhat excessive to require them to adopt legislation in that regard. As for Mr. Pambou-Tchivounda's proposal that account should be taken of the role of territory when determining nationality, he would point out that, in many parts of the world, including central Europe, the territorial link, while important, was not crucial. Ethnic, cultural, religious and other factors were equally important, if not more so. He was thus opposed to according pride of place to the territorial factor in determining nationality, at least where his own region was concerned.

44. Mr. GALICKI, referring to article 3, said that he agreed with Mr. Pambou-Tchivounda's point about "undue delay" and the need to be more specific if laws had to be enacted concerning nationality and other connected issues arising in relation to the succession of States. As already pointed out, States usually had their own nationality laws. However, those laws did not normally provide for cases of succession, because States generally did not consider such an eventuality. Therefore, the problem was one of the application of existing laws. But the latter might not be sufficient, and he wished to draw the Special Rapporteur's attention to an alternative solution, set out in article 19 of the European Convention on Nationality, which stated that

In cases of State succession, States Parties concerned shall endeavour to regulate matters relating to nationality by agreement amongst themselves and, where applicable, in their relationship with other States concerned.

The Special Rapporteur had referred to article 15 of the draft, on the obligation of States concerned to consult and negotiate. His own impression was that that was not the same thing, because article 15 dealt with specific problems which might arise later as a result of succession. Alternative solutions in the form of international agree-

ments were not always possible, because if a State disappeared, it was impossible for it to be party to a given treaty. But if States agreed to address the problem of nationality in certain ways, that was preferable to forcing them to enact internal laws.

45. Mr. ECONOMIDES said that Mr. Pambou-Tchivounda had rightly drawn attention to an aspect which seemed to be missing in article 1, paragraph 1. In his view, that paragraph was a general provision which should simply lay down the principles whereby each person affected by a State succession had a right to a nationality; it should not contain substantive elements. Yet paragraph 1 did just that, because it referred to every individual who had the nationality of the predecessor State. On the other hand, it failed to mention a second condition which was just as necessary, namely residence in the territory that was the subject of the succession. In his opinion, either the principles should be set forth in a general fashion or article 1, paragraph 1, should also make provision for the latter requirement. He was in favour of simply laying down the general principles; the details should be left to Part II of the draft.

46. Mr. MELESCANU said that the territory could not play such an important role. Any reference to residence would have two consequences: first, it would force a person to have a nationality that he did not want; and, secondly, it would exclude the large numbers of citizens living abroad. There were many such examples in today's Europe, and he cited the Yugoslavs and Turks living in Germany. A Slovak who had lived in Prague for 30 years might not want to become a Czech. If the notion of territory of residence were introduced in article 1, it might create difficulties.

47. Mr. MIKULKA (Special Rapporteur) said that to a certain extent, Mr. Economides was right that one element was well-established, namely the nationality of the predecessor State. It was important and corresponded to the scope of the draft, which related to persons who had the nationality of the predecessor State before the date of the succession. The question arose whether at the level of a principle as general as the one set out in article 1 it was possible to add other criteria. Mr. Economides said that article 1 should cover persons who had the predecessor's nationality and who had a link with the territory that was transferred, but that assumed that only a transfer of territory or a secession took place and that the predecessor State survived. There was not much risk in that case, because the predecessor State's survival ensured that persons who resided in other States had a nationality. But if a State disappeared in the event of dissolution, that hypothesis was no longer valid: everyone found himself without a nationality. Thus, stressing the criterion of territory placed all nationals of the predecessor State residing abroad at risk. If the point was to have a general principle, virtually nothing could be added to article 1. The Working Group had spent a number of weeks considering the matter, and Part II, which contained more specific criteria on particular cases of State succession, had been produced for precisely that reason. The Working Group had not found other criteria of a general nature that might be included.

48. With regard to article 1, paragraph 2, he had been criticized for speaking of the absence of the nationality of a third State. Purely from the drafting standpoint, it was possible to speak of a child that had not acquired any nationality. But if it had been stated in such a simplified manner, there would have been a long debate in which members of the Commission would have discovered that a child could, in fact, have the nationality of a third State. Therefore, it had been thought useful to include all those elements *expressis verbis* and to indicate that a situation was involved in which a child was born to the persons concerned and acquired the nationality neither of the predecessor State nor any successor State(s). But at the same time, that would leave out a whole group of children who might acquire the nationality of a third State; in other words, the category of children was even more restricted than the category of persons concerned in paragraph 1, which was not confined to persons who might be left stateless.

49. Paragraph 1 applied to the case, for example, of a Czechoslovak who also had Canadian nationality. The fact that that person continued to have Canadian nationality did not exclude him from the scope of paragraph 1: as he was Czechoslovak, he still had the right to either Czech or Slovak nationality, depending on the case. That implied that the Czech and Slovak States did not have the right to impose their nationality, because with Canadian nationality, the person concerned was protected by the rule that a State could not impose its nationality on persons who lived abroad and had the nationality of a third State.

50. The suggestion had been made to reword article 1 to the effect that the States concerned were under an obligation to ensure that all the persons concerned eventually obtained the nationality of one of those States. That was in conflict with the rule that States could not impose their nationality on individuals who resided in, and had the nationality of, a third State. If the Commission wished to recast article 1 in terms of obligations of States instead of rights of individuals, that would necessarily exclude some of those individuals covered in paragraph 1. What would happen with them? Speaking of a right to a nationality had an advantage, because it was the only formula to cover all persons who had been nationals of the predecessor State.

51. Mr. BROWNLIE said that much of the debate had focused on the problem of the balance between the general principles, especially in articles 1 and 2, and the particular mechanism, which the Special Rapporteur relied on heavily, especially in article 3, which was to put in place very specific duties for States to legislate. There was no simple means to guarantee either legal stability after State succession or to eliminate all sources of statelessness. But an attempt could be made to do so.

52. He was in favour of strengthening the complementarity between the general principles and the duty to legislate in specific ways. To that end, he would propose the insertion of a new article 2 *bis*, to read:

“1. The States concerned shall implement the principle of general international law according to which on a succession of States persons having their habitual residence in the territory affected are pre-

sumed to acquire the nationality of the successor State on the date of the succession of States.

“2. The principle referred to in paragraph 1 is without prejudice to the provisions of articles 7 and 8.”

53. His intention was to introduce a general principle which would not have an adverse impact on the economy of the Special Rapporteur's draft.

54. Mr. ROSENSTOCK asked Mr. Brownlie to explain what happened in the case of a national of a third State who was a resident in the territory at the time of the State succession. The provision proposed seemed to grant the nationality of the successor State to that individual.

55. Mr. BROWNLIE said that the general principle was subject to much else in the draft. The concept was not to deal with all subsequent matters of nationality, but to apply the principle of continuity. The difficulty was in focusing on State succession as such and avoiding questions of nationality in general.

56. Mr. MELESCANU asked what happened with that presumption for citizens of a State who were living outside its borders. Would they not benefit from that presumption?

57. Mr. BROWNLIE said that the presumption was meant to maintain continuity. There was some analogy with the question of acquired rights after a change of sovereignty. The new sovereign could legislate in respect of property on its territory in the same way as any other sovereign. Its power to do so did not derive from the change of sovereignty except in the sense that it was now sovereign over that territory. The Commission must try to deal with the problem of State succession and not to regulate the subsequent powers of government that the new sovereign would have. That was one of the particular difficulties that the Special Rapporteur had had to face.

58. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) pointed out that the suggestions made would most usefully be discussed in depth in the Drafting Committee.

59. Mr. LUKASHUK said that he supported Mr. Brownlie's proposal.

60. Mr. GALICKI said that, in general, he too supported Mr. Brownlie's proposal. However, if the draft were to become a convention, the reference in the first paragraph of his proposal to the principle of general international law would not be easily accepted by States, and he was therefore opposed to including such a reminder simply to create a positive obligation for States.

61. Mr. ECONOMIDES said that Mr. Brownlie's suggestion to recall a principle of general international law was an excellent idea. In all cases of State succession when part of the territory came under new sovereignty, there was automatically a change in nationality. That had taken place so often that it could be recognized as a general rule of international law. But Mr. Brownlie's proposal spoke only of persons who had their residence in the territory affected by the succession, not of nationals of the predecessor State resident there. Without the element of nationality, the Special Rapporteur would then rightly

argue that in the case of the dissolution of a State, the nationals of the predecessor State residing abroad would all become stateless. It would therefore be necessary to have an automatic transfer of nationality to everyone.

62. Principles must be set out in very general terms and specific provisions must be used to settle problems in detailed fashion. The question of nationality should be linked with the articles of Part II.

63. Mr. MIKULKA (Special Rapporteur) said that he endorsed the philosophy behind Mr. Brownlie's proposal. The problem raised by Mr. Rosenstock could readily be resolved, because Mr. Brownlie certainly intended to cover "persons concerned". However, the principle was to be applied without prejudice not only to the provisions of articles 7 and 8 (Granting and withdrawal of nationality upon option), but also of article 18 (Granting of the nationality of the successor State), which spoke of unification, where the presumption of continuity extended to the entire population of the two countries which united.

64. Regarding the transfer of territory, it was also not certain that the population always shifted its nationality with the territory. On the contrary, in the case of small territorial exchanges, the population had often retained the nationality of the predecessor State. At issue instead was the basic principle of the right to opt for one nationality or another. He had cited two exceptions: unification and transfer of territory. Must a general principle be set forth when it only concerned dissolution and separation and would not cover the persons concerned abroad?

*The meeting rose at 1.05 p.m.*

## 2481st MEETING

*Thursday, 22 May 1997, at 10.05 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN informed the Commission that, the day before, the General Assembly had adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses by 103 votes to 3, with 27 abstentions.

2. He invited the Commission to continue its consideration of draft articles 1 to 3, including new draft article 2 *bis* proposed by Mr. Brownlie (2480th meeting).

PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

ARTICLES 1 TO 3 (*concluded*)

3. Mr. GOCO said he wondered whether the presumption stated in the new draft article 2 *bis* related exclusively to the criterion of habitual residence or whether it covered all the individuals referred to in article 1 (Right to a nationality), paragraph 1, in other words, those entitled to acquire the nationality of the predecessor State in accordance with the provisions of the internal law of that State.

4. Mr. HE pointed out that the right to a nationality set forth in article 1 was based on article 15 of the Universal Declaration of Human Rights<sup>2</sup> and article 7 of the Convention on the Rights of the Child. In the context of State succession, that right could be regarded as the positive expression of a State's duty to prevent statelessness. From that standpoint, article 1 was closely linked to draft article 2 *bis* proposed by Mr. Brownlie, which set out the duty of States to grant nationality. However, article 1 was more specific, providing for the right to the nationality "of at least one of the States concerned" and, thus, when read in conjunction with article 7 (The right of option), paragraph 1, and article 8 (Granting and withdrawal of nationality upon option), paragraph 3, paving the way for the phenomenon of multiple nationality. Although that phenomenon was made inevitable by the functioning of the various internal laws on nationality, it obviously had more disadvantages than advantages for individuals, States and the relations between them. There was so far no legal rule providing for the right of individuals to more than one nationality. Even the European Convention on Nationality,<sup>3</sup> which was fairly liberal in that regard, must be considered in conjunction with the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality. That Convention, like the many bilateral treaties between China and the other States of South-East Asia, for example, was based on the principle that the phenomenon of multiple nationality was generally undesirable and should be controlled to the greatest

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See 2475th meeting, footnote 8.

<sup>3</sup> See 2477th meeting, footnote 7.

extent possible; all those instruments provided for the automatic loss of nationality in the event that another nationality was acquired. The internal law of many countries, such as that of China, contained similar provisions. In order to reduce the risks of conflict of nationalities—both the negative ones, such as statelessness, and the positive ones, such as multiple nationalities—it might be worthwhile to consider deleting the words “at least” in article 1, paragraphs 1 and 2, and to amend article 7, paragraph 1, and article 8, paragraph 3, accordingly.

5. Mr. SIMMA pointed out that draft articles 1, 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness) and 3 (Legislation concerning nationality and other connected issues) gave concrete expression to the fairly general provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. In so doing, they helped to reinforce the law relating to human rights. In specific terms, they set forth the right of the individual to a nationality and the corresponding obligation of the States concerned. The right to a nationality could be immediately operational in some cases, whereas, in others, it had to be given effect by new rules that would be established either in the draft that the Commission was currently preparing or by States themselves in the context of treaties or their domestic legislation. The corresponding obligation imposed on States could take a variety of forms ranging from the strict obligation to grant a certain right to the simple duty to negotiate and consult with the other States concerned. The human rights consideration implicit in the articles was not so much continuity per se as prevention of statelessness. As Mr. Crawford had pointed out (2478th meeting), the rule laid down could not be regarded as forming part of *lex lata*, but it indisputably constituted a very desirable component of *lex ferenda*. In any event, the Special Rapporteur's concern to prevent statelessness was in no way an obsession and the wording of draft article 2 could even be made somewhat stronger.

6. Article 2 *bis* proposed by Mr. Brownlie was problematic in three respects. First, it raised the logical problem of the link between a principle of general international law—and hence, of customary law—and a presumption, although it was open to question whether a rule of customary law such as the one embodied in the proposal actually existed today. The second problem was that the principle applied solely to certain cases of succession of States and it therefore did not fit in with Part I (General principles concerning nationality in relation to the succession of States), which was devoted specifically to the principles applicable to all cases of State succession. If the Commission decided to retain the article, it would have to move it to Part II (Principles applicable in specific situations of succession of States) or divide it up among the various cases to which it applied. The third and most important problem was that that principle of continuity seemed to be based on a concern to protect human rights, but, when seen from a historical perspective, turned out to be the expression of the old rule of a link between population and territory. That philosophy of nationality in relation to the succession of States was highly debatable. The draft as submitted by the Special Rapporteur was based on premises that had far fewer historical connotations, since

it stressed free choice and set forth the right of the individual to a nationality and the obligation of States to prevent statelessness. There was a perfectly balanced set of principles underlying the entire draft, but that did not prevent reference to the principle in the proposed article 2 *bis* from being made in certain provisions—article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State), for example, in conjunction with the right of option. In fact, the basis should be not that principle per se, but the human rights concerns that inspired it and it must be asked whether the draft took account of those concerns, something about which there was, in his opinion, no doubt whatsoever.

7. With regard to the text of the first three articles of the draft, the phrase “irrespective of the mode of acquisition of that nationality” in no way unnecessarily encumbered article 1, paragraph 1. A situation could in fact arise when a successor State considered that the right to its nationality was valid only for those persons who had acquired the nationality of the predecessor State by a certain mode and not by another: usually by *jus soli* or *jus sanguinis*, but not by naturalization. Without a debate, the Commission could not delete that clause relating to non-discrimination on the basis of the mode of acquisition of the preceding nationality. He had already explained why the wording of article 2 could be strengthened somewhat. In article 3, the replacement of the word “should” by the word “must” strengthened the obligation and was therefore not simply a drafting question. It would be difficult to see how international agreements could be substituted for national legislation for the purposes of article 3.

8. Mr. ECONOMIDES explained that his comments on international agreements in the context of article 3 meant not that those agreements would serve in and of themselves as the instrument of internal law regulating matters of nationality, but, rather, that, before providing for an obligation to legislate at the internal level, it was necessary to establish an obligation to settle such matters at the level of international law, and that obligation went much further than the obligation to negotiate. Each State would subsequently, in conformity with its constitutional rules, adopt all the necessary measures to apply the international agreement in its internal legal system and to give full effect to the principle set forth in article 1.

9. Mr. CRAWFORD said that the origins of the rule set forth in draft article 2 *bis* proposed by Mr. Brownlie dated back to the time when the relationship between people and territory was seen in a more proprietorial way. Nonetheless, there was still a social reality in the link between people and territory, which meant that in general the new State had obligations towards a people who, for whatever reason, were resident on territory affected by State succession. Since the Commission was, in broad measure, in agreement as to the result that ought to be achieved, the matter should perhaps be referred to the Drafting Committee. If it looked, in particular, for wording that made a clear distinction between the process of acquiring nationality in the case of State succession and the process of acquiring it by naturalization, the Drafting Committee could, subject to certain other changes, find a solution that met Mr. Brownlie's concern. As to the question of international agreements and internal legislation in the context

of article 3, it was true that the former would be no substitute for the latter, but the Commission should not assume that the agreements would not be honoured. The ideal solution was an international agreement in advance of the succession and it should be presumed that such an agreement would have effect, directly or indirectly, in the internal legislation. Again, the Drafting Committee could resolve the problem by making sure that the wording of article 3 restated the obligation it set forth without making any assumption as to the way in which that obligation would actually be carried out.

10. Mr. HAFNER said that there was a question in his mind about respect for the free will of persons where nationality was granted automatically. Article 1, paragraph 1, seemed to preserve free will by setting forth a right, but not an obligation, but other provisions in the draft imposed a requirement on the successor State to grant its nationality so that individuals could be obliged to accept that nationality. He saw a certain inconsistency in this approach, which needed a harmonization in order to avoid any ambiguity on this basic concept.

11. Mr. LUKASHUK said that, in his view, Mr. Brownlie's proposed wording imposed too great an obligation on States. He therefore proposed that the words "The States concerned shall implement the principle of general international law . . ." should be replaced by the words "The States concerned, in accordance with the principles of general international law, . . .".

12. Mr. SIMMA, referring to Mr. Hafner's point, said that article 1 spelt out a principle—the right to a nationality—the scope and implementation of which was dealt with in further articles. The Special Rapporteur had dealt judiciously in the draft articles with the rights and obligations involved, as well as with the correlation between those rights and obligations, and had even adopted the principle of habitual residence, in particular in articles 17 and 21 (Granting of the right of option by the successor States).

13. Mr. MIKULKA (Special Rapporteur) said that Mr. Simma had fully grasped the idea he had sought to reflect in article 1.

14. Mr. BROWNLIE said he agreed with Mr. Simma that the essential principle laid down in his proposed article 2 *bis* was in fact a substratum for many of the draft articles submitted by the Special Rapporteur. Yet that principle did not appear in the preliminary articles, where it had its proper place. As to the wording of article 2 *bis*, he would have no objection to the deletion of the words "of general international law" in paragraph 1.

15. Mr. HERDOCIA SACASA said that articles 1 and 3 dealt with the fundamental problem of the continuity of nationality. It was therefore important to set forth a general rule, along with the right to nationality, laying down the principle of the continuity of nationality, which would complete the right of option and help solve the problem.

16. Moreover, the general rule of the continuity of obligations in respect of treaties in the case of State succession constituted a precedent in that it seemed to present a few analogies, *mutatis mutandis*, with the obligation of the successor State to ensure the continuity of nationality.

It was a question of avoiding any break in time in the nationality link, in other words, statelessness. He was therefore inclined to support draft article 2 *bis* proposed by Mr. Brownlie, which was based on two important assumptions: first, that there was an obligation to acquire the nationality of the successor State or at least a presumption to that effect; and, secondly, that continuity of nationality came into play from the actual date of the State succession, without prejudice to the right of option.

17. He also endorsed the idea of moving article 1, paragraph 2, which dealt with the specific case of the nationality of children and had no place in a rule of a general character. In that connection, he referred to the comments that, in that particular case, the nationality of the child should not be based on *jus soli* alone if the unity of the family and also the very notion of the acquisition of nationality were not to be jeopardized. The Pact of San José stipulated that "Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality" (art. 20, para. 2), while the European Convention on Nationality provided that each State party should provide in its internal law for its nationality to be acquired by children born on its territory who did not acquire at birth another nationality (art. 6, para. 2).

18. In article 3, the reference to "other connected issues" should, in his view, be retained, since nationality was also linked, in particular, to residence and to the protection of movable and immovable property.

19. It was also important to retain the words "irrespective of the mode of acquisition of that nationality" in article 1, paragraph 1, since all methods of acquiring nationality should be treated on an equal footing.

20. Mr. GALICKI said that, when the Drafting Committee had considered article 1 the previous day, it had discussed the definition of the term "person concerned". That definition was of crucial importance not only as a definition, but also as a matter of the scope *ratione personae* of the draft articles. The point was, would the principles to be adopted cover only "nationals" of the predecessor State or also other persons entitled to its nationality? If the second possibility were adopted, the scope of the draft articles would be substantially enlarged. At all events, like other members of the Commission, he feared that entitlement to the nationality of the predecessor State was very imprecise in the Special Rapporteur's proposed text, particularly as State practice in the matter varied. The Commission should therefore define whether it covered, for instance, a passive right and the conditions to be fulfilled in accordance with the law of the predecessor State.

21. Mr. OPERTTI BADAN said that the draft articles did not mean to treat *jus soli* more favourably than *jus sanguinis*, or conversely, but simply recognized that nationality could be based on either one or the other criterion. The solution proposed in paragraph 2 of the article was therefore a step in the right direction in that it ensured the continuity of nationality and was thus intended to prevent statelessness.

22. Draft article 2 *bis* proposed by Mr. Brownlie, which was along the same lines, was in keeping with articles 1

and 2 and supplemented them by introducing the concept of "presumption" of nationality. That presumption should, however, not be absolute, as a person could have acquired a nationality other than that of the State on whose territory he had his habitual residence from another source, for example, by *jus sanguinis*.

23. Several countries in Latin America allowed dual nationality and even multi-nationality. In his view, the draft articles should therefore be confined to guaranteeing continuity of nationality and should not interfere with the traditional methods of acquiring nationality.

24. Mr. GOCO, referring to the concept of "habitual residence" underlying draft article 2 *bis* proposed by Mr. Brownlie, said that the circumstances pertaining to the acquisition of nationality could vary. There were cases, as Mr. Galicki had pointed out, when a person was entitled to acquire the nationality of the predecessor State in accordance with its internal law; it was also possible for people to have their habitual residence in the predecessor State without being nationals of that State. The Commission should therefore indicate clearly whether the intention was to confine the presumption of nationality only to persons who had their habitual residence on the territory of the predecessor State at the effective date of the State succession or whether the intention was that all the nationals of the predecessor State should benefit from that presumption, even though they did not reside on its territory. It should also determine the situation of persons who might be entitled to acquire the nationality of the predecessor State, but who had not formally done so at the time of the State succession. Lastly, he supported the idea of continuity of nationality in the event of State succession.

25. Mr. BROWNLIE said that the precise object of the exercise was to determine the obligations of the successor State, which assumed in the broad sense responsibility for the territory transferred to it, in the matter of nationality and to help it to manage the problems of nationality without compromising its stability in any way.

26. With regard to Mr. Simma's initial comments on the feudal or humanist approach to be applied to the concept of population, he considered that, in that particular case, the Commission should deal with the problem from the angle of legal security and not just from that of respect for human rights—although the former guaranteed the latter.

27. His proposal retained the general economy and wording of the draft articles. The concept of continuity meant not the continuity of the nationality of the predecessor State, but a presumption as to the duty of the successor State to maintain stability and grant nationality to the population of the predecessor State. The link between territory and population was usefully reflected in the concept of "habitual residence".

28. Mr. Sreenivasa RAO said he supposed that the purpose of draft article 2 *bis* proposed by Mr. Brownlie was to fill a gap, in that the right to a nationality as set forth in article 1 was not automatic and should be formally set forth. But it would be possible, instead of including it in the proposed article 2 *bis*, simply to provide in article 1 that any natural person who on the date of the succession of States had possessed the nationality of the predecessor

State would continue to possess the nationality of at least one of the States concerned.

29. Mr. BROWNLIE repeated that he had proposed article 2 *bis* because the draft articles contained no provision that absolutely guaranteed the achievement of one of the Special Rapporteur's main objectives, namely, to prevent statelessness. It was an additional general principle which, taken in conjunction with the provisions of articles 1 and 2, would enable that objective to be achieved.

30. Mr. PELLET said that he remained opposed, albeit less categorically than before, to the principle embodied in article 2 *bis*. That principle appeared not to be applicable in all situations, and it was, for example, incompatible with article 18 (Granting of the nationality of the successor State) of Part II, whereas the exceptions for which it provided related only to articles 7 and 8. If the Commission retained it, either by combining it with article 1, as suggested by Mr. Sreenivasa Rao, or by making it a separate article, it would have to proceed with caution and provide for the existence of a principle of continuity linked to habitual residence, subject to the other rules that might be set forth in the draft articles. The fact remained that the proposed article complicated matters and he wondered whether it was really necessary to establish a general principle which had immediately to be qualified by providing for exceptions to its application. However, he had no objection to referring article 2 *bis* to the Drafting Committee.

31. Mr. BROWNLIE again stressed that the general principle he was proposing underlay a number, if not all, of the provisions of the draft articles applicable to specific cases and that some of them derogated from the general principle. He would see no disadvantage in specifying that article 2 *bis* was applicable subject to other provisions of the draft articles, including the provision concerning the right of option. It would be for the Drafting Committee to find a suitable formulation to that effect.

32. Mr. ECONOMIDES said he thought that draft article 2 *bis* proposed by Mr. Brownlie was correct with regard to State practice, in that the granting of the nationality of the successor State was generally automatic. However, as problems sometimes arose, it would be better to say that, where no specific solution was provided for, States must apply the rule whereby nationality was granted automatically. However, he did not think that the criterion of habitual residence should be the only one applied, as was the case in paragraph 1 of article 2 *bis*. It was essential that the persons concerned should not only have the nationality of the predecessor State, but should also reside in the territory which is the subject of the succession. Those were the two relevant criteria in that connection. That being said, article 2 *bis* nonetheless brought something new to the draft articles and thus served a very useful purpose.

33. Mr. MIKULKA (Special Rapporteur), speaking as a member of the Commission, said he was less and less convinced of the pertinence of draft article 2 *bis* proposed by Mr. Brownlie. The principle formulated therein was valid only in certain exceptional circumstances, for example, in the case of a unification of States. In other special cases,

such as the transfer of a portion of territory or the dissolution of a State, the rule was that the persons concerned exercised a right of option. It thus seemed that the principle was applicable in only two of the four special cases dealt with in Part II of the draft articles and that, consequently, it had no place in Part I, which established general principles applicable in all situations, including decolonization. It was clear that, in the latter case, which was not dealt with in Part II of the draft, the presumption established in article 2 *bis* would be impossible to defend. It would be unthinkable to automatically grant the nationality of the territory that had become independent to the nationals of the country that had formerly administered the territory in question who had habitual residence on that territory.

34. There was, moreover, no continuity in matters of nationality. Like sovereignty, nationality was always original. Succession in relation to nationality arose only in cases where a person kept the nationality of the predecessor State, if that State still existed. The term "continuity" perhaps covered the idea of prevention of statelessness, even as a temporary phenomenon, but article 2 dealt with precisely that concern.

35. What would become of the presumption of nationality if the persons concerned were able to exercise a right of option within a two-year period? There would inevitably be a conflict between two situations which were both perfectly legitimate. Account must also be taken of the fact that, when States legislated, as they were invited to do in article 3, they did not necessarily do so immediately and that that legislation could establish different rules, which would also bring about a conflict with the presumption referred to in article 2 *bis*. The problem of the validity of the presumption also arose when that legislation, for one of the States concerned at least, was already in force at the moment of independence. That was what had happened in Slovakia, where the law on Slovak nationality had been adopted before the date of the dissolution of the Federation and independence, and had provided that all persons who had formerly held Slovak "secondary" nationality, including the half million Slovaks residing in the territory of the Czech Republic, were Slovaks. If the Czech Republic had not promulgated its own legislation on nationality at the moment of independence, on the basis of the presumption established in article 2 *bis*, those Slovaks could have had Czech nationality conferred on them automatically.

36. He therefore thought that the principle set forth in draft article 2 *bis* proposed by Mr. Brownlie created far more problems than it solved, particularly for persons who would have their habitual residence in a third State, since no presumption would exist in their case, further complicating their situation. In his view, that principle could be adopted as a working hypothesis, but certainly not as a general principle formally set forth in Part I of the draft.

37. Mr. MELESCANU said it was his understanding that the purpose of draft article 2 *bis* proposed by Mr. Brownlie was to establish a principle more general than the one set forth in article 1, paragraph 1, to serve as a sort of safety net to prevent statelessness. If that was the case, the provision should be redrafted so as to specify, for

example, that that presumption would be applicable only if no other solution had been provided for either in the draft articles themselves or in national legislation. It would thus serve as a working hypothesis whose ultimate aim would be to prevent statelessness, with the fundamental principle remaining that every individual had the right to a nationality.

38. Mr. SIMMA said he took it that draft article 2 *bis* proposed by Mr. Brownlie had essentially been intended to reconcile two apparently conflicting ideas set forth in the draft articles, namely, that, on the one hand, individuals had the right to a nationality, but that, on the other, States were free to grant or not to grant their nationality, with the resultant risk of statelessness if they did not grant it. However, the principle formulated in article 2 *bis* was applicable to only two of the four special cases of succession of States dealt with in Part II of the draft. Consequently, perhaps it would be better not to set it forth formally in Part I, but simply to refer to it in Part II, in the specific cases in which it was applicable. He would like to know the Special Rapporteur's opinion on that point.

39. Mr. ROSENSTOCK said that, in view of Mr. Simma's last comment, he wondered whether the question of what happened when a State did not do what it was supposed to do was not in fact dealt with in article 16 (Other States). In his opinion, draft article 2 *bis* proposed by Mr. Brownlie insisted too much on the generally acceptable idea that States must respect certain principles of international law which could not be amended by the legislation they were required to adopt in accordance with article 3. Perhaps some way should be found of expressing that idea in the draft articles without making it a formal principle.

*Mr. Pellet took the Chair.*

40. Mr. SEPÚLVEDA said he thought that a balance should be struck between the right of individuals to a nationality and the obligations of States in respect of nationality. Those obligations were not clearly established in the draft articles and he thus welcomed draft article 2 *bis* proposed by Mr. Brownlie, which established a general principle concerning the matter. In any case, it had to be admitted that the presumption established could not be absolute and must always be relative.

41. Article 2 was too restrictive in that it dealt only with the obligation of the "States concerned"; it should refer to the obligation "of all States and in particular the States concerned" to take all reasonable measures to avoid statelessness. He also noted that the article imposed on States the "negative" obligation to avoid statelessness and that it would be better to impose on them the "positive" obligation of granting a nationality to the persons affected by a succession of States, corresponding to those persons' right to a nationality.

42. The idea set forth in article 3, paragraph 1, that each State concerned should enact laws concerning nationality and other connected issues without undue delay was expressed too vaguely. It should thus be redrafted with more precision so as to impart more legal rigour not only to that provision, but also to the draft articles as a whole.

43. Mr. MIKULKA (Special Rapporteur), focusing on the points raised by Mr. Simma with regard to article 1, said that the provision contained in paragraph 1 of that article could not be applied in isolation. In some cases, the person concerned might have a subjective right to a nationality, whereas, in others, that notion of a right to a nationality could be understood only as the introduction of a process which presupposed the application of other provisions of the draft articles. As to the question whether it was necessary to mention the mode of acquisition of nationality in that article, he noted that the mode of acquisition of nationality might give rise to a problem of treatment for certain persons. The Commission must adopt a position on the question and clearly indicate that the mode of acquisition must not serve as a pretext for treating nationals of the predecessor State differently at the time of the granting of the nationality of the successor State. The example given by Mr. Simma in that regard was quite explicit.

44. Replying to a question by Mr. Galicki, he said that it was advisable to take account of the case not only of persons who had had the nationality of the predecessor State, but also of those who might be entitled to acquire that nationality. It might happen that persons were entitled to do so in accordance with an option. In that connection, he cited the Treaty of Versailles, which provided, in the context of the restoration of certain persons' French nationality, that

The legal representative of a minor may exercise, on behalf of that minor, the right to claim French nationality; and if that right has not been exercised, the minor may claim French nationality within the year following his majority,<sup>4</sup>

in other words, as many as 20 years after the conclusion of the Treaty. In the context of a State succession, it was conceivable that persons might thus find themselves in the same situation as those who had actually had the nationality of the predecessor State. He would have no objection if the paragraph was reworded to make it clear what was meant by persons entitled to the nationality of the predecessor State and thus to make it easier to understand.

45. With regard to article 1, paragraph 2, he had had certain doubts about whether it should be included in the draft, but had acted in keeping with the wishes of the previous Commission, which had taken the view that the situation of a child, even born after the date of the State succession, required some attention. The text did not specifically provide for any limitations on the application of that paragraph, but some limitations were, implicitly necessary. He cited the example of the child of a person covered by paragraph 1 who had been born in the territory of the successor State and whose nationality could not be established because the legislation of the successor State, based on the principle of *jus sanguinis*, was not applicable owing to the fact that the parents did not have any nationality as a result of the State succession. In addition to that limitation relating to the category of children who might be concerned, there was a limitation in time because the problem existed only as long as the nationality of the parents had not been established. Once the nationality of the parents had been determined, with retroactive effect, in conformity with the proposed articles, the nationality of

the child could be established. However, if that was never done, the draft proposed the application of *jus soli*, a solution which States had already retained in the Convention on the Rights of the Child. He also pointed out that, in the French version of the paragraph the word *concerné* had been inadvertently omitted after the word *l'État* in the last part of the paragraph; the draft was obviously not meant to establish obligations for third States, something that would go beyond the Commission's mandate.

46. There appeared to be a virtual consensus on the content of article 2, subject to certain drafting changes.

47. The question of the place of treaties had been asked in connection with article 3. Treaties were in fact implicitly covered by article 15 (Obligation of States concerned to consult and negotiate), the very purpose of the negotiation being to determine whether problems of nationality could be settled by means of the respective internal legislation or whether an agreement had to be concluded. The notion of an agreement was also contained in article 16 and underlay all the draft articles, including those in Part II. Article 3, which dealt with the problem of internal legislation, thus could not be interpreted *a contrario* as ruling out the possibility for the States concerned of also settling the question by means of an agreement.

48. The CHAIRMAN invited the members of the Commission to give their reactions to the Special Rapporteur's summing up so that clear guidelines could be transmitted to the Drafting Committee.

49. Mr. ECONOMIDES said that a source of confusion lay in the fact that the Special Rapporteur had seemed to say that the child referred to in article 1, paragraph 2, was a child whose parents were stateless, whereas the text of the paragraph referred to "a child . . . whose parent is a person mentioned in paragraph 1", that is to say an individual who had the right to at least one nationality and had never been stateless. He also pointed out that some of the questions asked during the debate had not been answered. That was the case of the rather sensitive substantive question raised by the absence of any condition for residence in article 1, paragraph 1, the consequence of which was that, in all cases in which the predecessor State continued to exist, all persons who had had the nationality of that predecessor State and resided on its territory retained that nationality and, consequently, there was no problem of nationality with regard to them. He nevertheless thought that it was up to the Drafting Committee to look into those problems, taking into account all the proposals that had been made. He intended to formulate his own in writing.

50. Mr. MIKULKA (Special Rapporteur), replying to the first comment by Mr. Economides, said that the misunderstanding had come about because the right to the nationality of at least one of the States concerned in some cases constituted the right to retain the nationality of the predecessor State, in others the right to acquire the nationality of the successor State and, in a third category of cases, the right to exercise an option between two or more nationalities which the person concerned might be entitled to acquire—a right which might not be realized, for example, due to the death of the parents prior to the expiration of the time limitation for this option. With regard to the second comment, he did not quite understand how Mr. Economides intended to link the element of habitual residence with the concept of a right to nationality. If the point

<sup>4</sup> Part III, sect. V, annex, para. 2, subpara. (6).

was simply to add a condition of habitual residence to the possession of the nationality of the predecessor State, half the draft articles would no longer serve any purpose. First of all, that would be tantamount to excluding the consideration of persons who had had the nationality of the predecessor State, but who at the moment of dissolution had had their habitual residence in another State and, secondly, if the point was that those persons had a right to the nationality of the State on whose territory they had their habitual residence, the other articles were unnecessary because all the problems were resolved from the outset.

51. Mr. PAMBOU-TCHIVOUNDA said that he was puzzled about the very general nature of the scope of article 1, paragraph 1, because he remained convinced that a distinction should be drawn, which would not encumber the provisions of Part II, depending on whether the predecessor State had or had not ceased to exist. In his view, the Special Rapporteur seemed to be limiting himself to the hypothesis that, as the predecessor State continued to exist, the categories of natural persons claiming its nationality retained it, although the opposite hypothesis should also be borne in mind, namely, that of persons who lost the nationality of the predecessor State precisely because it had ceased to exist. As to procedure, he requested the Chairman to confirm that members of the Commission who were not members of the Drafting Committee could submit draft articles or amendments in writing to the Committee.

52. The CHAIRMAN confirmed that that was possible. He also requested the members of the Commission to take as clear a decision as possible both on the principle of referring articles 1, 2 and 3 to the Drafting Committee and on the Drafting Committee's specific mandate. Apart from putting the finishing touches on the draft, the Drafting Committee should consider draft article 2 *bis* proposed by Mr. Brownlie, the proposals made by Mr. Economides and the desirability of inserting in the text a number of general principles which had been the subject of lengthy discussion, such as the principle that State succession could not have any effect on the prior nationality of a third State or the idea that the rules set forth were of a residual nature.

53. Mr. MIKULKA (Special Rapporteur) said that it would be better for the Drafting Committee to consider certain specific proposals and not vague ideas put forward anonymously. As to the residual nature of the instrument being drafted, that idea had its place in a paragraph of the preamble and not in the body of the text itself. Likewise, he did not regard it as essential to state the principle that the succession of States had no impact on the nationality of a third State which a person concerned possessed, since it was obvious and rather banal. The Vienna Convention on the Law of Treaties contained no analogous provision preserving the integrity of the treaties between third States.

54. In conclusion, he said that the draft articles already contained the main points; any member who thought that a particular provision should be added should submit a proposal in writing.

55. The CHAIRMAN proposed that the members of the Commission should refer draft articles 1, 2 and 3 to the

Drafting Committee, requesting it to give particular consideration to the formal proposal for a new draft article 2 *bis* submitted by Mr. Brownlie and to the proposals made in the Commission in the framework of both the general discussion and the debate on articles 1, 2 and 3. He joined the Special Rapporteur in urging the members of the Commission to formulate their proposals in writing and give them to the Special Rapporteur or the Drafting Committee. For the further consideration of the draft, he invited the members to submit their proposed articles or additional paragraphs if possible in the course of the debate.

56. He said that, if he heard no objections, he would take it that the Commission decided to refer articles 1, 2 and 3 to the Drafting Committee and that it approved the proposed procedure.

*It was so decided.*

*The meeting rose at 1 p.m.*

---

## 2482nd MEETING

*Friday, 23 May 1997, at 10.35 a.m.*

*Chairman:* Mr. Alain PELLET

*later:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

---

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

---

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

## ARTICLES 4 TO 6

1. Mr. MIKULKA (Special Rapporteur) informed members that a number of corrections had been made to articles 4 and 5.

2. In the French version of article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1, the words *personnes intéressées* should be changed to read *personnes concernées*. In article 4, paragraph 2, at the beginning of the paragraph, the word "concerned" should be inserted after "persons" of the English version, and *concernées* after *personnes* of the French version.

3. The French text of article 5 (Renunciation of the nationality of another State as a condition for granting nationality) had been brought closer into line with the English, which was the original version, and should read:

*"Lorsqu'une personne concernée ayant le droit d'acquérir la nationalité d'un État successeur a la nationalité d'un autre État concerné, le premier État peut subordonner l'acquisition de sa nationalité à la renonciation par cette personne de la nationalité du second. Cette condition ne peut toutefois être appliquée d'une manière qui aurait pour conséquence de faire de la personne concernée un apatride, même temporairement."*

4. Mr. GOCO, referring to article 4, said he wondered whether it was really necessary to retain paragraph 1, considering that, as defined, the person concerned meant someone who was a national of the predecessor State or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State. If a person had habitual residence in another State and also had the nationality of that State, it did not seem to him that the provision was needed. Bearing in mind the definition of "person concerned", there was certainly no obligation on the part of the successor State to grant the person concerned its nationality. As to article 4, paragraph 2, he took it that the word "who" related to nationals of the predecessor State; that called for some clarification.

5. The phrase "and also of the predecessor State" should be inserted at the end of the first sentence of article 5 because the situation was one that involved dual citizenship. The "person concerned" referred to the national of the predecessor State, and that same national had the nationality of another State concerned. Hence, renunciation should cover the nationality not only of the predecessor State but also that of another State.

6. Article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), paragraph 1, presumably implied that the predecessor State still existed and therefore might also make provision in its legislation for the voluntary acquisition of the nationality of the State. In respect of paragraph 2, there seemed to be a difference, as far as the result was concerned, between the voluntary acquisition of the nationality of a State and the exercise of the right of option

7. Mr. ELARABY said that Mr. Goco's point on article 4, paragraph 1, was well taken, because the text

implied that such a person was a national of the State and had his habitual residence in another State, and might also have the latter's nationality. As such, the successor State, by not granting him nationality, would be denying him a right which he already had. It might be necessary to make the words "does not have the obligation" less precise. Perhaps the formulation should be redrafted so that the person concerned would have the choice of taking the nationality of the two States, assuming the laws so permitted. If necessary, he would support Mr. Goco's proposal to delete the paragraph.

8. Mr. GALICKI said that the phrase in article 4, paragraph 1, to the effect that "A successor State does not have the obligation to grant its nationality to persons concerned" might create difficulties. Taking an *a contrario* approach, it would mean that the successor State had the obligation to grant its nationality to persons concerned if they did not have habitual residence in another State and if they did not have the nationality of that State. In his view, the idea of creating a positive obligation on States in that fashion did not command any support.

9. Mr. ECONOMIDES said that, if it was the intention of article 4, paragraph 1, to introduce a rule, it was a poor way of doing so. Any rules belonged in Part II of the draft (Principles applicable in specific situations of succession of States).

10. Article 4, paragraph 1, was worded very flexibly. The successor State did not have an obligation to grant its nationality to such persons, but could do so if it wished. That being the case, there seemed to be an inconsistency between paragraph 1 and paragraph 2, according to which nationality could not be imposed unless the person concerned would otherwise become stateless. Pursuant to paragraph 1, the successor State did not have an obligation to do so, but if it did grant nationality, it then violated paragraph 2. He did not see any great need for paragraph 1, but if it was retained, it would have to be brought into line with paragraph 2 by saying that, if the successor State granted its nationality, it must do so solely on a voluntary basis. In other words, the person concerned could choose to acquire the nationality of the successor State. He pointed out that the Venice Declaration<sup>2</sup> already made provision for such cases. For example, provision 9 of the Venice Declaration said it was desirable that successor States grant their nationality, on an individual basis, to applicants belonging to certain specified categories. The Venice Declaration might perhaps be drawn upon to improve paragraph 1 so as to preclude the possibility of an arbitrary attribution of nationality.

11. The CHAIRMAN said that, if the proposal by Mr. Economides was adopted, it would mean eliminating the possibility for the successor State of imposing its nationality, yet that was the very purpose of paragraph 2.

12. Mr. ECONOMIDES said that, according to paragraph 2, the successor State could impose its nationality if the person concerned was in danger of becoming stateless. Paragraph 1 dealt with persons who had a nationality other than that of the predecessor State, and hence there was no risk of statelessness. Nevertheless, it flowed from

<sup>2</sup> See 2475th meeting, footnote 22.

paragraph 1 that the successor State could attribute its nationality to persons who had their habitual residence in another State and also had the nationality of that State. Perhaps the inconsistency between the two paragraphs could be overcome by further drafting.

13. Mr. FERRARI BRAVO said that it complicated matters to have to work with the English text. Unfortunately, the Secretariat had not distributed the French version, which had been the subject of quite a few changes.

14. There seemed to be an inconsistency in article 4. The key in paragraph 1 was “person concerned”, and it was useful in that context to refer to the definition of that term, namely “every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality”. The persons concerned were nationals of part of a given State which subsequently became independent from the other part. Paragraph 1 could be taken to mean that a successor State did not have the obligation to grant its nationality to persons concerned because they had the nationality of another State. Then, in paragraph 2, reference was made to persons concerned who had their habitual residence “in another State”, but that might mean a third State. That seemed to be a contradiction. It could lead to a situation in which, if a person became stateless, the State might impose its nationality. Recent history suggested the opposite. He was thinking of the case of a successor State which did not grant its nationality to persons, allowing them to become stateless, because it did not want certain minorities. That was not clear in article 4, and he sought clarification from the Special Rapporteur. As he saw it, paragraph 1 was confined to the successor State, whereas paragraph 2 opened the door to third States. That might be the case where the persons concerned had their residence in a third State but still had the nationality of one of the successor States. Hence, there was some confusion between “persons concerned”, which meant persons relating to the States created by the succession, and the reference to another State, that is to say, any third State.

15. Mr. LUKASHUK said that article 4, paragraph 2, was a violation of human and civil rights. There could be no question of a State imposing its nationality on persons against their will, because persons had the right at any time to renounce their nationality. He was in favour of deleting paragraph 2.

16. The CHAIRMAN observed that Mr. Lukashuk was in favour of a right to statelessness.

17. Mr. SIMMA said that the commentary to article 4, contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1), made it perfectly clear why the Special Rapporteur had used “another State” instead of “third State”. In the context of article 4 there was no reason why “another State” should not embrace the successor States. Perhaps the problems were due to the abstract form of language used.

18. Mr. HAFNER said that he too had problems with article 4 but felt that an article of that kind must nevertheless be retained. It should certainly be read in conjunction with Part II and he was inclined to agree with Mr. Economides that it should be placed in Part II.

19. He wondered whether it was really necessary for both the requirements of paragraph 1—the habitual residence in and the nationality of that State—to be met. He also wondered whether it would not also be possible to allow an exception to the successor State’s duty to impose its nationality when the person concerned had his habitual residence in another State and the nationality of any other State. Such a provision would still avoid the problem of statelessness.

20. Paragraph (1) of the commentary to article 5 indicated that the scope of article 4 went beyond State succession. That was particularly true of paragraph 2: since no time limit was specified, the provision meant that Austria, for example, which had become a successor State in 1918, was still subject to the obligation not to impose its nationality. He asked if that was truly the aim of paragraph 2 or whether the provision should be limited to specific cases of State succession. The problem could be overcome by referring to “persons concerned” instead of simply “persons” in the first line of paragraph 2, for then a time limit would be implied.

21. He noted the discussion in the commentary of the merits of the phrase “against their will” and the alternative “with their consent”. The latter was preferable for two reasons. It would be difficult for a person residing outside the territory of the successor State to familiarize himself with the latter’s legislation; and “against their will” certainly entailed the need for an opting-out provision, and he could find no such provision in the text. There was also the question of whether the possibility of acquiring a nationality against one’s will was consistent with the requirement of voluntary acquisition contained in articles 5 and 6.

22. Mr. MIKULKA (Special Rapporteur) said that he would have preferred to have had an opportunity to respond earlier to the flood of questions raised, many of which had in fact already been answered in the commentary and in his earlier statements. Moreover, his third report reflected the conclusions reached by the Working Group on State succession and its impact on the nationality of natural and legal persons after two years of deliberations.<sup>3</sup> With regard to one of the points raised by Mr. Hafner, for example, he had already made it clear that, at the beginning of paragraph 2, “persons” should read “persons concerned”. And he could again confirm for Mr. Ferrari Bravo that “another State” meant the same thing in both paragraphs.

23. Article 4 was concerned with the obligations of the successor State and the limits thereon. In paragraph 1 “persons concerned” meant, of course, persons who might have a claim to the nationality of the successor State, in other words, persons who might have dual nationality. The limiting provision was supported by most of the writers on the topic. However, if the Commission concluded that the obligation to grant nationality should exist even in the case covered by paragraph 1, it might find a compromise solution by adding the proviso “without prejudice to the provisions of articles 7 and 8”.

<sup>3</sup> See 2475th meeting, footnote 5.

24. The basic approach in paragraph 2 was slightly different in that it dealt with the extent to which a successor State could impose its nationality rather than with the limitation of its obligation to grant nationality. As Mr. Simma had pointed out, the commentary explained the reasons for using the term "another State", which covered other successor States and third States. Some members had asked whether the Commission should provide that a successor State could impose its nationality on persons concerned if they would otherwise become stateless. The Working Group had answered the question in the affirmative, since the aim was to eliminate statelessness. He must say to Mr. Lukashuk, who had disagreed on that point, that nowhere in the literature on the topic had he found any support for a right to statelessness. If the Commission agreed with Mr. Lukashuk, it could delete "unless they would otherwise become stateless", although that would create a gap in the scheme of the draft articles.

25. Mr. KABATSI said that he could generally accept the spirit of article 4 but was concerned about the human rights implications, for there might be instances in which the obligation limited by paragraph 1 should still obtain. A person having links to a predecessor State but the nationality of a third State might wish to maintain those links by acquiring the nationality of the successor State if its legislation allowed dual nationality. That was especially true when the predecessor State was entirely absorbed into the successor State. To take a concrete example, if a national of Lesotho was also a national of a third State and if Lesotho were to be absorbed into the Republic of South Africa, he might want to maintain his links to Lesotho, and the Republic of South Africa should be under an obligation to grant him its nationality.

26. As far as paragraph 2 was concerned, there should of course not be an unlimited right to statelessness. However, if a person did not wish to be a national of the successor State and had applied for the nationality of some other State but the imposition of nationality by the successor State prejudiced his application, he might welcome the right to be stateless during an interim period.

27. Mr. BROWNLIE, speaking on a point of order, said that it would be better not to use concrete examples naming countries, as Mr. Kabatsi had just done.

28. The CHAIRMAN said that he disagreed: it was perfectly legitimate to give such examples.

29. Mr. ECONOMIDES said that the misunderstandings about paragraph 1 stemmed from the words "does not have the obligation to grant". They meant that, although the State did not have an obligation to grant its nationality, it could do so under its internal law. He could not accept that possibility because, from the standpoint of international law, a State should not have the right to grant its nationality to persons not residing in its territory and having the nationality of the State in which they resided unless such persons so requested or consented. The beginning of the paragraph should therefore read "A successor State has the obligation not to grant . . .". A provision would then have to be added to the effect that it might grant nationality if the person concerned agreed.

30. The provision contained in paragraph 2 had no place in article 4. While it was true that in the event of stateless-

ness a successor State had the obligation to grant its nationality to persons residing outside its territory, the problem should be dealt with not in the terms used in paragraph 2 but rather those of article 7 (The right of option).

*Mr. Kabatsi took the Chair.*

31. Mr. ELARABY said that there was some inconsistency between paragraphs 1 and 2 of article 4. Whereas paragraph 2 made it clear that a successor State could not impose its nationality on certain persons against their will, there was no similar reference to the will of those concerned in paragraph 1. When it came to whether a successor State had an obligation to grant its nationality in the circumstances covered by paragraph 1, the will of the persons concerned should, as a matter of human rights, be taken into consideration.

32. Mr. MIKULKA (Special Rapporteur) said that that point was a purely drafting matter. He could only reiterate his proposal that it should be handled by adding to paragraph 1 of article 4 the words "without prejudice to the provisions of articles 7 and 8".

33. Mr. GALICKI said that, to avoid misunderstanding, it might be better to replace the words "does not have the obligation", in paragraph 1, by "may refuse". He also wondered whether the words "of that State", in the same paragraph, were not somewhat restrictive and should not therefore be replaced by "of any State".

34. Mr. ROSENSTOCK, stressing the importance of articles 4, 7 and 8 (Granting and withdrawal of nationality upon option), said that the obligations placed on States in the matter of nationality should, in his view, be limited to special situations such as statelessness. The softer word "should", used in articles 7 and 8, rightly served to mark the distinction between those two provisions and article 4 and also to indicate why article 4, though not absolutely essential, was useful in the context of the draft as a whole. The point made about the words "of that State", though purely a drafting matter, merited further reflection in the Drafting Committee.

35. Mr. BROWNLIE, said that, while some of the points raised might be drafting matters, they derived to some extent from certain underlying issues and as such would, he trusted, receive due consideration. The difficulty was that the Commission was not dealing globally with the limitations on the grant or withdrawal of nationality by States to or from individuals but with State succession. It was precisely because the successor State became the lawful sovereign—assuming a lawful transfer of territory—that the question of nationality must be subject to objective standards. Otherwise, if power and legitimacy were given to the reach, through nationality or otherwise, of the predecessor State there would be a derogation from the lawful transfer of the territory, and of the sovereignty and the powers that went with it. If his proposed article 2 *bis*, or some similar provision, were placed earlier in the draft, it might help to clarify some of the issues raised. But the problems which peeped out of the drafting and surfaced in paragraph 1 of article 6 involved an assumption that, unless further dispositions were made, the nationality of the predecessor State continued to apply in various ways. With some of the articles, there was an unfortunate

attempt to deal also with the specialized problem of the situation vis-à-vis third States other than the predecessor State. The situation vis-à-vis the predecessor State was of a specific nature precisely because, if it were not handled carefully, it could lead to a situation in which the lawful transfer of sovereignty was treated in such a way that the new legitimacy of control of the successor State was derogated from in the sphere of nationality because too much continuing power might be allowed to the predecessor State.

36. Mr. CRAWFORD said that a disturbing disparity in the treatment of the predecessor State and the successor State emerged from article 6. As he read it, the successor State might *ex lege* recognize the nationality of the persons habitually resident on its territory. The predecessor State might not, however, *ex lege* withdraw its nationality unless it was satisfied that such persons had assumed the new nationality voluntarily. In the context of *ex lege* naturalization, the predecessor State could know that only by adopting some form of statutory presumption.

37. Mr. MIKULKA (Special Rapporteur) said the problem was that the situation of the predecessor State differed from that of the successor State in that the legislation of the former did not necessarily provide only for the situation of the successor State. It also provided for the voluntary acquisition of the nationality of, say, a third State. There was a valid reason for separating the paragraph on the predecessor State from that on the successor State since, if the predecessor State survived the State succession, it had to be presumed that, apart from certain special cases, the nationality of the predecessor State could not disappear. In other words, in the event of State succession, the nationality of the predecessor State could be questioned only in cases where the nationality of the successor State was acquired. There was always a hard core of persons who necessarily acquired the nationality of the successor State and, in their case, the predecessor State had to respect the fact that they had become nationals of the successor State and it had to give effect to that state of affairs by withdrawing from them its own nationality.

38. The point at issue was concerned with an exception which related to all categories of the succession of States. Possibly, when it came to the final revision of the draft as a whole, the question should be asked whether some of the provisions in Part I could not better fulfil their purpose if they were placed after the provisions in Part II. Indeed, that alternative had been considered by the Working Group, which, after deciding against a Part III of the draft, had opted for just two parts, one incorporating the principles relating to all categories of State succession and the other laying down more specific rules. He recognized, however, that Mr. Crawford's problem deserved attention in order to preclude the need to revert to the question of the structure of the draft at a later stage.

39. Mr. CRAWFORD, thanking the Special Rapporteur for his helpful explanation, said that, if the place in the draft of the rule in question were retained, a "without prejudice" clause would certainly have to be added. The solution proposed by the Special Rapporteur was probably even better, however.

40. Mr. Sreenivasa RAO said that, as he understood it, article 4 provided an exception to article 1 and the expression "another State" meant a third State that was neither a predecessor State nor a successor State. Also, he noted that paragraphs (3) and (4), respectively, of the commentary to article 5 contained the following unequivocal statements: it may happen that such renunciation is required only with respect to the nationality of another State concerned (or rather another successor State), but not the nationality of a third State and it is not for the Commission to suggest which policy States should pursue on the matter of dual/multiple nationality. Bearing those statements in mind and having regard to the need to avoid, in so far as possible, situations of dual/multiple nationality in cases of State succession, the question was whether the use of the expression "another State" would confine the effect of the provision to the successor State alone. With greater clarity in the drafting, some of the problems raised including those relating to paragraph 2 of article 4, could be eliminated.

41. Mr. ADDO said he would prefer the word "may", rather than "shall", in article 4, paragraph 1, since such a formulation would avoid giving the impression that the successor State was required by a peremptory norm to confer its nationality on seemingly stateless persons who might not wish to become nationals of that State.

42. Mr. Sreenivasa RAO said that, like the word "obligation" in paragraph 1, the word "impose" in paragraph 2 seemed rather too emphatic. While he understood that the basic intention was to avoid statelessness, there were situations in which statelessness might be to a person's advantage, or in which to be a national of certain countries might be a disadvantage. In such circumstances there was no need to go the extra mile by imposing a nationality upon persons against their will.

43. Mr. HERDOCIA SACASA said many of the problems raised stemmed from the fact that articles 4, 5 and 6, placed in a Part I of the draft which was devoted to general principles that must be fully respected, were negative provisions constituting exceptions to provisions set forth in a Part II of the draft which merely set out to offer technical guidelines for States. The Commission should try to ensure that all the general principles in Part I were set out in the form of obligations of a positive rather than a negative character, and those principles should not deal with issues such as dual nationality that were clearly matters for national legislation. It must also be borne in mind that the idea of a presumption of nationality conflicted with the provisions of a number of articles, among them article 6. He thus welcomed the possibility, left open by the Special Rapporteur, of placing those exceptions in Part II or elsewhere.

44. On a purely technical matter, he noted that article 4 used the expression "another State", one which, unlike the terms "successor State", "predecessor State", "State concerned" and "third State", was nowhere defined. Either that term should also be defined, or else its meaning in the context should be made explicit.

45. Mr. Sreenivasa RAO said the Special Rapporteur had made it abundantly clear in the commentary that the term "another State" referred to the successor State, the

predecessor State and also the third State. Whether the term should also be defined in the list of definitions was another matter, and one that the Drafting Committee could consider if need be.

46. Mr. ECONOMIDES said that articles 5 and 6 dealt with traditional questions of nationality that were regulated by national legislation, rather than with questions of nationality in relation to State succession. The only provision therein that fell within the Commission's mandate was the last sentence of article 5; even that provision, however, did not regulate an issue of major importance. Otherwise, the provisions merely provided what amounted to gratuitous advice to States on what were essentially sovereign matters. His inclination was therefore to delete articles 5 and 6 *in toto*.

47. As to article 4, he would reiterate his view that, if paragraph 1 was to be retained, it should contain the idea that the successor State did not have the right to confer its nationality automatically in the circumstances envisaged, but that the option of naturalization was not ruled out, to allow such persons to acquire voluntarily the nationality of the successor State. In the last analysis, however, he could accept Mr. Rosenstock's opinion that, even if paragraph 1 was deleted, the substance of the article would not be affected. Paragraph 2, on the other hand, was indispensable, but must be redrafted.

48. Mr. LUKASHUK said that he appreciated Mr. Economides' position, but the Commission was preparing a document that was intended to provide guidance to States. A different approach was thus needed from what would be appropriate in the case of a legally binding instrument, and articles 5 and 6 could be extremely useful to States in that regard.

49. Mr. MIKULKA (Special Rapporteur), responding to Mr. Economides' comment regarding the value of the first sentence of article 5, said that a wealth of documentation had been produced by the Council of Europe and UNHCR on the question of temporary statelessness, and that there were also constant discussions between international bodies and successor States on the problem. Several successor States' legislation had even been amended because those States acknowledged the UNHCR argument that statelessness, even temporary statelessness, was unacceptable. The problem was thus one of the utmost topicality and urgency. Nor had he had the slightest intention of "advising" States in articles 5 and 6. Whenever his intention was to advise or invite States to take a certain course of action, he used the expression "should". In articles 5 and 6 he had noted what they "could" do—in other words, that they retained some freedom of action in those areas. If the Commission wished to establish strict rules, and even an obligation for States to grant their nationality to certain individuals, it could not simply ignore their freedom of action in certain areas. To do so would be to risk producing a draft text lacking in balance and thus unacceptable to States.

50. Mr. RODRÍGUEZ CEDEÑO said that article 4 consisted of two important paragraphs containing two necessary negative obligations. Regarding paragraph 1, the argument in favour of imposing a positive obligation on the successor State was misguided. The current wording

gave the successor State the power to decide whether or not to grant its nationality despite the fact that the persons concerned had their habitual residence in another State and also had the nationality of that State. It was important that the State should enjoy such discretion in a matter regulated by national legislation. In order to avoid misinterpretations, both paragraphs should be worded so as to refer in Spanish to "persons concerned".

51. An obligation of the type set forth in article 4, paragraph 2, should indeed be included in the draft, but he had some doubts about the last phrase of the paragraph. In his view, the Commission should try to draft an absolute obligation to the effect that the State could not impose its nationality on the persons concerned. The current wording conferred undue power on the successor State in that regard. It might also conflict with the provisions of article 7. In any case, it had rightly been pointed out that articles 4, 5 and 6 constituted exceptions to Part II. They should thus be considered at a later stage, in conjunction with articles 17, 18, 19 and 22, at which point a decision might also be taken on the most appropriate place for them in the draft.

52. Mr. GOCO, referring to article 4, paragraph 1, said he could see the rationale whereby the successor State might grant its nationality to persons concerned who had their habitual residence in another State but were not nationals of that other State. However, he failed to see why the successor State should reach out to persons who were not resident in the territory of the successor State and were indeed nationals of another State. He thus questioned the need for paragraph 1.

53. Mr. MELESCANU said it seemed that most of the problems aired could be reduced to matters of drafting. He therefore proposed that the Commission should agree to refer articles 4, 5 and 6 to the Drafting Committee.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer articles 4, 5 and 6 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

---

## 2483rd MEETING

*Tuesday, 27 May 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda,*

Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPporteur  
(*continued*)

PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

ARTICLES 7 AND 8

1. Mr. MELESCANU, noting that article 7 (The right of option) dealt with perhaps one of the most important questions in the draft, said that paragraph 2 referred to a genuine link with the States concerned, which was essential for the practical application of the right of option, but had not been defined in the text. He therefore proposed that the Commission should either prepare a definition and include it in the relevant part at the beginning of the draft articles or that it should request the Special Rapporteur to try to make the concept somewhat clearer in the commentary. The definition, in one form or another, might usefully be based on already existing documents. For example, chapter VI, article 18, of the European Convention on Nationality<sup>2</sup> referred to the existence of a “genuine and effective link of the person concerned with the State”, and that appeared to include habitual residence, the will of the person concerned and the territorial origin of the person concerned. The Venice Declaration<sup>3</sup> also contained a number of useful elements with regard to a definition.

2. Mr. GALICKI said that he endorsed Mr. Melescanu’s proposal. During the drafting of the European Convention on Nationality, it had at first been suggested that the concept of a genuine and effective link should be defined in article 2 on definitions, but it had finally been decided that the concept should be explained in the commentary, drawing on the wording of the *Nottebohm* case.<sup>4</sup>

3. It was probably also inadvisable for the draft declaration being prepared by the Commission to include many definitions and an explanation by the Special Rapporteur in the commentary would probably be enough.

4. Mr. GOCO said that there was a close link between the first two paragraphs of article 7. On reading paragraph 1, it might be asked why the right of option for the nationality of two or several States concerned was applicable; the reason for that was given in paragraph 2,

which referred to the genuine link with States. Hence the need to provide a definition of the concept of “genuine link”, which should be added to the others at the beginning of the text.

5. Mr. CANDIOTI said he agreed that an attempt should be made to produce a definition of “genuine link”.

6. Mr. ECONOMIDES said he also thought that article 7 was perhaps the most important provision in the draft. Paragraph 1 called for three comments, the first was a question to the Special Rapporteur: he wished to know what the conditions were which must be met, either in whole or in part, by a person concerned and where those conditions were set forth in the draft. Secondly, the text should be worded positively, by replacing the word “should” by the word “shall”. Lastly, since the question of multiple nationality must remain outside the framework of the draft articles and the Commission must not give the impression that it intended to favour multiple nationality, he thought that there was no point in retaining the words “Without prejudice to . . . multiple nationality” at the beginning of the paragraph.

7. As to paragraph 2, he supported the proposal that a definition of “genuine link”, should be drafted or at least that its meaning should be explained.

8. Mr. MIKULKA (Special Rapporteur), replying to the question asked by Mr. Economides, said that the criteria allowing a person to acquire the nationality of a State were set forth in Part II (Principles applicable in specific situations of succession of States). They included habitual residence, secondary nationality and place of birth.

9. The CHAIRMAN said that it might therefore be advisable to add the words “set forth in Part II” at the end of paragraph 1.

10. Mr. SIMMA said that he still did not quite understand what was meant by the words “is equally qualified, either in whole or in part”. Those words called for further explanation, perhaps on the basis of what the Chairman suggested.

11. Mr. MIKULKA (Special Rapporteur) said that those words, which had been discussed and recommended by the Working Group on State succession and its impact on the nationality of natural and legal persons, referred by and large to two categories of situations. The first would correspond, for example, to the hypothetical case in which Czech legislation was based exclusively on the criterion of secondary nationality, which would suffice for a person concerned to qualify in full to obtain the nationality of the independent Czech State. Assuming, which was not the case, that Slovakia’s legislation provided only for the criterion of permanent residence, the same Czech might also qualify in full to acquire the nationality of the independent Slovak State. The second category of situation was one in which the internal legislation made the acquisition of nationality conditional on the fulfilment of two or more elements, the person concerned meeting only one.

12. The CHAIRMAN said that he, too, was concerned about the words “in part”.

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See 2477th meeting, footnote 7.

<sup>3</sup> See 2475th meeting, footnote 22.

<sup>4</sup> *Ibid.*, footnote 6.

13. Mr. FERRARI BRAVO stressed that the entire article 7 was conceived in a soft and hypothetical manner, illustrated by the use of the word "should", because the right of option was a very delicate matter. Although there were many treaties, they did not all say the same thing. He was therefore opposed to the deletion of the word "should", but also considered the words at the beginning of paragraph 1 to be all the more superfluous in that they introduced an element which had nothing to do with the codification of international law.

14. Mr. HE said he agreed that, although the will of the person concerned had to be taken into account and expressed through the right of option so as to avoid the imposition of nationality against that person's wishes, care should be taken not to create or increase the number of cases of dual or multiple nationality in the event of State succession. The recognition of the right of option and the exercise of that right should be aimed at reducing statelessness and discouraging dual or multiple nationality. He therefore suggested that the wording of article 7, paragraph 1, should be strengthened by the addition, at the end of the paragraph, of the following phrase: "with the aim of acquisition of the nationality of his own choice". The first phrase of that paragraph should also be deleted so as not to give the impression that the Commission was in favour of multiple nationality.

15. For the same reasons and in view of the close relationship between articles 5 (Renunciation of the nationality of another State as a condition for granting nationality), 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), 7 and 8 (Granting and withdrawal of nationality upon option), he proposed a number of drafting changes to articles 5, 6 and 8, which he would submit in writing to the secretariat.

16. He was of the opinion that article 7 should contain a provision similar to the one in provision 16 of the Venice Declaration stating that the exercise of the right to choose the nationality of one of the States concerned must have no prejudicial consequences for those making the choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein.

17. The CHAIRMAN pointed out that, since articles 5 and 6 had been referred to the Drafting Committee, any drafting changes proposed for those articles should be submitted to the Drafting Committee.

18. Mr. LUKASHUK said that, in view of the reactions within the Commission to the words "either in whole or in part" in article 7, paragraph 1, and the likelihood of even stronger reactions in the Sixth Committee, he was in favour of the deletion of those words and the inclusion in the commentary of any appropriate explanations of specific cases.

19. Mr. BENNOUNA, referring to provision 16 of the Venice Declaration, said the idea that the right of option must not serve as a pretext for penalties of any kind was an essential human rights concern that must have its place in the draft articles. The right of option must be left entirely open and any idea of "reprisals" against any person who had made the "wrong" choice must be precluded.

20. Mr. ECONOMIDES said that he basically agreed with Mr. He and Mr. Bennouna, but recalled that, until recently, the practice of States had provided for the application of penalties. All of the treaties concluded after the Second World War had provided for the obligation, for persons choosing a nationality other than that of the successor State, to leave the territory and liquidate the entirety of their movable and immovable property within a certain period of time. The Venice Commission had rightly concluded that that solution, which was legal under international law, was no longer in keeping with the minimum standards of international law relating to the protection of human rights. Hence the idea of changing the rule as part of the progressive development of international law.

21. Mr. GOCO said he did not think that the first phrase of article 7, paragraph 1, promoted multiple nationality. That paragraph stated the general rule of the right of option in respect of acquisition of the nationality of the two States concerned or more, but paragraph 2 introduced the criterion of a genuine link, which reduced to only one the number of States concerned in respect of which the right of option could be exercised.

22. The CHAIRMAN said that it might nevertheless be possible for more than two States to be concerned.

23. Mr. ROSENSTOCK said that, in the context of the right of option, he was not sure about the need for the words "if the person would otherwise become stateless as a consequence of the succession of States" at the end of article 7, paragraph 2. A person in a position to exercise the right of option was qualified, either in whole or in part, to acquire more than one nationality.

24. Mr. SIMMA pointed out that paragraph 2 limited the right of option solely to situations where the only other alternative was statelessness, whereas it should likewise cover situations involving the following alternatives: to exercise the right of option or to acquire the nationality of the successor State. The introductory phrase "Without prejudice to their policy in the matter of multiple nationality" at the beginning of article 7, paragraph 1, could be deleted, for there was no need to limit in that way the right of option, which was already formulated fairly weakly. If it was a right, perhaps it should be expressed in more forceful terms. The expression "either in whole or in part" was likewise superfluous and seemed to cause confusion as well.

25. Mr. MIKULKA (Special Rapporteur) pointed out that the commentary to articles 7 and 8, contained in his third report (A/CN.4/480 and Add.1), indicated that the Working Group had used the words "right of option" in a broad sense to cover the choice from among the nationalities offered, the possibility of acquiring a nationality with no repercussions on another nationality and the ability to renounce one nationality in favour of another. The whole purpose of article 7, paragraph 1, was to deal with situations of multiple nationality, which covered all possibilities in which the will of the person could be expressed. Persons qualified to acquire or keep multiple nationality must have the right of option, but some States would consider that an individual who chose nationality B would lose nationality A, whereas other States would not object

to multiple nationality. That was the meaning of the opening phrase of paragraph 1. Paragraph 2, on the other hand, referred to a different situation, namely, that of individuals who had the nationality of the predecessor State, but fulfilled none of the criteria that the successor States had established for the automatic acquisition of their nationality. In such instances, numerous State laws incorporated a savings clause permitting the acquisition of nationality by declaration. That had been the case, for example, of individuals who had been born abroad as a result of emigration and had had Czechoslovak nationality, but neither of the two secondary nationalities (Czech and Slovak) of Czechoslovakia, whereas the basic criterion adopted by the two successor States (the Czech Republic and Slovakia) for the acquisition of their nationality had been precisely secondary nationality.

26. The commentary to article 16 (Other States) and the introduction to Part II of the draft provided sufficient information on the question of the genuine link. Perhaps it might be useful to include a reference to those explanations in the commentary to article 7. Regarding the question of penalties, articles 7 and 8 related to the principle of respect for the will of the person concerned and to the fundamental mechanism of the right of option. To introduce elements relating to discrimination might give the impression that, *a contrario*, discrimination was possible in other cases. The problem of penalties should be dealt with during the discussion of article 11 (Guarantees of the human rights of persons concerned).

27. The CHAIRMAN said he was still not convinced that the beginning of article 7, paragraph 1, was necessary, especially if the words “should give” remained unchanged. If the right provided for in that paragraph was a “soft right”, why should pride of place be given to one of the reasons why States might not grant that right? The question of penalties did not necessarily come within the context of article 11, which was in any event too vague. The right of option was exercised by an individual, who acted on his own responsibility, and that was different from the automatic acquisition of nationality. It was therefore precisely in connection with the right of option that a State might be tempted to impose penalties on those who made what it considered to be the “wrong choice”.

28. Mr. LUKASHUK said that the opening phrase of paragraph 1 was important for the future adoption of the draft articles because it confirmed clearly the right of each State to establish its policy in the matter of multiple nationality. That phrase was therefore of fundamental importance and should be retained.

29. Mr. PAMBOU-TCHIVOUNDA said that the basis of the qualification “. . . to acquire the nationality of two or several States concerned” raised a question in his mind. If it was State legislation, then not all legislation approached multiple nationality in the same way. Should such legislation be harmonized or should provision be made for a generic act, in the form of an agreement, for instance, that transcended it? Moreover, if the aim was to emphasize the interests of persons who were going to exercise the right of option, the beginning of the paragraph was contrary to that aim, since it tended to favour States. In any event, the paragraph as a whole should be made more explicit and more imperative. Lastly, para-

graph 1 spoke of “policy” in the matter of multiple nationality, whereas paragraph 2 spoke of “legislation”, which seemed more felicitous in that context.

30. Mr. ECONOMIDES said he gathered from the Special Rapporteur’s explanations that article 7 did not reflect the classic concept of the right of option in the context of State succession, but something entirely new which was perhaps specific to the situation of the former Czechoslovakia. In its classic concept, the right of option was always granted to persons who, for ethnic, linguistic or religious reasons (which involved the notion of minority), did not wish to acquire the nationality of the successor State, but wanted to retain the nationality of the predecessor State. That right was generally provided for by treaty and accompanied by penalties in the event of an option in favour of the nationality of the predecessor State. The Venice Commission had adopted the classic solution, according to which the objective was just one nationality, not several. Article 7, paragraph 1, on the other hand, set forth, in the form of a recommendation, the right to acquire several nationalities if the requisite conditions for the acquisition of each of them were fulfilled, which meant that States were required to show a measure of tolerance towards multiple nationality.

31. Paragraph 2 also did not derive from the classic concept of the right of option and dealt with a more or less borderline case: that of persons who did not fulfil the criteria for the acquisition *ex lege* of nationality, but who had links with the States concerned. Such persons were accordingly granted the right to apply for the nationality of one or several of those States, but on one condition, namely, that, if they did not benefit from that right of option, they would become stateless. He made no secret of his perplexity and doubts at that new concept of the right of option in the case of State succession which emerged from article 7 as a whole, a right which was determined by national laws instead of being a requirement of international law.

32. The CHAIRMAN said that he saw no basic difference in approach between the article under consideration and the position of the Venice Commission.

33. Mr. SIMMA, agreeing fully with Mr. Economides’ conclusions, said that, in his view, the right of option was expressed very clearly in the Venice Declaration, but not in article 7. In effect, paragraph 1 of that article seemed to give a plus to the classic right of option and paragraph 2, a minus, by providing for a right of option—which was not a real option—between the nationality of the successor State and statelessness.

34. Mr. MIKULKA (Special Rapporteur) said he really did not see how paragraph 1 conflicted with traditional practice in the matter, as Mr. Economides asserted. The cases he had quoted in the commentary to the paragraph, to which he would refer members, and by which he had been guided—the Treaty of Versailles, the Peace Treaty of Saint-Germain-en-Laye, among others—were all classic examples. The basic principle underlying the right of option was that a person having his permanent residence in a State that was not to his liking and having acquired the nationality of that State by virtue of his right of residence enjoyed that right if he was drawn, on account of

his ethnic origin, to another State. But ethnic origin was not the sole consideration to be taken into account. There were many others, such as secondary nationality in the case of federal States. Similarly, paragraph 2 was hardly an innovation, being based on numerous laws, as for example on that of Burma.<sup>5</sup>

35. Furthermore, the legal literature did not provide a standard definition of the notion of "option". For some writers, it meant a choice from among possible nationalities, while for others it meant the possibility of acquiring a nationality by a unilateral act of will on the part of the person concerned, without any consequences for another nationality. Indeed, the notion was supposed to operate in favour of the acquisition of a nationality.

36. Mr. ROSENSTOCK said that he could accept article 7 on condition that the words "the right of option for the nationality" of the States referred to in paragraph 2, should be understood as the right to acquire that nationality.

37. Mr. Sreenivasa RAO, stressing the importance of the right of option in the particular case, said that it should be laid down at the outset and its content and the conditions for its exercise should be carefully defined. It was a right that played a central role in guaranteeing the continuity of nationality, particularly in the cases of separation or transfer of territory, when it was necessary to provide that the persons concerned who settled in the new State which had been created were deemed to possess its nationality, with the option of keeping the nationality of the predecessor State. That, in fact, was the classic definition of the right of option. If the predecessor State ceased to exist, the right of option had to be considered from the standpoint of human rights. In other words, the persons concerned should have the right to choose their nationality according to their convenience and preference.

38. He had no difficulty in accepting the Special Rapporteur's proposed wording. In the light of the discussion just initiated, however, he believed strongly that the right of States to decide their policy in the matter of multiple nationality would benefit from being guaranteed in other articles or in a separate article.

39. He wondered whether the principle of a "genuine link", as referred to in paragraph 2, also applied with regard to paragraph 1. Paragraph 2 seemed to state an exception to paragraph 1, which provided for the exercise of a right of option in general under conditions which it defined, rather than under a complementary condition, as others had argued. As for the "reasonable time limit" for exercising the right of option contemplated in paragraph 3, it would be better to specify that any right of option granted by a third State must be "effective", as in fact was the Working Group's interpretation (see para. (41) of the commentary to articles 7 and 8).

40. Lastly, with regard to paragraphs (34) and (35) of the commentary to articles 7 and 8, he was convinced that, in the matter of the right of option, the will of individuals

must, out of respect for the human rights, prevail over the right of States to grant or not grant it.

41. Mr. KABATSI said that article 7 occupied a key place in the draft, as it set forth an essential right. Consequently, paragraph 1, which was currently worded in rather weak terms, should be redrafted to say explicitly that the States concerned should not only take account of the will of the persons concerned, but should also enable them to exercise a right of option. As to the expression "without prejudice to their policy in the matter of multiple nationality", he thought it should be retained, as it simply recognized the right of States to determine their policy on nationality as well as the possibility open to them of rejecting the option chosen if it was incompatible with their internal law.

42. On paragraph 3, he thought, like Mr. Sreenivasa Rao, that the time limit for the exercise of a right of option should be such as to enable the person concerned to exercise that right "effectively".

43. Mr. LUKASHUK said that he found the drafting of article 7 quite precise. It was essential that States should give consideration to the will of individuals and paragraph 1 seemed to strike a balance between the rights of individuals and those of States. It was that balance which was the basis of the provision and which enabled the right of option to be exercised in practice.

44. Mr. THIAM said that the use of the conditional in the text of the article was quite inappropriate, especially in paragraph 3, for it was unthinkable that a reasonable time limit should not be allowed for the exercise of the right of option.

45. Mr. ELARABY said he also thought that the right of option had a critical importance that should be more clearly highlighted in the text of the article and that paragraph 1 should therefore be redrafted. Moreover, as currently worded, paragraph 2 gave the impression that the right of option would not be granted to those persons concerned who were not at risk of becoming stateless. Consequently, it would be better, as other members had suggested, to delete the words "if the person would otherwise become stateless as a consequence of the succession of States" at the end of the paragraph. Lastly, he said he would welcome an explanation of the meaning of the word "any" in the phrase "any right of option" at the end of paragraph 3.

46. Mr. MIKULKA (Special Rapporteur), responding to Mr. Elaraby's last question, said that the expression referred to a potential right of option, for that right of option was not absolute. If a right of option existed in the situation under consideration, a reasonable time limit must be accorded to the persons concerned, to enable them to exercise that right.

47. Mr. GALICKI said he agreed with Mr. Thiam that the conditional was inappropriate in article 7. In the European Convention on Nationality, the word "shall" was used in the English version and he suggested that the Commission should base itself on that model.

48. Mr. SIMMA said that Mr. Elaraby had highlighted the need to redraft article 7. It was true that in paragraph 2,

<sup>5</sup> Burma Independence Act, 1947 (United Nations, Legislative Series, *Materials on Succession of States in respect of Matters other than Treaties* (Sales No. E/F.77.V.9), p. 145).

the words “if the person would otherwise become stateless as a consequence of the succession of States” were unnecessary and that the preceding phrase was sufficient to codify the right of option. However, it was clear that the Special Rapporteur had also wished to stress that the granting of the right of option was one way of eliminating statelessness and that, in his view, the essentials of that right were set forth in paragraph 1. But paragraph 1 also provided for the possibility of the person concerned acquiring the nationality of two or several States concerned, thus going far beyond the right of option as traditionally understood and interpreted. Hence the need to review the text of article 7.

49. Mr. ELARABY said that it would be more logical to invert the order of paragraphs 1 and 2. The current paragraph 2, which defined the right of option, should appear at the beginning of the article.

50. Mr. MIKULKA (Special Rapporteur) said that one of the fundamental rules of international law was the sovereign right of States to impose their nationality on the persons concerned residing in their territory; they were not obliged to grant a right of option to those persons. That was why he had opted for the conditional, which was entirely appropriate, in order to avoid any conflict with the existing rules, whose validity was indisputable. It was to reconcile that sovereign right of States with the right of option of individuals that States concerned were required, regardless of their policy in the matter of multiple nationality, to give consideration to the will of persons concerned, failing which they would be entitled to acquire two or several nationalities. States should thus allow them to acquire the nationality they wished. That idea could be formulated differently, but the essential point was to avoid giving the impression that all the persons concerned had a right of option. The rule must be limited to certain situations and must not confer the right of option on all and sundry; and he considered that the Commission could not follow the Venice Declaration on that point.

51. Mr. PAMBOU-TCHIVOUNDA said he unreservedly endorsed Mr. Elaraby's suggestion concerning the order of the three paragraphs of article 7. Furthermore, he remained convinced that it would not be superfluous to specify what precisely was meant by the word “qualified” in paragraph 1, even if the Special Rapporteur had said that the qualifications in question were those mentioned in Part II of the draft. Lastly, in view of the fact that treaties were referred to in paragraph 2, paragraph 3 should indicate whether the obligation to grant a reasonable time limit existed by virtue of the draft articles or by virtue of an agreement or treaty.

52. Mr. CRAWFORD said that, like Mr. Lukashuk, he thought that article 7 was intended to reconcile the interests of individuals and those of several of the States concerned. It was true that the Venice Declaration, provision 13 of which provided that, in cases where the predecessor State continued to exist, the successor State must grant the right of option to the persons concerned, on the basis, *inter alia*, of ethnic links, went far beyond what was provided under general international law. The successor State would in a sense have the right to determine not only its own policy on matters of nationality, but also that of the predecessor State. The European Convention on

Nationality was much less categorical in that regard. This and a number of other problems raised with regard to article 7 could be solved by rewording the text; the article should thus be referred back to the Drafting Committee.

53. Mr. ECONOMIDES said that provision 13 of the Venice Declaration did indeed formulate a proposition that went far beyond anything that was provided for elsewhere in the rules of international law, as it appeared to grant a right of option to any person wishing to exercise it. It should be remembered, however, that provision 14 of the Declaration provided for the exercise of the right of option conditional on the existence of effective links, in particular ethnic, linguistic or religious, with the predecessor State or with the successor State. The Special Rapporteur had referred to the right of the successor State to grant its nationality to the persons residing in the territory that was the subject of the succession, but those persons might be ethnic or other groups which would not necessarily want that nationality. In that case, the successor State must grant a right of option to those groups. Furthermore, there was a wealth of State practice on that question. The proposed article 7, however, dealt with the right of option not of groups, but of individuals. The fundamental problem was thus whether that right of option must be seen from a collective perspective—the one in which it had always been exercised in the context of succession of States—or from an individual perspective.

#### **Organization of work of the session (concluded)\***

[Agenda item 1]

54. The CHAIRMAN, referring to paragraph 6 of General Assembly resolution 51/160 and to the possibility envisaged by the Enlarged Bureau (2475th meeting) of setting up a working group on international liability for injurious consequences arising out of activities not prohibited by international law, proposed setting up that working group on the understanding that it would be called upon solely to decide on the advisability of retaining the topic on the Commission's agenda and specifying the guidelines to be given to it, or of abandoning it, and to report to the Commission on its decisions.

55. After a discussion in which Mr. BENNOUNA, Mr. THIAM, Mr. SIMMA, Mr. LUKASHUK, Mr. ELARABY, Mr. Sreenivasa RAO and Mr. KATEKA took part, the CHAIRMAN noted that the majority of the members of the Commission favoured the proposal to set up a working group on international liability for injurious consequences arising out of activities not prohibited by international law.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

---

\* Resumed from the 2479th meeting.

## 2484th MEETING

Wednesday, 28 May 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

#### PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

#### ARTICLES 7 AND 8 (*concluded*)

1. Mr. GOCO noted that paragraph (43) of the commentary to articles 7 (The right of option) and 8 (Granting and withdrawal of nationality upon option), contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1), stated that the Working Group on State succession and its impact on the nationality of natural and legal persons had indicated that it was using the term "option" in a broad sense, covering both the possibility of "opting in", that is to say making a positive choice, and the possibility of "opting out", that is to say renouncing a nationality acquired automatically.<sup>2</sup> He wondered whether the reference in article 8, paragraph 1, was exclusive to the possibility of "opting in", or whether it was also intended to cover "opting out" in situations where individuals did not wish to remain nationals of the successor State. What would be the consequences where such a right was invoked? Why was it that, when an individual voluntarily acquired or retained a nationality in the circumstances detailed in article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), the result was apparently different from the situation covered in article 8, paragraph 3? Did the State also have the obligation to grant the option even if the result of "opting out" would be to withdraw the nationality of the successor State that had been automatically acquired?

2. Mr. LUKASHUK said he had doubts concerning the expression "withdrawal of nationality". Withdrawal of nationality was an act of States; but article 8 referred to the right of option, which presupposed the will of a person. It would thus be more appropriate to use the expression "loss of nationality", as in article 6. Problems also arose with regard to constitutional law: the constitutions of some States, including that of the Russian Federation, forbade the unilateral withdrawal of a nationality by a State.<sup>3</sup> Article 34 of the recently adopted Constitution of Poland,<sup>4</sup> for example, provided that a national of Poland could not lose that nationality unless he or she voluntarily renounced it. The European Convention on Nationality also used the term "loss", rather than "withdrawal".<sup>5</sup> Article 8 should therefore be redrafted. The title should be: "*Acquisition and loss of nationality upon option*" and paragraph 2 should read: "When persons entitled to the right of option in accordance with these draft articles have exercised such right, those persons shall lose the nationality which they renounced."

3. The CHAIRMAN said that that aspect of the option was expressly envisaged in paragraph 3: it was in cases where persons had renounced a nationality that they lost it, not in other cases.

4. Mr. BENNOUNA said that article 8, and in particular paragraph 3, was one of the most convoluted he had ever read. With regard to renunciation, the article tried to establish a general rule that would cover an extremely wide range of cases. It should be noted that under Moroccan law, for instance, in accordance with the principle of "perpetual allegiance", persons could take another nationality but were prohibited from renouncing their Moroccan nationality.

5. The CHAIRMAN said that article 8, paragraph 3, was drafted in such a way as to be without prejudice to the allegiance imposed by Morocco on its nationals in that regard.

6. Mr. MELESCANU, referring to the comments by Mr. Lukashuk and Mr. Bennouna, said that it was not the intention of article 8 to amend countries' statutory provisions, but merely to regulate one specific set of circumstances, namely, the impact of State succession on questions of nationality. Consequently, the Commission should not dwell unduly on the importance of national legislation in that context.

7. Mr. GALICKI said that there was a discernible trend away from recognizing the exclusive right of the State to grant or withdraw nationality, and towards placing the burden—or privilege—of such a decision in the hands of the individual. The trend was reflected in the European Convention on Nationality, which preferred the more neutral term "loss" to the term "withdrawal", and in the new Polish Constitution, already mentioned, which for the first time accorded individuals the right to renounce their nationality. Unfortunately, however, the trend was not

<sup>3</sup> Article 6, paragraph 3, of the Constitution of the Russian Federation, adopted at the 12 December 1993 referendum (Moscow, "Juridical Literature" Publishing House, 1994), p. 86.

<sup>4</sup> Adopted by National Assembly on 2 April 1997.

<sup>5</sup> See 2477th meeting, footnote 7.

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1995*, vol. II (Part Two), annex, para. 23.

reflected in article 8 as currently worded, which instead stressed the role of, and an act of, the State. He therefore supported the amendments proposed by Mr. Lukashuk.

8. The CHAIRMAN said that one way to deal with the concerns voiced by Mr. Lukashuk and Mr. Galicki would be to insert the word "loss" after the word "Granting".

9. Mr. ELARABY said that paragraph 2 of article 8 appeared to curtail the right of option of persons whose renunciation of a nationality would result in their becoming stateless. In his view, the right of option must be exercised fully and should not be limited in any way. Otherwise it would be possible for a State to impose its nationality on an individual who had renounced it in the knowledge that he would acquire another nationality in due course. He asked the Special Rapporteur to clarify the situation in that regard.

10. The CHAIRMAN said that he failed to see how Mr. Elaraby's objection was compatible with article 7, paragraph 2, which postulated that the right of option did not include the right to opt for statelessness.

11. Mr. MELESCANU said that there was an ambiguity in article 8, paragraph 2. If persons entitled to the right of option had chosen a nationality, how could they thereby become stateless? Those persons had already made a choice and the choices available did not include the choice of being stateless. Perhaps the phrase "unless they would thereby become stateless" should be deleted from paragraph 2.

12. The CHAIRMAN, speaking as a member of the Commission, said that he had had the same doubts as Mr. Melescanu concerning article 8, paragraph 2. If persons had exercised a right of option, they must by definition have chosen a nationality and therefore could not become stateless. He had supposed that the solution to that objection was to be found in the fact that article 7 set forth "soft" rules with which States "should" comply. If States failed to comply with those "soft" obligations, then situations of statelessness could theoretically arise.

13. Mr. ADDO said he agreed with members who proposed deleting the phrase "unless they would thereby become stateless", at the end of paragraph 2. He did not think that if a person had renounced a particular nationality and opted for another, the State whose nationality he had renounced should have the obligation to impose its nationality on that person merely because he might become stateless. How would a person who renounced one nationality in order to acquire another become stateless solely because of that renunciation?

14. Mr. THIAM said that he was concerned about the wording of article 8, paragraph 1. The affirmation that the State whose nationality such persons had opted for must grant them its nationality implied that it was not sufficient for persons to exercise their right of option. Yet if it was a right, he did not see why the State must then grant its nationality. When a person exercised a right of option, he had the right to opt: there were no further formalities. As paragraph 1 was currently formulated it could be inferred that the State did not simply recognize the choice made but had the right to refuse to grant its nationality. How

could that be possible? He sought clarification on that point from the Special Rapporteur.

15. Mr. ECONOMIDES noted that a number of members had questioned the logic of article 8, paragraph 2. If a person exercised a right of option, it was assumed that he acquired another nationality, and the problem of statelessness was thus irrelevant. The phrase "unless they would thereby become stateless", could indeed be deleted, or replaced by the words "upon the acquisition of the new nationality", because that was the point at issue.

16. Mr. GOCO said that article 8 covered a number of different situations. Paragraph 2 provided for the right of option but also recognized the right of the State to withdraw nationality subject to the condition that that would not result in statelessness. Thus, the situation contemplated in that provision was the substitution of one nationality for another, a notion which could be found in the nationality legislation of many States. If a person opted for the nationality of one State, he must renounce the nationality he currently held. Of course, the State which withdrew its nationality should ensure that the renunciation did not automatically lead to statelessness.

17. Paragraph 3, on the other hand, dealt with a situation in which there were two States, and renunciation was not required. In accordance with that provision, a person with two nationalities opted for one. The State concerned other than the State whose nationality the persons concerned had opted for did not have the obligation to withdraw its nationality from them. That situation differed from the one described in paragraph 2.

18. Mr. BENNOUNA said that the discussion was becoming absurd. It could not be argued that under paragraph 2 loss of nationality was automatic without taking account of paragraph 3. The proposal by Mr. Economides was worth considering. However, it did not fit in with paragraph 3, because paragraph 2 provided that a State withdrew its nationality when persons acquired another, whereas pursuant to paragraph 3, there was no obligation to withdraw nationality unless the person concerned expressly renounced his nationality or his renunciation was presumed. Thus, withdrawal of nationality was not automatic.

19. He agreed with Mr. Thiam that paragraph 2 seemed to be suggesting that there were two stages: exercise of a right of option, followed by the granting of nationality by the State concerned, and that there was no reason for the second stage.

20. The phrase "unless they would thereby become stateless" should indeed be deleted from paragraph 2. Furthermore, he drew attention to a contradiction with paragraph 3: while paragraph 2 provided that the State for which a person had not opted must withdraw the nationality of the person concerned, paragraph 3 stipulated that the State was not under an obligation to withdraw its nationality. In the final analysis, that was to be welcomed, because the right of option meant that it was possible to have two nationalities. Why not? In that case, paragraph 2 should be deleted.

21. In his view, paragraph 3 was so incredibly complicated as to be incomprehensible. It should at least be simplified.

22. Again, there was a difference between "withdrawal" and "loss" of nationality. Withdrawal was an intentional act of a State, whereas loss was the result of an event. A clear distinction must be made between those two situations.

23. In the final analysis, it could be argued that article 8 simply complicated matters and article 7, on the right of option, was sufficient on its own.

24. Mr. LUKASHUK said that the provisions of article 8 had a very important place in the text. That was particularly true of paragraph 1, in which there was a clear legal construct: persons had the right to choose a nationality, and a State therefore had the obligation to grant its nationality. That position of principle must be retained.

25. The provision in paragraph 3 made a clear point: the State was not required to withdraw its nationality. The only doubt he experienced was about the last sentence, which was open to different interpretations and thus might well be deleted.

26. Mr. ROSENSTOCK said that there appeared to be no disagreement on the substance of article 8, apart from Mr. Elaraby's point on whether to have a right to statelessness. Paragraph 2 was not about choosing to acquire a certain nationality, it was about opting not to acquire such nationality. The "unless" clause in paragraph 3 basically meant: "unless the situation in paragraph 2 applies". The last sentence of paragraph 3 merely spelt out what would have been covered implicitly. Thus, the concepts were clear. He was inclined to agree that the proposal by Mr. Economides on paragraph 2 would simplify matters. But apart from the question of a right to statelessness, all the problems raised were actually drafting issues and, the sooner the Commission referred article 8 to the Drafting Committee the better.

27. Mr. GALICKI said he agreed with Mr. Lukashuk that article 8 had a precise logical construction but he felt that there were too many stages in the procedure: first, the entitlement to exercise the right of option; next, the exercise of the right, which did not necessarily mean the person would obtain the desired nationality; and then the granting of the nationality by the State concerned. During that procedure the problem referred to in paragraph 2 arose: renunciation of another nationality and the withdrawal of such nationality by the State concerned, which took place at the moment the right of option was exercised, that is to say not necessarily at the same time as the new nationality was acquired. Statelessness could therefore occur at that point in the procedure, and it would be preferable for the obligation to withdraw nationality to be triggered by the person's acquisition of the nationality that he opted for.

28. Furthermore, paragraph 2 dealt with a specific situation and to some extent spoiled the scheme of the article. It would also be noted that paragraphs 2 and 3 used different formulas: the obligation to withdraw nationality contained in paragraph 2 started at the moment of renunciation, while in paragraph 3 it was qualified by the

proviso "unless those persons have clearly expressed their will to renounce its nationality". He would be grateful for an explanation of the difference.

29. The CHAIRMAN said perhaps the answer was that paragraph 3 made an exception to the provision contained in paragraph 2 and that the second part of paragraph 3 made an exception to the first part.

30. Mr. ECONOMIDES said that he understood article 8 but agreed with other members that paragraph 3 was complex and hard to apply. The problem was that persons concerned in a succession must complete two procedures: they must not only opt for a nationality but also renounce the nationality of the predecessor State. In contrast, when the right of option was regulated by an international treaty, both the acquisition of the new nationality and the loss of the previous one were automatic. Article 8, however, appeared to be dealing with a right of option exercised not under a treaty but under national legislation. It would perhaps be useful to distinguish between those two quite different situations, for the article as it stood complicated a rule which was very clear in international law. As far as internal law was concerned, it might be possible to take a step forward by adopting the solution provided at the end of paragraph 3 as a global compromise solution.

31. The CHAIRMAN pointed out that the right of option might have to be exercised between the nationality of several successor States in cases where the predecessor State disappeared.

32. Mr. SIMMA said that he supported Mr. Economides' proposed amendment to paragraph 2. As he understood things, paragraph 1 covered a situation in which an individual exercised the right of option and the State concerned had an obligation to accept his choice; paragraph 2 covered a situation in which an individual exercised the right of option and the State of his previous nationality had an obligation to withdraw that nationality; and paragraph 3 provided that the State whose nationality was renounced did not have to comply with an obligation to withdraw its nationality contained in its domestic legislation. Accordingly, paragraph 3 had a meaning of its own which made sense to him, but he hoped for further clarification from the Special Rapporteur.

33. Mr. RODRÍGUEZ CEDEÑO said that article 8 was important as a complement to article 7 and its current formulation should generally be retained. It must be remembered that option for and granting of nationality were two different issues: the right of option had to be supplemented by the granting of nationality by the State concerned. Accordingly, he had at first been in favour of the proposed deletion of "unless they would thereby become stateless" from paragraph 2, but it was a provision that might be needed to cover a gap between exercise of the right and the granting of a nationality. The problem could probably be solved in the Drafting Committee.

34. Mr. MIKULKA (Special Rapporteur) said that, as several members had noted, the provisions of article 8 must be read jointly but for completely different situations. Sometimes the right of option was regulated by a treaty but, even when it was not, there was still a right of option resulting from the combination of two or three

national legislations of States concerned. With the Working Group's support he had tried to formulate common rules covering all situations.

35. He had no problem with the suggestion made by Mr. Galicki and Mr. Lukashuk that the reference to "withdrawal" of nationality should be replaced by a reference to "loss" of nationality. He could likewise accept the similar comments made on the "granting" of nationality. It was not the intention to stipulate that the exercise of the right of option was to be followed by a separate stage of granting the nationality opted for. The problem raised was purely one of language and could be solved by the Drafting Committee.

36. As to the other points of substance, he re-emphasized that article 8 was indeed intended to cover the right of option regulated by a treaty, which might be described as an exclusive option. But there were other situations in which an individual could choose to acquire or not to acquire the nationality of one of the successor States in addition to the nationality he already possessed. In response to those who held that the right of option must necessarily mean a choice between nationalities, he recalled that Kunz had written: "The one who opts does not choose between two nationalities, but only has the right to retain one's old nationality."<sup>6</sup> The Working Group had agreed that the option was sometimes an exclusive choice between nationalities, but in other situations, and certainly when exercised under a national legislation, it could have other meanings. One such meaning was "opting in", when the person concerned could choose the nationality of a State concerned regardless of the consequences for another nationality he might already possess. The other possibility was that the law automatically extended a State's nationality to a certain category of persons while at the same time envisaging the possibility of renouncing that nationality, that is to say "opting out". That was how the three paragraphs should be read. It was not a question of the exercise of a single right of option but of the exercise of that right in three completely different situations.

37. He took it that no one was opposed in principle to the simple rule set out in paragraph 1 and that all the objections could be overcome by the Drafting Committee. Paragraph 2 was concerned basically with the situation in which a person exercised an "opting out" right and the State of his previous nationality did not have the right to impose its nationality on him. The only substantive problem was with the proviso "unless they would thereby become stateless". The suggestion by Mr. Economides that the proviso should be replaced by a reference to the automatic acquisition of another nationality did not cover the case of a person who already possessed the nationality of a third State. In the current wording, paragraph 2 covered both situations. Furthermore, he had included the proviso precisely because the Commission had asked him to do so in order to avoid the possibility of statelessness.

<sup>6</sup> J. L. Kunz, *Die völkerrechtliche Option*, vol. 1 (Breslau, F. Hirt, 1925), p. 83. See also Y. Onuma, "Nationality and territorial change: In search of the state of the law", *The Yale Journal of World Public Order*, vol. 8, No. 1 (Fall 1981), p. 6.

38. Paragraph 3 sought to answer the question of what consequences arose when exercise of the right of option was not coordinated by the two legislations concerned. He would take the example of the situation in which a State disappeared as such, leaving successor States A and B. State A did not allow dual nationality and so adopted legislation to the effect that any person acquiring the nationality of another State "upon request" automatically lost the nationality of State A. State B which had no problem with dual nationality allowed that any national of the predecessor State who did not automatically acquire the nationality of State B might do so by opting in without having renounced the nationality of State A. Accordingly, a person automatically having the nationality of State A might also opt for the nationality of State B, reasoning that State A would object only if the latter nationality was acquired by request and that he would not risk losing the nationality of State A if acquiring the nationality of State B by option. The provisions of paragraph 3 were thus designed to cover the situation in which two national legislations operated independently. To Mr. Lukashuk, who wished to delete the last sentence of the paragraph, he would say that such a provision was quite common in national legislations and was not just an invention for the purposes of State succession. He could not see how the point could be disregarded.

39. The CHAIRMAN said that two different trends of opinion were discernible in the Commission, one of which favoured avoiding any case of statelessness, while the other preferred to recognize a right to statelessness. At that stage, the most reasonable course would be to refer articles 7 and 8 to the Drafting Committee.

40. Mr. BENNOUNA said that he could agree to such a course, but trusted that the Drafting Committee would ultimately merge the two articles.

*Articles 7 and 8 were referred to the Drafting Committee.*

#### ARTICLES 9 TO 14

41. Mr. CRAWFORD said that articles 9 to 13 involved an issue of principle which would, to some extent, have to be left to the Drafting Committee as some fine-tuning would be required. The problem was to distinguish between those matters that were either directly related to or directly consequential upon the issue of State succession and nationality, and those that were in some sense related to State succession but also raised broader issues such as human rights. While he had great sympathy with all the substantive proposals put forward in articles 9 to 13, the Special Rapporteur seemed to have overstepped the line somewhat, with the result that some of those provisions dealt more with the human rights of persons who were subject to situations in which their nationality was liable to change rather than with the direct consequences for the status or rights of such persons by reason of the change in their nationality.

42. That essential point of principle could be seen, for instance, in the context of the right of residence. To some extent, article 10 (Right of residence) was really concerned with the problem of people who left an area

affected by State succession and who later wished to return to that area when their nationality might have changed but would not necessarily have done so. The question of their right of return—no matter how much one wished to ensure it—was different from the question addressed in the draft articles. His particular concern was that the Commission should not be seen to go beyond the scope of State succession with respect to nationality, and risk rejection on that ground, thereby giving rise to a *contrario* interpretations of the broader issues concerned. There would be opposition—and not necessarily well-intentioned opposition—if the Commission enacted what amounted to an international covenant on the civil, political, social, economic and cultural rights of persons whose nationality might have been affected by State succession.

43. He was very sympathetic to the principle of non-discrimination (art. 12) which, accurately formulated, was essential, for persons should not be discriminated against on account of the fact that they had acquired or lost the nationality of a State in the context of State succession. The prohibition of arbitrary decisions concerning nationality issues (art. 13) was equally appropriate. In the context, however, articles 9 (Unity of families), 10 and 11 (Guarantees of the human rights of persons concerned) went too far and he spoke as one who supported all the substantive values reflected in them.

44. On a point of terminology, some of the problems in the draft articles might be solved if a slightly more general formulation were adopted. In particular, he would propose that the word “acquired” should be replaced throughout the draft by the word “obtained”. Also, the words “the acquisition or loss of” in article 9—which, again, raised a question of principle as to how far the provision could properly go—were not really necessary.

45. Rather than engaging in a lengthy debate on a difficult point, it might be better to refer the matter to the Drafting Committee and to request it to distinguish those issues that were sufficiently directly related to nationality and succession to justify inclusion in the draft.

46. The CHAIRMAN said his personal view was that articles 9 and 11 were general provisions that had no place in a precise draft on State succession.

47. Mr. FERRARI BRAVO said that article 9 raised the interesting problem of the unity of members of the family who might have different nationalities. In that connection, he was concerned to note that at no point in the draft was there any indication of the precise nature and extent of the family. The only reference appeared to be in paragraph (28) of the commentary to article 9, which suggested that members of the family should be able to live at the same place. That, however, could have a major effect on emigration laws and he therefore wished to underline the need to spell out the nature of the family either in the article or in the definitions.

48. Mr. BROWNLIE said he agreed with Mr. Crawford that, in analytical terms, articles 9 to 13 went beyond the problem of succession of States but he did not himself have any problem with the general economy of the draft articles. That was because the articles in question were highly relevant to the whole problem of succession and—to borrow a term of the common law—could be said to form part of the *res gestae*.

49. Mr. DUGARD said he too found it difficult to see how articles 9 to 13 could belong in a declaration or convention of the kind contemplated. Essentially, they were designed to protect the basic rights of individuals who did not qualify for nationality and the Special Rapporteur clearly wished to ensure that their human rights were protected. In the case of article 9, however, it was not clear how members of the family could be reunited or allowed to remain together if they were not given the nationality of the State in question. That article seemed more in the nature of a plea to the State to treat the members of the family decently and allow them to live together. The same applied to article 11: the States concerned were enjoined to allow persons concerned habitually resident in their territory to exercise their human rights. Obviously, they would be unable to exercise all of those rights since some of them would be attached to nationality, such as franchise, which would be granted only to those persons who enjoyed the nationality of the State.

50. In the circumstances, it might be better to contemplate a general provision acknowledging that the basic rights of persons who did not qualify for nationality in the process of State succession were not in any respect to be undermined.

51. The CHAIRMAN said that Mr. Crawford had raised a fundamental point on which he would invite comments at the next meeting.

*The meeting rose at 11.35 a.m.*

---

## 2485th MEETING

*Thursday, 29 May 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, 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. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.*

---

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

PART I (General principles concerning nationality in relation to the succession of States) (continued)

ARTICLES 9 TO 14 (concluded)

1. The CHAIRMAN invited the members of the Commission to give their views on Mr. Crawford's proposal that articles 9 to 14 should be deleted, as they set forth very general principles and, in his view, had no place in the draft articles on nationality in relation to the succession of States.

2. Mr. SIMMA said he thought that articles 9 to 14 did indeed have a place in the text, as they were consistent with the approach based on protection of human rights adopted by the Special Rapporteur and responded to the human rights concerns raised by the succession of States. The right to a nationality was not simply the right to a passport, but also the right to continue living at home, whatever was understood by that expression. He therefore thought that all the provisions of articles 9 to 14 were related to the question of the succession of States.

3. Article 9 (Unity of families) in particular should certainly be included in the draft, as it obliged States, not to grant their nationality to the members of a family, but simply to adopt all reasonable measures to allow that family to remain together. Admittedly, the concept of "family" was ambiguous, but it would be perfectly reasonable for a State to specify, indeed restrict, its meaning.

4. With regard to article 10 (Right of residence), paragraph 3, the Special Rapporteur had been right not to go as far as the European Convention on Nationality<sup>2</sup> and the Venice Declaration.<sup>3</sup> He had adopted a neutral position, confining himself to indicating that, if the laws of the State concerned provided that persons who had not opted for its nationality must leave its territory, a reasonable time limit must be granted them by which to do so. However, the conditions of the transfer of residence should perhaps be spelt out and, consequently, a clause added safeguarding human rights, particularly the economic and social rights that were stressed in the European Convention on Nationality.

5. The text of article 11 (Guarantees of the human rights of persons concerned), which was of too general a character, should also be redrafted. It could, for example, be specified that the human rights and fundamental freedoms referred to were those internationally recognized.

6. Article 12 (Non-discrimination) was satisfactorily worded, as it did not rule out the possibility of a State

applying some of the criteria mentioned to extend to new categories of persons the right to acquire or retain its nationality or a right of option. However, it did not seem necessary to indicate that explicitly at the current stage.

7. Mr. ECONOMIDES said that he supported Mr. Crawford's suggestion if it referred essentially to article 10, paragraphs 1 and 2. Those two paragraphs would be very difficult to implement in some cases and they also set forth a right of residence that did not exist in a number of countries. It might thus be asked whether they really had a place in a set of draft articles dealing with nationality in relation to the succession of States and whether it would not be better to delete them. Article 10, paragraph 3, on the other hand, called for more detailed consideration.

8. Mr. BROWNLIE said he thought that the problem was one of the distinction between the precise consequences of the succession of States in matters of nationality and the general question of the granting or withdrawal of nationality. In the event, it did not seem necessary to establish that distinction. In his view, there were good practical reasons for dealing with those questions, which were clearly interrelated, in the draft articles.

9. Mr. GOCO said he wondered whether it might not be possible simply to combine the provisions of articles 9 to 13 in a single article, as they all dealt with the obligation of States to adopt reasonable measures to guarantee the unity of families and the right of residence, to protect human rights and to avoid discrimination.

10. The CHAIRMAN, speaking as a member of the Commission, said that he supported both Mr. Crawford's and Mr. Goco's suggestions. All the articles being considered, and in particular articles 9 and 11, had a very broad scope of application, and did not apply solely to cases of succession of States. The best solution would perhaps be, as Mr. Goco had suggested, to combine them in a single article, indicating that the succession of States must never lead to violations of human rights.

11. Mr. HAFNER said that he shared Mr. Crawford's view concerning article 11 as currently worded. But, as it set forth an important principle, it might perhaps be retained and redrafted, as Mr. Simma had suggested. As for the other articles, he did not think they could be replaced by a single article, as Mr. Goco had proposed, for they dealt with particular situations linked to the succession of States and to the effects of that succession on nationality. The principle of non-discrimination, for instance, was essential and had been particularly stressed by some delegations in the Sixth Committee. It was thus necessary to retain a provision on that question in the draft articles. As for article 10, he thought that paragraphs 1 and 2 were perhaps not indispensable, but that paragraph 3 posed a problem to which he would like to return subsequently.

12. Mr. SIMMA said that, unlike the Chairman, he was convinced that the problem of the unity of families, dealt with in article 9, was closely linked to the question of the succession of States.

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

<sup>2</sup> See 2477th meeting, footnote 6.

<sup>3</sup> See 2475th meeting, footnote 22.

13. The CHAIRMAN said that that article could be applicable in the case of succession of States, but it did not deal specifically with that situation.

14. Mr. MELESCANU said that he shared Mr. Simma's opinion. Practice showed that succession of States almost always had consequences for families and it was thus essential to deal with the question of unity of families, in one form or another, in the draft articles.

15. Mr. HE said that, in his view, article 9 gave rise to a problem because the concepts of a family and of members of the family were not clearly defined and varied from country to country. Furthermore, it was not unusual for members of a family to have different nationalities. He also noted that neither the Venice Declaration nor the European Convention on Nationality contained any provisions on unity of families and he therefore wondered whether article 9 really had a place in the draft articles.

16. Mr. LUKASHUK said that all the articles being considered were of importance in settling the problem of nationality in relation to the succession of States. Only paragraph 3 of article 10 was unacceptable, as it in a sense legitimized the expulsion of persons who would voluntarily have opted for the nationality of a State other than the successor State. Furthermore, that was contrary to the principles of international human rights law and to the rules of *lex lata*; in particular, it conflicted with article 20 of the European Convention on Nationality, which provided for the right of those persons to remain in the territory of the successor State. Lastly, that provision seemed totally illogical having regard to the provisions of paragraph 2 of the same article. He was thus opposed to retaining paragraph 3.

17. Mr. ECONOMIDES said it appeared from article 10, paragraph 3, that a State could expel a person who had not opted for its nationality. That principle belonged to the past and no longer reflected established international human rights standards. Consequently, as currently worded, the paragraph was unacceptable and should be deleted. There should, however, be a provision regulating the situation of persons who had voluntarily acquired the nationality of a State other than the successor State, expressly indicating, as was specified in the Venice Declaration, that their choice must have no prejudicial consequences with regard to their right to residence in the territory of the successor State and their property located therein.

18. Mr. CRAWFORD said that international law did not currently require States to grant the right of residence in their territory to persons opting for a nationality other than their own. When persons opted for a given nationality, they in effect accepted the consequences that might result from their choice, such as the obligation to leave the territory of the State whose nationality they had not acquired. The best way of settling the problem would be to insert a general clause indicating that measures must be taken to ensure that those persons were not subjected to arbitrary treatment, particularly in certain contexts.

19. The CHAIRMAN said that he personally would go further than that and make the provision more explicit, as recommended by Mr. Economides, because it was incon-

ceivable in 1997 to allow for the expulsion of persons in the event of the "wrong choice".

20. Mr. GALICKI noted that articles 1 to 8 embodied the most important principles on nationality in relation to the succession of States. Articles 9 to 14 covered a number of possible secondary effects of the succession of States, but they still had their full value and should be retained in the draft because they dealt with questions raised in many international instruments.

21. Article 9 in particular was of great importance. As the Special Rapporteur pointed out in the commentary to that article, contained in his third report (A/CN.4/480 and Add.1), in practice there were many examples of provisions whose purpose was to preserve the unity of families. That was the idea which emerged from the European Convention on Nationality. The problem was how to define the word "family", which was interpreted differently depending on the country. It might therefore be useful to use the same terminology as in the Convention, where the word "family" meant husband and wife and their children, which limited its scope. However, it should be pointed out that article 9 dealt with the need for the States concerned to give the members of a same family the possibility of living together, not to grant them all the same nationality. That was a more cautious solution which might be useful in cases of mixed marriages.

22. He shared Mr. Lukashuk's views on article 10. The specific problem of residence arose in virtually all cases of State succession and it was therefore essential to protect and preserve the right of residence. Yet article 10, paragraph 3, related to the obligation for persons who had not opted for the nationality of the successor State to leave that State's territory, which negated the right of residence set forth in paragraphs 1 and 2 of that article, although it was precisely the concern for human rights which helped ensure growing recognition of that right. He was therefore in favour of deleting paragraph 3 and also thought that paragraph 2 should be recast to make it applicable to all cases of the loss or non-acquisition of nationality, even when voluntary.

23. As to article 11, the Commission must bear in mind the practical importance of such a provision for interpreting certain rules because, in the event of doubt, guaranteeing human rights should take precedence. The Commission might also consider the possibility of giving the article a more practical content, for example, by drawing on article 20 of the European Convention on Nationality, which introduced the principle of the equal treatment of nationals and non-nationals in respect of social and economic rights.

24. Lastly, he was in favour of retaining the principle of non-discrimination stated in article 12, but regretted that the list of criteria was rather short compared to those in other conventions, particularly the European Convention on Nationality. The Commission might discuss that matter.

25. Mr. THIAM said that it might not be necessary to focus on specific problems in the draft articles because the setting out of general principles sufficed to cover them. Thus, guarantees for human rights, non-discrimination and the prohibition of arbitrary decisions must necessarily

be included in the draft, unlike the unity of families, which came under private law and therefore had a different scope under the law of each State and was also a notion which did not relate only to the problem of nationality. Likewise, the notion of residence did not automatically have the same content in each State. Also, citing specific cases which could not be applied in a uniform manner entailed a risk of omission. The more the Commission went into detail, the more difficult it would be for it to solve the problems. He proposed therefore that articles 9 and 10 should be deleted and that articles 11, 12 and 13 (Prohibition of arbitrary decisions concerning nationality issues), which genuinely enunciated general principles relating to respect for human rights, should be retained.

26. Mr. MIKULKA (Special Rapporteur), replying to the questions that had been asked and referring to article 9, drew attention to the conclusions of the Working Group on State succession and its impact on the nationality of natural and legal persons,<sup>4</sup> confirmed by the Commission, to make provision for such a principle in the draft articles. A number of delegations in the Sixth Committee had spoken out along the same lines and none had expressed opposition. Having acted accordingly, he was surprised to hear some members say that the article did not belong in the draft. The idea that that problem was not specific to the succession of States was contradicted by practice. It was rare for the question of the unity of families to be invoked before the courts in relation to a simple problem of nationality, whereas it was very often raised at the time of a State succession when the members of a family sometimes acquired different nationalities. The practical problems which arose might then require a special solution.

27. The argument that there was no such provision in the Venice Declaration and the European Convention on Nationality was hardly convincing because all treaties on the question of nationality, even if they did not go so far as to include an article on unity of families, showed a concern, through the inclusion of certain provisions, for maintaining that unity. The members of the Commission might refer to the many examples cited in the commentary to article 9.

28. He considered the variable nature of the concept of family to be irrelevant because, whether account was taken of the union or the division of a country at the time of succession of States, it was likely that the States concerned, being situated in the same part of the world, would have the same, or a similar, conception of the family.

29. As to the right of residence referred to in article 10, he was very surprised to hear that certain members considered paragraphs 1 and 2 to be unnecessary. With regard to paragraph 1, the example of refugees from the former Yugoslavia had nevertheless shown the true practical problem that arose when persons were forced by events linked to a State succession to leave their habitual residence. More generally, if the Commission adopted the premise on which Mr. Brownlie's proposal was based and which was that the nationality of the successor State flowed from the right of residence, the deletion of para-

graph 1 would, in most cases, eliminate any basis for linking the criterion of habitual residence with consequences from the point of view of nationality.

30. The principle stated in paragraph 2 corresponded to a similar provision contained in the European Convention on Nationality and, in the case of an *ex lege* change of nationality, he did not see what could possibly be wrong with saying that the persons concerned retained the right of residence. That provision constituted a step forward of sorts because positive international law had perhaps not yet really arrived at that point and, in his view, a declaration on the subject might help develop international law in that direction.

31. Criticism of article 10, paragraph 3, had been particularly strong, despite the fact that he had merely stated the current situation in international law, which recognized that a State was usually justified in inviting foreigners, and thus also persons who voluntarily acquired a foreign nationality, to leave its territory. In that context, a draft declaration, unlike a convention, could not lay down a rule contrary to international law and could thus only urge States to act in a reasonable manner from the point of view of the time limit or perhaps stipulate other conditions relating to human rights. Daily experience showed that free choice of place of residence was not a principle of positive law; a fortiori, and contrary to the opinion of some members of the Commission who spoke of the fundamental right of the individual, it is not a question of the rule of *jus cogens*.

32. He acknowledged that the wording of article 11 was vague and he was therefore astonished by certain proposals that all the other articles should be deleted and replaced by a sole article whose wording would be just as vague as that of article 11.

33. In respect of article 12, he referred to his misgivings and those of the Commission about the desirability of inserting a clause providing that the application of criteria for the purposes of increasing the number of persons entitled to acquire the nationality of the successor State should not be interpreted as discrimination. At the forty-eighth session, he had nevertheless attempted to draft a provision along those lines on the basis of the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*.<sup>5</sup> After some discussion, the Commission had instructed him to delete that provision, and he had done so. At the current session, it was therefore up to the Commission to take a position on the contention of a number of members that treaties usually recognized the application of the criteria of ethnic, linguistic, religious or cultural identity to justify the right of option. As to the brevity of the list of criteria, he was unaware of any other relevant instrument which laid down a further criterion.

34. Articles 13 and 14 (Procedures relating to nationality issues) contained provisions on nationality which were not specific to State succession; hence, they were the only

<sup>4</sup> *Ibid.*, footnote 5.

<sup>5</sup> Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4. See also *International Law Reports* (Cambridge), vol. 79 (1989), p. 283.

ones which might perhaps be deleted, subject to reactions in the Sixth Committee.

35. Mr. ROSENSTOCK, referring to article 9, said that, in view of the nature of the obligation, any imprecision in the notion of family was not a problem because in the context in question, the concept of extended family might be applicable. Moreover, as pointed out by the Special Rapporteur, it was unlikely that succession would take place between two States which had totally different conceptions of the family. Given that that article was directly relevant in the framework of a State succession, it would be very regrettable for the Commission to decide to delete it. Article 9 was also of great practical interest in relation to article 10, paragraph 3.

36. Mr. KATEKA, thanking the Special Rapporteur for his work, said that, in respect of article 9, he shared the concerns that had been expressed about different conceptions of the family. In connection with article 10, he had been surprised to hear it said that the Commission was working to draft a declaration and not an instrument of another kind; as he understood it, that question had not yet been decided. On the substance, he endorsed the idea that international law allowed States to expel non-nationals and was of the opinion that it was up to the State concerned to decide what the reasonable time limit was in that connection. The European conventions referred to in the commentary were of great interest for the European continent, but the Commission must not necessarily consider itself bound to be guided by those instruments. Lastly, he was in favour either of deleting article 10, paragraph 3, or of reducing the entire article and combining articles 9 and 10 to form a single article.

37. The CHAIRMAN again read out paragraph 88 of the report of the Commission on the work of its forty-eighth session<sup>6</sup> in order to avoid any ambiguity about the form to be taken by the instrument currently being drafted.

38. Mr. FERRARI BRAVO said that, in principle, he endorsed articles 9 to 14, but he thought that the Drafting Committee should review their sequence. Articles 11, 12 and 13 should probably come before articles 9 and 10, the two latter articles being specific applications of the general principles embodied in the three former articles. Article 9 was particularly important because the proximity of States and the speed of international communications meant that different civilizations were currently very close. The main drawback of article 10, was that it was too long and too detailed. It could be shortened into a single sentence that would say essentially that the succession of States had no effect on the right of residence of persons who had their habitual residence in the territory of the State concerned, unless exceptional circumstances necessitated a derogation from that principle. In view of the abuses to which the question of residence had given rise during recent successions of States, it was important to enunciate the principle and to make it the obligation of a State that wished to derogate from it to provide proof of exceptional circumstances.

39. Mr. HAFNER said that he saw article 9 as a useful reminder to States whose wording had been toned down enough to remove any doubts about the need to retain that provision. Article 10, paragraphs 1 and 2, were also useful, but paragraph 3 remained problematic. Although the right of the successor State to oblige persons who had made the "wrong choice" to leave its territory was provided for in some treaties signed in the period between the two World Wars, the development of human rights law and the task of developing international law which had been assigned to the Commission meant that it was not a good idea to refer to that practice. Mr. Ferrari Bravo's proposal could solve the problem as long as no mention was made of "exceptional circumstances". The article should deal solely with the right to nationality, leaving the question of exceptional circumstances to be dealt with in the context of the right to residence. A distinction must, moreover, be made between the fact that no one had the right to take up residence wherever he wished and the fact that a State would have the right to expel persons who were already in its territory and under its jurisdiction. In the second case, which was comparable to that of State succession, there was no discretionary right of a State.

40. As it stood, article 11 was constitutive in nature, whereas it should be declaratory. The starting point must be the principle that human rights were applicable not only to nationals of the State concerned, but also to any person under its jurisdiction. The wording of article 12 raised the issue of the relationship between the criteria it laid down (ethnic, linguistic, religious or cultural considerations) and the genuine link introduced in article 7, paragraph 2. There was no problem with article 13. Article 14 could become critical to the possibility of the full implementation of the rights provided for in the entire draft, if the subject was approached from the standpoint of human rights. As the Commission seemed to be tending towards an intergovernmental approach to the right to nationality, the significance of that article might be diminished, but the possibility could not be ruled out that States should actually have an obligation to provide the persons concerned with the administrative and judicial means of asserting the right to a particular nationality in accordance with the draft articles.

41. Mr. BROWNLIE said article 10, paragraph 1, was of major importance within the entire structure of the draft in that it guaranteed that the succession of States did not jeopardize the status of the persons concerned in relation to their habitual residence. Since article 10 dealt with human rights, it might be appropriate, for tactical reasons, to provide for that guarantee in a separate article, distinguishing it from the other aspects of article 10. The guarantee was, however, somewhat vague because it came under the heading "Right of residence", whereas it was intended to protect the status that was derived from habitual residence, and because it dealt with "events connected with the succession of States", whereas it would be better to speak of "events such as wars or other public emergencies or events involving personal duress to the persons concerned". If the paragraph, or new article, were reformulated in that way, the desired goal could be more easily achieved.

42. Mr. ECONOMIDES said that article 9 was acceptable, all the more so as the Special Rapporteur had drafted

<sup>6</sup> See 2479th meeting, footnote 6.

it in fairly flexible terms. Concerning article 10, he considered paragraphs 1 and 2, on the right of residence, as not belonging in a draft devoted to the nationality of persons. The wording proposed by Mr. Ferrari Bravo might well constitute a solution. The major defect of article 10, paragraph 3, was its implication that the successor State had the right to expel persons who opted for the nationality of another State. As the year 2000 drew near, the Commission could not validate that practice or afford not to formulate a more humane rule. It would therefore be better to make article 10, paragraph 3, an article 8 *bis* (to follow article 8 on the right of option) and to use as a recommendation the wording of the provision 16 of the Venice Declaration, which read:

The exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein.

43. Article 11 was concerned with guaranteeing the rights and interests of persons affected by the succession of States, not with guaranteeing all the human rights of such persons. Perhaps that provision belonged in the preamble. In article 12, a distinction must first be made between the right to grant or withdraw nationality, an area in which discrimination must be prohibited, and the right of option, which, by its very nature, entailed discrimination, although positive discrimination, in favour of certain groups. Secondly, the concept of non-discrimination should be expanded by providing for complete equality between new nationals and former nationals. Article 13 did not give rise to problems other than those of a drafting nature. Article 14 was a fundamental provision which should be given greater weight by developing further the idea of an effective remedy currently being used in the human rights context.

44. Mr. SIMMA said he could not accept the statement that article 10, paragraph 3, went against the spirit and the letter of human rights. As the Special Rapporteur had pointed out, there were both logical and general policy reasons for taking account of the case covered by paragraph 3. If, after having been duly informed of the choices available to them and the ensuing consequences, individuals voluntarily renounced the nationality of the successor State, nothing in human rights law prohibited that State from requesting such individuals to leave its territory, as long as the modalities under which they left that territory were in conformity with human rights.

45. Mr. LUKASHUK pointed out that articles 11 and 12, which had been rightly described as too general, dealt with general ideas and principles. He therefore proposed that the Drafting Committee should be requested to consider the possibility of placing those articles immediately after article 1.

46. The CHAIRMAN said that the beginning of paragraph 2 and paragraph 3 went too far. Paragraph 2 should not be characterized as being "Without prejudice to the provisions of paragraph 3", which was too ambiguous and based on case law dating from the period between the two World Wars. By retaining that paragraph, the Commission would not be promoting the development of international law. The fact that the draft articles would take the form of

a declaration did not mean that that declaration must be confined solely to positive law.

47. Mr. Sreenivasa RAO said that articles 9 to 14 fitted well into the overall structure of the draft articles and were especially relevant because of their link to the right of option and their function of explaining how that right was to be applied. Article 9 was useful because it stated the general principle of the unity of families, while leaving it up to the States concerned to define what that meant. More restrictive wording would have given rise to problems in view of the differing approaches to the family and the evolution of those approaches as a result of economic change. Perhaps the Special Rapporteur could simply specify the limits implied by the words "unjustified demands" in paragraph (28) of the commentary to article 9.

48. Article 10, paragraph 1, should be retained because it established the important principle of the right of return for those who had been forced by war, an emergency situation, and the like, to leave a territory. Paragraph 2 could be recast in order better to reflect the distinction drawn by the Special Rapporteur in paragraph (19) of the commentary to article 10, should the Commission decide to retain that distinction. As other members of the Commission had pointed out, paragraph 3 contained material for the progressive development of international law. If properly worded, it could help to reconcile States with the idea of habitual residence. Retaining one's habitual residence was a legitimate demand and did not mean that a State was being forced to accept a new principle under which it would be obliged to take in foreigners against its will. However, it was not necessary to go as far as complete equality between new nationals and former nationals. If a minority had not been granted certain rights before succession, the succession would not necessarily change that state of affairs.

49. Lastly, articles 13 and 14 were in their proper place within the draft articles and were especially useful in explaining the procedures relating to the right of option.

50. Mr. MIKULKA (Special Rapporteur), providing the clarification requested by Mr. Sreenivasa Rao about the words "unjustified demands" in paragraph (28) of the commentary to article 9, said that they were intended to refer to a situation where all members of the same family claimed the nationality of a State on the grounds that the grandmother had opted for that nationality, even if they had acquired another nationality under the relevant legislation and nothing prevented them from residing in the State concerned, remaining there together, continuing to work there and, in a word, living there together under the same conditions as those prevailing before the succession of States. Preserving the unity of families meant preventing a change of nationality as a result of the succession of States from having any repercussions on family life.

51. Mr. ROSENSTOCK said that he would draw the attention of members of the Commission to the word "voluntary" in article 10, paragraph 3. That word meant not that the State could not allow a person, in the circumstances referred to, the choice of living in its territory, but that, if it did not wish to allow him that choice, it must act in a humane and reasonable manner. Paragraph 3 gave rise

to no problem and it did not seem either necessary or desirable to delete it, still less to include in the draft a provision requiring States not to have such a rule.

52. Mr. BROWNLIE said he wished to explain, for the information of Mr. Sreenivasa Rao, that his point was that article 10, paragraph 1, established an uneasy relationship between the right of residence—an intrinsic human right—and habitual residence—a concept which, though not involving human rights, was a fundamental element in the draft and should be retained. It should therefore form the subject of an independent provision, to avoid any confusion between the two elements.

53. Mr. RODRÍGUEZ CEDEÑO said that, in general, articles 9 to 14 embodied important norms and principles which had a place in the draft whether or not the articles were retained.

54. The concept of unity of families bore a direct relationship to the matter under discussion even though it could be the subject of different interpretations depending on social, cultural and even legal criteria, which it was for the States concerned to appraise. In that connection, the wording of article 9 proposed by the Special Rapporteur could be simplified if only the last part was retained, which provided that the States concerned should adopt all reasonable measures to allow the family to remain together or to be reunited.

55. Article 10 also provided for an important right and article 11 related to a fundamental question, but there was no need for a separate article: it would be better to move to the preamble the principles and norms to which it referred. Article 12 should be retained, for the reasons given by the Special Rapporteur in his commentary to the article. Lastly, article 13 dealt with the prohibition of arbitrary decisions concerning nationality issues, a matter which, by its very nature, fell within the competence of States and should not be made into a specific rule in a separate article. It would be better to refer to it in other provisions.

56. The CHAIRMAN, summing up the conclusions of the discussion on articles 9 to 14, said that many members had raised questions about the advisability of retaining separate articles on the various questions covered and had suggested that they should be combined in one or two provisions, others had questioned the justification for retaining a particular provision, especially article 11, in the body of the draft articles, and one member had questioned the place of articles 13 and 14. The Commission as a whole appeared to consider that the articles under consideration had a place in the draft and should be referred to the Drafting Committee with the request that it should simplify and circumscribe the wording and avoid unduly general provisions.

57. He said that, if he heard no objection, he would take it that the Commission agreed to refer articles 9 to 14 to the Drafting Committee.

*It was so decided.*

#### ARTICLES 15 AND 16

58. The CHAIRMAN invited the members of the Commission to comment on articles 15 and 16.

59. Mr. CRAWFORD suggested that article 15 (Obligation of States concerned to consult and negotiate), paragraph 2, should be deleted altogether. It added nothing, as it was based solely on a presumption, as reflected by the words "is deemed", namely, the presumption that a State, in a particular case, had fully complied with its international obligations relating to nationality in the event of a succession of States. The codification and progressive development of international law in the matter, however, called for appropriate norms, not for "deeming" provisions.

60. Article 16 (Other States), paragraph 2, was important and its deletion would give rise to fundamental questions in that State practice in the area existed and should be recognized.

61. The CHAIRMAN said that the words "is deemed" appeared in certain treaties.

62. Mr. PAMBOU-TCHIVOUNDA said that he shared Mr. Crawford's reservation about the relevance of article 15, paragraph 2. The Commission could not lay down the assumption that States would necessarily bring their internal law into line with international law, since nationality fell within the competence of States. Paragraph 1 of article 15 should be the subject of a single article and, in the general structure of the proposed draft, should come immediately after article 1. He reserved the right to revert to article 15 later and also to speak on article 16.

63. Mr. FERRARI BRAVO said that, in his view, article 15, paragraph 1, did not give rise to any major difficulty, although it could be improved by the Drafting Committee. Paragraph 2, on the other hand, established a substantive rule. If the future instrument took the form of a declaration, as contemplated by the Special Rapporteur, that rule should be referred to in the commentary and not in the body of the text itself, unless the General Assembly were to gain the impression that the Commission was trying to lay down substantive rules by way of a declaration.

64. Mr. MIKULKA (Special Rapporteur) said that he had no definite position on article 15, paragraph 2, which he had actually decided to include at the very last moment. He was, however, surprised to note that Mr. Pambou-Tchivounda currently apparently considered that questions of nationality were a matter for internal law when, at the beginning of the session, he had given the opposite impression.

65. Mr. Sreenivasa RAO said that he agreed with Mr. Crawford's views on article 15, paragraph 2, and all the more so as the instrument under consideration was supposed to be a declaration designed as a guide for States in their negotiations. It was important not to presume that the State refused to negotiate, as the reasons for such refusal could vary.

66. Mr. GALICKI said he too considered that article 15, paragraph 2, was entirely unnecessary. In the first place, paragraph 1 created a kind of obligation for States to consult and negotiate, whereas paragraph 2 related to the evaluation of the effects of such consultations and negotiations. Secondly, it would sometimes be difficult to determine the internal law that was consistent with the

articles under consideration. There was no body for evaluating the laws of States, as each one could say that it was following the future instrument. Paragraph 2 created more problems than it solved.

67. Mr. GOCO said he also considered that there was no need for article 15, paragraph 2, since it referred to a very hypothetical case. Paragraph 1 sufficed.

68. Mr. ELARABY, agreeing with Mr. Galicki and Mr. Goco, said that, if the problem referred to in article 15, paragraph 2, were to arise, it would be enough to refer to Chapter VI of the Charter of the United Nations (Pacific settlement of disputes).

69. Mr. SIMMA said that he also took the view that article 15, paragraph 2, could be deleted without compromising the general structure of the draft articles.

70. Mr. ECONOMIDES said that he likewise favoured the deletion of article 15, paragraph 2, for the reasons stated. Moreover, that paragraph gave the impression that States could, in that context, refuse to negotiate—something that he would dispute from the standpoint of the rules of international law.

71. Mr. MIKULKA (Special Rapporteur) said he would reiterate that he had no definite position on article 15, paragraph 2. There were reasons, as were explained in the commentary, for keeping the paragraph and there were reasons for deleting it. The intent behind the provision was, however, in no way to encourage States not to negotiate, but simply to provide that, in the event of failure of negotiations—as would be illustrated by the absence of any treaty—a State which had complied with international law, in other words, with the future instrument, would not be held responsible for the cases of statelessness that would arise.

72. Mr. LUKASHUK said that, like the Special Rapporteur, he considered that it would be a good idea not to take any hasty decision and to revert to the matter at the following meeting.

*The meeting rose at 1.05 p.m.*

## 2486th MEETING

*Friday, 30 May 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*later:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner,

Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

#### PART I (General principles concerning nationality in relation to the succession of States) (*concluded*)

#### ARTICLES 15 AND 16 (*concluded*)

1. Mr. ECONOMIDES said the simple obligation for the States concerned to consult and negotiate, set out in article 15 (Obligation of States concerned to consult and negotiate), paragraph 1, was not sufficient in itself and needed to be supplemented by the relevant rules of international law. State succession was, after all, a question of international law and it must be made clear that the obligation to negotiate applied automatically to all matters falling within the scope of international law, including international disputes of a legal nature. It was essential to go further. In the Drafting Committee he had made a proposal along those lines in the context of article 3 (Legislation concerning nationality and other connected issues). Article 15, paragraph 1, should also say that the States concerned “shall settle”—it was an obligation, almost a *pactum de contrahendo*—questions of the nationality of individuals involved in a State succession, notably by agreement. In addition, the article should be placed at the beginning of the draft, for it was wrong to refer first to national legislation in a topic that was one of international law par excellence.

2. Mr. SIMMA said that he did not agree with Mr. Economides. He could not see anywhere an obligation on States to conclude agreements on nationality questions; there was only the duty to consult and negotiate as provided for in article 15. Provision 4 of the Venice Declaration<sup>2</sup> said that, in the event of State succession, the States involved “may”, by agreement, settle the question of nationality. Obviously, if two States managed to settle nationality questions relating to a succession of States by means of their national legislation, which was in conformity with international law, then they were under no further obligation.

3. Mr. BROWNLIE pointed out that the draft articles did not contain a standard dispute settlement clause because they were not intended to take the form of a multilateral convention. Article 15, paragraph 1, was certainly not designed to be a dispute settlement clause, for it

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See 2475th meeting, footnote 22.

did not deal with disputes. Its focus was rather on structural difficulties which could probably not be classified as international disputes but needed to be resolved. Article 15, paragraph 1, should therefore be retained as it stood.

4. Mr. ECONOMIDES said he understood Mr. Simma's point about the Venice Declaration but thought that the Declaration did not do what it should do. Clearly, States could settle any matter by agreement if they wished, but the current draft ought to encourage States to make progress in the development of international law. It should therefore contain a provision requiring them to settle by agreement questions of the nationality of natural persons. He would prefer a strong provision using "shall", but could accept the more flexible "should". The current wording represented a regression rather than a progressive development of international law.

5. Mr. GOCO said that the positions of Mr. Economides and Mr. Simma were not mutually exclusive. It might be possible to resolve the difficulty by adding "and endeavour to settle the issues" at the end of paragraph 1.

6. The CHAIRMAN said that the paragraph was already stronger because of the phrase "under the obligation to consult".

7. Mr. GALICKI confirmed that he was opposed to the inclusion of article 15, paragraph 2. The reason for the difficulties with paragraph 1 might be that in the other conventions on State succession the obligation to consult and negotiate was confined solely to the problem of dispute settlement. In the draft articles, in contrast, the aim was to cover a wider range of issues. A similar difficulty had arisen earlier in connection with article 3, but article 3 was concerned with the creation of certain legal conditions governing nationality rather than with the *ex post facto* settlement of problems. The Commission should keep the two matters separate. Article 3 should contain a "weak" provision along the lines of provision 4 of the Venice Declaration and article 19 of the European Convention on Nationality<sup>3</sup> offering alternative means of solving problems, for example by applying domestic law. Article 15, paragraph 1, could then be limited to the usual issues covered by dispute settlement clauses.

8. Article 16 (Other States) dealt with two quite different problems. Paragraph 1 repeated an established principle confirmed in several international treaties. Paragraph 2, however, formulated a presumption of certain practical effects regarding the nationality of the person concerned when the State concerned did not grant its nationality. Despite the increasing role of international law in the regulation of nationality questions, the Commission itself nonetheless admitted in the preamble to the draft articles that nationality was essentially governed by internal law. International law could not assume the powers of a sovereign State against its will, even if that State disregarded the draft articles. In short, the presumption was not acceptable because it placed limitations on the sovereign rights of States. Of course, he understood the purpose of the provision—to protect individuals against statelessness—but it went too far.

9. A technical problem arose with the use in article 16, paragraph 1, of "genuine link", a concept which was not and should not be defined. It had already been suggested, with respect to article 7 (The right of option), paragraph 2, for example, that something like "appropriate connection" should be used instead. The point could be settled by the Drafting Committee. He also experienced some difficulty with the term "other States", as opposed to "third States", the term used by the Special Rapporteur in the commentary to article 16, contained in the third report (A/CN.4/480 and Add.1). If there was no reason for the differing usage, the terminology should be made consistent.

10. Mr. MIKULKA (Special Rapporteur) said that he had clearly explained in the commentary why he had used "other States" in article 16: the reference was to "other States" vis-à-vis one single State concerned. Why exclude the other States concerned by the State succession? For example, where a dissolution created States A and B and State A granted its nationality in an abusive manner, there was no reason why only third States alone should be entitled to take action on the basis of the *Nottebohm* case.<sup>4</sup> State B might in some circumstances have a greater need to do so.

11. Mr. SIMMA said he, too, did not regard article 15, paragraph 1, as a dispute settlement clause. There would be no difficulty with placing the principle set out in article 15 immediately after article 3. In the Drafting Committee the Special Rapporteur had, in fact, said that the principle had appeared earlier but had then been moved to the end of Part I (General principles concerning nationality in relation to the succession of States).

12. As to the concept of "general link" he disagreed with Mr. Galicki that there should be uniformity between article 7, paragraph 2, and article 16, paragraph 1. The use of the term in the former served a different purpose. The Drafting Committee currently intended to use "appropriate connection" in article 7, paragraph 2. That was a correct move because the aim of that article was to provide persons who would otherwise be stateless with a nationality, whereas article 16, paragraph 1, dealt with the question whether other States or third States—the actual term was not important—had to recognize an abusive grant of nationality.

13. Mr. CRAWFORD said he did not agree with Mr. Galicki that article 16, paragraph 2, created a presumption; it merely reserved a right of States in special circumstances. Mr. Galicki regarded that as inconsistent with the sovereign right of States to determine who its nationals were. But there was not just one sovereignty involved, and to give priority to the sovereignty of the wrongdoing State over that of other States was completely unacceptable. Of course, the State granting nationality was in a special position, but had no special priority vis-à-vis other States concerned. Compared with some of the situations which had arisen, *Nottebohm* was not a strong case, since his naturalization was voluntary and complied with the law of Liechtenstein; but ICJ had ruled that the issue did not concern Liechtenstein alone. In contrast, the Commission was dealing with abuse of rights or violations of international law, and it was quite improper to give priority to a

<sup>3</sup> See 2477th meeting, footnote 6.

<sup>4</sup> See 2475th meeting, footnote 6.

State acting contrary to international law. Article 16, paragraph 2, provided a minimum means of reaction by the international community against States which denaturalized persons on ethnic grounds, for example, in situations where they would become stateless.

14. Mr. DUGARD said that, in a historical context, article 16, paragraph 2, would have addressed precisely the policy of the apartheid Government in South Africa which had denationalized 9 million South African nationals and granted them Bantustan nationality. The international community had refused to recognize such nationality. It was important to include the provision contained in paragraph 2 as a warning to States which might be considering embarking on such a course.

*Mr. Kabatsi took the Chair.*

15. Mr. SIMMA recalled that, at an earlier meeting, Mr. Hafner had asked a question about the enforcement of the rules on nationality. One answer was that article 16, paragraph 1, provided a classic means of enforcement. He had currently changed his mind about paragraph 2 because it supplemented that classic sanction in a way which strengthened the concept of an individual's right to a nationality. It dealt not just with a matter to be settled between two sovereignties but constituted an important pillar in the architecture of the draft articles. The phrase "owing to the disregard by that State of the present draft articles", in paragraph 2, could cause a problem, for it might convey the impression that what was a soft-law declaration could lead to hard-law consequences. The difficulty might be overcome by using a formulation such as "owing to the disregard by that State of the principles of international law reconfirmed in the present draft articles".

16. Mr. GOCO, speaking on a point of order, said that the point regarding article 15, paragraph 1, raised by Mr. Economides, as to whether States must be required to settle questions of the nationality of individuals, had been left in the air and should be resolved.

17. The CHAIRMAN said his impression had been that most members took the view that article 15 merely created an obligation to negotiate and did not obligate States to reach any specific conclusions.

18. Mr. Sreenivasa RAO said that the difficulty could perhaps be avoided if members addressed both article 15 and article 16 in their general statements and confined themselves to each article individually in the "mini-debate". In any case, the point raised would constitute a conclusion, which could be more freely reflected in the drafting.

19. Mr. CRAWFORD, speaking on a point of order, said it was his understanding that the Commission had provisionally decided to proceed with the draft articles on the assumption that they would take the form of a resolution, not of a convention. That assumption ruled out the possibility of including a dispute settlement provision, as a resolution could not contain such a provision. Once the draft articles were concluded and the Commission returned to the question of the form they should take, the issue of whether to include a dispute settlement provision

would again be in order. For the moment, however, it was not.

20. Mr. BROWNLIE, reinforcing the point made by Mr. Crawford, said that the absence of any reference to "legal disputes" in paragraph 1 of article 15 was obviously deliberate. That paragraph referred instead to the broad category of situations where difficulties arose which did not necessarily constitute a legal dispute. Article 15, paragraph 1, was not a dispute settlement clause.

21. Mr. ECONOMIDES said the debate was being distorted by a misunderstanding. No one in the Commission had proposed that the text should contain a dispute settlement clause. The question simply did not arise.

22. Mr. PAMBOU-TCHIVOUNDA said that the provision in question referred to the obligation for States to consult and negotiate with a view to avoiding the detrimental effects that might result from the succession of States with respect to nationality. That was the heart of the matter. The question of dispute settlement did not arise in the context of article 15.

23. Mr. GALICKI said he had not claimed that article 15 dealt with settlement of disputes. He had merely criticized the fact that it used certain terms which, in analogous conventions, were used only with reference to the settlement of disputes. Of course, article 15 addressed a broader range of situations. What was missing from article 15, paragraph 1, was a reference, of the sort contained in the Venice Declaration and in the European Convention on Nationality, to international agreements as a modality for achieving its objectives.

24. Mr. GOCO said that the debate missed the point. Paragraph 1 of article 15 did not envisage any dispute settlement mechanism, but merely obliged States to consult and negotiate. His own proposal had been that, in addition, the States concerned should endeavour to settle those problems. Unlike Mr. Simma, he thus supported Mr. Economides' view.

25. The CHAIRMAN said that the whole purpose of the provision was, naturally, to secure the settlement of problems through the consultations and negotiations envisaged. However, it did not go so far as to impose an obligation on States to resolve those problems.

26. Mr. MIKULKA (Special Rapporteur) said that the discussion on Mr. Simma's comments appeared to have taken a wrong turning in the wake of Mr. Galicki's assertion that the other conventions on State succession established an obligation to negotiate only in relation to settlement of disputes. In point of fact, however, a number of other articles in the 1983 Vienna Convention referred to "agreements", presupposing that negotiations had already taken place between States. That was the message contained in article 15: it obliged States to negotiate. It did not go so far as to oblige them to conclude an agreement, because, as already explained by Mr. Simma and others, once States had realized in the course of negotiations that national legislation had resolved all the problems, there was no longer any need for an agreement. But paragraph 2 specified that if negotiations failed, States should at least unilaterally follow the draft articles, unless a treaty provided otherwise. Regardless of the wording used, the idea

of negotiation was implicit throughout the articles of the 1983 Vienna Convention.

27. Mr. PAMBOU-TCHIVOUNDA said he very much doubted that it was in the spirit of the recommendation made by the Working Group at the forty-eighth session<sup>5</sup> to treat the obligation to negotiate set forth in article 15, paragraph 1, in the same way as that obligation was treated in the framework of the 1983 Vienna Convention, which established a norm in that regard and a derogation therefrom. Two very different questions were involved.

28. Mr. ELARABY said that, notwithstanding everything he had heard to the contrary at the current meeting, he was firmly of the view that an obligation to consult and negotiate was undoubtedly an aspect of dispute settlement.

29. Mr. Sreenivasa RAO said the basic point being stressed in article 15 was that when a succession of States occurred a broad spectrum of problems arose, particularly concerning the status and nationality of the individuals involved, and that in order to settle those problems amicably, prevent statelessness and protect the will of the persons concerned, States would be well advised to engage in consultations. However, States would differ as to the modalities for resolving those problems; consequently, negotiations would ensue. Whether, at that stage, a "dispute" could be said to have arisen between them was a moot point. While the Special Rapporteur's basic intention must be acknowledged, a more suitable wording would have to be found in the Drafting Committee, for it was clear that, in spite of the clear guidance provided by the Working Group, the drafting of paragraph 2 of article 15 fell short of its intentions.

30. The purpose of consultations and negotiations was twofold: to conclude agreements encompassing solutions to a broad spectrum of problems; and to prevent statelessness and back up the will of the persons concerned. Agreements that suppressed the will of the persons concerned or created statelessness would not achieve the purpose of the draft articles. States must thus be guided towards resolving their differences (rather than their "disputes") with due regard shown to those priority objectives. That point must in some way be built into the article. Guidelines for States could also be incorporated in the commentary.

31. As to paragraph 2, the view had been expressed that it gave the wrong impression by seeming to impose a sanction. He had no problem with the basic intention underlying the paragraph, but the form of language used was too strong, and the presumption enshrined therein was too pungently expressed. It would be remembered that an analogous situation had arisen in the negotiations on the law of the sea, where there had been a conflict between the "median line" and "equity" principles. In view of the technical and substantive problems to which it gave rise, he was inclined to support the proposal to delete paragraph 2, if consensus could be achieved by so doing. The basic purpose of the paragraph could be incorporated in paragraph 1 or elsewhere, in a suitable wording that elaborated on the objectives of the negotiations. There

again, other problems could be resolved in the commentary.

32. As for article 16, a "genuine link" was the benchmark for granting nationality under general international law, whereas in article 7, paragraph 2, the concept arose in the context of State succession and the prevention of statelessness. How those two situations could be reconciled was a matter the Drafting Committee would have to consider: perhaps, pace Mr. Simma, the problem could be solved by means of a cross-reference. Initially, he had thought he was in a position to propose a clear solution to the problem. Having listened to the debate, he was less clear about the issues himself.

33. Paragraph 2 of article 16 gave rise to even more complex arguments, and some members proposed that it should be deleted. He would support deletion if consensus could be achieved thereby. Failing that, the paragraph could be redrafted—an exercise which, however, was likely to prove very complicated.

34. Mr. BROWNLIE, responding to the comments by Mr. Sreenivasa Rao, said he had become somewhat shaken in his faith that article 15, paragraph 1, had a clear purpose. He was beginning to worry that it tried to do two jobs at once and that its clarity suffered in consequence. Initially, he had supposed it to be an attempt to cope with the broad range of problems that might arise when States dealt with one another in the absence of any legal dispute but in circumstances in which there were difficulties to be resolved—not least, so as to avoid disregard for the fate of the individuals involved. Clearly, there was no dispute settlement clause as such in the draft articles. Yet, as Mr. Elaraby had pointed out, in some sense article 15, paragraph 1, was a dispute settlement clause. It involved an obligation to negotiate—a form of settlement. Again, although it avoided the terminology of legal disputes or legal issues, the range of issues involved could undoubtedly include legal issues. Consequently, albeit perhaps only in a residual manner, it had points in common with a classic dispute settlement clause. In the world of dispute settlement, use was made of the expressions "legal disputes", "legal issues" and "legal controversies". In the current instance, however, the language used was deliberately fluid and general, precisely to encourage States to settle problems even if they could not be formulated as legal disputes.

35. The difficulty with paragraph 2 was that—leaving aside its internal problems, such as the awkward use of the presumption—it rather confirmed the view that paragraph 1 was indeed heavily concerned with legal disputes. Paragraph 1 was partly a *sub rosa* dispute settlement clause, although intended to deal with structural problems affecting the fate of individuals which could not properly be classified as legal disputes between the States concerned.

36. Mr. SIMMA said that, although he largely agreed with Mr. Brownlie's comments, he was still in favour of retaining article 15, paragraph 1, in view of the fact that it embodied an important principle.

37. Mr. ROSENSTOCK said he had no problem with article 15, paragraph 1, which, despite appearances, was not a dispute settlement clause, but that he had some ques-

<sup>5</sup> See 2475th meeting, footnote 5.

tions with regard to paragraph 2 of the article. Paragraph 1 should be perceived largely as an exchange-of-information requirement, and it did not presuppose the existence of a dispute.

38. His concern regarding paragraph 2 was whether, if one of the States concerned did not refuse to negotiate, that paragraph was still valid. Was the *a contrario* implication of the phrase “if one of the States concerned refuses to negotiate” a legitimate area of concern? The rest of the paragraph was clearly valid, whether or not a State had refused to negotiate—unless paragraph 1 was in fact, in some sense, a dispute settlement provision. He would welcome some clarification of that point by the Special Rapporteur.

39. Mr. MIKULKA (Special Rapporteur), referring to article 15, paragraph 1, said that, in his view, the rule was perfectly clear. States were under an obligation to consult and, if necessary, proceed to negotiate. They must first consult to ascertain whether there were populations which might be affected, for example on the territory transferred and then to find out what the legislators’ intentions were. If the legislators were in agreement from the outset to apply the same rules, why must States be required to conclude an agreement? If successor States A and B consulted on legislative texts and decided that they were virtually identical or overlapped and respected the possibility of persons to choose, why say that that was not sufficient and require the conclusion of an agreement? Surely, if the States consulted and established that the question could be resolved without a formal agreement, that was enough. Even the Venice Declaration said less, because it provided that States might conclude an agreement but not that they must consult or negotiate. Article 15, paragraph 1, required States to consult and, if they saw that there were questions to be resolved, to negotiate. Solutions might be by way of internal law or an international treaty.

40. Article 15, paragraph 2 should be understood as creating a link between Part I and Part II (Principles applicable in specific situations of succession of States). If it was deleted, how could Part II be interpreted? Something would be missing. It would then be necessary to instruct the Drafting Committee to specify what the link between a treaty and the articles was. He asked members to imagine that there was no paragraph 2 and that States concluded an agreement which was fully consistent with Part I, but which chose criteria other than those set out in Part II. If it was simply found that the behaviour of States should be in conformity with those articles, did the Commission mean to say that the agreement between the States was not valid and contradicted international law? International law could still be changed, unless *jus cogens* norms were involved, but the Commission was not in the process of formulating *jus cogens*. Consideration must therefore be given to how to make it clear that Part II was purely residual. In other words, it was telling States that, if they embarked upon negotiations, but did not know where to start, they could take the provisions of Part II as a basis, and that if they found a better solution for their particular case, it was assumed that they would adhere to the principles of Part I on the prevention of statelessness, non-discrimination, respect for the person’s will in certain situations, and so on. As far as specific criteria were con-

cerned, States were of course free to reach other conclusions. If, however, there was no agreement and negotiations aborted, did the Commission mean to say to those States that everything contained in Part II was merely for use during negotiations but, where negotiations failed, it was no longer of any value? Or did the Commission want to tell them that, even if negotiations were unsuccessful, it afforded States at least a guarantee, namely, States which did adhere to the rules set out in Part II had an assurance that no one could accuse them that their legislation was improper or excessive and that their granting of nationality exceeded the genuine link. No one would be able to assert that those States had acted against the will of the persons concerned, because Part II included provisions on situations where the will of the persons concerned should be respected.

41. He was open to suggestions, but it must be clearly indicated somewhere in Part I that Part II was residual in character, that States could of course conclude an agreement which provided otherwise and that, in the absence of an agreement, they should as a minimum, act in conformity with the content of Part II. That was why paragraph 2 was useful. It might not be absolutely essential, but the Commission must find a way to tell States how it wanted them to proceed with the principle behind Part II.

42. Mr. ECONOMIDES said he must correct the mistaken impression that he had suggested that an international treaty had to be concluded at all costs. What he had meant was that States must deal with the question of the nationality of natural persons and find solutions to the problems in question. Solutions could be reached through international agreement—which was the most common way—or otherwise. States might find that their internal legislation was fully consistent and that an international agreement was unnecessary. In any case, it should be expected that States must themselves deal with those questions and find appropriate solutions.

43. Paragraph 2 was unacceptable and even dangerous. If it was really necessary to have several elements in connection with Part II, they must be found by using an approach other than the one employed in article 15, paragraph 2, which contained the seed of a perpetual conflict. Who would decide whether a State’s legislation was in conformity with the draft? Each State would pass judgement on the other, something that would violate the fundamental principle of equality between States. He agreed with Mr. Galicki and was categorically opposed to paragraph 2.

44. Mr. PAMBOU-TCHIVOUNDA pointed out that the purpose of the obligation to negotiate was not to conclude an international agreement, but to get the States concerned, as the Special Rapporteur had rightly said, to ascertain that there was a convergence of views in their legislation and that there was at least agreement on ways to settle the question: that was already one of the objectives of the obligation to negotiate, which served as a safety valve for the populations concerned by State succession. At no point was it stipulated that States which had embarked upon a process of mutual consultation must reach an agreement. Reassuring the Special Rapporteur that there was no contradiction with what Mr. Economides and Mr. Sreenivasa Rao had said, he fully endorsed

the latter's position on article 15, paragraphs 1 and 2, which tied in with the formal opposition voiced by Mr. Economides.

45. Mr. GOCO said that paragraph 1 did not contemplate dispute settlement. Parties were merely obligated to identify any detrimental effects of the State succession with regard to the nationality of individuals, as well as other related issues concerning their status, and to seek solutions to those problems. The difficulty had arisen because Mr. Economides had raised the point that parties might go as far as to try to work out a settlement. If the word "settlement" was problematical, perhaps paragraph 1 could be redrafted to say "... to seek a solution to those problems through negotiation and to endeavour to work out their differences".

46. Mr. LUKASHUK said that paragraphs 1 and 2 were both well-founded. Two provisions were involved, the first being the general principle that States were obligated to consult. It was difficult to see how anyone could object to that. The second provision encouraged States to bring their internal legislation into line with the provisions of the draft. Some members had asked who would determine whether or not internal legislation was consistent with the draft. Were they able to cite any other rule of international law in respect of which the same sort of question could not be posed? He supported the arguments very convincingly adduced by the Special Rapporteur and Mr. Rosenstock for retaining both provisions.

47. Mr. Sreenivasa RAO said the problem was that, if the Commission decided to delete article 15, how did it intend to save the substance and make it clear to States that there must be a requirement to draft internal legislation in conformity with the principles contained in Part II? That question could be readily answered by referring to article 3. Article 3 already provided guidance to States on legislating and, if such legislation was drafted in conformity with the principles contained in the draft articles, it would achieve its purpose. Article 15, paragraph 1, would stipulate that States must consult with a view to identifying problems arising out of State succession and arriving at solutions to the extent possible. Failing a solution, the requirement existed to provide for appropriate legislation under internal law in accordance with article 3. Accordingly, any State with such legislation would benefit *ipso facto* from the presumption that, as long as the basic principles in the draft articles, and especially those in Part II were generally accepted, there should be less difficulty.

48. Mr. SIMMA asked whether the Special Rapporteur had any views on Mr. Rosenstock's concern as to the undesirability of an *a contrario* argument.

49. Mr. MIKULKA (Special Rapporteur) said that he had no objection to Mr. Rosenstock's proposal to delete the first words of article 15, paragraph 2, and to retain the rest of the provision, which addressed an aspect not covered entirely in article 3.

50. Mr. ELARABY, referring to Mr. Rosenstock's comment that the obligation to which reference was made in paragraph 1 concerned the exchange of information, proposed that the words "to exchange information and" should be inserted before "to consult", so as to make it clear what was meant by that obligation.

51. Mr. ADDO said that paragraph 1 required consultations to prevent, by mutual agreement, any harmful effects of the State succession with respect to nationality. He did not see how there could be any objection to that. He was in favour of retaining paragraph 1 as it stood and endorsed Mr. Rosenstock's comment on the exchange of information.

52. Mr. HAFNER said that he had no problem with the objective of article 15 and shared Mr. Brownlie's view that the article served a dual purpose. It was a consequence of article 1 and provided that the States concerned were under an obligation to consult in order to see whether there were any detrimental effects of the succession. Consequently, they must consult in any case. A provision on devices to settle difficulties might then come as a next step, for if there were any detrimental effects owing to disparities in legislation, States should try to settle the matter through negotiations.

53. The Commission should not exclude other means. It was not necessary to speak explicitly of reaching an agreement, but such a possibility should not be ruled out either. Again, other solutions which did not require negotiation were conceivable and could also help settle problems. It might be useful, for example, to add the words "or by other lawful means" at the end of the paragraph.

54. The commentary said that the effects should be detrimental to the individual. Might it not be useful to have an example of such effects in order to give an indication of what was meant, other than the wish to prevent statelessness? As to Mr. Sreenivasa Rao's example concerning the solution reached on the delimitation of the continental shelf and the reference to the "equity group" and the "median-line" group, he was not convinced that the situation was comparable in all respects.

55. Article 15, paragraph 2, was redundant. It would only serve a purpose in cases where the obligation to consult was considered a prerequisite for enacting internal legislation. States were already under an obligation under the terms of article 3. It was, however, necessary to retain the last part of paragraph 2, namely the reference to treaties, for States might come to an agreement which differed from the rules set out in the draft.

56. He had anticipated Mr. Simma's comment that article 16 should be regarded as an answer to his question about how the instrument was to be enforced. Yet article 16 raised a number of problems. Paragraph 1 was likely to touch upon the question of State responsibility in the large sense and the act of State doctrine, of which national acts certainly constituted an example. The question was whether one State could pass judgement on the acts of another. Various solutions had been found in practice, and the point was whether the paragraph was in conformity with the general rules. But surely the possible impact of those rules embodied in paragraph 1 in the field of State responsibility was more important since, in its actual wording, it laid down the legal consequences of non-compliance with the draft articles. It was generally held that, if a State acted contrary to its obligations, it committed a delict. There was, however, one major difference: article 16, paragraph 1, allowed for non-recognition of acts which constituted delicts in international law, a

possibility not found in the draft articles on State responsibility,<sup>6</sup> where non-recognition of illegal acts was allowed only in cases of crimes, although, admittedly, that had not yet gained widespread acceptance. Article 16, paragraph 1, thus departed from the general rule on State responsibility. He wondered whether the Commission intended to create what ICJ called a self-contained regime. In other words, should article 16 be understood as a sanction for acts of non-compliance with the draft articles? In the literature and in past decisions, the rule—which was currently enshrined in article 16, paragraph 1—had been more or less firmly established that, if a State granted nationality contrary to international law, such nationality need not be recognized by other States. But it was important to be clear that that rule departed from the general rules on State responsibility.

57. Apart from those basic principles and ideas, there were a number of problems with the wording of the paragraph. Reference had already been made to the question of a genuine link, and he agreed fully with those who had pointed out that article 16 differed from article 7, paragraph 2, in that regard. Nevertheless, the draft articles contained no general rule limiting the granting of nationality to the existence of a genuine link. It could be inferred that the whole of the draft was only an elaboration of the question of such a link, which must be interpreted in the context of the draft and had no independent meaning. Again, paragraph 1 seemed to establish primary and secondary rules. The primary rule would then be that States must not grant nationality without a genuine link, and the secondary rule would be the reaction to non-compliance with the primary rule. He would be grateful for the Special Rapporteur's comments on how the primary rule was to be understood in that regard.

58. As to the period of applicability of the principle set out in paragraph 1, the current formulation indicated only the starting point of the obligation. Was it deemed to apply for an unlimited period after succession, since the provision simply stated "following the succession of States"? Furthermore, did article 16, paragraph 1, relate only to the attribution of nationality by a successor State or did it also cover the retention of the nationality of the predecessor State, contrary to the draft articles? To cite an example, article 24 (Withdrawal of the nationality of the predecessor State), paragraph 2, set forth the obligation of the predecessor State to withdraw its nationality. Was the principle in article 16, paragraph 1, also valid for cases in which the predecessor State did not withdraw nationality, contrary to article 24?

59. He had serious doubts that article 16, paragraph 2, would find broad acceptance in the international community and the Commission was duty-bound to take that consideration into account.

60. Lastly, on a practical point, there was a presumption that nationality was granted by another State and then by the national State. Who issued the passports for that purpose?

<sup>6</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.

61. Mr. MIKULKA (Special Rapporteur), referring first to a comment made by Mr. Elaraby, said that he agreed in principle with Mr. Rosenstock's interpretation. In large measure the obligation to consult involved an obligation to exchange information whereby States would inform each other of their intentions in regard, for instance, to national legislation. The obligation to consult could also broaden into an obligation to seek a solution through negotiation, as was apparent from the last phrase of paragraph 1 of article 15. It was, of course, implicitly understood that, wherever possible, States would arrive at agreement but, if that was not possible, they were presumed at least to follow the requirements laid down in the article. At all events, there was certainly no case of *pactum de contrahendo*. On the whole, it seemed to him that a consensus on paragraph 1 of article 15 was emerging in the Commission.

62. He had been asked to give examples of detrimental effects. The prime example, of course, was statelessness, which could have such effects for both the persons and the States concerned. Another example was that of the effects on mixed nationality marriages. From the moment of the dissolution or separation of a State two regimes governing nationality could subsist within the same family, with all the attendant difficulties in terms of visas and work permits for some of its members. There was thus a whole set of problems which, while going beyond the question of nationality, was nonetheless directly related to it. The point could perhaps be elaborated in the commentary.

63. The "genuine link" concept certainly had a place in article 16, paragraph 1 of which set forth the principle recognized by ICJ in the *Nottebohm* case. So far as paragraph 2 of the article was concerned, he presumed that it more or less satisfied the genuine link requirement and trusted that it would not be rejected by States. If the Commission felt that any exercise in which it was engaged would not be acceptable to States, however, it should say so and the provision in question should be deleted. Personally, he believed that the "presumption" in paragraph 2 would be accepted by States because they had acted in a similar fashion on a number of occasions. In that connection, he would again remind the Commission of the case of the German Jews who had been denationalized after the Second World War under decrees enacted by the Allied Governments and who had been regarded as being of German nationality for the purposes of their treatment by third States.<sup>7</sup>

64. Paragraph 2 of article 16 did not go so far as to impose any requirement that stateless persons should be given passports. The citizens of the former Union of Soviet Socialist Republics (USSR) and the former Czechoslovakia had travelled all over the world for at least two or three years with Soviet or Czech passports without difficulty. In other words, the nationals of the predecessor State had been treated as though they already had the nationality of one or other of the successor States, even if that was not apparent from their papers.

65. The question of time limits was somewhat academic because the obligation in fact existed until the problem

<sup>7</sup> See 2478th meeting, footnote 6.

had been resolved. In other words, as long as a portion of the population remained stateless, every effort would be made to find a solution to that problem until it was resolved. To that extent, therefore, there could be no time limit. Indeed, if such a limit were to be established, it would divest the draft of its meaning, since the aim was to suggest that the problem was so urgent that it could not be suspended in time.

66. Mr. CRAWFORD said it seemed to him that Mr. Hafner had confused the issue of State responsibility with the quite different issue of opposability of the action of the particular State in respect of nationality. It was true that there were obligations of non-recognition arising from State crimes but there might be obligations of non-recognition in other situations as well. Article 16, paragraph 2, was, however, concerned with a different question in that it recognized that States were not obliged to recognize the legal effects of the unlawful conduct of a State in failing in some respect under the draft articles. The analogy with State responsibility was therefore beside the point.

67. It had rightly been said that paragraph 2 of article 16 could raise questions of acceptability and he agreed that it should be explained that States needed such a power in some situations, including situations of great importance to a majority of States, and should not preclude themselves from using it. In any event, it was not the Commission's function to anticipate adverse verdicts from States in respect of provisions it regarded as necessary, and he would argue that paragraph 2 was necessary.

68. On the question of passports, no third States had issued passports to the persons affected by the Bantustan policy. Nonetheless, those persons had been treated as continuing to be South African. An analogous situation had obtained in some of the cases of denaturalization in Germany and Eastern Europe in the context of the anti-Jewish decrees.

69. The problem of time limits applied with respect to all rules of international law and there was no reason to treat the current situation any differently from the way in which other situations were treated.

70. He was a little concerned about the reference in article 16, paragraph 1, to *de facto* statelessness which seemed to raise a distinction between *de facto* and *de jure* status that might be problematic. He would prefer it, therefore, if the last part of the paragraph could be amended to read: "and this would result in treating them as stateless", or words to that effect.

71. Mr. Sreenivasa RAO, responding to Mr. Hafner's remarks, said that, in referring to the equity group and the median-line group, he had not been trying to draw any strict analogy. Possibly, however, it could be suggested that, in the absence of agreement, any national legislation in conformity with the general principles of the draft declaration could be deemed valid for application in the mutual relationships between States.

72. The problems relating to article 16, and specifically the genuine link concept and the obligation of States to recognize or not to recognize the nationality of certain

persons, could perhaps be resolved if a different approach to the problem could be found.

73. Mr. SIMMA said that, as he understood it, Mr. Hafner had not been drawing any analogy but rather regarded the problem in article 16 as one of State responsibility. If that understanding was correct, he strongly disagreed with it. Article 16, in his view, fell entirely within the ambit of primary rules and if he had used the words "sanction" and "enforcing" he had done so colloquially and not to intimate any move into the realm of secondary rules on State responsibility. The issue was not one of a self-contained regime in the sense of a separate chapter within the secondary rules as such, but rather of a self-contained regime in the sense of a specific primary rule pertaining to State behaviour. To his mind, there was nothing strange about that.

74. Mr. ECONOMIDES said that he wished to clarify an earlier point he had made about *pactum de contrahendo*. His view was that States concerned had an obligation to settle a question of nationality by treaty or by any other means. If they did not do so by any other means, then they must do so by treaty.

75. Paragraph 1 of article 16 typified the kind of provision that, in his opinion, was to be avoided in an international instrument. Nationality was, of course, a matter for internal law, albeit within the limits imposed by international law. Moreover, the paramount principle of equality between States had to be borne in mind. Accordingly, he did not see how one State, acting unilaterally, could judge another, condemn it and immediately impose sanctions, by not recognizing the nationality given to certain persons. Such a provision could only pave the way for pressure tactics or even disputes, which would be undesirable. If the Commission really wanted to keep the provision, then it would also have to incorporate provisions on the settlement of disputes that would arise out of the interpretation and application of the instrument and even a provision for the mandatory intervention, if need be, of ICJ. For all those reasons, paragraph 1 of article 16 should be deleted.

76. He better understood the idea underlying article 16, paragraph 2, but thought that the provision had the same defects as paragraph 1 and that it would therefore be inapplicable in practice.

77. Mr. DUGARD said he was surprised to hear the Special Rapporteur state that article 16, paragraph 2, contained a presumption, since both paragraphs of the article restated primary rules. The only problem was that the words "are not precluded from treating", in paragraph 2, were perhaps a little weak. He suggested that they should be replaced by the words "shall treat" to make it quite clear that a primary rule was involved.

78. Mr. MIKULKA (Special Rapporteur) said that in his own mind he had placed the word "presumption" between inverted commas and indeed, at the time of speaking, had so indicated by the appropriate gesture.

79. Mr. PAMBOU-TCHIVOUNDA, referring first to paragraph 1 of article 16, said that there was considerable misunderstanding about the validity of nationality, on the

one hand, and the international opposability of nationality, on the other. As far as the question of validity was concerned, a State attributed its nationality, by law, to whomsoever requested it, and the conditions could not be fixed in advance. That being so, how could a third State be expected to have control over the conditions in which the nationality of another State was attributed? International opposability, on the other hand, and more specifically as it applied to the criterion of genuine link, was an issue that arose only in relationships or disputes between two or more States. In the context of opposability, the scope of the genuine link requirement should perhaps therefore not be exaggerated. The words in paragraph 1 “other States do not have the obligation to treat persons as if they were nationals of the said State” raised the question of the possibility of interference of third States in the internal affairs of another State or, even, of a violation of the principle of the sovereign equality of States.

80. The construction of paragraph 1 of the article was good, but the whole effect was destroyed by the last phrase “unless this would result in treating those persons as if they were de facto stateless” because once persons had acquired the nationality of a State the question of genuine link mattered little. What did matter was the State that granted nationality and was in a position to specify on what conditions it did so. Care should be taken not to strip those in search of a new nationality from the security they currently enjoyed. Above all, third States should not be vested with the power to destroy what another State could do on behalf of “victims”.

81. He was struck by one passage in particular in paragraph 2, which read: “owing to the disregard by that State of the present draft articles”. But was the Commission drafting recommendations that States were free to apply or not, or was it elaborating a convention that would be subject to acceptance by States? The phrase “are not precluded from treating such persons as if they were nationals” also raised a question in his mind. Since when was a State prepared to treat as nationals of another State persons who could not prove they were in fact nationals of that State? The Commission should be very clear as to what it was elaborating and how it proposed to proceed.

82. The CHAIRMAN, noting that the Commission had concluded its debate on Part I of the draft articles on nationality in relation to the succession of States, said that, if he heard no objection, he would take it that the Commission wished to refer articles 15 and 16 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

## 2487th MEETING

*Tuesday, 3 June 1997, at 10.05 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

*Present:* Mr. Addo, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### Reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>1</sup> A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

#### SECOND REPORT OF THE SPECIAL RAPporteur

1. The CHAIRMAN invited the Commission to begin its consideration of the topic “Reservations to treaties”, on the basis of the Special Rapporteur’s second report (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) reminded the Commission that he had introduced his second report at its forty-eighth session together with a draft resolution,<sup>2</sup> which, owing to lack of time, the Commission had been unable to examine in detail; it had deferred the debate on both until the current session.<sup>3</sup> Since the Commission’s composition had just undergone a significant change, however, he proposed, for information purposes, to make an overall presentation of the topic—recalling the broad lines of the first report<sup>4</sup>, the discussion to which it had given rise and the decisions taken by both the Commission and the Sixth Committee—and of chapter I of the second report. He would, however, defer the introduction of chapter II to later in the session. The members of the Commission had the right to react, of course, should they deem it useful, though it was to be hoped that the decisions already taken would not be called into question at the current stage.

3. As he had explained when introducing his first report, the topic of reservations to treaties was far from being *terra incognita* in international law: there was a wealth of doctrine in the matter and the Commission itself had considered the question on a number of occasions, taking a very definite stand which had had a major influence on

<sup>1</sup> See *Yearbook . . . 1996*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1996*, vol. II (Part Two), para. 136 and footnote 238.

<sup>3</sup> *Ibid.*, para. 137.

<sup>4</sup> *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/470.

State practice and, on the whole, continued to do so. Originally, a study<sup>5</sup> had been carried out in 1951 at the express request of the General Assembly.<sup>6</sup> The Special Rapporteur, Mr. Briery, followed by the Commission, had taken a view that had run counter to the solution adopted by ICJ in the advisory opinion handed down the same year on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide<sup>7</sup> abiding by the old strict consensual system of unanimous acceptance—or at any rate of the absence of objection—as proof of the permissibility of reservations. Faced with that disagreement between the Court and the Commission, the General Assembly had prudently refrained from taking a clear-cut position.<sup>8</sup> There had then been a fairly confused period during which the law had remained unsettled. It had been only in 1962, with the first report on the law of treaties by the Special Rapporteur, Sir Humphrey Waldock,<sup>9</sup> that the trend in the Commission had been reversed and the flexible system advocated by ICJ in 1951 had found favour with the Commission. And that was the system which, based on Latin American practice, had finally been codified in articles 19 to 23 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the “1969 Vienna Convention”), article 2, paragraph 1 (d), of which defined the word “reservation”. Those provisions were, in fact, repeated, virtually word for word and with the same numbering, *mutatis mutandis*, in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the “1986 Vienna Convention”), while article 20 of the 1978 Vienna Convention simply took account of the lessons implicit in the provisions of the 1969 Vienna Convention relating to reservations.

4. Thus it was that the hallowed “flexible system”, whose very essence was expressed in article 19 of both the 1969 and 1986 Vienna Conventions, had come into being. The principle was that a State “may . . . formulate a reservation” except in three cases:

(a) If the reservation was “prohibited by the treaty”—which immediately signified that the general legal regime of reservations was of an exclusively residual character even for the States parties to the treaty (in other words, it was a security net for States);

(b) If the treaty authorized only certain specified reservations, the other reservations being prohibited;

(c) In all other cases, a reservation was prohibited if it was, in the words used by the Court in 1951, “incompatible with the object and purpose of the treaty”.<sup>10</sup>

5. It had to be recognized that, on the whole, that flexible system, which reflected current positive law in the matter, worked very smoothly. The question therefore was

whether there was really any point in returning to it, with the risk of undermining it. The answer was less simple and straightforward than was immediately apparent and it called for a brief historical review of the circumstances that had led the Commission to include the topic on its agenda.

6. During the discussions in the Sixth Committee at the forty-fifth session of the General Assembly, in 1990, the representatives of two States had made a similar suggestion by pointing out that the implementation of the legal regime governing reservations as provided for in the 1969 Vienna Convention had raised problems and that it would be useful to ask the Commission to review it. The working group appointed by the Planning Group at the forty-fourth session, in 1992, to decide on topics for inclusion in the Commission’s agenda had taken the view that that suggestion, which responded to practical concerns, should be adopted.<sup>11</sup> At the forty-fifth session, in 1993, the Special Rapporteur had prepared a general outline,<sup>12</sup> briefly indicating the main problems that had been raised, the relevant instruments, existing doctrine and the advantages and disadvantages of codification.

7. After the working group, and then the Commission, had endorsed the conclusion that a detailed study of the topic was justified, the General Assembly had, in paragraph 7 of resolution 48/31, endorsed the Commission’s decision to include in its agenda the topic “The law and practice relating to reservations to treaties” and had requested it to undertake a preliminary study. That study comprising the first report of the Special Rapporteur, was divided into three chapters. Chapter I referred to the Commission’s earlier work on the 1969, 1978 and 1986 Vienna Conventions, while chapter II contained a brief inventory of the problems posed by the topic, on the basis of which he had noted that the “Vienna regime” was riddled with ambiguities and lacunae.

8. So far as the ambiguities were concerned, in particular regarding the question or rather the questions connected with the lawfulness of reservations and their opposability, the main problem was the following: was a reservation null and void *ipso facto* simply because it was contrary to the object and purpose of the treaty or, on the contrary, did the only criterion for the validity of a reservation lie in the position taken by the other co-contracting States? According to one part of doctrine, known as the “opposability” school, the validity of a reservation depended solely on its acceptance by another contracting State, whereas the opposing school, the so-called “permissibility” school, took the view that a reservation which was contrary to the purpose and object of the treaty was null and void in itself, irrespective of the position the other contracting parties might have on the question. Admittedly, that was a doctrinal disagreement, but the actual consequences were significant and could not be dealt with under the terms of the 1969 Vienna Convention. The result was great uncertainty, particularly regarding the effect and acceptance of reservations that were contrary to the object and purpose of the treaty and regarding objections to reservations the legal regime for which, under existing positive law, was highly uncertain. As for lacu-

<sup>5</sup> Report on reservations to multilateral conventions (*Yearbook . . . 1951*, vol. II, p. 1, document A/CN.4/41).

<sup>6</sup> General Assembly Resolution 478 (V) of 16 November 1950, para. 2 (a).

<sup>7</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

<sup>8</sup> General Assembly resolution 598 (VI) of 12 January 1952.

<sup>9</sup> *Yearbook . . . 1962*, vol. II, p. 27, document A/CN.4/144.

<sup>10</sup> *Reservations . . .* (footnote 7 above), p. 19.

<sup>11</sup> See *Yearbook . . . 1993*, vol. II (Part Two), p. 96, paras. 427-429.

<sup>12</sup> *Ibid.*, vol. II (Part One), document A/CN.4/454.

nae—and they were the same in the 1969 and the 1986 Vienna Conventions—they were extremely numerous, starting with the definition of the word “reservation” itself and the legal regime of interpretative declarations on which the 1969 Vienna Convention was silent.

9. In his conclusions contained in chapter II, sections A and B, of his first report, he had endeavoured to summarize the main ambiguities and gaps in the texts of the 1969, 1978 and 1986 Conventions, the long list of which amply justified the detailed study of the subject which the Commission had been requested to undertake. That, moreover, had been the tone of the debate the Commission had devoted to the matter at its forty-seventh session: all those members who had spoken on the subject had acknowledged the existence of many gaps and areas of uncertainty, some of which, moreover, had been clearly highlighted.<sup>13</sup>

10. That debate had also dealt at length with chapter III of the first report, entitled “The scope and form of the Commission’s future work”, in which he had dealt, first, with the question of the relationship between that work and the provisions of the 1969, 1978 and 1986 Vienna Conventions, and, secondly, with the question of the form that the results of the Commission’s work might take. He had indicated in that chapter that the then title of the topic, “The law and practice relating to reservations to treaties”, was not satisfactory, particularly because it was rather academic and might—no doubt wrongly and in any case a priori—give the impression that there might be some opposition between “the law” and “practice” in that area. With regard to the relationship between the Commission’s work and the 1969, 1978 and 1986 Vienna Conventions, in his first report he had come out very firmly in favour of preserving what had been achieved: taken as a whole, despite their numerous shortcomings, the 1969, 1978 and 1986 Vienna Conventions worked well and their provisions constituted rules of reference which, irrespective of their nature at the time of their adoption, could be regarded as having acquired a customary value. Consequently, it had seemed to him that it was not necessary, in order to remove existing ambiguities and fill existing gaps, to reconsider a system which had proved its worth, particularly in view of the fact that to call the existing principles into question would place States that had ratified the 1969 and 1978 Vienna Conventions in an extremely delicate position: there was no guarantee that they would all rally to a new regime and the result would be an inextricable legal muddle.

11. On the other hand, he had adopted no clear-cut position in his first report on the form the results of the Commission’s work might take, confining himself to pointing out that there were a fairly large number of possibilities, ranging from a draft convention to a mere study, by way of additional protocols to the existing conventions, a guide to practice, a set of “consolidated” draft articles, that is to say, one including the provisions of the existing conventions, model clauses or a combination of those various solutions.

12. Called upon to draw conclusions from the debates in plenary, he had summarized them as follows:

(a) The Commission considers that the title of the topic should be amended to read “Reservations to treaties”;

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission’s statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.<sup>14</sup>

13. Those conclusions had been adopted in their entirety by the Sixth Committee at the fiftieth session of the General Assembly and the Assembly, in paragraph 4 of resolution 50/45, had taken note thereof and had invited the Commission “to continue its work . . . along the lines indicated in the report”. Most, if not all, representatives who had spoken on the subject at the fiftieth session of the Assembly had stressed the need to preserve what had been achieved and some had reverted to the question at the fifty-first session, pointing out, *inter alia*, that the Vienna regime had established a satisfactory balance between the need to preserve the integrity of the treaties and the desirability of enabling the largest possible number of States to become parties thereto.

14. It was thus on those bases that he had drafted his second report, which consisted of two chapters, the first of them devoted to an overview of the study and the second to the unity or diversity of the legal regime for reservations to treaties, particularly human rights treaties—a fundamental problem that had been much discussed both in the Commission itself and in the Sixth Committee, as well as in human rights bodies, universities and scientific forums.

15. Chapter I of the second report dealt with the outcome of the first report and its consequences for the future work of the Commission on the topic. In that chapter, he summed up the main questions which had been taken up by the Commission at its forty-seventh session and which very largely coincided with those dealt with by the Sixth Committee at the fiftieth and fifty-first sessions of the General Assembly. It was in many respects comforting to note that the independent experts in the Commission were not out of touch with reality and that they had the same views as representatives of Governments about the order of importance of the problems. Those key problems were: the question of the definition of reservations; the distinction between them and interpretative declarations, and the legal regime governing the latter; the effect of reservations which clashed with the purpose and object of the treaty; the effect of objections to treaties; and the unity or otherwise of the legal regime of reservations. While it was true that those problems were indisputably at the root of the most serious questions raised by the topic, the Commission could not content itself with trying to come up with answers to them because those questions formed part of a broader set of problems and the Commission would

<sup>13</sup> See *Yearbook . . . 1995*, vol. II (Part Two), paras. 436-487.

<sup>14</sup> *Ibid.*, para. 487.

not fully perform its task, namely, the preparation of a guide to practice in respect of reservations, if it did so. That was why the provisional general outline of the study, set out in chapter I, section B, of the second report and briefly analysed at the end of the chapter, summarized the topic as a whole as completely as possible. As the informal working group established by the Planning Group had indicated at the preceding session, and as contained in the report of the Planning Group adopted by the Commission,<sup>15</sup> it seemed normal and legitimate that a special rapporteur should indicate as precisely as possible the questions he planned to deal with in future and, if possible, the order in which he planned to deal with them. That was what he himself had tried to do in the current case, aware as he was of the perilous nature of the exercise, for it was not possible to foresee every eventuality. As his work progressed, he was discovering the complexity and technicality of the topic and also the politically sensitive nature of some of its aspects. He thus did not claim that the outline was definitive, or even complete. Any suggestions for additions or changes would be welcome.

16. He said he wished to draw the Commission's attention to the paragraphs of his second report in which he had tried to define the objectives of the general outline of the study and the spirit in which he had conceived it and which was more pragmatic than doctrinal, still less doctrinaire. In the last paragraph of chapter I, he set out his plan of work for the years ahead, which was a little over-ambitious because he had had to abandon his intention of submitting a third report on parts II (Definition of reservations) and III (Formulation and withdrawal of reservations, acceptances and objections), as it had not been possible to consider his second report at the forty-eighth session. That being said, his work on the analysis of those topics was already well advanced and he thus hoped to be able to submit two reports to the Commission at its fiftieth session, namely, the one he would have submitted at the current session if his second report had been considered at the forty-eighth session and the report on "Effects of reservations, acceptances and objections" that he had planned for the fiftieth session. However, it was clear that, as pointed out in the last sentence of the last paragraph of chapter I, those indications were only and could be only of a purely contingent nature.

17. Chapter I also set out to give further details of the form the proposed study would take. It was indeed a question of further details, for the matter had already been decided by the Commission, and its decision had been adopted by the General Assembly. It would thus be necessary to preserve what had been achieved by the 1969, 1978 and 1986 Vienna Conventions with regard to reservations, and that meant that those Conventions would be the starting point for the study. The idea was then to draw up a guide to practice in respect of reservations, which presupposed the establishment of a set of draft articles. In that regard, he did not intend to make innovations, except perhaps in one area that was also connected with the desire to preserve what had been achieved, in that he planned to preface the new draft articles with the provisions on reservations already included in the 1969, 1978

and 1986 Vienna Conventions, first, to give the guide to practice a comprehensive nature and, secondly, to ensure that it was consistent with what already existed. The draft articles would be accompanied not only by commentaries, but also by "model clauses", in other words, model provisions that States could insert in the treaties they concluded in the future if they needed to have recourse to special clauses derogating from ordinary law in certain specific areas.

18. In closing, he said that annex I to the second report contained the bibliography on the topic and was available to all members of the Commission who did not have it and would like to obtain it. It was a long document which, however, certainly had gaps as concerned not only works published in languages which he did not know, but also new material on a topic on which there had been many writings. He urged all members of the Commission to draw any omissions to his attention so that the bibliography could be completed.

19. The other two annexes, which also had not been distributed at the current session, but which were available, contained the two questionnaires which the Commission had authorized him to send, through the secretariat, to States and international organizations.<sup>16</sup> The questionnaires, which were very long, did not solicit the opinion of States and international organizations on the problems to which the topic gave rise, but inquired into their practice in respect of reservations.

20. He had received replies from 18 international organizations, but not, unfortunately, from certain specialized agencies, such as WHO, or from the European Communities, and also from 30 States, including third world countries, whose effort deserved to be noted. Some of the States with a national in the Commission had not replied and he urged his colleagues to prompt their States to do so. As the replies had been very long, it had not been possible to circulate them and he would thus try to produce a summary in his future reports. The results were very encouraging because they reflected the interest of States and international organizations in the topic of reservations to treaties and he hoped that his work would be useful to them. To his mind, that was an additional reason to ask all members of the Commission to help him in his task through their comments, advice and criticism. The debates would probably focus on chapter II of the second report, but he was prepared to respond to any questions to which chapter I might have given rise.

21. Mr. KATEKA said that he had doubts about the Commission's procedure for considering the second report because it might create confusion, particularly for the new members of the Commission like himself. It was not logical to submit the two chapters of the report separately and to return in the interim to another topic. At that rate, he was not certain that the consideration of the question could be completed by the fifty-first session of the Commission, in 1999.

22. As to the substance of the topic, he too felt intimidated by its complexity and its highly political nature. Although he agreed that the objective must be to fill any

<sup>15</sup> *Yearbook* . . . 1996, vol. II (Part Two), paras. 144-250.

<sup>16</sup> ILC (XLVIII)/CRD.I and ILC (XLIX)/CRD.I.

gaps and dispel any ambiguities in the 1969, 1978 and 1986 Vienna Conventions, he wondered whether drafting a non-binding guide was the best way to do so. He would like the Special Rapporteur to provide clarification on that point. It also appeared that such a guide would be very voluminous because it would contain draft articles together with commentaries and model clauses as well. It was to be hoped that the guide would really help improve the situation and not add to the confusion which already reigned in the system established by the 1969, 1978 and 1986 Vienna Conventions.

23. Lastly, it would be very useful if the Special Rapporteur could summarize all the replies he had received to the questionnaires so that all members of the Commission could have a clear idea of the situation in that regard.

24. Mr. LUKASHUK said he agreed entirely with the Special Rapporteur that the topic under consideration was very concrete. He pointed out that when the 1969, 1978 and 1986 Vienna Conventions had been adopted, it had been the socialist countries, supported by the developing countries, which had insisted on the right to make reservations, whereas recently it had been the western countries which had made use of that right. He nevertheless endorsed the Special Rapporteur's method of starting with the consideration of the provisions and principles embodied in the Conventions. The question of reservations was of vital importance and must be studied in depth. Attention should also be given to the particular regime of treaties which had established rules to reflect the interests of the international community as a whole, an aspect which the Special Rapporteur had rightly underscored. From a practical point of view, the procedure chosen for the adoption of reservations and the formulation of objections would be essential, as would the way in which the permissibility of reservations was determined, those all being elements which currently gave rise to considerable difficulties.

25. He noted that, although the practice of formulating reservations was in general on the decline, the question of reservations to bilateral treaties had assumed greater importance. The Senate of the United States of America had taken the initiative in the area and other States had followed. A new trend in that direction had even appeared in the Russian Parliament. The Commission had already focused on the question, but there had not been any unanimity on whether only reservations to multilateral treaties should be regarded as acceptable. Admittedly, the 1969 Vienna Convention itself did not prohibit reservations to bilateral treaties. The question therefore warranted more in-depth consideration.

26. Mr. PAMBOU-TCHIVOUNDA said, first, that there was nothing new about the idea that the practice of the States parties to the 1969, 1978 and 1986 Vienna Conventions had itself created customary rules. It was clear that custom preceded codification and that the latter had neither transformed nor added anything in terms of substance, apart from making a "sole outline" widely available.

27. Secondly, with regard to the doctrinal quarrel referred to by the Special Rapporteur between the permissibility and opposability schools, he wondered whether permissibility was not a condition for opposability and

whether it would not be possible to reconcile the two points of view, since both operations functioned within the same system.

28. His third comment had to do with reservations and interpretative declarations, which were related categories. In his opinion, it might be possible to go beyond the usual criterion of distinction, which usually concerned the subject, and focus on the function of those two techniques, which of course was what they were. It would be necessary to determine the function of each one in relation to a system which a State either planned to join while retaining its own views and defending its own interests or of which it was already a part, but which it would like to improve.

29. Fourthly, he noted with interest that, in his introduction, the Special Rapporteur had taken account of a highly political dimension, namely, the basis of a reservation by a State or an international organization. If a State planned to become part of a whole while making its intention to join conditional on a "yes, but", it was not the joining which determined entry, it was the reservation so expressed. In other words, by drawing the attention of the members of the Commission to the political context which was the basis of the reservation procedure, the Special Rapporteur was asking them to assess the place of the instrument which existed in relation to the reservation and the role of the reservation in relation to the instrument which existed. That required a diachronic evaluation of the relationship between the reservation, which was the expression of the political approach of its author, and the legal instrument, which itself served political interests. In the nineteenth century, the treaty had been considered above all in its formal dimension; the waning twentieth century would be one in which international law appeared as increasingly reduced to essentials in that the international treaty was recognized as an act which was not neutral, but which promoted interests.

30. His fifth comment had to do with the form which the result of the Commission's work would take. As there was agreement on the principle of retaining the achievements of the 1969, 1978 and 1986 Vienna Conventions, it might be asked whether the guide to practice which the Special Rapporteur proposed to draft would have the same authority as the "Vienna system" and become part of the binding logic of that system. That was an essential question.

31. Mr. DUGARD suggested that, since the Commission was in all likelihood about to enter into an in-depth debate on the relationship between the Vienna regime and reservations to human rights instruments, the secretariat should prepare a compendium of the reservations to the major human rights conventions and make it available to the members of the Commission. The secretariat should also obtain copies of general comment No. 24 (52) of the Human Rights Committee,<sup>17</sup> on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,<sup>18</sup> as well as the reactions or objections to general comment No. 24 (52) by certain

<sup>17</sup> See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, annex V.

<sup>18</sup> *Ibid.*, annex I.

Governments.<sup>19</sup> He wished to know whether the draft resolution at the end of the second report was still to be considered at the current session.

32. Mr. MIKULKA congratulated the Special Rapporteur on his brilliant second report and endorsed the method of referring to a number of issues which the Commission had practically settled and on which it would be unfortunate to reopen the debate. He fully agreed that the Commission needed to preserve the aspects of the 1969, 1978 and 1986 Vienna Conventions that represented successful achievements in the codification of international law and try to remove the ambiguities and gaps in those instruments. With regard to the provisional general outline of the study, contained in chapter I of his second report, he had two questions about part II. On the legal regime of interpretative declarations (item (d)), he had understood that the intention was primarily to define such declarations in order subsequently to exclude them from the study. He would like to have assurances from the Special Rapporteur on that point. As to reservations to bilateral treaties (item (e)), he had the impression that the Commission had already taken a decision not to study such reservations and that would mean that item (e) could be deleted. He also asked the Special Rapporteur whether 1999 was still the date of the completion of the study or whether he intended to push the time limit back one year.

33. Mr. SIMMA congratulated the Special Rapporteur on his excellent second report and on the questionnaire, which attested to in-depth knowledge of the topic. He fully endorsed the Special Rapporteur's proposals on the form of the draft articles and the work to be done on it. He nevertheless wished to know why the Special Rapporteur was planning to submit two reports to the Commission at its fiftieth session rather than a single report combining parts II and III of the provisional general outline of the study. He endorsed the requests by other members of the Commission that the secretariat should compile documentation containing at least excerpts or summaries of replies by States to the questionnaire, copies of reservations to human rights instruments and the full text of the reactions by States to general comment 24 (52) of the Human Rights Committee.

34. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his remarkable work on an important topic. He regretted that, owing to lack of time, the Commission had been unable to begin its discussion of the topic at its preceding session, but he nevertheless agreed with the conclusions reached during the preliminary consideration. The way the Special Rapporteur had approached his task by starting with extensive background analyses augured well for the quality of his future reports. Despite the magnitude of the task still to be accomplished, the Commission could be confident that, under the guidance of the Special Rapporteur, who had shown that he was open-minded and objective, it was not in danger of going astray or of neglecting any aspect of the topic.

35. Mr. HAFNER, congratulating the Special Rapporteur, said that he had two questions. First, since he shared Mr. Mikulka's view about reservations to bilateral treat-

ties, but had noted that other members were of the opposing view, he wondered whether, as a compromise, it might not be possible to draft part II, item (e), of the provisional general outline of the study as a question. Secondly, referring to the documentation to be compiled by the secretariat, he wondered whether it might not also be possible to obtain the reactions of States to reservations to human rights instruments.

36. Mr. PELLET (Special Rapporteur) said that he would reply briefly to the comments made. With regard to Mr. Kateka's and Mr. Pambou-Tchivounda's concerns about the preparation of a guide to practice, he pointed out that, although a decision had been adopted it was not immutable because the decisions taken by the Commission and by the General Assembly in 1995 had left a way out. At the current stage, however, there was no reason to reconsider that decision, which had been fairly well received by States. As to the authority of such a guide to practice, he explained that, as an advocate of "soft law", he did not view international law as a succession of obligations and prohibitions, but was convinced that, if well designed, directives and guidelines could have an impact on the conduct of States. In the current instance, if the members of the Commission were able to reach agreement as part of a consensus or near consensus on important explanations about the Vienna regime, those explanations would undoubtedly carry a great deal of weight with States.

37. With regard to Mr. Lukashuk's comments, he said that he had doubts about the statement that it was mainly western States that used reservations because, in his view, the situation was a bit more complex and nuanced. It was true that, during the cold war period, some treaties had been imposed on the western States, which had been on the defensive to some extent and, on some issues, had used the technique of reservations to protect themselves against clauses that they had not wanted. Statistically, however, he believed that reservations had been very often made by the States that were then called socialist. Currently, reservations were used mainly by third world countries on human rights issues, with western countries acting as fairly consistent and increasingly vigilant objectors in an effort to preserve the integrity of human rights.

38. On the question of reservations to bilateral treaties, he did not think that the Commission had already taken a decision. Part II, item (e), of the provisional general outline of the study should be understood as a question and not as a statement; in that connection, he referred to the relevant paragraph of his first report. He intended to proceed deductively, by asking questions and, through a study of practice, doctrine and jurisprudence, seeing what the answers should be. It would therefore be unfortunate for the Commission to prejudge the issue. Incidentally, having received no reply by Russia to the questionnaire, he would be very interested in any information that could be provided on the practice of the Russian State Duma to which Mr. Lukashuk had referred.

39. With regard to Mr. Pambou-Tchivounda's suggestion that there might be a reconciliation between the permissibility and opposability schools, he recalled that he had considered such a possibility in his first report, but had greater and greater doubts about achieving any

<sup>19</sup> *Ibid.*, annex VI, and *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, annex VI.

results, since each of the schools had its own way of looking at the problem.

40. Replying to the question asked by Mr. Dugard, he confirmed that the consideration of the proposed draft resolution would be one of the main objectives of discussion of the topic at the current session.

41. He was opposed to the exclusion of interpretative declarations from the study and believed, rather, that the problem must be looked at in greater depth, even if it was obvious that interpretative declarations were not reservations. He therefore intended to consider the legal regime for such declarations in the context of part II of the provisional general outline of the study.

42. As to whether 1999 was still a valid date for the completion of work on the topic, he confirmed that he intended to meet that deadline as long as he was able to cover parts II, III and IV of the provisional general outline of the study at the fiftieth session of the Commission. In reply to the question asked by Mr. Simma, he explained that he had always intended to submit parts II and III of the outline in a single report, but that the idea of devoting a separate report to part IV of the outline was based on considerations relating to the Commission's working methods and was intended to prevent the Commission from having to consider a very voluminous report all at once.

43. Referring back to the comment made by Mr. Sreenivasa Rao, he said he was convinced that the extensive background analyses that he was trying to carry out would enable the Commission to move forward more rapidly and be more consistent in its approach to the topic. He hoped that the discussion on chapter II of the second report would confirm that viewpoint.

*The meeting rose at 11.55 a.m.*

## 2488th MEETING

*Thursday, 5 June 1997, at 10 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, 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. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)\*

1. The CHAIRMAN announced that, since the Drafting Committee was progressing faster than expected in its work on the draft articles on nationality in relation to the succession of States, it had been decided to give priority to the consideration in plenary of the entire text, with a view to adoption on first reading before the end of the session. That decision would have no effect on work on the topic of reservations to treaties, which would not be neglected.
2. He invited the Commission to commence its consideration of Part II of the draft articles.

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

3. Mr. MIKULKA (Special Rapporteur), introducing Part II, said it comprised articles 17 to 25, setting out principles applicable in specific situations of succession of States, in contrast to the articles in Part I (General principles concerning nationality in relation to the succession of States), which applied generally to all cases of State succession. The specific cases envisaged were: transfer of part of the territory (sect. 1, art. 17); unification of States (sect. 2, art. 18); dissolution of a State (sect. 3, arts. 19 to 21); and separation of part of the territory (sect. 4, arts. 22 to 25). Only sections 3 and 4 incorporated articles dealing with the scope of application of those sections. That was purely for editorial reasons: the articles served as *chapeaux*, obviating the need for repetition of phrases and at the same time defining the context in which the terms "predecessor State" and "successor State" were used.

4. In most cases of States succession, the States concerned should negotiate in order to settle any problems that might arise, negotiations that would normally culminate in the conclusion of a treaty. In that regard, it should be emphasized that the principles set out in Part II were residual in character. States would not be bound to fully apply the principles, which would simply aid them in their negotiations, but in the event of no agreement being

\* Resumed from the 2486th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

reached, the principles were considered as a minimum standard to be respected.

5. The specific cases of State succession envisaged in Part II were based on the 1983 Vienna Convention. The only type that was missing was the case of newly independent States, for reasons already explained during his introduction of the report as a whole (2475th meeting).

6. Article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) was likewise based on extensive State practice and set out a very simple rule: when part of a territory was transferred by one State to another State, the successor State must grant its nationality to the persons concerned who had their habitual residence in the transferred territory and the predecessor State must withdraw its nationality, unless the persons concerned indicated otherwise by exercise of the right of option which all such persons must be granted. Accordingly, the principle was that, in cases of transfer of part of the territory, the persons concerned must have the right of option. Only as a residual rule was it presumed that, if the persons concerned did not avail themselves of that right, they acquired the nationality of the successor State and lost that of the predecessor State. That residual rule was in accordance with the general principle proposed by Mr. Brownlie (2476th meeting), namely that habitual residents should acquire the nationality of the successor State. However, that principle as proposed by Mr. Brownlie was based on the presumption that the rule operated from the very outset. Many cases could be cited, and were cited in the commentary to article 17, contained in the third report (A/CN.4/480 and Add.1), in which States had agreed that the principle operated from the time the succession of States took place. Yet in other cases, also to be found in the actual practice of States, States had decided to allow for an initial period during which the right of option could be exercised, and only upon expiry of that period did the presumption of automatic acquisition of nationality apply to persons who had not availed themselves of that right. For example, paragraph (5) of the commentary to article 17 referred to the 1848 Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America<sup>2</sup> and cited article VIII, which indicated that acquisition of the nationality of the successor State was deferred until the end of a period reserved for the exercise of the right of option.

7. Article 17 gave no indication about the timing for the acquisition of the nationality of the successor State but simply emphasized the right of option and set out a rule that was well grounded in practice: it was the nationality of the successor State that was granted to the persons concerned, unless they decided otherwise through the exercise of their right of option.

8. The CHAIRMAN, speaking as a member of the Commission, and referring to Part I as a whole, said one could consider, as did the Special Rapporteur, that the decolonization process was almost completed. Yet during

the discussion of Part I of the draft articles, a number of members had already opined that that was not sufficient reason for failing to address the problem of decolonization. He agreed with that viewpoint. It was true, as the Special Rapporteur had argued in the course of his first presentation, that the principles in Part I applied equally to situations of decolonization. But somewhere, perhaps in an introductory article in Part II, it should be made clear that Part I of the draft articles applied to all cases of succession of States, including decolonization. The absence of such an indication might cause perplexity in the mind of some readers.

9. He would even go further: it was not because a phenomenon had run its course historically that the applicable law should be neglected. A parallel could be drawn with the law on acquisition of ownerless territories. Such territories no longer existed, yet problems relating to their acquisition and delimitation persisted, and to resolve them, the old rules had to be applied.

10. The same was true of nationality problems tied in with decolonization. In view of the quantitative and historical importance of the phenomenon, such problems continued to arise, both for the former colonial powers and for the States created through decolonization. To help States cope with such problems, the clearest possible guidelines should be established, and the general principles in Part I were not sufficient for that purpose. A fifth section should thus be incorporated in Part II. Aside from that, he had no objections to the structure of the draft and very few hesitations about the content of the articles in Part II.

11. Mr. LUKASHUK, responding to the concerns raised by the Chairman, said that the Commission should, to the extent possible, refrain from depicting the countries that had emerged through decolonization as a special case not covered by the basic principles of international law on State succession. In the modern world, international law must apply to all, excepting only certain cases, such as those involving the right to development, which deserved particular consideration. Mention might be made of decolonization in the commentary, but there was no justification for the introduction of a new article attributing to the developing countries a special or unique position.

12. Mr. KATEKA endorsed the Chairman's comments about including provisions on decolonization and hoped that that could be done. In connection with section 2, article 18 (Granting of the nationality of the successor State), he suggested that a good example of that process could be found in the United Republic of Tanzania, formed in 1964 through the unification of Zanzibar and Tanganyika. At the time of unification, issues of State succession, nationality and the relevant laws had arisen, and they could be fruitfully examined for the work on article 18.

13. Mr. THIAM welcomed the fact that the Chairman had again raised the issue of newly independent States. In the earlier discussion, when he himself had raised the matter, the Special Rapporteur had replied that decolonization was a general issue, not a special case, and could be addressed through the draft articles as currently drafted, without need for a special section. Personally, he did not agree that decolonization was not a separate case.

<sup>2</sup> *Treaties and Conventions concluded between the United States of America and Other Powers*, revised edition (Washington, Government Printing Office, 1873), p. 562. See also *The Consolidated Treaty Series* (Dobbs Ferry, New York, Oceana Publications, 1969), vol. 102, p. 29.

The relations between a colonized and colonizing State were so close as to raise issues unique to those relations, or to pose specific problems, for example in regard to the right of option. It was surprising that very little mention was made of that fact, either in the draft articles, or in the commentary. The 1978 and 1983 Vienna Conventions incorporated a section on newly independent States, and it would be strange for the future instrument on nationality in relation to the succession of States, where the issue arose in a particularly poignant manner, not to do so.

14. Mr. KABATSI said he endorsed the Chairman's comments on the absence of provisions relating to decolonization as a specific form of State succession. Admittedly, colonization was not a widespread problem nowadays, but the phenomenon was not dead. There were still some territories in the world under foreign domination and, when they were liberated, issues of State succession would arise. He agreed with Mr. Kateka that unification should be addressed, even though not many options were available in such cases. Lastly, he endorsed the text of article 17 currently before the Commission.

15. Mr. ELARABY said he was pleased that the Chairman had raised the issue of decolonization, for it was not just a passing phase in international relations. In view of the number of States that had gone through the decolonization process since the Second World War—perhaps half the members of the United Nations—there was no question that problems could still arise, and it was important to refer to them in the articles on nationality.

16. As to article 17, he hoped the phrase "persons . . . who have their habitual residence" was being used in the sense of persons who had nationality, for if it meant persons residing in a country without having its nationality, then such persons were being accorded more rights by the successor State than they had had under the predecessor State. If two of the Gulf States, for example, were to unite and all persons having habitual residence in one State became nationals of the new State, the demographic structure would be radically altered. It would create havoc and open a Pandora's box.

17. Mr. MELESCANU said that if decolonization issues were, in the Commission's opinion, so great as to continue to arise frequently in the future, then appropriate rules should be elaborated for inclusion in the draft. If, on the other hand, the remaining number of territories under colonial rule was deemed to be fairly limited, the Commission might wish simply to include in the commentary references to State practice in respect of decolonization. A choice should be made in that regard.

18. Mr. DUGARD said that, although the number of remaining colonies was small and major problems were unlikely to arise with them in future, as the debate had shown, the decolonization process had an important role in general international law and especially in connection with problems of State succession. He was not suggesting that the draft should include a large section on the subject, but some reference should certainly be made; otherwise, it would be construed as a very serious omission.

19. Mr. GALICKI said he supported the inclusion of a reference to the problem of decolonization in the draft articles. Though decolonization was mostly a problem of

the past, some territories were still affected by the decolonization process and the inclusion of rules that reflected State practice in such situations would be very useful. It had been rightly pointed out that lengthy sections on newly independent States were to be found in the 1978 and the 1983 Vienna Conventions. Omission of any reference to such States in the current draft articles might convey the wrong impression that even the general principles set out in the articles were not applicable to the process of decolonization and to its effects on nationality. It was not enough to incorporate a reference in the commentary, which sometimes went unread. The Commission should suggest that the Special Rapporteur give consideration to including a new section in Part II to supplement the set of specific situations already addressed in that portion of the draft.

20. Mr. ROSENSTOCK said that, on the whole, there seemed to be no demonstrable need for such a separate category. Nor had the experience been ignored as there was no paucity of examples of the decolonization process in the commentaries, though the Tanganyika/Zanzibar merger could perhaps have been covered in more detail. He was therefore a little puzzled by the call for a separate provision on the matter, unless it could be seen as a soothing gesture to nostalgia for the olden days.

21. Mr. SIMMA said that the Commission should not be guided by ideological or political considerations. The question was whether, in the context of State succession, the subject of decolonization could be adequately treated within the schema developed by the Special Rapporteur. If the conclusion was reached, on an empirical basis, that matters of nationality did not differ substantially in the context of decolonization from the other processes the Special Rapporteur had used as the basis for developing his system, then newly independent States should not be treated as a separate category. The manner in which those States had, however, been excluded, in paragraph 11 of the introduction to the Special Rapporteur's third report and the relevant footnote was a little tough and matters could perhaps be couched in more conciliatory terms.

22. Mr. KATEKA said that he failed to understand those who claimed that decolonization was a thing of the past. Nor did he understand the reference to nostalgia. Nobody had claimed in 1978, in the context of the 1978 Vienna Convention, that decolonization was a thing of the past, even though a large measure of decolonization had already taken place in the 1960s. That was because, at the time, States had been interested in keeping the topic alive. Now that they saw nothing in it for themselves they wanted to dismiss it. Some of the elements of the problem still endured, however, and it was therefore necessary to strike a balance in the draft.

23. Mr. BROWNLIE said that the Commission should avoid unhelpful references to Pandora's box, nostalgia and the like. If, as might indeed be the case, the Special Rapporteur had not taken sufficient account of the extensive experience relating to decolonization, then that was a sort of criticism and should be taken seriously. A great deal of literature was available. The footnotes in the third report, for instance, did not make much, if any, reference to the experience of decolonization. Purely as a matter of practicality, care should be taken not to exclude any

attention to a useful monograph on the decolonization of Tanganyika, by Seaton and Maliti.<sup>3</sup>

24. However, he was not at all certain what a separate rubric in the draft for decolonization would involve. From the historical standpoint, he saw no sharp distinctions between cases of decolonization and the dissolution of a federation. It was often a matter of political taste, or political abuse, as to whether a particular regime involved either colonization or some associated form of oppression: colonization as such was far too narrow a category. The historical experience of oppression included cases that involved very serious forms of oppression but, as a matter of historical convention, were not classified as colonization.

25. He did have some knowledge of the history of colonialism. The history and constitutional background, for example, of the three former British territories in East Africa were very varied and the historical backgrounds of the three principal States in the Maghreb—Algeria, Morocco and Tunisia—were also quite distinct.

26. The CHAIRMAN said that it was difficult to understand why Mr. Brownlie saw no difference between decolonization and the dissolution of a federation. The main difference, in terms of nationality, was that, as a general rule, the colonizers did not grant their nationality to the colonized. That was a basic problem which led him to think that it was not possible to assimilate decolonization to anything else.

27. Mr. THIAM said that nostalgia did not enter into the equation. Complicated problems stemming from decolonization still subsisted. In his own family, for instance, there were Senegalese who were also French and others who were not. They did not know to which rule of international law to turn. The Special Rapporteur's third report stated merely that the general rules laid down in the draft would apply equally in the case of decolonization, but that was not enough if one bore in mind that nationality affected the fibre of a person's very being. The matter called for special treatment and the Special Rapporteur should develop the subject in far more detail, and in such a way as to reveal the special issues involved; he should also explain the reasons for his own position.

28. Mr. CANDIOTI said he noted that the Commission with its previous membership had decided to leave aside the question of decolonization because, as explained in paragraph 11 of the introduction to the third report, the decolonization process had been completed. A number of cases of decolonization were, however, still before the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and, notwithstanding the historical fact that a large number of countries had been decolonized, there was no reason why the subject should not be studied further. In particular, he would ask the Special Rapporteur whether there was a legal case for creating in the draft a special category for decolonization or whether the various forms of decolo-

nization could be covered by the existing categories identified by the Special Rapporteur.

29. Mr. Sreenivasa RAO said that the views expressed on such an important issue called for careful consideration. Whether or not a separate chapter was needed was not important. The main thing was for the study on which the Special Rapporteur had embarked to be sufficiently broadly-based to cater for future cases. The many sensitive issues involved and the question of how best to deal with them could not be resolved in any quick debate. He therefore suggested that, for the time being, the matter should be flagged with a question mark and that the Special Rapporteur should be asked to reflect on the matter further. In particular, any possible lacunae should be identified to determine whether the problem should be dealt with by including a separate section or by enlarging or suitably amending the current draft.

30. Mr. ELARABY said that there were still some, if not many, cases of decolonization on every continent. He would, however, be no more specific than to say that it was a very sensitive issue. He agreed with Mr. Sreenivasa Rao that the Special Rapporteur should be asked to reflect on the matter and that the Commission should revert to it in due course.

31. Mr. MIKULKA (Special Rapporteur) said that, at the United Nations Conference on Succession of States in Respect of Treaties and the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,<sup>4</sup> he had been very much in favour of provisions on newly independent States, and rightly so. He was therefore much concerned by the accusations levelled against him which implied he had something against including decolonization in the draft articles. In that connection, he would point out that the statement in paragraph 11 of the introduction to his third report referred to what the Commission had decided and not to what he, as Special Rapporteur, had done. He was all the more concerned because those who had initiated the debate had been members of the Commission in its previous composition when it had approved that decision. He had asked the Commission whether or not it wanted him to deal with the question of decolonization and the response had been in the negative. What justification, then, would he have had for proceeding to carry out a study on the subject when the Commission and General Assembly did not want him to?

32. There seemed to be some confusion about precisely what was involved. Newly independent States, of course, were not the only outcome of decolonization. Decolonization could also result, for instance, in unification with another State or simply in a transfer of territory. It was

<sup>3</sup> E. E. Seaton and S. T. Maliti, *Tanzania Treaty Practice* (Nairobi, Oxford University Press, 1973).

<sup>4</sup> See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, First Session, Vienna, 4 April-6 May 1977*, vol. 1, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), p. 172, 25th meeting of the Committee of the Whole, paras. 22-23; and *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1 March-8 April 1983*, vol. 1, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.6), p. 185, 29th meeting of the Committee of the Whole, paras. 10-11.

very difficult at the current time to find cases in which it was possible to talk of a typical category of decolonization in which a large dependent territory gained complete independence and became, in other words, a newly independent State. Members might therefore wish to ask themselves whether, in the light of the discussion, it was worthwhile to re-establish a category of newly independent States.

33. The Commission had decided not to undertake a study that would judge the past—it was not an international court or an arbitral tribunal—but rather to carry out a review that would assist States in resolving problems that had caused them harm. The draft articles provided sufficient basis for solving any existing or possible future problems relating to decolonization. Any attempt to launch into a study of the past and to draft a report on the situation of newly independent States would be a purely academic exercise.

34. The report was rich in references to examples of State practice. Anybody who had ever been engaged in similar work would know that to compile all the relevant materials in the time available to him was not easy. Obviously, he did not claim to have covered all situations and the omission of any reference to Tanganyika was a case in point. Members of the secretariat would, however, bear witness to his desperate, and unsuccessful, attempts to find something on Tanganyika. Moreover, all Governments had been invited on several occasions to make their legislation available to him. Members could see from the first and second reports<sup>5</sup> which Governments had in fact replied to that invitation.

35. In short, he saw no point in inventing a specific category of newly independent States for inclusion in a draft that had been perceived as an instrument to help States to resolve problems of the future, not the past. He was sure that any remaining cases of decolonization could be adequately dealt with under the existing provisions of Part II and would again invite attention to the commentaries with their many references to the rich practice of States. If members felt that he had not paid enough attention to the practice of newly independent States, he could only disagree.

36. The CHAIRMAN said he was undoubtedly speaking for all members of the Commission in recognizing the quantitative and qualitative importance of the Special Rapporteur's work and his remarkable research effort. As a professor of law himself, with an interest in the third world in general, he knew all too well how difficult it was to find examples other than those from the same few States that systematically published their practice. If members of the Commission considered that certain examples were lacking, they should endeavour to assist the Special Rapporteur by bringing them to his attention.

37. He agreed that it would not be reasonable at the current stage to consider recasting the draft and adding an entire section on decolonization. While it was true that the Commission in its previous membership had given the Special Rapporteur its blessing regarding the absence of any such section, the Special Rapporteur would no doubt

acknowledge that those who had spoken in the debate that morning, including himself, had opposed that decision. The Special Rapporteur might, however, wish to proceed along the lines suggested by Mr. Simma—who had referred to the relevant statement in paragraph 11 of the introduction to the third report as “tough”, whereas he himself would perhaps have termed it hasty and cavalier. It was essential to explain to the uninitiated reader why the Commission, in its previous composition, had not considered it necessary to study the problem from that standpoint, rather than making do with an assertion according to which the Commission had come to that decision. It was all the more important in view of the fact that the various views expressed within the Commission would not appear in its report to the General Assembly. He therefore appealed to the Special Rapporteur to come up with a balanced text in the commentary, indicating that some members were firmly of the conviction that, juridically, something was missing; giving proper coverage to the differing viewpoints expressed; and stating where appropriate in the commentaries that the problem would, or might, also arise in cases of decolonization. If the Special Rapporteur agreed with that proposed solution and he heard no objection, he would at that time close the debate on the question.

38. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur's comments in response to the various speakers had put him in mind of two cases. In the first, that of Western Sahara, a problem of nationality in relation to the succession of States was certain to arise in the future, with Spain, Mauritania and Morocco—to name only three States—all involved in the territory's future. The second case was that of the enclave of Cabinda. A very large number of persons originating in that territory resided in Portugal but had not lost their links with Cabinda and Angola. If and when that problem was eventually resolved at some time in the future, possibly by the creation of a new State, problems of nationality in relation to the succession of States would also arise in that connection. On the basis of those two cases alone, it could not be asserted that the process of decolonization was already complete. He thus supported all those members who had spoken in favour of devoting a new section to the problem of decolonization.

39. The CHAIRMAN said he agreed with Mr. Pambou-Tchivounda, who, he supposed, was nonetheless not radically opposed to the solution he himself had just proposed.

40. Mr. KATEKA, referring again to the question of balance, said that there was almost no mention of African States in the commentaries. In the interests of striking a proper balance, more references to African examples should be included in the commentaries in view of the fact that almost 50 States had been created in Africa as a result of the process of decolonization.

41. As for the Special Rapporteur's comment that his third report had been delayed for two weeks while he had searched for information on Tanganyika and Zanzibar, Mr. Brownlie had already referred to a monograph on the treaty practice of the United Republic of Tanzania which contained the text of the Articles of Union between the

<sup>5</sup> See 2475th meeting, footnote 4.

Republic of Tanganyika and the People's Republic of Zanzibar.<sup>6</sup> Citizenship was one of the 11 matters mentioned in that Treaty and had also subsequently been dealt with by national legislation. He should have thought the Special Rapporteur would have tried to obtain some information on the question.

42. The CHAIRMAN said that Mr. Kateka might provide that information. He was sure the Special Rapporteur would be very pleased to include it in the commentaries to draft articles.

43. Mr. MIKULKA (Special Rapporteur) said that all members of the Commission had a moral obligation to draw a special rapporteur's attention to any examples of which they were aware that might be of relevance to him. The Commission was collectively responsible for the results of that work and should support him in his task. Thus far, members had cited almost exclusively the Venice Declaration<sup>7</sup> and the European Convention on Nationality, as if no other examples existed. He would welcome with an open mind any examples drawn to his attention, whether they confirmed his proposed draft articles or pointed to the need for amendments.

44. Mr. THIAM said he agreed with the proposal made by Mr. Sreenivasa Rao. But the Commission should be very circumspect when stating that it had decided on any course of action, for only very rarely did it take an explicit formal decision. That was partly attributable to its working methods, for the Commission did not vote. Nor should the current Commission be bound by a report adopted by the Commission in a previous incarnation.

45. The CHAIRMAN said it was not true to suggest that the Commission did not vote, although admittedly it had not been the custom to do so very often in the past. He himself was a member who favoured voting where problems could be resolved by recourse to that procedure.

46. Mr. LUKASHUK said he was sure that legal problems relating to decolonization—even those acts of decolonization that had been completed in the past—would continue to arise for a long time to come. To say that colonialism was dead, and hence there would be no further problems in that regard, was wrong. There would continue to be problems in the future. However, in the current case the Commission was dealing with a special situation. The draft articles offered a very high level of protection of human rights and, in particular, of the right to a nationality. He feared that if the Commission included in the draft a special section on newly independent States, the result might be a lowering of that level of protection. He thus proposed that, as a practical solution, a small informal group should be set up, under the chairmanship of Mr. Pellet, the initiator of the idea, to prepare specific articles addressing the situation of newly independent States.

47. The CHAIRMAN said that Mr. Lukashuk's proposal was another possible solution, albeit not one that he personally endorsed.

48. Mr. GOCO said he supported the explanation given by the Special Rapporteur. The matter had been thoroughly discussed in the past and, as was pointed out in the footnote at the end of paragraph 11 of the introduction to the Special Rapporteur's third report, the Commission had decided to consider issues of nationality which arose during the process of decolonization, insofar as their consideration shed light on nationality issues common to all types of territorial changes. Both arguments were thus valid. He supported the proposal made by Mr. Sreenivasa Rao: the best solution would be to put the issue aside for the moment and return to it at a later date. He also supported Mr. Lukashuk's proposal concerning the setting up of a small informal group to discuss the matter further.

49. Mr. BROWNLIE said that it should be a relatively easy matter to improve the balance and coverage of the third report and its footnotes. The lectures given by Mohammed Bedjaoui at the Hague Academy<sup>8</sup> constituted a classic text on the legal problems of decolonization. While the Special Rapporteur was doubtless familiar with them, no reference was made thereto in the third report.

50. The CHAIRMAN said that he felt rather as if he were in the position of some sorcerer's apprentice, for he had opened a complex debate that it was at the current time difficult to halt. He could not support Mr. Lukashuk's proposal. To begin with, he simply was not familiar with the subject. If he had raised the matter, it was because he was convinced that a genuine problem existed and was not being addressed. He had not personally insisted on the inclusion of a section [on decolonization] in the report. He would simply like to have a scientific assurance that the problem did not arise. In response to Mr. Brownlie, he had said that it seemed clear that the colonizer did not behave towards the colonized in the same way as it did towards its own nationals. They were not "true" nationals, and he was sure that that posed a problem different from the other cases. However, while he considered that the problem must be studied, he had no preconceived ideas as to the best way of resolving it. As he had already said, he shared Mr. Simma's opinion that the presentation of paragraph 11 of the introduction to the third report was too hasty and cavalier. He therefore asked the Special Rapporteur to prepare something as an introduction to the commentaries, clearly explaining why and to what extent the draft articles were or were not suitable for cases of decolonization. It was not enough simply to say that the Commission had decided to leave aside the category of newly independent States that had emerged from decolonization—reasons must be given. If the Special Rapporteur agreed and there was no objection, he would take it that the debate was closed. If there were strong objections, he would, with slight reluctance, call a vote—a procedure to which, unlike Mr. Thiam, he was not averse, should the need arise.

51. Mr. PAMBOU-TCHIVOUNDA said he was opposed to the procedure proposed by the Chairman. However, in view of the fact that the draft articles would at some stage have to go to a second reading, he would not insist on a vote.

<sup>6</sup> E. E. Seaton and S. T. Maliti, *op. cit.* (footnote 3 above), appendix, p. 151.

<sup>7</sup> See 2475th meeting, footnote 22.

<sup>8</sup> M. Bedjaoui, "Problèmes récents de successions d'Etats dans les Etats nouveaux", *Collected Courses of the Hague Academy of International Law, 1970-II* (Leiden, Sijthoff, 1971), vol. 130, pp. 455-586.

52. The CHAIRMAN said that the only course open to the Commission at the current stage was thus to ask the Special Rapporteur to heed his appeal. He invited members to turn to the consideration of the individual articles of Part II.

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

#### ARTICLE 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

53. Mr. PAMBOU-TCHIVOUNDA, noting the key role assigned by article 17 to the concept of habitual residence, said that in his view its function was very restrictive and weakened the scope of the article. In the first place, from the standpoint of article 7 (The right of option), if the concept of habitual residence was the one retained, the right of option might be reserved solely to those deemed to have the nationality of the successor State. In accordance with the general principles set out in Part I, the persons concerned were not only the inhabitants of the successor State, but also included the inhabitants of the predecessor State.

54. Secondly, from the standpoint of article 9 (Unity of families), he feared that the concept of habitual residence could lead to the break-up of families. To say that only those who had their habitual residence in the transferred territory had the nationality of the successor State was to overlook the possibility that other close relations living elsewhere at the moment of State succession would not benefit from the provisions of article 17. That adverse effect could be overcome by adding, after the words "transferred territory", the words "or can demonstrate a genuine link with it". Persons resident in the territory of the predecessor State who were able to exercise the right of option in order to choose the nationality of the successor State would also benefit from such an amendment.

55. The CHAIRMAN invited members to comment on Mr. Pambou-Tchivounda's proposal.

56. Mr. GOCO said he thought the Commission might go even further in amending article 17 and cover persons entitled to acquire the nationality of the transferred territory, not simply persons habitually resident there. On article 17 generally, he felt there was a need to define precisely the terms "habitual residence" and "genuine link".

57. Mr. RODRÍGUEZ CEDEÑO said he, too, thought that use of habitual residence as the sole criterion in article 17 was likely to have an adverse effect on the exercise of the right of option and the principle of the unity of the family. He thus supported Mr. Pambou-Tchivounda's proposal in principle.

58. Mr. ECONOMIDES said that the normal practice in cases of transfer of part of a territory was for the successor State to be required automatically to grant its nationality to all persons who had been nationals of the predecessor State and who had been permanent residents in the transferred territory. But that in itself was not enough, for some persons "originating"—the term was admittedly vague—in that territory had their habitual residence elsewhere at

the time of the State succession but wished to maintain their links with that territory. In such cases, it was the practice, where the predecessor State continued to exist, to give those persons the right, on an individual and voluntary basis, to opt for the new nationality if they so wished. That was the solution envisaged in the Venice Declaration. Mr. Pambou-Tchivounda's proposal extended the scope of the article, but perhaps it should be extended still further, to confer a special right of option on all persons who originated in the territory.

59. The CHAIRMAN said that the concept of a genuine link seemed to him to cover the case of persons "originating" in the territory.

60. Mr. ECONOMIDES said that, if that was the case, he would object that it was not possible to impose automatically the nationality of the successor State on persons holding the nationality of the predecessor State who might wish to retain that nationality, whereas no problem would arise if such persons were granted the right of option on a voluntary basis.

61. The CHAIRMAN invited Mr. Economides to formulate a specific wording for his proposal, which could then be considered by the Drafting Committee.

62. Mr. MELESCANU said he fully endorsed the views expressed by Mr. Economides and the solution he had proposed. Article 17 addressed a very specific case, and the problem raised by Mr. Pambou-Tchivounda was best dealt with in the context of the right of option. He favoured recourse to the broader concept of a "genuine link", which could perhaps be defined.

63. Mr. ROSENSTOCK said he agreed that the problem should be viewed in terms of the right of option. In the case to which Mr. Pambou-Tchivounda had referred it might perhaps be preferable to use the word "should", rather than impose an obligation on the successor State through use of "shall". That question could be considered by the Drafting Committee.

64. Mr. KABATSI, thanking Mr. Pambou-Tchivounda for his proposal, said that the issue was one of the option to remain with the predecessor State or to move to the successor State, but article 17 in its current form meant that that option was available only to persons who had habitual residence in the transferred territory and did not extend to the category of persons Mr. Pambou-Tchivounda had in mind. It was a matter of real concern, as it was not unusual for the cause of the transfer to be ethnic or racial. Even if a person did not live in the territory, but originated there and belonged to a particular race, tribe or ethnic group, he or she should have the option either to move with it or to stay in the predecessor State. As it stood, the option was restricted to persons with habitual residence in that transferred territory.

65. Mr. HAFNER said that he appreciated the spirit behind Mr. Pambou-Tchivounda's proposal and the comments made by Mr. Economides. But he agreed with Mr. Kabatsi, for it was necessary to distinguish between two different kinds of nationality, namely *ex lege* and by option. As he took it, article 17 provided for acquisition of nationality automatically, that is to say an *ex lege* obligation imposed on the successor State. As to broadening the

category of persons covered by the obligation to grant a right of option, he shared the views expressed by Mr. Economides. However, the matter seemed to have already been dealt with in a preceding provision. Article 7, paragraph 2, as drawn up in the Drafting Committee, currently covered the case under discussion because the paragraph had been altered to say that each State concerned had an obligation to provide a right of option to all persons who had an appropriate connection with that State. If read in the context of article 17, it signified that the successor State was already under an obligation to grant the right of option to any person who had such a link to that State. The problem would thus be solved.

66. Regarding Mr. Pambou-Tchivounda's point about habitual residence, a definition was indeed needed, either in the draft or in the commentary. The European Convention on Nationality, for example, contained a reference to habitual residence, whereas the Venice Declaration spoke of permanent residence. He asked which term would be used, since there was quite a difference between them. Perhaps the Special Rapporteur could indicate what he had in mind, for sometimes the text used "residence" and sometimes "habitual residence". He asked if a distinction was being made.

67. Mr. GALICKI said that he saw the rationale behind Mr. Pambou-Tchivounda's proposal, but experienced some difficulties with it. As Mr. Hafner had rightly pointed out, under article 17 there was a kind of obligation on the successor State, an obligation based on habitual residence, which was an objective criterion that was very easy to verify. On the other hand, to speak of effective links with the territory might create a problem. He asked what kind of links they would be, and on which criteria they were based? He asked if that would cover origin, economic links and family links. If it was to be an *ex lege* obligation, the criteria should be as clear as possible. If adopted, the provision might even be abused in certain instances. The rule already set out in article 7 was a general rule that might apply to the situation involved and he would be very wary about including an effective link as a criterion for *ex lege* acquisition of the nationality of the successor State.

68. Furthermore, one should be very careful about including any formal definitions of the terms "habitual residence" and "effective link". As already pointed out, different documents used different wordings. A final definition of habitual residence should be left to the internal law of each State, which would decide what the formal and substantive conditions were for habitual residence or "lawful" residence, to use the term employed in the European Convention on Nationality. If the Commission tried to create such a definition, much time would be spent unproductively. The same applied to genuine or effective link, since elements included in that concept also differed in different situations. However, the commentary could provide some guidance simply for the purposes of interpretation.

69. Mr. BROWNLIE said he appreciated the good intentions behind Mr. Pambou-Tchivounda's proposal, but preferred to take the path proposed by Mr. Rosenstock and Mr. Galicki and rely on the provisions of article 7. However, there was another aspect of the proposal that

gave cause for concern. The concept of habitual residence was the connecting factor which formed an important part of the entire structure of the draft and, if members of the Commission had had that kind of conception in the previous quinquennium, they really should have introduced it earlier. There was a danger of confusing the specific issue of nationality with the general civil status of persons present on the territory concerned after a State succession. If the Commission moved in that direction and tried to define genuine or effective link, States simply would not accept the draft.

70. Mr. LUKASHUK said he fully endorsed Mr. Galicki's comments. He was uneasy about the phrase "withdrawal of nationality" and suggested changing the title of article 17 to read "loss", rather than "withdrawal", of the nationality of the predecessor State and replacing the phrase "and the predecessor State shall withdraw its nationality from such persons" in the body of the article by "and such persons shall lose the nationality of the predecessor State".

71. Mr. SIMMA said that he understood the desire of Mr. Pambou-Tchivounda, Mr. Economides and others to accommodate persons who had some kind of connection with the predecessor State's territory that was involved in the succession but who did not have habitual residence in that territory. He did not think that article 7 took care of the issue. The Drafting Committee's new version of article 7 stipulated in mandatory terms, "shall provide for the right of option" only if the person would otherwise become stateless. That was not the case under article 17: if they were not granted the right of option, the persons would remain nationals of the predecessor State. He agreed entirely with Mr. Economides that in State practice the very strict terms of article 7 could not apply to the case under discussion to such persons. The successor State must be afforded the opportunity to exercise discretion in deciding whether the connection with the territory was enough. A second paragraph could be formulated to cover the problem. Paragraph 1 should be expressed in the mandatory "shall" form in favour of those persons who had habitual residence, and a new paragraph 2 should be drafted in looser, discretionary terms to address the problem of persons who had an appropriate connection with their territory, as stated in the Drafting Committee's new version of article 7, and it would be for the State to decide whether the connection was appropriate.

72. Mr. ECONOMIDES said he fully agreed with Mr. Simma. The crucial weakness of the draft was that it did not itself provide for a right of option, but rather a possible right of option conditional on internal legislation: States could introduce a right of option if they wanted, and to the extent they saw fit. For example, persons originating in the transferred territory might not have a right of option under article 7, because States could provide for a right of option for other cases with other criteria. Again, the expression used from the outset, namely "genuine link", was not defined, and it was left to States to say how they wished to interpret it, or even to refuse to grant a right of option. Thus, the right of option, a fundamental feature of State succession, was not ensured in the draft. For each concrete kind of State succession—in the current instance transfer of a part of the territory—it was necessary to examine whether, in addition to the *ex lege* attribution of

nationality, there was reason to grant a right of option and, if so, a provision must be included in the article concerned. In the end, it would be seen whether the general provision of article 7 was useful and to what degree.

73. Mr. DUGARD said that many of the treaties referred to in the commentary used the test of domicile, while some employed that of ordinary residence or habitual residence. It was a matter worth considering, because the test of domicile was wider than that of habitual residence, which suggested that it should only include those who resided in a territory at a particular time, whereas domicile emphasized intention, which might be closer to the effective link concept. In his view, attention needed to be paid to the connecting factor in the light of State practice included in the report, which was essentially what Mr. Pambou-Tchivounda had suggested by raising the question of effective link.

74. The CHAIRMAN said that it was not certain that countries with a common law tradition had the same understanding of the notion of domicile as did countries with a civil law tradition.

75. Mr. Sreenivasa RAO said that many of the issues were drafting problems. As had been rightly pointed out, article 17 must be seen in the context of article 7 for certain categories of persons who had to be covered. To a certain extent, there was an inherent link between Part I and Part II that must be borne in mind if the draft was to be understood correctly. The real issue, however, was that persons who at the time of succession had the nationality of the predecessor State—either they were on the territory and moved with the territory or they were abroad, but were not nationals of any other State—continued to be the nationals of that particular State. They might, for example, live and work as permanent residents in the United States and wish to return to India after 20 years for whatever reason. At that stage, they did not have habitual residence in India. In his view, if a person continued to be a national of a State and lived abroad, he would be entitled under article 17 either to acquire the nationality of the successor State if he so chose or, if he wished, to retain the nationality of the predecessor State. The habitual residence and genuine link criteria did not apply to persons whose nationality was clear. How to cover the category of persons in question was another matter. He was not certain whether the last part of article 17 applied only to the option to obtain the nationality of the successor State or also to the option to retain the nationality of the predecessor State. In his opinion, both options should be available, but that was not clear from the text.

76. Mr. PAMBOU-TCHIVOUNDA said that, as the many comments showed, the problem was a real one. It was in the name of equal treatment of persons seeking to acquire a given nationality that he thought it necessary to take account of persons who, at the time of the State succession, were not on the transferred territory but had good reason to claim that nationality. Once a genuine link had been established, there was no obstacle to having an *ex lege* obligation apply to persons who demonstrated that they had such a link with the territory in question. His proposal should be read in conjunction with article 5 (Renunciation of the nationality of another State as a condition for granting nationality). He would have no objection if

the Commission could find a better wording, perhaps for a second paragraph. But the problem was real, and the Commission must deal with it.

77. Mr. MIKULKA (Special Rapporteur) regretted that members had not expressed their views on paragraph (37) of the commentary to article 17, which dealt with the question and contained the answer he was able to give on the subject. The paragraph stated that the nationality of all other nationals of the predecessor State, residing in the predecessor State as well as in third States, remained unchanged. It was for the successor State to decide whether some of them should be allowed to acquire its nationality on an optional basis. The problem raised by Mr. Pambou-Tchivounda did exist, but it was already resolved by the provisions the Commission had already adopted. As Mr. Rosenstock had rightly pointed out, there was a difference between the obligation to grant the right of option and the power of the successor State to grant the right of option. The obligation to grant the right of option was already addressed in article 17, for both the predecessor State and the successor State. That right of option must be reserved for all persons concerned who had their habitual residence in the territory which was the subject of a succession. Where were all the other persons concerned to whom the successor State might attribute its nationality? They were either in the predecessor State or in a third State. The Drafting Committee had already agreed on a revised wording of article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1, which said that the “successor State does not have the obligation to extend its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State”. The State naturally had the power to attribute its nationality to those persons, but it was limited by paragraph 2: it could not impose its nationality on persons against their will. That was all resolved in article 4.

78. In his opinion, it would be unwise to introduce another provision, but here was also another reason not to do so. The articles of Part II were purely residual in character. They took effect only when States had not agreed, in a treaty, on a specific solution. If, in a treaty, the States changed the criteria set forth in article 17, they could indeed do so. They could very well extend the right of option to everyone who had an ethnic, cultural or other link. There were any number of treaties in which States granted the right of option to persons who had nothing to do with the territory concerned, simply to cover the problem of a given minority or for other reasons. Yet article 17 must apply even in cases in which States were unable to reach agreement by means of a treaty. The article would then be interpreted by third States. For example, in article 16 (Other States), States were asked to work on certain assumptions: if certain rights were not granted to a person pursuant to the present articles, a State could assume that that person should be considered a national of that country. Under the current terms of article 17, they did not have the problem of determining the criterion of habitual residence or defining which persons had the right to choose. If the element proposed by Mr. Pambou-Tchivounda was included, States would not know how to apply the article. He asked how third States could be expected to investigate criteria over and above those enu-

merated. Why introduce an element of uncertainty? Nothing prevented States from resolving the problem through a treaty, but if the Commission wanted a residual rule, it could not go beyond what was stated in article 17. It was no accident that the Draft Convention on Nationality prepared by the Harvard Law School had already arrived at the same solution as long ago as 1929.<sup>9</sup>

79. Mr. SIMMA said that it might be difficult for members not in the Drafting Committee to follow the discussion, because the text of article 4 as formulated in the report did not cover the kind of case that a number of members of the Commission had had in mind. The Drafting Committee's new version did.

80. It was one thing to say, as did the most recent version of article 4, that a successor State "does not have the obligation to extend its nationality" to such persons and—something that was closer to the Commission's concerns—another thing to say that the State "may" grant a right of option to the persons concerned. Such a provision would not be contrary to the spirit of the draft, would not create a problem in the light of article 16 because it gave discretion to the successor State and would be more in conformity with the human rights thrust of the entire draft.

81. The CHAIRMAN noted that the Special Rapporteur defended the current wording by stressing on the one hand that the draft was residual and, on the other, that Part II complemented Part I. However, that was not stated anywhere, other than in the commentary, and he feared that anyone who read the articles without the commentary might be lost. Perhaps the Special Rapporteur could introduce something appropriate to that effect in the text, either in an introductory or final article.

*The meeting rose at 1.05 p.m.*

<sup>9</sup> See 2475th meeting, footnote 9.

## 2489th MEETING

*Friday, 6 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*later:* Mr. João Clemente BAENA SOARES

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, 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. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

##### SECTION 1 (Transfer of part of the territory) (*concluded*)

#### ARTICLE 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

1. Mr. THIAM, referring to the debate to which the relationship between succession of States and decolonization had given rise at the preceding meeting, pointed out that independence could be the result either of negotiation or of a breakdown in relations. In the first case, the granting of the nationality of the successor State to persons having their habitual residence in the transferred territory was perfectly feasible and was generally provided for in the devolution agreement. However, when independence had to be won from a colonial power, he asked how it could be imagined that the successor State would grant its nationality to residents originating from that power. The same was true of the withdrawal of the nationality of the predecessor State, since the colonial power could hardly withdraw its nationality from its own subjects residing in the successor State. He asked where the right of option fit in between the obligation for the successor State to grant its nationality and the obligation for the predecessor State to withdraw its nationality. Article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) as it stood did not seem applicable to colonial-type situations and required clarification as to the situations to which it did apply.

2. Mr. MIKULKA (Special Rapporteur) said that decolonization was not confined to situations where a new independent State was created. The two treaties on the cession to India of the territories of the French Establishments in India, mentioned in paragraphs (24) and (25) of the commentary to article 17,<sup>2</sup> and the treaty on Spain's retrocession to Morocco of the territory of Ifni, mentioned in paragraph (27) of the commentary,<sup>3</sup> demonstrated how article 17 could perfectly well apply to colonial-type situations and the right of option was an integral part of that article.

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> Treaty of cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France (New Delhi, 28 May 1956), United Nations, Legislative Series, *Materials on succession of States in respect of matters other than treaties* (Sales No. E/F.77.V.9), p. 86; and Treaty of cession of the territory of the Free Town of Chandernagore of 1951 between India and France (see 2475th meeting, footnote 24).

<sup>3</sup> Tratado por el que el Estado Español retrocede al Reino de Marruecos el territorio de Ifni (Fez, 4 January 1969), *Repertorio Cronológico de Legislación* (Pamplona, Editorial Aranzadi, 1969), pp. 1008-1011 and 1041.

3. The CHAIRMAN said he thought the problems raised by Mr. Thiam related more to section 4 on separation of part of the territory than to the section currently under consideration, which dealt with the transfer of part of the territory.

4. Mr. ECONOMIDES, referring to article 17 from the standpoint of the relevant classical rules of international law, said that the first four lines codified a well-established—and even the soundest—customary rule on the succession of States through the transfer of part of the territory. The text rightly stated that rule in the form of an obligation, thereby helping to prevent statelessness and to guarantee the right to a nationality, whereas the rest of the text departed from traditional practice by extending the right of option to all persons concerned. He asked if it was logical that, if the end of the article gave the possibility of a choice to all persons concerned, the beginning should set out obligations. In historical terms, a transfer was often the result of a lengthy process set in motion by the determination of the vast majority of the population to achieve its national aspirations, and that made the right of option meaningless. In practice, that right thus existed only for a small portion of the population which had very strong links to the predecessor State and clearly did not want the nationality of the successor State. The right of option as provided for in the text should therefore be reduced to its proper proportions.

5. Mr. MIKULKA (Special Rapporteur) said he agreed that Mr. Economides' objection to the extension of the right of option to all persons having their habitual residence in the territory of a State was to some extent justified. Some delegations in the Sixth Committee had also criticized the Commission's "generosity" in that regard. He himself had been somewhat hesitant about stating that rule in the form of an obligation, but, all things considered, he had thought that, at the end of the twentieth century, the Commission could not take a position that was a step backwards from what the Harvard Law School had adopted back in 1929<sup>4</sup> on the basis of all the practice referred to by Mr. Economides. Of course, the Commission could refrain from making it an obligation for States to grant the right of option and could simply suggest that they should grant that right to certain categories of persons, which it would then have to list. It was also true that the transfer of a part of the territory of a State was the culmination of a historical process reflecting the will of the population. In practice, however, the population was often divided, sometimes 51 per cent to 49 per cent. It had even been the case that two successive referendums on the same territory had not yielded the same result. He had therefore considered that the only logical solution would be to leave it up to each person to decide.

6. Mr. Pambou-Tchivounda had proposed (2488th meeting) that the right of option should be extended to persons who, while not having their habitual residence in the territory of the State, had genuine links with that State. That possibility was provided for in article 4 (Granting of nationality to persons having their habitual residence in another State).

7. Mr. PAMBOU-TCHIVOUNDA explained that the comment he had made had been based on a concern for equity and could be very well illustrated by the following situation: when a family had its habitual residence in the transferred territory, why should the children of that family who were in the territory of another State or in that of the predecessor State not benefit from the same rights and advantages, whether those were the automatic acquisition of nationality (first part of article 17) or the right of option (second part of that article)? In such cases, a uniform rule must obviously be applied to both parents and children.

8. The CHAIRMAN said he thought that the problem raised by Mr. Pambou-Tchivounda could be solved by a provision such as that of provision 9 (a) of the Venice Declaration,<sup>5</sup> while provision 13 of the Declaration was relevant to Mr. Economides' objection. Since article 17 conveyed the same idea as provision 13 (a) of the Declaration, Mr. Economides' opposition to the solution proposed in article 17 could perhaps be explained by the fact that article 17 lacked the explanation provided in provision 14 of the Declaration.

9. Mr. ECONOMIDES said that, historically, the overwhelming majority of the population of a transferred territory wanted to acquire the nationality of the successor State and it would therefore be absurd or naive to impose the right of option on it. The problem raised by Mr. Pambou-Tchivounda did indeed correspond to provision 9 (a) of the Venice Declaration, under which genuine links could replace the residence criterion, but the successor State granted its nationality only "on an individual basis, to applicants". The same rule could be derived from article 4 of the draft under consideration, but was not stated as clearly therein as in the Declaration.

10. The intention behind provision 13 (a) of the Venice Declaration, which perhaps expressed it awkwardly, was to leave to the successor State the task of implementing the right of option, although that must be done in the light of provision 14, which made the exercise of the right conditional on the existence of effective links with the predecessor State, which meant that the right of option was an obligation only where effective links existed. The solution that had been adopted by the Venice Commission was certainly not ideal, but it corresponded to practice, and not only that dating back to the First World War: the 1947 Treaty of Peace with Italy, for example, limited the right of option solely to populations having very close links with the predecessor State. In point of fact, granting the right of option to all interested parties was not only contrary to practice, but also potentially dangerous.

11. Mr. MIKULKA (Special Rapporteur) said that, in his view, the comments made by Mr. Pambou-Tchivounda and Mr. Economides were not at all similar.

12. Mr. Pambou-Tchivounda had given the example of children whose family had its habitual residence in the territory that had been transferred, but who, at the time of the transfer, were outside that territory. That situation was not at all problematic. Such children were deemed to have their habitual residence in that territory and as such were

<sup>4</sup> See 2475th meeting, footnote 9.

<sup>5</sup> *Ibid.*, footnote 22.

covered by article 17. Similarly, in the case of children born in the transferred territory who, at the time of transfer, no longer had their habitual residence there, he assumed that such children would have reached the age of legal majority and saw no reason why they should receive treatment different from that given to other habitual residents: they answered the description in the expression "persons concerned", which applied whether or not such persons had their habitual residence in the transferred territory. In addition, article 9 (Unity of families) of the draft sought to protect the unity of families by committing States to adopt all reasonable measures to allow the members of a family to remain together or to be reunited.

13. Mr. Economides had spoken of the case of persons "originating" from the territory concerned, as referred to in provision 9 (a) of the Venice Declaration. That provision, however, related not really to the right of option, but to the granting of nationality on an individual basis or, in other words, to the acquisition of nationality on request—which was a straightforward case of naturalization. Furthermore, the Declaration did not draw a clear distinction between the different cases of State succession, failing to differentiate between transfer and separation of territory when the solutions for the two were not equally valid.

14. He had sifted through all the cases of transfer of territory in search of an example that would militate in favour of the extension of the right of option provided for in article 17 to persons who originated from the transferred territory, but were not resident there. He had found but one: the transfer of Schleswig to Denmark by the defeated Germany after the First World War.<sup>6</sup> Persons born in the territory of Schleswig who had acquired German nationality under the German occupation had enjoyed the right to opt for Danish nationality. It was an atypical case, which had some bearing on the restitution of the territory. There was no other example that would warrant laying down a rule to provide in particular that the predecessor State should be required to grant the right of option to persons solely on the ground that they had been born in the transferred territory. The position was different in the case of separation of territory, which would be examined later.

15. So far as limits to the rule laid down in article 17 were concerned, he agreed with Mr. Economides that States had not always been so generous. He also agreed with him that, throughout history, there were examples of the right of option being granted to only a portion of the population, the habitual residents of the territory concerned, often on the basis of the criterion of ethnic origin, language or religion. All those criteria were part of a phenomenon that had emerged after the last two world wars and had been closely linked, almost without exception, to the obligation imposed on persons who had exercised their right of option on the basis of those criteria to transfer their habitual residence from the transferred territory to the territory of the State for whose nationality they had opted. It was one thing to state what the practice had been and to explain that the right of option had been accompanied by an obligation; it was another—and it was unnecessary—to separate two elements of a phenomenon.

16. Mr. SIMMA said that Mr. Economides and Mr. Pambou-Tchivounda had raised different problems.

17. In the case of Mr. Pambou-Tchivounda's concern, provision 9 (a) of the Venice Declaration, which offered him only a pious hope on that score, and paragraph (37) of the commentary to article 17 were not sufficient from the human rights standpoint, in his view. He therefore reiterated his proposal that a paragraph 2, worded along the lines of provision 9 (a) of the Declaration, should be added to article 17.

18. Mr. PAMBOU-TCHIVOUNDA said that it was the notion of "origin", with all it encompassed, that had prompted him to quote a typical example (2488th meeting) and to recommend using the notion of "genuine connection", which sufficed to convey the idea intended, as universally understood in public international law. There was nothing either fanciful or unreal about his proposal given the arrangements concluded between Germany, France and Great Britain at the end of the Second World War that had affected the peoples of some African countries.

19. It was unfortunate that the substance of the topic was to be found more in the commentaries than in the proposed articles, which did not provide a positive answer to the problems. States would, however, dwell on the articles, not the commentaries. The Commission and the Drafting Committee should therefore endeavour to transfer to the actual articles the ideas that had been clearly expressed in the commentaries.

20. Mr. ECONOMIDES, noting that the Venice Declaration was a model of clarity and simplicity, said it stipulated that, in all cases of State succession, the successor State should grant its nationality and clearly distinguish the cases where the predecessor State continued to exist and that where it had ceased to exist and settle in all those cases the question of the right of option according to international law.

21. As to the example of Schleswig quoted by the Special Rapporteur, he could think of at least three cases in Greek practice when the State had allowed persons originating from the territory concerned or who had connections with but did not reside in that territory to acquire its nationality through naturalization: that was the case provided for in provision 9 (a) of the Venice Declaration, and it was very prevalent.

22. It was not a question of making the right of option general. It would suffice to provide, where necessary, that the successor State must not impose its nationality by force and that it must grant the right of option. It would be foolish and naive to try, in the case of succession, to organize a referendum on the question of nationality.

23. Mr. ROSENSTOCK said that provision 9 (a) of the Venice Declaration was not very clear, in his view. In the first place, it stated that "It is desirable that successor States". Secondly, he said it was not clear who were the persons "originating" in the territory that was the subject of the succession: whether they were persons who had for instance been born there or who had at some point in time had their habitual residence there.

<sup>6</sup> Treaty of Versailles, art. 112.

24. At any rate, it would be most unfortunate to envisage depriving the people of a transferred territory of the right to opt for the nationality of the predecessor State, quite apart from any consideration as to the legitimacy of the transfer. Care should also be taken to avoid adopting an extreme stance on the right of the State for whose nationality the person concerned had not opted to take certain action.

25. Nonetheless, article 17 struck an appropriate balance. A second paragraph could however be added to it to provide that the successor State would have the possibility—not the obligation—of granting its nationality to persons originating from the transferred territory, since that was in no way excluded in the commentary. He had no very strong feelings on the matter, particularly since the case it would cover would rarely occur, bearing in mind the provisions of the other draft articles, including those relating to unity of families.

26. Mr. MIKULKA (Special Rapporteur) said that Mr. Economides could also have referred to provision 13 (a) of the Venice Declaration, which imposed an obligation on the successor State to grant the right of option and which was entirely in keeping with the terms of the second part of article 17, instead of merely quoting another provision from the Declaration which dealt not with the right of option, but with naturalization. The question of naturalization, however, went far beyond the scope of the draft articles.

27. The Venice Declaration, it had to be recognized, was not clear. For instance, the right of option the successor State granted could be the right not to acquire its nationality. But it was not for the successor State to decide whether the persons referred to could or could not retain the nationality of the predecessor State. Moreover, provision 14 made the exercise of the right of option subject to the condition that those who exercised it had genuine links—and in particular ethnic, linguistic or religious links—with the predecessor State or a successor State: that sounded like discrimination. At all events, he was prepared to explain point by point why he had not adopted the provisions of the Venice Declaration.

28. As to Mr. Simma's proposal, he wondered whether it was really advisable to encourage States to go down that path when they had themselves said that the exercise of the right of option should not be enlarged unduly and the only example he had found in practice was that of Schleswig. A well-established rule should not be called into question: in the case of a transfer of territory, it was perfectly normal to presume that, save for the people in the transferred territory, the status of the other peoples did not undergo any change.

29. Lastly, he would remind the members that, at its forty-seventh session, the Commission as a whole had severely criticized the emphasis the Working Group had placed on the *jus soli* element. How could it currently favour that element, when that was certainly not justified by State practice?

30. The CHAIRMAN said that the problem raised by Mr. Pambou-Tchivounda had more to do with *jus sanguinis*.

31. Mr. HAFNER said that, in his view, the right of option as referred to in the last part of article 17, which would, incidentally, be improved if it were redrafted, should be read in the light of the draft articles as a whole.

32. He agreed that the answer to the problem raised by Mr. Pambou-Tchivounda could lie in the principle of unity of families laid down in article 9. He also agreed with Mr. Simma that the problem was connected with the way in which paragraph (37) of the commentary was worded. It should be made clear that the draft articles did not exclude the right of States to grant the right of option. But that right stemmed from the sovereignty of the State, as referred to in the second paragraph of the preamble, on which there were no restrictions other than those laid down in articles 4 and 5 (Renunciation of the nationality of another State as a condition for granting nationality).

33. As to the recommendation that States should grant the right of option to persons residing outside the territory concerned, it should be conditional on the existence of certain links. It would also be necessary to envisage all of its consequences and, in particular, to ascertain whether it corresponded to the leitmotif of the draft articles, namely, that the will of the persons concerned must be respected and both statelessness and multiple nationality must be avoided.

34. Mr. GOCO said that article 17, as drafted, referred to the case of a State transferring part of its territory to another State. In such circumstances, it was normal that the successor State should grant its nationality to the persons concerned who had their habitual residence in the transferred territory and that the predecessor State should withdraw its nationality from such persons, subject, of course, to the exercise of the right of option. He wondered why, in view of the definition of the term "person concerned", the Special Rapporteur had introduced the criterion of "habitual residence". He asked if it represented a further condition that had to be met. Supposing that the "person concerned" did not have his habitual residence in the transferred territory, he asked if his situation would be changed as a result. There were cases where nationality had been granted to all nationals of the State concerned.

35. There were also cases where a person considered to be a national of the State whose territory had been transferred did not reside in that territory. In that connection, he referred to the distinction between "domicile" and "residence" drawn by Mr. Dugard. The word "domicile" did not necessarily mean "physical residence"; it could happen that persons were domiciled in a given place while having their habitual residence elsewhere. Some clarification of that point by the Special Rapporteur would help the Drafting Committee in its work. In conclusion, he said that he endorsed the spirit and letter of article 17.

36. Mr. MIKULKA (Special Rapporteur), replying to Mr. Goco, said that the criterion of habitual residence for the granting of the nationality of the successor State was essential in the case of a State transferring part of its territory to another State, as the only persons concerned were those who habitually resided in that portion of territory and not all nationals of the State which had ceded that territory. For example, in the 1960s, Czechoslovakia and Austria had exchanged part of their respective territories

because of the construction by Czechoslovakia of a dam on the Moldau River. Only persons who might have resided in those territories would have been concerned by the effects of the mutual cession of territories on their nationality. There had been no question of changing the nationality of nationals of either State who resided in other parts of the territory of the two States.

37. The CHAIRMAN, summing up the discussion on article 17, noted that the first part of the article was not challenged; two problems arose, however, following the proposal made by Mr. Pambou-Tchivounda. The first was whether the obligation to grant nationality should not be extended to persons having a genuine link with the territory concerned or originating from that territory; the other was whether the right of option offered in the second part of the sentence ("unless otherwise indicated by the exercise of the right of option which all such persons shall be granted") was not too extensive. One solution might be, as Mr. Simma had suggested, to add a paragraph 2 modelled on the wording of provision 9 (a) of the Venice Declaration.

38. He noted that the Commission had concluded the discussion on section 1 of Part II of the draft and said that if he heard no objection, he would take it that the Commission wished to refer that section, comprising article 17, to the Drafting Committee.

*It was so agreed.*

## SECTION 2 (Unification of States)

### ARTICLE 18 (Granting of the nationality of the successor State)

39. Mr. MIKULKA (Special Rapporteur), introducing article 18 (Granting of the nationality of the successor State), said that it contained what was, in a sense, a definition of the term "unification of States". The term covered two situations: the merging of two States into a single new State and the absorption of a State by another in conformity with international law, annexation by force being of course precluded. The second part of the article dealt with the effects of such unification on the nationality of the persons concerned. All persons who, on the date of the succession of States, had had the nationality of one of the predecessor States, regardless of the manner in which that nationality had been acquired, were to be granted the nationality of the successor State. In the case of persons having their residence in a third State or having the nationality of a third State, the applicable provisions were those of Part I (General principles concerning nationality in relation to the succession of States) of the draft articles.

40. Mr. LUKASHUK said that he generally supported the contents of article 18, but was concerned about the words "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 merged", which were not explained in the commentary and not borne out by practice. He would like some clarifications about the intended meaning of the word "personality". In his view, the question of granting nationality arose only when the unification of two States entailed the disappearance of those two States and the creation of a new one. The example of the

United Arab Republic, which was cited in paragraph (3) of the commentary to article 18,<sup>7</sup> was very clear in that respect. The creation of that new State had been confirmed by the adoption of the Provisional Constitution of the United Arab Republic<sup>8</sup> which provided for a new nationality for the nationals of the two predecessor States.<sup>9</sup> He therefore thought that it would be best to delete the words in question, which gave rise to legal problems.

41. Mr. HAFNER said that the question raised by Mr. Lukashuk was extremely delicate and should be considered in the light of European experience in the past few years. In practice, the problem had already arisen as to whether the 1978 and 1983 Vienna Conventions were applicable to those cases. Inasmuch as those two Conventions were not very explicit on the point at issue, it would seem useful to maintain the wording proposed by the Special Rapporteur, which could cover all the cases of unification which had given rise to difficulties in Europe. It remained to be seen whether the wording should be retained in the text of article 18 itself or simply be inserted in the commentary. It was, however, preferable that the wording should clearly indicate to what cases article 18 was applicable.

42. Mr. GALICKI said that he shared the concerns expressed by Mr. Lukashuk. The situations covered by article 18, namely, the unification of two States resulting in the creation of a new State and the absorption of a State by another State, were slightly different from one another and the term "personality" was confusing since it could imply that the predecessor State, which might have kept its identity, but would become the successor State, would be required to grant its nationality again to persons who already had it. That seemed completely illogical and, if that were the case, he would have difficulty in accepting the wording as it stood. Some clarification was called for.

43. Mr. ROSENSTOCK said that he saw no point in dealing with the two situations separately. That would be an unnecessary complication because, in both cases, the result for the persons concerned would be the same. The matter could perhaps be settled by using a word other than "grant", which was a little clumsy. The problem was essentially one of form and could easily be solved by the Drafting Committee.

44. Mr. MIKULKA (Special Rapporteur) said he also thought that different wording should be found in order to avoid any absurd or illogical interpretation of the word "grant". There was obviously no question of a State granting its nationality again to its own nationals. With regard to the question raised by Mr. Lukashuk, he referred to paragraph (4) of the commentary to article 18, which cited Singapore as having acceded to independence through a transient merger with the already independent Federation of Malaya, which had continued to exist after the merger. Singaporean nationals had thus acquired Federal citizen-

<sup>7</sup> E. Cotran, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly* (London), vol. 8 (1959), p. 346.

<sup>8</sup> *Ibid.*, p. 374.

<sup>9</sup> Nationality Law of the United Arab Republic, No. 82 of 1958, *ibid.*, p. 380.

ship in addition to Singaporean citizenship, while Malaysian nationals had kept their Malaysian nationality.<sup>10</sup> The case of the two Germanies was largely the same. It did not seem necessary to provide for each of the two situations in a separate article because the result was the same in both cases. What mattered was that the persons concerned should ultimately have the nationality of the successor State. There were no grounds for interpreting the 1978 and 1983 Vienna Conventions as applying solely to the case of a merger of two States resulting in the disappearance of both those States and the creation of a new one. Even if not expressly stated, it was obvious, as many commentaries attested, that the drafters of those instruments had had both of those situations in mind and that they could therefore be treated together.

45. Mr. GOCO said he thought that the passage explaining what was meant by “successor State” merely made the text of article 18 more confusing and that it should therefore be deleted.

46. He also wondered why article 4 was mentioned at the beginning of the text, since it had given rise to some objections because it dealt mainly with persons who were not nationals of the predecessor State, resided in a third State and had the nationality of that third State. It was clear that, in such a case, the successor State had absolutely no obligation to grant its nationality to such persons and should not impose it on them. He therefore thought that the words “Without prejudice to the provisions of article 4” should likewise be deleted. Thus amended, the text of article 18 would be much clearer and more readily understandable.

47. Mr. HAFNER said that the question of the applicability of the 1978 and 1983 Vienna Conventions to situations which had recently occurred in Europe had arisen in diplomatic practice. He therefore considered that the qualifier should be retained.

48. Mr. GALICKI said that he was not in favour of creating two sets of provisions relating respectively to each type of unification, but he felt that the Commission should specify and limit the obligation of the successor State by adding the words “which ceased to exist” at the end of the article. Otherwise, the article would imply, for example, that the Federal Republic of Germany should have “granted” its nationality to its own nationals after reunification.

49. Mr. Sreenivasa RAO, viewing the problem as basically an editorial one and deriving not so much from the word “grant” as from the whole of the last phrase, proposed that the words “at least” should be deleted and that the words “or the nationality of the State absorbed, as the case may be” should be added at the end of the article.

50. Mr. SIMMA pointed out that, at least according to the official position of the German Government, article 18

would have very limited application in the case of Germany because the Federal Republic of Germany had always treated nationals of the German Democratic Republic as Germans within the meaning of its Basic Law. Article 18 would be applicable only in the case of certain foreigners, such as Greeks, who had become citizens of the German Democratic Republic prior to reunification and who had not been recognized by the German courts as having German citizenship for the purposes of the Basic Law.

51. Mr. MIKULKA (Special Rapporteur) said that it was difficult for the international community to accept the official position of the Federal Republic of Germany because of its assumption that the German Democratic Republic had never existed. The issue would arise when the Commission came to discuss article 24 (Withdrawal of the nationality of the predecessor State), the commentary to which made special mention of that historic case. With regard to article 18, he agreed that the problems could be solved by rewording the last phrase. He was nevertheless pleased to note that there was general agreement on the basic rule.

52. The CHAIRMAN noted that the Commission had concluded the discussion on section 2 of Part II of the draft and said that if he heard no objection, he would take it that the Commission wished to refer that section, comprising article 18, to the Drafting Committee.

*It was so agreed.*

### SECTION 3 (Dissolution of a State)

#### ARTICLE 19 (Scope of application)

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

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

53. Mr. MIKULKA (Special Rapporteur) said that article 19 (Scope of application) was a preliminary clause whose purpose was exclusively of a drafting nature, namely, to avoid having to repeat in articles 20 (Granting of the nationality of the successor States) and 21 (Granting of the right of option by the successor States) what type of territorial change was being envisaged. It was based on a very simple hypothesis and was fully in conformity with the 1978 and 1983 Vienna Conventions.

54. Articles 20 and 21, which dealt respectively with granting of the nationality of the successor States and granting of the right of option by the successor States, did not rule out the possibility of some overlapping between the categories they covered. Article 20 referred to the granting of nationality either through the application of legislation or a treaty, and hence occurring automatically, or through the exercise of a right of option. That accounted for the safeguard clause at the beginning of article 20. Under article 20, the nationality of the successor State was granted to two categories of persons. Sub-paragraph (a) concerning persons having their habitual residence in the territory of the successor State would, he felt sure, secure broad agreement in the Commission.

<sup>10</sup> See Singapore, *State of Singapore Government Gazette, Subsidiary Legislation Supplement*, No. 1 (Singapore, September 1963); the Constitution of Malaysia, 1963 and the Malaysia Act (United Nations, Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 89 and 91). See also the Republic of Singapore Independence Act, 1965, reproduced in *Republic of Singapore Government Gazette, Acts Supplement*, No. 2 (Singapore, December 1965).

Subparagraph (b), on the other hand, referred to persons having their habitual residence outside the successor State, subject to a general reservation concerning the exceptions listed in article 4. Subparagraph (b) was subdivided into two parts. Subparagraph (b) (i) related to persons who had been born in what had become the territory of the successor State or who had had their last permanent residence there before leaving it. Subparagraph (b) (ii) referred specifically to the case of a dissolved State which had been structured as a federation and where there were secondary nationalities that became criteria for the granting of nationality.

55. Article 21 applied the general provisions governing the right of option set forth in Part I to the specific case of the dissolution of a State. Paragraph 1 mentioned only successor States on the assumption that the predecessor State had disappeared. It would apply when, for example, a person who had his habitual residence in the territory of State A but possessed secondary nationality of State B was entitled, pursuant to article 20, to acquire the nationality of those two States. The only solution was to allow the person concerned to choose between the two nationalities, as had occurred in several recent cases of dissolution of federal States in eastern Europe. Paragraph 2 dealt with the case of persons who, since they were not covered by article 20 and were therefore in danger of finding themselves without any nationality, should be entitled to acquire the nationality of the successor State by exercising an option based on voluntary choice. The paragraph was designed first and foremost to prevent cases of statelessness, but also to enable each individual concerned to exercise the right to a nationality provided for in article 1. The aim was to bridge all gaps that might remain following the application of the preceding provisions.

56. Mr. PAMBOU-TCHIVOUNDA said that a harmonious approach should be adopted in dealing with the different categories of State succession, either by inserting a preliminary article before article 17, along the lines of article 19, indicating what was understood by the "transfer of part of a territory" or by deleting article 19 and article 22 (Scope of application). Moreover, referring to article 20, subparagraph (b) (ii), he said that he was convinced of the need to use the same reasoning, in the event of a transfer of territory in accordance with article 17, to examine the situation of persons born in the territory, but residing elsewhere. The debate on article 17 had shown that the problem existed and should be taken into consideration as in the case of the dissolution of a State.

57. Mr. HAFNER asked whether the definition in article 19 also covered the case of the dissolution of a State whose constituent parts did not form two or more successor States, but became an integral part of already existing States. He noted that, when the Commission had considered the draft 1978 and 1983 Vienna Conventions, there had been a discussion on whether dissolution should be distinguished from separation, but no distinction had been made. He asked the Special Rapporteur for clarification since the point had not been mentioned in the commentary to article 19.

58. Mr. MIKULKA (Special Rapporteur) said he would comment later on Mr. Pambou-Tchivounda's observations. In reply to Mr. Hafner's question, he said that the

Commission had refrained from making a distinction between dissolution and separation only in the 1978 Vienna Convention and had dealt with the two situations under the general concept of separation.<sup>11</sup> In drafting the 1983 Vienna Convention, however, the Commission had fully recognized that it was impossible to follow the same procedure as in the case of treaties and had made a distinction between dissolution and separation.<sup>12</sup> The main reason for the lack of a reference in the commentary to article 19 was that the Special Rapporteur had referred, in paragraph 11 of the introduction to the third report (A/CN.4/480 and Add.1), to the Commission's decision to adopt the types of succession referred to in the 1983 Vienna Convention.

59. Mr. ECONOMIDES asked the Special Rapporteur whether, given the distinction in article 18 between new successor States and successor States that were continuators of an existing international personality, article 19 was to be viewed as referring exclusively to two new successor States or whether one of the two could be the continuator of the legal personality of the dissolved State.

60. Mr. MIKULKA (Special Rapporteur) confirmed that article 19 must be interpreted as excluding the latter possibility, which was covered by article 22.

*The meeting rose at 1 p.m.*

<sup>11</sup> See *Yearbook* . . . 1972, vol. II, document A/8710/Rev.1, articles 27 and 28, pp. 292 and 295.

<sup>12</sup> See *Yearbook* . . . 1981, vol. II (Part Two), paragraphs (1) to (3) of the commentary to articles 16 and 17, pp. 44-45.

## 2490th MEETING

*Tuesday, 10 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

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

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

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

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

ARTICLE 19 (Scope of application)

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

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

1. Mr. ECONOMIDES, referring to article 20 (Granting of the nationality of the successor States), subparagraph (b) (i), said it provided for two cases in which persons had the right to be granted the nationality of the successor State: persons who had their habitual residence in a third State, and persons who were born in the territory which was the subject of the succession or had their habitual residence there before leaving that territory. He was in favour of a much wider provision for granting that right to all persons who had a genuine link with the territory concerned. The term "genuine link" had not been defined in the draft, which in his view was a shortcoming.

2. He wondered whether article 21 (Granting of the right of option by the successor States) really concerned a right of option, since each State must allow in its legislation for the possibility of granting its nationality to persons affected by the succession. A right of option meant a choice between two nationalities: either between that of the predecessor State or that of the successor State, or between that of one successor State or that of another successor State. But when each State granted a right of option, in actual fact that was not a right of option, but the possibility to acquire the nationality of one or several of the States concerned.

3. Article 21, paragraph 1, stated that the right of option was granted to all persons concerned who would be entitled to acquire the nationality of two or more successor States. Which persons had such rights? That was not explained anywhere either. Moreover, whereas article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) provided for the right of option for everyone without any restrictions, article 21 set conditions which were not very clear and would depend on the legislation of each State, and hence on internal, and not international, criteria. Nevertheless, in his view, the erroneous solution was the one contained in article 17, not the one in article 21.

4. Mr. MIKULKA (Special Rapporteur) said that everything Mr. Economides was asking for could be placed either under article 20 or article 21. All persons who were

not addressed in article 20, subparagraph (b) (i) were covered by article 21, paragraph 2. Article 20 could not be read simply as calling upon States to grant their nationality automatically to those categories of persons. The sole question was where to say that all categories were covered. He preferred putting it in article 21, whereas Mr. Economides was in favour of including it in article 20.

5. Mr. ECONOMIDES noted that, when the Special Rapporteur had introduced articles 19 (Scope of application), 20 and 21, he had said that article 21, paragraph 2, concerned cases of statelessness. It was not apparent whether other persons were also concerned, but if other persons fulfilled the positive requirements for acquiring nationality, why was it not possible to include them under article 20, subparagraph (b) (i), and possibly draw a distinction between them? Currently, both provisions gave rise to confusion. To his mind, one could speak of persons who had a genuine link with the territory.

6. As he saw it, in the framework of article 20, subparagraph (b) (i), nationality should not be granted automatically, but solely on an individual basis to persons requesting the nationality. That did not emerge clearly from the current formulation. The persons in question had their habitual residence outside the territory which was the subject of the succession and had the nationality of the predecessor State. Yet those persons could very well opt for the nationality of another successor State, since there were several such States. Thus, granting them a nationality automatically was like imposing a nationality upon them, perhaps against their will. Such persons must be allowed to acquire nationality on a voluntary basis. That was not clear in the text.

7. The CHAIRMAN said that it did, in fact, seem that article 20 concerned the automatic acquisition of nationality, and that it was only under article 21 that an option existed.

8. Mr. MIKULKA (Special Rapporteur) reminded the members of the Commission that the provisions under consideration examined cases in which the nationality of the predecessor State had disappeared along with the predecessor State itself. In cases in which the predecessor State and its nationality no longer existed, persons who did not have the nationality of a third State were necessarily stateless, something the two or more successor States must prevent by sharing that population among themselves.

9. As already pointed out, the articles under discussion fell under Part II (Principles applicable in specific situations of succession of States), which dealt with specific cases. The Commission had already prepared certain general rules which were applicable in all cases. Article 21 was, of course, applicable in the framework of the general rules set out in Part I (General principles concerning nationality in relation to the succession of States), which clearly stipulated that nationality could not be imposed on persons with habitual residence in a third State and who had the nationality of another State. In other words, if article 20, subparagraph (b) was read in that context, the sole interpretation possible was that the successor State had the right to extend its nationality to include the persons concerned who had their habitual residence in a third

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

State and had the nationality of another State, provided that it was not against their will. But that did not have anything to do with the way in which that was done. It could easily be accomplished by a procedure which provided for automatic granting of that nationality if it was accompanied by the right to opt out, that is to say the person concerned could immediately reject that nationality by means of a declaration. Article 20, subparagraph (b), while it might give the impression that it covered the automatic granting of nationality, was always conditional upon the possibility that the person concerned could reject that nationality, as provided under article 7 (The right of option).

10. Mr. ECONOMIDES said that, although the predecessor State ceased to exist, he noted that there could be two, three or even four successor States. The persons concerned lived abroad and, if the States concerned all imposed their nationalities, such persons might find themselves with a number of nationalities granted automatically. That ran counter to the spirit of the draft, because the nationality must be offered, and the person concerned must be able to choose. For that reason, he was in full agreement, in respect of article 20, subparagraph (b) (i), with automatically granting nationality for persons with habitual residence, but nothing should be imposed upon persons who were abroad and lost their nationality and could acquire a number of nationalities. Such persons must have a choice.

11. Mr. MIKULKA (Special Rapporteur) pointed out that article 20, subparagraph (b) read: "Without prejudice to the provisions of article 4 . . .". Mr. Economides would find from article 4 that the problem he raised was resolved there.

12. Mr. PAMBOU-TCHIVOUNDA said that he supported the proposal by Mr. Economides to broaden the list in article 20, subparagraph (b) (i) of persons entitled to acquire a nationality and include the genuine link criterion. He had already expressed the view that such an approach applied not only in regard to article 20, subparagraph (b) (i) but also to article 17.

13. Mr. LUKASHUK said that he had no objection to the ideas contained in articles 20 and 21. However, articles 20, 21 and a number of others reflected in a certain sense features of the international law of the past. To some extent his views went in the same direction as those expressed by Mr. Economides. The international law of the past had dealt solely with the interests of States and their sovereign rights; the individual had been absent from it. Today, respect for human rights had become one of the fundamental principles of international law. A trend in international law had been observed in which the focus had shifted to the individual: *hominum causa jus gentium constitutum est*—in other words, all international law was created for the well-being of man.

14. International law was following the path taken by internal law. Constitutions of States currently recognized the pre-eminence of the individual. In particular, they denied the right of the State to deprive an individual of his nationality. The right to nationality was laid down in international law. Unfortunately, the individual was not sufficiently reflected in the draft, which invariably used a

formulation such as "States shall grant nationality", "States shall withdraw nationality", "States shall grant the right of option". Where was the right to a nationality or of option? Such an overwhelming emphasis on States was no longer justified. Even the Draft Convention on Nationality prepared by the Harvard Law School<sup>2</sup> had placed greater stress on the rights of the individual than did the current articles, because article 18 (Granting of the nationality of the successor State) had provided that, when the entire territory of a State was acquired by another State, those persons who had been nationals of the first State became nationals of the successor State, unless those persons declined the nationality of the successor State.

15. The rights of the individual were not in conflict with the rights of States. Ensuring the rights of the individual had become a prerequisite for a democratic legal order, and in the final analysis, that was in the interest of all States.

16. His proposal would not require a radical change in the draft but would be of fundamental importance: it would be enough, for example in article 17, to speak of "acquisition" and "loss" of nationality instead of "granting" and "withdrawal", in articles 18 and 20 of "acquisition" instead of "granting", and so forth. There was reason in article 21 to strengthen the right of option, a point already raised by Mr. Economides. Although the alternative proposed by the Special Rapporteur was more likely to be acceptable to States, the Commission's task was not to support views which were inconsistent with the current state of development of international or internal law, but to point the way to the future. As for the statement by the Special Rapporteur that soft law instruments could only codify existing law, one should remember that soft law instruments, including those adopted in the framework of the United Nations, had played an enormous role in the progressive development of international law, including in the area of human rights. The Sixth Committee and meetings of legal counsels in the United Nations system had stressed the importance of soft law in the progressive development of international law in connection with the activities of the Commission.

17. The CHAIRMAN, speaking as a member of the Commission, said that he disagreed with Mr. Lukashuk's point of departure. No one contested that the individual should be at the centre of international law, but international law must not necessarily allow individuals to do entirely as they pleased. Avoiding statelessness was the fundamental idea behind the draft. Mr. Lukashuk had on a number of occasions suggested that individuals should have the right to choose to be stateless, but he himself challenged the right to statelessness: individuals must not be allowed to decide to acquire no nationality whatsoever. The provisions in section 3 reflected the idea that sometimes things must be done for people's well-being, be it against their wishes. He did not believe that contemporary law consisted in saying that the individual had all rights against the State. It was not because human beings and human rights were the central concerns in many spheres that individuals should be given the opportunity to make senseless decisions. The current trend in the law was not to give people every possible right. In social security leg-

<sup>2</sup> See 2475th meeting, footnote 9.

isolation, for example, people were not deemed to have the right not to contribute to retirement schemes.

18. Thus, he was not in favour of the philosophy behind Mr. Lukashuk's proposal, but had no strong feelings about the formulation to be used—"States shall grant nationality" or "Individuals shall acquire nationality".

19. Mr. GALICKI said that, with all due respect both to Mr. Lukashuk and to human rights concerns, he was of the same view as the Chairman. Despite the increasing role of the individual in international law in general, the principles to be included in the draft articles should focus on States. If the Commission had not totally rejected the idea that the future draft would take the form of a convention, it should concentrate on principles that created obligations for States. Introduction of the notion of acquisition, rather than granting, of nationality, as a phrase that reflected the standpoint of the individual, would attenuate the obligation to ensure the right to nationality. The better course would be for rights to be translated into obligations for States, as such obligations were more visible, better defined and, accordingly, could better serve the ideal of protection of human rights.

20. Mr. THIAM said that, as he understood it, Mr. Lukashuk was opposed to the notion of absolute rights for States in the area of nationality. The time-honoured, and possibly outdated, vocabulary used, "States shall grant", "States shall withdraw" and the like, should be employed with circumspection, for in reality it was increasingly recognized that individuals also had rights. On that point, he agreed with Mr. Lukashuk.

21. Mr. CRAWFORD said he agreed with the Special Rapporteur's decision to use two categories, dissolution and separation, in line with the 1983 Vienna Convention, not the 1978 Vienna Convention. However, once those categories had been introduced, it might not immediately be clear into which of them certain situations fell. Disputes between States, not merely about recognition, but about identity, might take a considerable amount of time to resolve. Hence one of the virtues of presumptions was that they could provide a bridge for the individuals concerned at a time when such inter-State issues of classification had not been resolved. In general, the articles were sufficiently flexible in that regard.

22. He was nonetheless concerned about the relationship between articles 7 and 21. Article 21 provided that States "shall" grant the right of option to all persons covered by article 20. Article 7, also on the right of option, said States "should" provide for the right of option. The obligation relating to the specific case outlined in article 21 thus appeared to be stronger than the one provided for in general in article 7. Yet article 20 made an important distinction: subparagraph (a) referred to persons habitually resident in the territory of the successor State, while subparagraph (b) dealt with persons who had some other connection with that territory. It was not clear that the same level of obligation ought to exist with respect to both categories of persons. In his view, the situation covered by article 20, subparagraph (a) was the core of the nationality situation, and it was not plain that the State was under an obligation to grant the right of option to persons habitually resident in its territory, irre-

spective of whether they would be stateless. In the "softer" situations covered by article 20, subparagraph (b), however, the obligation to grant the right of option was different, especially since secondary nationality, rather than being a term of art, might merely be defined in the law of a particular predecessor State. The Drafting Committee should look into the distinction between subparagraphs (a) and (b) and consider whether the obligation to grant the right of option in article 21 should have equal force with respect to those two subparagraphs, in the light of the wording of article 7.

23. Mr. MIKULKA (Special Rapporteur), summing up the discussion on section 3, said that the difficulties pointed out by Mr. Crawford in respect of the distinction between dissolution and separation in State succession could be illustrated by the disintegration of Yugoslavia. In the first few months, Slovenia and Croatia had been generally considered to have been born of the separation of part of Yugoslav territory. But as the disintegration of the State continued, the Arbitration Commission had concluded that the process of the dissolution of Yugoslavia as such had ended.<sup>3</sup> That pointed to a certain relativity in separation and dissolution.

24. Faced with that dichotomy, which nothing in international law resolved, the only thing the Commission could do was to try to formulate rules for both cases in such a way that no conflict would ensue if a situation was categorized first in one way, and then in another. That was what he had tried to accomplish in the draft articles. When the Commission came to consider section 4, it would become clear that, despite the somewhat academic typology that drew a distinction between dissolution and separation, there was very little risk of conflicts arising from the actual application of the provisions of section 3 or section 4.

25. Two diametrically opposed viewpoints had been expressed on article 20. Mr. Lukashuk said it limited the right of the individual and compelled him or her to hold one nationality, while Mr. Economides said the application of the article could result in an individual's having more than one, indeed too many, nationalities. Another issue was whether a State on whose territory an individual had habitual residence was in any way obliged to allow such an individual to divest himself of his or her nationality.

26. His initial comments on Part II should be borne in mind in that regard. Part II was not designed to set out well established rules of international law, but to assist States engaged in negotiations. Ultimately, the States concerned would determine themselves the exact modalities whereby the population affected by the dissolution of a State would be shared among them. The rules set out in the articles would be available as guidelines: they were not being put forward as positive international law. The phrases "shall grant", and the like, should thus be read, not as setting out legal obligations, but as suggesting pos-

<sup>3</sup> Conference for Peace in Yugoslavia, Arbitration Commission: Opinion No. 8 of 4 July 1992, *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 6 (November 1992), pp. 1521-1523, at p. 1523.

sible solutions for States in wording that might ultimately be incorporated in international treaties.

27. In response to Mr. Economides' question on multiple nationality in the context of article 20, one might cite a straightforward example. A federation of two States underwent, not a simple dissolution into two parts, A and B, corresponding precisely to two entities that had previously made up the federation, but a complex dissolution resulting in three States: A split into two, and B formed the third successor State. The first two States could naturally operate on the basis of the principles set out in article 20, subparagraphs (a) and (b) (i), while the third State could use the rules in article 20, subparagraphs (a) and (b) (ii). Hence, there would be a considerable amount of overlap, for when a State granted its nationality to all individuals that had held it as a secondary nationality, that would naturally include nationals of the first two successor States. The only way of coping with the ensuing situation of multiple nationality was through the right of option, and that was the reason for the formulation used in article 21. Paragraph 1 of that article envisaged multiple nationality, and paragraph 2, the specific problem of statelessness, though that was not the sole concern addressed in that paragraph.

28. Mr. HE noted that the notion of secondary nationality as set out in the draft articles was to be applied to a federal State composed of distinct entities, but it was alien to many other federal States in which the nationality of the federal State was dominant. The use of the expression "secondary nationality" raised the possibility of the application of different degrees of nationality. The expression was not used in the European Convention on Nationality, the Venice Declaration,<sup>4</sup> or in internal law. If the Commission wished to retain it, it should define the expression in a separate article, in order to clarify the distinction between nationality granted by a federal State, or primary nationality, and secondary nationality granted by the constituent entities of such a State.

### Cooperation with other bodies

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

29. The CHAIRMAN invited Mr. Zelada Castedo, Observer for the Inter-American Juridical Committee, to address the Commission.

30. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said he welcomed the opportunity to pursue with the Commission the exchange established some years ago and to explore possibilities for more intensive cooperation in future. After all, the two bodies had similar functions. The Inter-American Juridical Committee was committed to promoting the development and codification of international law in the Americas, providing advisory opinions at the request of OAS and conducting studies on topics of special interest

relating to public and private international law in the Americas.

31. At its two most recent sessions, held at Rio de Janeiro, Brazil, in August 1996 and February-March 1997, the Committee had focused on several subjects. The task that had called for the greatest amount of time and effort had been the preparation, at the request of the OAS General Assembly, of an advisory opinion on the status under international law of the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), signed into law by the United States of America. The Committee had also pursued its earlier efforts in the development and codification of international law, concentrating on the elaboration of rules to improve the application of the Inter-American Convention against Corruption. Among the special studies carried out at the request of OAS, special mention must be made of a study on the right to information, with particular reference to access to and protection of personal information and data. Work had also been done on the development and application of the most-favoured-nation clause among States in the hemisphere. The Committee had organized a course on international law for specialists from the Americas, particularly government advisers and professors of international law. And lastly, it had held what had, at the current time, become a meeting to exchange views, experience and information with legal advisers and heads of legal departments within ministries of foreign affairs.

32. The Committee's advisory opinions were mainly of a recommendatory nature and were not binding on member States or on OAS bodies. It was in that context that the Committee had been requested in 1996 to examine in the light of international law, the Helms-Burton Act. The Committee had stated that it did not intend to pronounce on a State's internal legislation but that it would give its view, in the abstract as it were, on legislation whose content was approximately the same as that of the Act. The Committee had decided that there were two sets of provisions in the Act that merited special attention, those on the protection of nationals and the duty of States to protect their own nationals, and those on the exercise of the jurisdiction of States beyond the limits imposed by international law, practice and custom. The Committee's conclusion was that, had the legislation been applicable in practice, it would not have been in conformity with international law on account of part of its content. He would not enter into the detail of the considerations that had led to that finding.

33. So far as the development and codification of public international law were concerned, the Committee's February-March 1997 session had been devoted to exploring new formulas for legal development in inter-American cooperation to combat corruption in public office. In March 1996, the OAS General Assembly had convened the Specialized Conference of the Organization of American States against Corruption, in Caracas, which had adopted the Inter-American Convention against Corruption to regulate cooperation between American States in combating corruption in public office. That important instrument had earlier been discussed at three intergovernmental meetings on the basis of a draft prepared by the Committee and was currently being implemented by several OAS member States. Under the Convention, member

<sup>4</sup> See 2475th meeting, footnote 22.

States in the Americas were also urged to develop draft internal legislation to characterize and punish two specific offences: unlawful enrichment in the exercise of public office, and transnational bribery. Other agreements adopted by the OAS General Assembly also recommended that possible forms of cooperation should be explored to cope with those offences. In 1997, discussions had been initiated on the possibility of elaborating international rules to complement the Convention and to draft model rules with a view to encouraging member States to draft internal legislation. Model legislation, which offered scope for greater cooperation between the Commission and the Committee, was another technique being promoted by the Committee to bring about legislative harmonization. Perhaps the development of international law by codification could be replaced in some cases by the technique of devising model national legislation.

34. As to specific areas for further cooperation, the Committee was particularly interested in exchanging more information on the Commission's crucial experience in conceptualization with regard to the development in the 1970s of the draft articles on the most-favoured-nation clause.<sup>5</sup> The matter was receiving special attention since the development of a new legal order under the WTO system had created special obligations for all States in the Americas, which were committed to initiating negotiations in the short term for the possible establishment of a wide-ranging free trade regime. OAS had urged the Committee to reflect on the practice of American States in regard to the use of the most-favoured-nation clause bilaterally, whether conditionally or unconditionally, in free-trade agreements or other legal regimes of that kind. The Committee had also been asked to explore most-favoured-nation commitments at the internal level, and also such commitments imposed by the clause's new dimensions within the WTO regime at the external level. It would also be useful to have an exchange between the Committee and the Commission on the new technique of legislative harmonization, with particular reference to the drafting of model laws. Finally, he would welcome institutional arrangements for the exchange of experience between the two bodies with regard to the annual Course on International Law run by the Committee. Some members of the Commission had already taken part in those courses and it would be a great honour if more would do so.

35. The CHAIRMAN, thanking the Observer for the Inter-American Juridical Committee for a clear and constructive statement, said that the proposals he had made could perhaps be discussed in the Planning Group. Personally, he would remind members that, in the report of the Commission to the General Assembly on the work of its forty-eighth session, the Commission had taken the view that visits by representatives of legal bodies were useful but tended to be rather formal, complimentary exchanges. It had advocated, *inter alia*, a less formal discussion on selected issues of interest to both the legal

body concerned and the Commission.<sup>6</sup> He invited members to proceed on that basis.

36. Mr. BAENA SOARES said that, while he fully agreed on the need for a less formal approach, he also wished to extend his thanks to the Observer for the Inter-American Juridical Committee. He agreed that the Planning Group should consider the various points raised with a view to closer cooperation between the Committee and the Commission.

37. He would like, in particular, to have more information about the annual Course on International Law organized by the Committee and possible participation by members of the Commission, and also about the documents published by the Committee on the preparation of model rules for the guidance of the OAS member States.

38. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the Course on International Law organized by the Committee, which had been introduced several years ago, was on specific subjects, as the persons attending the Course were young specialists in international law who stood in need of further knowledge in specific areas. Thus, the main theme of the 1996 Course had been settlement of disputes in contemporary law, with special reference to the development of means for dispute settlement in economic international law and in the law of economic integration. The main theme of the Course to be held in August 1997 would be the classic topic of the interrelationship between the internal legal order and public international law. In 1998, the Course would possibly be on another specific subject. The Committee was endeavouring to introduce into the Course a nuance to reflect the important changes that had taken place in international law over the past 20 years, particularly in the field of human rights and international economic law. His reference to the possibility of members of the Commission participating in the discussions held during the Course had been motivated by a desire to find a practical form of cooperation between the Committee and the Commission.

39. The Committee was just beginning its work on the preparation of model laws. As a first step, it would probably be preparing model legislation on the two subjects he had mentioned—the characterization and punishment of the crimes of unlawful enrichment and of transnational bribery. The Committee had completed the preliminary phase of its studies in that connection and had carried out a comparative examination of the legislation of the countries of the Americas from which it had determined, on a preliminary basis, that, while there were some internal legislative developments in the Americas in regard to unlawful enrichment, there were fewer legal developments in regard to transnational bribery, save in the case of the United States of America.

40. Mr. LUKASHUK said that he was grateful to the Observer for the Inter-American Juridical Committee for the very useful information he had provided. The Sixth Committee of the General Assembly had stressed that the Commission must cooperate with regional bodies and scientific institutions and he had the impression that, in the

<sup>5</sup> See *Yearbook . . . 1978*, vol. II (Part Two), chap. II, sect. A (Introduction), which dealt with the background to the topic, pp. 8-15; and sect. D, which contained the final draft articles on most-favoured-nation clauses, pp. 16-72.

<sup>6</sup> See *Yearbook . . . 1996*, vol. II (Part Two), para. 239.

future, such cooperation would become one of its main activities. He fully agreed that the Commission and the Committee should begin with an exchange of views and, in that connection, it would be useful if the Commission could receive documentation and information from the Committee. In particular, it was evident that it was essential to include in the Commission's long-term programme specific subjects such as the extra-territorial effects of national law, about which nothing had yet been done though it had long been an issue.

41. Another subject mentioned was the fight against corruption. Hardly a country remained unaffected by that scourge, which had not only internal but also external repercussions and undermined international law and cooperation. The fight against corruption also related to the Commission's earlier work on international criminal law and, specifically, the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. The Commission must pursue the matter, for corruption was on the increase.

42. It was also clear from the statement by the Observer for the Inter-American Juridical Committee that the principles of international economic law deserved the most careful attention. Indeed, it had already been referred to by legal counsels of States Members of the United Nations and in the Sixth Committee of the General Assembly.

43. An important field for cooperation with the Committee was dissemination of information on international law. As the General Assembly and other bodies had pointed out on a number of occasions, knowledge about international law was very poor. The cooperation of the Committee in research and especially in the dissemination of such knowledge held out great promise.

44. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said he was surprised to learn that the documentation in question had not been circulated to the Commission as a matter of course. He would request the Committee's secretariat to transmit more information to the secretariat of the Commission in future.

45. Mr. Sreenivasa RAO thanked the Observer for the Inter-American Juridical Committee for his excellent overview of the work being done in the Committee. He was struck by the similarities between the scope and functions of that Committee and those of the Asian-African Legal Consultative Committee, a body that took up subjects at the request of member States or on its own initiative, and whose conclusions were of a recommendatory character. The conclusions reached by the Inter-American Juridical Committee on the Helms-Burton Act and the material it had considered in that connection would be of extreme importance to the work of the Asian-African Legal Consultative Committee.

46. Cooperation between the Commission and regional bodies, and between the regional bodies themselves, was an extremely important matter. He therefore sought clarification as to whether the Committee had any institutionalized links with other regional bodies of the sort it engaged with the Commission.

47. Visits by representatives of the Commission to regional bodies afforded an opportunity to exchange information. However, it was also important for the reports of the special rapporteurs of the Commission, the summary records of its meetings and the reports to the General Assembly on the work of its sessions to be made available to those bodies as a matter of course, so that they could obtain fuller information on the Commission's activities and provide an additional means of promoting a mutually sustaining relationship.

48. The CHAIRMAN said that Mr. Sreenivasa Rao's useful suggestions could be given fuller consideration in the Planning Group.

49. Mr. KATEKA said he had been particularly interested to hear the remarks by the Observer for the Inter-American Juridical Committee concerning the Inter-American Convention against Corruption, as corruption was "Public Enemy Number One" in many countries, especially developing countries. The Committee's preliminary studies would be of great interest to the Commission. Specifically, he asked whether the Convention had yet entered into force. He also endorsed Mr. Lukashuk's request that the issue of corruption, especially the transnational aspects, should be taken up in the Commission's long-term programme of work.

50. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that, according to the latest information at his disposal, the Inter-American Convention against Corruption was already in force for those States that had deposited an instrument of ratification. He was not sure how many States had complied with that formality.

51. Mr. SEPÚLVEDA said he looked forward to further close cooperation between the Committee and the Commission. The Observer for the Inter-American Juridical Committee had referred to the Committee's advisory opinion on the legal validity of the Helms-Burton Act. In his view, that legal opinion had a direct bearing on the work of the Commission, and in particular of its Working Group on Unilateral Acts of States. He therefore wished to ask the Observer for the Inter-American Juridical Committee to arrange, with the Chairman's approval, for that legal opinion to be circulated to members of the Commission.

52. The CHAIRMAN said he doubted that the opinion, with which he was well acquainted, would be especially useful to the Commission in the context of its work on unilateral acts of States. However, he saw no objection to its being distributed in the Committee's working languages.

53. Mr. FERRARI BRAVO said he wished to take the opportunity to thank the Observer for the Inter-American Juridical Committee for the valuable support the Committee had provided for a congress on uniform law,<sup>7</sup> which he had attended in his capacity as President of the International Institute for the Unification of Private Law (UNIDROIT). Very useful links had been forged between

<sup>7</sup>A New Approach to International Commercial Relations: the UNIDROIT Principles of International Commercial Contracts, held at Valencia (Venezuela), from 6 to 9 November 1996.

the Committee and UNIDROIT on the occasion of that congress.

54. In the framework of the annual Course on International Law and of other joint activities, the preparation of model laws, referred to by the Observer for the Inter-American Juridical Committee, could prove very useful. Members of the Commission might contribute to establishing such a practice, which, in his view, was a much more promising activity than the preparation of conventions that often remained a dead letter, as States had neither the time nor the inclination to ratify them.

55. The CHAIRMAN said that UNIDROIT, too, was yet another body with which the Commission could forge official links, rather than purely personal links with Mr. Ferrari Bravo.

56. Mr. DUGARD said that the European Union too was currently considering promoting a convention covering the question of corruption, and had shown particular interest in developments in that regard in Latin America. He would be interested to know whether it was still too early for any practice to have developed in that area. It would, in due course, be very helpful if information concerning the practical application of the very important Inter-American Convention against Corruption could be more widely distributed.

57. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that no case of practical application of the Inter-American Convention against Corruption had yet come to the Committee's attention. Responsibility for monitoring application of inter-American conventions lay with the Secretariat for Legal Affairs of the OAS secretariat.

58. The Convention had three fundamental elements. First, it provided a better characterization of the meaning of an act of corruption. Secondly, it refined certain procedures and provisions of bilateral treaties concerning extradition of persons involved in corruption. Lastly, it contained special provisions to enhance cooperation between the legal and administrative authorities of signatory States in cases of corruption.

59. Mr. CANDIOTI asked what the current status was of the study on personal data protection to which the Observer for the Inter-American Juridical Committee had referred. Regarding the dissemination of international law, he would like to know whether the proceedings of the courses organized by the Inter-American Juridical Committee were readily accessible, as it would be interesting to follow the evolution of legal thinking on the various topics covered by the courses.

60. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the Committee's study on personal data protection was still in the preliminary phase. The Committee was refining the concept and making a comparative analysis of legislation in the countries of the region. In due course the analysis would enable it, either to prepare an inter-American convention to promote cooperation in that matter, or else to draft model laws. At the current time, however, work was still at the diagnostic stage.

61. With regard to the dissemination of information, it had traditionally been the practice to publish the proceedings of the Courses on International Law. Unfortunately, budgetary constraints had recently halted the programme of dissemination of the courses and other materials produced by the Committee. The Committee had a wealth of ideas, but few resources with which to propagate them.

62. Mr. HAFNER said there was a widespread feeling that international law was undergoing a process of fragmentation on a global level. He asked whether, as the representative of a regional body, the Observer for the Inter-American Juridical Committee shared that perception. He also asked whether he perceived any particularities of a regional nature in, so to speak, inter-American international law.

63. The CHAIRMAN said that Mr. Hafner might usefully put the same kind of question to the other representatives of regional groups due to address the Commission in the days ahead.

64. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the question was a very interesting one, on which there was no general agreement among experts on public international law in the Americas. During the 1930s and 1940s an effort had been made, at the urging of some Latin American countries, intensively to develop a body of regional international law in the Americas. That had led some scholars to maintain that the American continent had some singularity that enabled it to develop a system of international law with its own special features. In justification of that view they had cited important innovations in areas such as the law of treaties, problems of nationality, and the rights and obligations of States, as a result of cooperation between States of the American region. However, in the past 15 or 20 years a different tendency had been discernible, with those States instead seeking to promote the universalization of various institutions of public international law. The trend could be seen in the manifest interest shown by States of the region in participating very actively in the development of the new system of international economic law on a global scale. Twenty years ago, fewer than half of the Latin American States had been members of the General Agreement on Tariffs and Trade system, yet almost all States of the region were currently members of the new international trade system. It was obvious that there was a move towards developing norms that had no regional particularity: the Inter-American Convention against Corruption, for example, was not peculiar to the region's culture, but was potentially of universal application. That shift was attributable to the new economic and political climate in the region. He personally detected no trend towards fragmentation or excessive regionalization of the fundamental institutions of contemporary international law.

65. The CHAIRMAN said that the Commission looked forward eagerly to receiving the documentation mentioned, including the Inter-American Convention against Corruption. He expressed the hope that next year the Committee would provide the Commission with documentation sufficiently well in advance to enable members to be better prepared for the discussion. On behalf of all members, he thanked the Observer for the Inter-American

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

*The meeting rose at 12.10 p.m.*

## 2491st MEETING

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

*Chairman:* Mr. Alain PELLET

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

### Cooperation with other bodies (*continued*)

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

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

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

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

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

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

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

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

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

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

<sup>2</sup> See 2477th meeting, footnote 7.

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

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

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

10. CAHDI had also given extensive consideration to the law and practice relating to reservations to treaties. It had noted that, given the major omissions in the 1969 Vienna Convention and pending the emergence of new rules of international law, a coordinated line of action by a large group of States representing different legal traditions such as the member States of the Council of Europe could contribute decisively to the development of more consistent State practice in that area. CAHDI was taking account of the Commission's work on the subject—particularly the questionnaire circulated by its Special Rapporteur, Mr. Pellet<sup>4</sup>—in order to avoid duplication. The role of CAHDI was, in effect, more political than technical.

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

<sup>4</sup> See 2487th meeting, footnote 16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>7</sup> See 2475th meeting, footnote 22.

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

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

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

30. Mr. MIKULKA said that in his work as Special Rapporteur on the topic of nationality in relation to the succession of States, he had always had very useful contacts with jurists from the Council of Europe and he hoped that that fruitful cooperation would continue. He had noted a discrepancy between the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina with a view to the implementation of the Dayton/Paris Peace Agreements<sup>9</sup> and the principles set out in the European Convention on Nationality. Whereas article 18 of the Convention established the principle that each State party concerned must take account of the criteria, *inter alia*, of genuine and effective link, habitual residence, will of the person concerned and territorial origin of that person, the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina contained no reference to the will of the persons concerned or to the right of option and gave considerable weight to secondary nationality as compared to habitual residence. He therefore wondered whether the same experts had drafted both the Convention and the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina and whether the absence of the

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

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

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

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

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

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

<sup>8</sup> See 2476th meeting, footnote 10.

<sup>9</sup> See footnote 3 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPOREUR  
(*continued*)

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

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

ARTICLE 19 (Scope of application)

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

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

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

<sup>10</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

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

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

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

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

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

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

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

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

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

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

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

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

<sup>12</sup> See A/CN.4/472/Add.1, para. 29.

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

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

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

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

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

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

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

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

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

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

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

*The meeting rose at 1 p.m.*

---

## 2492nd MEETING

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

*Chairman: Mr. Alain PELLET*

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

Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

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

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

ARTICLE 19 (Scope of application)

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

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

1. The CHAIRMAN invited members to continue their consideration of Part II (Principles applicable in specific situations of succession of States) contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1), with particular reference to the matter of secondary nationality, in article 20 (Granting of the nationality of the successor States), subparagraph (b) (ii).

2. Mr. THIAM said secondary nationality was not a widely known concept and, if it was to be used in the body of a draft article, it was essential for the Commission to try to define it in plenary, as was the custom with other concepts it employed. For his own part, he had to confess that it was the first time he had come across the expression. He noted, however, that all the instruments cited by the Special Rapporteur in that connection related to Central and Eastern Europe in the context of the dissolution of a State.

3. More generally, most of those instruments confused the two quite distinct concepts of nationality and citizenship. The former referred to the link between an individual and a State under international law or defined an individual as belonging to a national community, whereas the latter denoted a status implying a set of rights and duties. Great care must thus be taken to clarify the terminology used in that connection. The term "secondary nationality" also had pejorative overtones which he found unacceptable and might convey the wrong impression to the uninitiated. In any event, the Commission should not evade its responsibilities by referring any and every problem to the Drafting Committee, when many of those problems could and should be settled in plenary.

4. The CHAIRMAN said that, while the expression might give rise to perplexity, it undoubtedly denoted a very real state of affairs.

5. Mr. LUKASHUK said it was well known that parallel or secondary nationality of the Republics had existed in the former Union of Soviet Socialist Republics (USSR). It had not played a major role in State succession, for the territorial principle was generally the one adopted. He wholly agreed with the Special Rapporteur's proposals. However, in view of many members' objections, he would like to ask the Special Rapporteur whether it would be possible to consolidate the text of article 20 into one general article, not going into details but simply determining that account must be taken of secondary nationality.

6. He did not think it possible to ask the Special Rapporteur to provide a definition of secondary nationality, as not even primary nationality had been defined. The best solution would be, not to define it, but simply to draw attention to the phenomenon.

7. The CHAIRMAN observed that such a solution could perhaps be adopted in the commentary, but hardly in the text of the draft article itself.

8. Summing up the debate thus far, he said, first, that it was clear that the concept of "secondary nationality", or at any rate the term, posed problems for a number of members, given that it was specific to a small number of States, albeit not exclusively Eastern European States.

9. Secondly, the expression was defined neither in the text nor even in the Special Rapporteur's report itself. If so specific an expression was used, it had to be defined somewhere. He personally did not agree with Mr. Lukashuk: nationality and secondary nationality were terms that posed very different problems, the former being an accepted concept in international law, whereas the latter was a concept specific to certain internal legal systems. If the draft referred to secondary nationality, it would be necessary either to specify that the term was used as understood in certain States' internal law, or to attempt a general definition.

10. Thirdly, some members thought that the problem could be solved if article 20, subparagraph (b), was defined more broadly so as to encompass secondary nationality, indicating that it was one element of the genuine link concept that would be incorporated in a more broadly drafted paragraph.

11. Fourthly, it would be possible to conserve the current division into subparagraphs (b) (i) and (b) (ii), but to come up with a looser wording that would not include the term "secondary nationality".

12. Lastly, some members considered that it was not possible, in a text of international law, to refer to a notion particular to certain internal legal systems, whereas others, such as Mr. Simma, saw no objection to such a procedure. In the latter case, however, it would be necessary to define somewhere a concept that was not generally accepted in international law. He invited the Special Rapporteur to indicate his own views on the matter.

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

13. Mr. MIKULKA (Special Rapporteur) said that, as the Chairman had rightly pointed out, it was not unusual for international law to make a renvoi to a concept of internal law. The 1983 Vienna Convention had avoided defining what was to be understood by State property, instead providing that it was for the internal law of the predecessor State to determine what was covered by that concept. A number of other examples of States referring to internal law to resolve matters of international law could be found in the commentaries to the draft articles on succession of States in respect of State property, archives and debts, of which the final text was adopted by the Commission at its thirty-third session.<sup>2</sup>

14. Some members claimed that the concept of secondary nationality—which, incidentally, was certainly not intended to have any pejorative connotation—was not universally accepted. However, the same could be said of the distinction drawn by many members between the concepts of nationality and citizenship. In many countries in Central and Eastern Europe, no distinction was drawn between the two concepts, and the idea that some nationals enjoyed full rights while others enjoyed only certain rights was alien to their legal systems. The presumption that there was a generally accepted distinction between nationality and citizenship was thus wrong.

15. Confusion also arose at the linguistic level: the connotations of “nationality” varied from one language to another. In Central and Eastern Europe the term “nationality” sometimes equated with the Western concept of “ethnic origin”, and conversely, the Western notion of “nationality” was covered by the concept of “citizenship”. In order to avoid confusion, the Commission had decided to work on the basis of the concept of “nationality”, taken in the sense of a fundamental link between the State and the individual that had international consequences. It should continue to adhere to that interpretation of the concept, bearing in mind, however, that some texts referred to the same concept by the term “citizenship”. He had been accused of being inconsistent in using those terms in his report. However, when quoting from laws that used the term “citizenship”, he had had no choice in the matter: he could hardly have falsified the text by substituting a different term. It was clear that the Commission was dealing with terminology that was still evolving. Having agreed on the basic meaning of the concept, it could surely tolerate occasional references in quotations to the term “citizenship” used with the same meaning.

16. Mr. Pambou-Tchivounda had rightly asked for an explanation of how secondary nationality functioned. To begin with, it was not true to say that it had been a phenomenon confined to a small part of the globe. Once again, he was shocked at the attitude of some members, from States with a tradition of international law but whose doctrine often tended to ignore other parts of the world. Famous authors often cited endless precedents going back 200 years that had absolutely no relevance to contemporary international law, yet rejected a phenomenon that had existed in States occupying one sixth of the world’s surface, including the USSR, a State that had existed for some 70 years—clearly not long enough for some legal

doctrine to have taken note of what had been happening in that region. In federations such as the USSR, Yugoslavia and Czechoslovakia, citizenship or nationality had existed at federal level and also at the level of the component States. The link between the two had been so close that one could not exist without the other. To be a national of the federation, the person concerned had had to possess the nationality of one of the component States.

17. The technique for acquisition of that nationality had functioned in different ways at different stages. Sometimes legislation had stressed federal nationality; at other stages, secondary nationality had been considered more important at the level of internal law. For example, while declaring that all nationals of the component Republics had the nationality of the Federation, federal law referred all aspects of regulation of nationality to the level of the component Republics. Thus, the authorities of Croatia or Slovenia had determined the conditions for acquisition of their nationality, the automatic consequence of which was acquisition of the nationality of the Federation. Consequently, so-called “secondary” nationality had sometimes been very important. At other times, especially at the time of dissolution of those States, it had been devoid of any practical significance. For example, to exercise the right to vote, it was the criterion of habitual residence rather than secondary nationality that had been important. That was why he had decided to use habitual residence as his own basic criterion, and to use secondary nationality only as an additional criterion to cover cases of persons who had been outside the territory of the predecessor State or the State concerned at the time of the dissolution.

18. The CHAIRMAN said that the Special Rapporteur’s remarks constituted a defence of the article as currently worded, but took little account of the comments thereon. He invited members to propose specific solutions to the problem posed by article 20, subparagraph (b) (ii).

19. Mr. THIAM said he supported the approach taken by the Chairman, but unfortunately he had no specific proposals to make, except, perhaps, that instead of referring the text to the Drafting Committee in its current state, the Commission might establish a small working group to find a solution to the problem.

20. He did not wish to enter into a debate about the Special Rapporteur’s comments on the distinction between citizenship and nationality. The fact was, however, that a distinction existed in all countries of the world, even if it was not one formally acknowledged. Minors were nationals who did not enjoy all citizens’ rights, as were persons sentenced or deprived of their civil or political rights. The distinction was an essential and important one.

21. Mr. Sreenivasa RAO said that, if the provision was retained as it stood, certain problems would arise. Although the Special Rapporteur had only included the expression in a subordinate clause and limited it to a particular situation, he had incorporated it in a principal article on a par with nationality itself. The conditions under which secondary nationality were granted or recognized in a country were not clearly stated. One could cite the case of Egypt and Syria: when they had formed a confederation (and not a federation), earlier nationalities had been retained and not merged, but then for international

<sup>2</sup> *Yearbook . . . 1981*, vol. II (Part Two), pp. 20 et seq., chap. II, sect. D.

reasons their nationality had been superimposed, and therefore had existed to a certain extent. Malaysia and Singapore constituted a similar example.

22. In the various federal systems around the world, there were very active sub-groups, defined according to different criteria, that demanded different types of rights. If, in addition to the identification of sub-groups within a national entity, the higher value of nationality was also to be attached to them, it could only emphasize differences between groups, something which integration was seeking to avoid.

23. To invoke the example of his own country, there were a number of languages in India, and there were constant calls to have only one language at the national level to help with integration. But others did not want to lose their languages, which had existed for centuries, and thus continued to use them. States in the Indian federal system were organized on the basis of language, which was a very powerful identification factor that was similar to secondary nationality in other cases. Saying that someone had a particular nationality in his system could be a very sensitive matter. He did not question the system, but to set it out as a principle in the draft would be to send the wrong signals. There was a need to address the matter more closely, either in a small group or in the Drafting Committee, in a way that would not pose problems for different internal legal systems.

24. Mr. LUKASHUK said that, clearly, the plenary was not in a position to take a decision on the question at the current stage, because there was too much difference of opinion. He had gained the impression that the issue was not at all one of substance, but one of terminology. That, however, could be resolved.

25. The Special Rapporteur had referred to the experience in Eastern Europe. To cite an example closer to the Commission, Switzerland had secondary and even tertiary nationality—at the levels of the canton and the commune. Looking to the future, the European Union, pursuant to the Maastricht Treaty, made provision for its own nationality. That had little relation to nationality today, but who knew what form the question would take tomorrow? The Russian Federation had concluded a union agreement with Belarus, which had also given rise to a secondary or to a “supra-nationality”. He did not think it was necessary to address those questions further, but the Commission could not simply discard the Special Rapporteur’s proposal. Therefore, he supported Mr. Sreenivasa Rao’s suggestion to refer the question to the Drafting Committee, which should be instructed to prepare a draft text for the plenary.

26. The CHAIRMAN said that when the Special Rapporteur spoke of secondary nationality, he did not have in mind the nationality of federated States, such as “cantonal nationality”, but rather the very special institution found in certain States which was different from relations which persons had with the federated States to which they belonged.

27. Mr. KABATSI noted that a number of members had argued against the inclusion of the notion of secondary nationality, entirely or mainly because its application at national level was so rare and therefore had no place in the

draft. He would normally concur with them. Some had even pointed out that in certain jurisdictions the notion would be unacceptable. On the other hand, no one had seriously challenged the existence of the notion of secondary nationality as such. In his view, if it did in fact exist, albeit in special circumstances and in few areas of the world, secondary nationality should still be addressed in the context of the Commission’s exercise. There was a discernible move throughout the world towards integration through the building of economic regions and groups, and it was conceivable that that notion might in the future become more prevalent than had been the case so far. Looking even further ahead, occasions might arise in which it was necessary, as a result of a State succession, to deal with the situation of a number of persons that might otherwise not be covered. That was what the Special Rapporteur, for whom such a situation was not alien, had tried to do. But such a situation could also occur in other parts of the world, and he did not think it should be left aside. He would even go farther than Mr. Sreenivasa Rao and suggest that the provision should be sent to the Drafting Committee, which could, if it was unable to sort out the matter, say so. The notion did exist, was applied in some parts of the world and might some day be applied even more widely. For that reason, he was opposed to deleting the notion.

28. Mr. PAMBOU-TCHIVOUNDA said that Mr. Kabatsi had been right to urge the Commission to look to the future. But then the problem should be included in section 2, on unification of States, where the considerations Mr. Kabatsi had in mind could be most usefully turned to account.

29. After listening to the Special Rapporteur’s reply to his question from the previous day, he would point out that two different matters were involved: the term “secondary nationality”, which was found nowhere in international law, and the thing itself, which was an internal fact in State confederations and federations. The thing itself could be characterized juridically as a fact of internal law, even though, needless to say, it was for the federation or confederation to decide how that fact was perceived. When a dissolution of a State occurred, followed by fragmentation, he wondered whether that fragmentation could not be reflected, once again, in the genuine link concept. The matter should not be sent to the Drafting Committee; rather, the plenary itself should take a decision on the question by drawing upon the “Crawford-Pellet axis”.

30. Mr. DUGARD said it was common knowledge that many internal statutes did not distinguish clearly between citizenship and nationality, and indeed many treaties which had been referred to by the Special Rapporteur in the commentary contained in his third report likewise failed to do so. At the current time, members must contend with another area of confusion, the concept of secondary nationality. If the Commission did recognize it as it appeared in the draft articles, it would approve the concept of secondary nationality, something that should not be encouraged, because it would simply add another area of confusion to the whole field of nationality in international law. In his view, the Special Rapporteur should explain in the commentary that international law was concerned with nationality but that the competing terms, citizenship and nationality, existed.

31. As to article 20, subparagraph (b) (ii), he suggested retaining the principle, which was an important one, although it might be largely of regional relevance, but the situation should be described without giving approval to the concept of secondary nationality. That could be done in the Drafting Committee, for example by saying that where the predecessor State was a federal or confederal State in which the category of federal or confederal citizenship or secondary nationality was known, steps of the kind suggested by the Special Rapporteur should be taken. In other words, it could be resolved in the Drafting Committee if there was agreement that clear approval should not be given to the concept of secondary nationality.

32. Mr. SIMMA said he was somewhat surprised that some members of the Commission, for reasons which had until the current time remained unstated, felt that the concept of secondary nationality had a separatist or centrifugal connotation. That might be the case in some countries, but it was not so in his own. The concept did exist, as the Special Rapporteur had proved beyond a doubt. He did not see how taking account of the concept in the way it was done in article 20 signified that the Commission approved it. If a concept existed in certain States, it was not for the Commission either to approve it or disapprove of it.

33. With reference to a point made by Mr. Sreenivasa Rao, it was one thing to attach to a concept the higher value of nationality, but it was another simply to take it into account without any value judgement in cases where it existed. Unquestionably in cases of dissolution of States, the fact that there had been an attachment to a sub-unit, be it a State or a community, had to be taken into consideration when deciding how to divide, as it were, the populations among the various successor States. He could live with what had been called the "Crawford-Pellet axis". If, for instance, the word "category" was deleted, he would not object; something might also be added to secondary nationality, along the lines of "attachment to local sub-units". But he was in favour of keeping a reference to it in the draft article and not relegating it to the commentary.

34. The CHAIRMAN said that, as he saw it, there were three possible solutions: to refer the text as it stood to the Drafting Committee, which would be instructed to improve the wording while retaining the term "secondary nationality"; to retain the idea of secondary nationality but attempt to find another term for it; to instruct the Drafting Committee to merge article 20, subparagraphs (b) (i) and (b) (ii), and ask the Special Rapporteur to include the notion of secondary nationality in the commentary together with the explanation which he had just given the Commission.

*The Commission decided to instruct the Drafting Committee to merge article 20, subparagraphs (b) (i) and (b) (ii).*

35. Mr. MIKULKA (Special Rapporteur) said he regretted the Commission's decision. In all likelihood the text would not be acceptable to States created as the result of recent dissolutions, because it would completely ignore the problems that gave rise to their legislation.

36. Mr. HAFNER said he had problems with article 21 (Granting of the right of option by the successor States), both paragraphs of which referred to the right of option, but from differing standpoints. In paragraph 1, the right of option was to be used for selecting one of the nationalities to which a person was already entitled. It therefore pertained solely to the right to select, not to the entitlement to nationality. In paragraph 2, however, the right of option seemed to cover both the entitlement to nationality and the right to select from among a number of nationalities. It therefore pertained both to the acquisition of nationality and to the right to select.

37. It could also be argued, however, that paragraph 2, could be read as signifying that the prerequisite for entitlement to nationality was the right to acquire nationality under the internal law of the State concerned. In that regard, the provision would again be reduced to the right to select among nationalities which would be offered on a different legal basis, namely on that of internal law. Though he did not agree with that interpretation, it was one possible way of looking at article 21, paragraph 2. He requested the Special Rapporteur to explain which interpretation of article 21, paragraph 2 was correct.

38. Mr. MIKULKA (Special Rapporteur) said paragraph 1 was perfectly clear: when a person was entitled to acquire the nationality of two or more successor States, that person had the right of option. When a person was not covered by paragraph 1, paragraph 2 came into play, that person had the right to acquire, by virtue of a declaration, the nationality of at least one of the successor States.

39. Mr. CRAWFORD said that, in summarizing the debate on section 3 (Dissolution of a State), the Special Rapporteur had made the point that Part II, dealing with specific situations, was intended primarily to give guidance, whereas Part I (General principles concerning nationality in relation to the succession of States) laid down fundamental rules. Unfortunately, that distinction was not clear from the actual wording. In the normative part of the draft, care was taken to employ properly the mandatory "shall" and the conditional "should". Yet in the non-normative part, they were used less carefully. For example, the obligation under article 20, subparagraph (a), and the situation outlined in article 20, subparagraph (b), were different, yet both were prefaced by "shall". There was a discrepancy between the "shall" applied to the right of option in article 21 and the "should" applied to the same right in article 7 (The right of option). The Drafting Committee must give serious consideration to the drafting technique, for it was not a good idea to use the mandatory "shall" in Part II, if that Part was to continue to reflect only policy prescriptions.

40. Mr. RODRÍGUEZ CEDEÑO said that article 20, subparagraph (a), established the obligation on the part of the successor State to grant nationality by the criterion of habitual residence. Article 20, subparagraph (b), sought to cover other cases—persons who did not have their habitual residence in the territory of the successor State—and obligated that State to grant nationality to such persons unless they had their habitual residence in another State and also had the nationality of that State, in line with article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1. Under

article 20, subparagraph (b) (i), the granting of nationality was based on strictly territorial criteria: persons residing in a third State, who were not born in the predecessor State but were the children of a national of the predecessor State, would not be covered. Article 21, paragraph 2, on the other hand, might cover such persons, giving them the right of option. Perhaps part of the wording of that article, reflecting the criterion of *jus sanguinis*, could be incorporated in article 20, subparagraph (b) (i). Alternatively, the commentary could explain that article 20, subparagraph (b) (i), must be read in conjunction with article 21, paragraph 2. He requested clarification from the Special Rapporteur on those points.

41. Mr. MIKULKA (Special Rapporteur) said Mr. Rodríguez Cedeño was correct in his interpretation. Article 21, paragraph 2, was aimed at persons who had acquired the nationality of the predecessor State by virtue of *jus sanguinis* and were not covered by any of the provisions of article 20. He saw no alternative other than to provide for the right of option for such persons as a way of enabling them to become nationals of one of the successor States. Mr. Rodríguez Cedeño's proposed modification of the text could be acceptable for States whose nationality legislation was based on *jus sanguinis*, but it was difficult to presume that it would be accepted by countries whose nationality regime operated on the basis of *jus soli*. He therefore thought it inadvisable to incorporate part of article 21, paragraph 2, in article 20, subparagraph (b) (i).

42. As to the reference in article 20, subparagraph (b) (i), to place of birth, that criterion was generally accepted in both *jus soli* and *jus sanguinis* regimes as a way of enabling persons residing in foreign countries to acquire the nationality of a successor State.

43. The CHAIRMAN noted that, in accordance with the decision just adopted, article 20, subparagraph (b) (i), and article 21, paragraph 2, would need to be brought into alignment. The decision would not do away with the idea of secondary nationality. It would no longer appear in the text of section 3, but that did not mean the commentary could not refer to that category of nationality. On the contrary, it would be unfortunate if the commentary was impoverished by the removal of any mention of secondary nationality.

44. He noted that the Commission had concluded the discussion on section 3 of Part II of the draft and said that, if he heard no objection, he would take it that the Commission wished to refer that section, comprising articles 19, 20 and 21, to the Drafting Committee.

*It was so agreed.*

#### SECTION 4 (Separation of part of the territory)

##### ARTICLE 22 (Scope of application)

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

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

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

45. Mr. MIKULKA (Special Rapporteur), introducing section 4 (Separation of part of the territory), said article 22 (Scope of application) served as a *chapeau*, mainly to obviate the need for repetition of the definition of separation of part of the territory, and to explain the sense in which the terms "successor State" and "predecessor State" were used in that section.

46. Article 23 (Granting of the nationality of the successor State), subparagraph (a), set forth habitual residence as the primary criterion for identifying persons who should acquire the nationality of the successor State. Subparagraph (b) indicated that, if the predecessor State had been organized as a federation, the principle of secondary nationality would apply. If the predecessor State was Yugoslavia, for example, upon the secession of Croatia or Slovenia, the nationality of persons who had been entitled to acquire either Croat or Slovene nationality could be determined by application of the secondary nationality criterion. It should be recalled that such persons could not have held the nationality of the federal State unless they had had Slovene or Croat nationality, and upon losing Slovene or Croat nationality, they had automatically lost the nationality of the federal State. The conditions for acquisition of the nationality of the federal State had not been the subject of regulations under federal law, except in general terms. The precise conditions had been worked out in the legislation of the republics that had made up the federation.

47. In article 24 (Withdrawal of the nationality of the predecessor State), paragraph 2 set out the counterpart of the obligation under article 23 for the successor State to grant its nationality to certain categories of persons. It stipulated the obligation on the predecessor State to withdraw its nationality from those categories of persons entitled to acquire the nationality of the successor State. Paragraph 1 might seem superfluous, and the Drafting Committee might wish to delete it, but he had included it with a view to avoiding any possible misinterpretation.

48. Article 25 (Granting of the right of option by the predecessor State and the successor States) provided for the right of option for persons who would be entitled to acquire two or more nationalities. The situation was distinct from the one envisaged in the context of dissolution of the State in article 21, paragraph 2: all other persons except those covered by the provisions of article 23 would conserve the nationality of the predecessor State.

49. Preserving the criterion of secondary nationality—the concept and not necessarily the term itself—was more important in section 4 than it was in section 3. He gave the example of Singapore uniting with the Federation of Malaysia but very shortly thereafter deciding to leave that federation: it was desirable for Singapore to retain the same population profile after leaving as before entering the federation. Though doctrine did not speak explicitly of secondary nationality, it was frequently inspired by the concept and applied the rules of *uti possidetis* in the preservation of borders between the States of a federation that was undergoing disintegration. It would be illogical to accord great weight to the rules of internal law for the

definition of borders between the States of a federation, yet completely overlook the rules for nationality or citizenship of persons from such entities.

50. In the interests of unifying its codification efforts, the Commission should also be mindful of its work on succession of States in respect of State property, archives and debts, in which it had defined local debts as continuing to bind the entities that had been autonomous in the context of a composite State. The Commission had thus drawn a distinction between localized debts, meaning debts of a State at the international level, and local debt, meaning debts contracted by the units of a federation or composite State.

51. The CHAIRMAN invited members of the Commission to make comments on section 4 in general.

52. Mr. ECONOMIDES said he had no comments to make on article 22. Article 23, subparagraph (a), set out a fundamental rule and he endorsed the substance of subparagraph (b). In the current context, the category of secondary nationality was absolutely indispensable, but it could be titled differently if the Commission so desired—for example, “nationality for domestic purposes”—with a corresponding explanation of the term. He would also have liked to have seen an additional subparagraph in article 23, aligned with article 20, subparagraph (b) (i), specifying that persons having their habitual residence in a third State could choose the nationality of the territory of the State concerned. Those persons obviously originated in, or had genuine links with, the State concerned, and were resident abroad when the State acceded to independence. Such persons must have the possibility of choosing the nationality of the new State that currently possessed the territory with which they had links. The acquisition of nationality would in such instances be on an individual basis and voluntary.

53. Article 24, paragraph 1 (a), referred to persons who had their habitual residence in the predecessor State—that is to say, residents of that State, in fact its nationals—but they were not “persons concerned” within the meaning of the footnote on definitions. The definition was thus defective, or at least incomplete. The full definition of “persons concerned” would be individuals who had the nationality of the predecessor State and had their habitual residence in the transferred territory. In the case of State succession, therefore, the two elements of nationality and residence were present and inseparable. When a predecessor State ceased to exist, however, the circle of “persons concerned” was broadened to comprise individuals who had the nationality of the predecessor State but had their habitual residence abroad; such persons lost their nationality when the predecessor State ceased to exist. Hence a problem of definition arose, since the nationals of the predecessor State, which continued to exist, who resided on its territory and those who were residents abroad would not lose their nationality and therefore did not fall into the category of “persons concerned”.

54. As for article 25, it, too, created confusion, for despite its title, it did not actually deal with right of option. The right of option applied to a choice between two nationalities, but in the cases envisaged in article 25 the nationalities of two or more States were available for

the persons concerned to choose from. It was not clear who had the right to take the nationality of the predecessor State or of the successor State, or of two or more successor States, since that depended on the internal law of the States concerned. The idea of acquiring a number of nationalities made him a little uneasy. States had always endeavoured, in the event of State succession, to avoid statelessness as well as dual and multiple nationality. Yet article 25 actually seemed to encourage the phenomenon of multi-nationality when the real objective was that every person should have one nationality. If, following a State succession, certain persons happened to acquire several nationalities, that was a matter for internal law. The draft article should certainly not provide for it as a desirable possibility. Also, article 25 was silent as to the modalities and criteria for the exercise of the right of option. On both points, greater clarity was required.

55. He would remind the Commission of the four classic rules of international law in the matter of State succession. First, all nationals of the predecessor State resident on the transferred territory automatically acquired the nationality of the successor State. Secondly, the successor State must recognize the right of option of the nationality of that State of not all those persons but only those who had evident and unquestionably genuine links with the predecessor State. Thirdly, nationals of the predecessor State resident abroad also automatically acquired the nationality of the successor State if they lost their own nationality on account of State succession, for instance, where the predecessor State disappeared following unification or dissolution. Fourthly—and it was a rule required not so much by international law as by current human rights standards—nationals of the predecessor State resident abroad who had evident and genuine links with the transferred territory must have the opportunity, even though they retained the nationality of the predecessor State, of acquiring, on an individual and voluntary basis, the nationality of the successor State. In such cases, the predecessor State could, of course, withdraw its own nationality.

56. The international law content of the articles under consideration must be strengthened to make sure that the text finally adopted formed the basis for a genuine instrument for the codification and progressive development of international law. At the moment, it seemed at times to be more in the nature of a model for a uniform law.

57. The CHAIRMAN, pointing out that the subject for discussion was separation of part of the territory of a State, said that the third rule referred to by Mr. Economides applied solely to the case of unification or dissolution of a territory. He would therefore ask members not to comment on it at that stage. Moreover, he was not sure whether the fourth rule referred to by Mr. Economides was relevant to the discussion, since it too concerned not separation of part of the territory but transfer of the territory.

58. Mr. LUKASHUK, agreeing with the Chairman, said that the articles under discussion had his full support, with the possible exception of article 24. There seemed to be some contradiction between the title of that article, which referred to the “withdrawal” of nationality, and its content which dealt with the retention of nationality. Possibly,

therefore, the article could be entitled "Retention of the nationality of the predecessor State" and the first sentence of paragraph 2 could be placed at the end of the article, as an exception.

59. The CHAIRMAN said that due note had been taken of that suggestion.

60. Mr. BROWNLIE said that, unless there was some substantial policy difference in the matter, he would be a little uneasy about the lack of symmetry between sections 1 and 4 of Part II of the draft, and specifically between the content of articles 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) and 23.

61. The CHAIRMAN said that, to his mind, there was a fundamental difference in that, in the case of separation of part of the territory, a new State was created, whereas transfer of part of the territory took place between States that already existed.

62. Mr. BROWNLIE said he accepted that the history of the two situations was different but still wondered whether the same was true of policy. As far as he could see, the policy would be the same, namely, to maintain stability in legal relations and to protect the status of the population in the particular area of territory concerned. It was, however, not immediately apparent how a difference in political mechanics could dictate a difference between the rules laid down in article 17, on the one hand, and articles 23 and 24, on the other. If there was such a difference, he would like to know the reason for it.

63. Mr. MIKULKA (Special Rapporteur) said that transfer of part of the territory could be agreed between two States for purely technical reasons, for instance, for the purpose of building a dam or a motorway, in which event the population's attitude would be entirely neutral since its ethnic, religious or other origins would not be involved. In such cases, the principle that all persons concerned on the territory should have the right of option was perfectly acceptable. Separation of part of the territory, on the other hand, which involved the creation of a new State, was a revolutionary occurrence and the population involved would be highly motivated. In such cases, it was absurd to argue that everybody could opt for the nationality of the predecessor State. If so, what would be the point of creating a new State which might well end up with no population at all? That highly logical argument militated in favour of a distinction between the two situations.

64. There would, of course, be individual instances when other elements could be taken into consideration, as where transfer of part of the population might be caused by the need to solve, say, ethnic difficulties. That did not, however, mean that any distinction whatsoever between transfer of part of the territory, on the one hand, and separation of part of the territory, on the other, should be eliminated. If that line of thinking were followed to its logical conclusion, the upshot would be that matters would eventually be regarded as too complicated for any principle to be laid down. Indeed, that seemed to be the position taken by Mr. Brownlie, who, in his writings, had concluded that it was not possible to draw any distinction. The crux of the matter was that no one had had the courage to face up to the problem and find a distinction. In

dealing with section 4, the Commission was not engaged in the codification of international law but in formulating certain recommendations for the guidance of States. That, at any rate, was the approach he had adopted to the whole of Part II, and it had received the blessing of the Commission with its previous membership. It was not for the Commission in its new composition to reproach him on that score.

65. The CHAIRMAN said that it was absolutely essential to have some indication of the scope of Part II right at the beginning, for otherwise the same problems would arise outside the Commission.

66. Mr. MIKULKA (Special Rapporteur), agreeing with the Chairman, said that he had already mentioned on a number of occasions that Part II would need an introductory provision or article to explain clearly what was involved. If the emphasis continued to be on the codification of international law, however, Part II might well disappear.

67. Mr. SIMMA said Mr. Brownlie's question, as he understood it, was that, since the situation contemplated in article 23, subparagraph (b), could arise within the context of the situation covered in article 17, should there not be greater symmetry between those two provisions?

68. Mr. GALICKI said he would like to know whether it was correct to assume that the principles set forth in very general terms in article 17 with regard to territorial transfer could apply equally in the situations dealt with in section 4, concerning separation of territory. If so, the relevant provisions should perhaps be harmonized or recast.

69. Mr. BROWNLIE said that it would help if the Special Rapporteur could accept that, when he spoke, he was not attacking him. Had he wanted to attack the draft, he would have said that, in historical terms, the distinction between transfer of a territory and separation of a territory was probably not very substantial. When the Austro-Hungarian Empire had broken up, for example, what had happened was that the allied and associated powers had made dispossessions: whether or not that involved a transfer or a separation of territory seemed to him to be a wholly academic matter.

70. That, however, was not his actual position. If he had played ball, it was partly because he had come on the scene more recently, though that was not necessarily a disadvantage. He agreed, however, that, as a matter of presentation, it was perfectly acceptable to keep the distinction in question and he was not suggesting that there should be any general rearrangement. Mr. Simma had understood him correctly: he had been raising a simple question as to the symmetry and content of article 17 and the counterpart articles under discussion.

71. The CHAIRMAN said that article 17 must be read and understood in the light of the discussion in plenary. If that was borne in mind, the article would probably not emerge unscathed from the Drafting Committee.

72. Mr. MIKULKA (Special Rapporteur) said that, as he had already explained in connection with article 17, habitual residents of the transferred territory acquired the nationality of the successor State but did not do so

immediately. The rule to that effect was thus residual, the main rule proposed for article 17 being that the entire population had a right of option for two years from the moment of the transfer of the territory. Until that period had expired, it was deemed to continue to be the population of the predecessor State. The position was entirely different in the case of separation of part of the territory, since the purpose of separation was precisely to create another State with a population from the moment of its creation. Such a State was in no way obliged to grant a right of option to the whole population and could, moreover, reasonably expect to have at least a certain population from the outset. Consequently, despite a certain similarity between the two rules, there was in fact a significant difference between the situations to which they applied.

*The meeting rose at 12.40 p.m.*

## 2493rd MEETING

*Friday, 13 June 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

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

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

[Agenda item 5]

#### **THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)**

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

#### **SECTION 4 (Separation of part of the territory) (continued)**

#### **ARTICLE 22 (Scope of application)**

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

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

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

1. The CHAIRMAN invited the members of the Commission to state their views on the question of the relationship between article 23 (Granting of the nationality of the successor State) of section 4 (Separation of part of the territory) and article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) of section 1 (Transfer of part of the territory) of Part II (Principles applicable in specific situations of succession of States) of the draft articles on nationality in relation to the succession of States contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1).

2. Mr. PAMBOU-TCHIVOUNDA said that there were also similarities on a number of points between section 3 (Dissolution of a State) and section 4. He wondered whether dissolution, which formed the subject of section 3, might not simply be one of the aspects of the separation of States within the framework of the succession of States. If so, some of the questions arising from article 20 (Granting of the nationality of the successor States) of section 3, as well as from articles 23 and 25 (Granting of the right of option by the predecessor and the successor States), would perhaps find a solution.

3. Mr. CRAWFORD said he presumed that, so far as secondary nationality was concerned, the Commission would adopt the same solution for section 4 as for section 3.

4. Mr. MIKULKA (Special Rapporteur), reverting to the comments made by Mr. Economides (2492nd meeting), explained that the expression "persons concerned" did not appear in article 24 (Withdrawal of the nationality of the predecessor State), paragraph 1, because that provision did not relate specifically to "persons concerned" or, in other words, to persons who, on the date of the succession of States, had had the nationality of the predecessor State and whose nationality might be affected by the succession. It related to persons whose nationality would not be affected and who would quite simply retain the nationality of the predecessor State. In paragraph 2 of the same article, the use of the word "concerned" would be redundant because that paragraph referred back to article 23, which spoke expressly of "persons concerned".

5. Replying to another question by Mr. Economides, he drew attention to the possibility of duplication of nationalities entailing the granting of the right of option to the persons concerned, for example, in cases where a person habitually resident in the territory of the predecessor State or of one of the successor States had, at the same time, the secondary nationality of one of the successor States. That person would then be entitled to acquire the nationality both of the predecessor State and of the successor State. The right of option, which formed the subject of article 25, eliminated that risk. If, as Mr. Economides had proposed, the criterion of the origin of persons in the territory concerned were added to the two criteria already

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

mentioned, the risk of duplication would be even greater; hence the necessity for the right of option.

6. Recalling that Part II of the draft articles was intended to provide recommendations or guidelines, or model rules, for the use of the States concerned, he pointed out that, if the Commission decided that Part II should be designed for eventual codification, it would then have to change Part II completely and no longer maintain the distinction between the two parts.

7. He maintained his position on the question of secondary nationality. In his view, it would be regrettable if the Commission chose not to take account of the "category of nationality", which played an important role and reflected the formal link existing between a person and a constituent entity of a State. To delete that element would be to ignore all the new factors which had arisen in the sphere of the succession of States in the past few years and which had led to the inclusion of the topic in the Commission's agenda.

8. With regard to Mr. Economides' proposal that article 23, subparagraph (b) should be brought into line with article 20, subparagraph (b), he said that the possibility could be considered in cases where the distinction between dissolution and separation was difficult to draw. It could also be thought that the distinction lay in the disappearance or the survival of the predecessor State. In the event of dissolution, the predecessor State ceased to exist; it was therefore necessary to consider the situation of all categories of persons, and article 20, subparagraph (b) (i), then appeared justified. On the other hand, in the event of separation, the predecessor State continued to exist. There was therefore no overriding need to envisage the same solution, since persons who did not acquire the nationality of the successor State kept that of the predecessor State. While he recognized the validity of both approaches, his own position was that reflected in article 23.

9. The CHAIRMAN said that it would therefore be appropriate to leave it to the Drafting Committee to settle the issue.

10. Mr. BROWNLIE said he continued to think that there was no adequate reason for the lack of symmetry between article 17 and article 23. He still saw no substantial difference between cases of transfer and cases of so-called separation of parts of the territory of a State and the examples furnished in the respective commentaries to those two articles contained in the third report of the Special Rapporteur only served to reinforce his view. Article 23 seemed a little more explicit than article 17 in that it covered more possibilities. He failed to understand why there should be such a discrepancy between the contents of two articles dealing essentially with the same subject. That was an anomaly which had not been sufficiently explained. He would not press the point, but would like to see his views reflected in the record of the meeting.

11. Mr. MIKULKA (Special Rapporteur) said he agreed that there could be a similarity in some cases between the separation and transfer of part of a State's territory and that the solution adopted by the States concerned to regulate the question of nationality could also present similarities. However, there were even more pronounced similarities between the dissolution of a State and the

separation of part of a State's territory. He asked if it followed that the same rules should be applied in all cases on the pretext that it was sometimes difficult to distinguish between dissolution and separation or between separation and transfer of part of a territory.

12. It should be noted that the transfer of part of a State's territory to another State had no effect on the existence of the two States concerned. In the case of separation, the predecessor State also continued to exist, but a new State was created and became a subject of international law. In both cases, the rule of granting the nationality of the successor State was generally applicable, but that general rule could be modified by the exercise of the right of option where part of a territory was transferred. For example, the two States concerned could decide that persons who had their habitual residence in a village located in the transferred territory could, if they so wished, keep the nationality of the ceding State. That possibility was ruled out in the case of separation, since it was inconceivable that the new State thus created should have no nationals of its own and a population consisting solely of foreigners. Such an extreme example illustrated the difference between transfer and separation of part of a territory. Moreover, it could be assumed in the case of separation that persons residing in the territory of the successor State would automatically acquire its nationality, whereas exactly the opposite would occur in the case of transfer. The majority of persons having their permanent residence in the transferred territory would probably opt for the nationality of the State that had ceded the territory, with only those who had not done so within a specific time limit being automatically granted the nationality of the successor State. There were many other arguments in favour of maintaining the distinction, which allowed provision to be made for all possibilities without imposing a general rule.

13. Mr. BROWNLIE said that he was not convinced by the Special Rapporteur's explanation, since the situations he had referred to involved only small parcels of territory or the population of a limited number of villages. But there was no hint in the commentary to article 17, contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1), that the situations envisaged fell into that category, which would account for the distinction between article 17 and article 23. The historical examples given in the commentaries to the two articles all related to transfers of very large territories.

14. He again emphasized that he was not advocating a general restructuring of the two parts of the draft. He simply wished to draw attention to the fact that the situations referred to in the two articles were very similar so that there was no reason for the provisions of article 23 to differ so markedly from those of article 17. That was the point of his criticism.

15. Mr. ECONOMIDES said he regretted that the Special Rapporteur had been influenced by minor border adjustments, whereas very large transfers of territory had occurred in the historical context of State succession. The rule of automatic acquisition of nationality had always applied in those cases just as in other cases of State succession, possibly with the subsequent granting of a right of option. In his own research on practice, he had never

come across a case such as that described by the Special Rapporteur in which the nationality of the predecessor State had been maintained by the successor State for a certain period, with provision for a right of option.

16. However, the general issue which concerned him and which, in his view, merited a full discussion in plenary was the fate of persons originating from the ceded territory who did not reside in the territory. At the preceding meeting, he had mentioned four general rules of international law applicable to all cases of State succession, one of which specifically concerned persons other than those residing in the territory, that is to say the hard core of State succession, namely persons originating from the territory and living abroad. He felt that the Special Rapporteur's definition of the term "originating" based on *jus soli* was too narrow and should be expanded by some element of *jus sanguinis*. For example, where a father was born in the territory concerned, that fact should have some consequence for the children. The idea was to leave individual States free to define the substance of the concept in their legislation. That point having been made, the real issue related to the fact that international law defined two separate cases for "originating" persons: if the predecessor State had disappeared, such persons would automatically acquire the nationality of the successor State so as not to remain stateless, which corresponded to the provisions of the draft articles; but, if the predecessor State did not disappear and originating persons had the nationality of the predecessor State, but lived abroad, the general inclination was to give such persons who had a special link with the territory the right to choose the nationality of the successor State on an individual and voluntary basis. But neither article 17 nor article 23 provided for the second case, and that raised a question of principle.

17. He agreed with the Special Rapporteur's proposal that article 24, paragraph 1, should be deleted because paragraph 2 said exactly the same thing in reverse. Lastly, the discussion had, in his view, confirmed the inadequacy of the definition of the term "person concerned" from the legal point of view.

18. The CHAIRMAN, noting that the members of the Commission should preferably avoid querying provisions that had already been referred to the Drafting Committee, such as the definitions or article 17, said that the provisions of Part I of the draft articles should always be borne in mind when reading Part II, corresponding to what the Commission advocated *de lege ferenda* rather than *de lege lata*. For example, it should be borne in mind, in connection with the problem of children of "originating" persons, that there was an article 9 (Unity of families) dealing with the non-separation of families.

19. Mr. ROSENSTOCK asked Mr. Economides what he meant exactly by "originating from". Should the term be understood as meaning simply "born in" or did it apply to successive generations? In particular, did the concept differ in intent from that of "secondary nationality" as applied in Eastern Europe?

20. Mr. ECONOMIDES said he was unable to reply to the second question because the relationship between the concept of secondary nationality and the concept of origin depended on the internal law of countries that had second-

ary nationalities. In reply to the first question, he could say that the concept of "origin" comprised several elements, the first of which was birth in the territory, to which could be added the father's birth in the territory and, in general, a person's links with the territory, the fact of having resided or lived there for a certain period of time. His only concern was to give a person originating in a territory and residing abroad the possibility, if that person so desired, of acquiring the nationality of the new State in the territory. The concept of family unity was insufficient in that regard since it was too general. The notion of origin was taken into consideration in article 20; its absence from articles 17 and 23 was therefore illogical.

21. The CHAIRMAN, speaking as a member of the Commission, said that the wording of articles 20 and 23 was both too precise and probably incomplete. More general wording based on the concept of an effective link or attachment would be sufficient, since the concept was familiar to all international lawyers and referred both to an origin-based link and secondary nationality.

22. Mr. BROWNLIE said that both the members of the Commission and, to a large extent, the Special Rapporteur consciously avoided referring to the concept of an effective link. He personally found that regrettable since it was, in his view, an important and, in a sense, an inescapable principle. However, he thought that the approach adopted in the draft was defensible on practical grounds. The concept of habitual residence had been used as a sort of shorthand for the simpler forms of the effective link, and that avoided the subtle problems of defining the latter concept. By omitting all explicit reference to effective links, the Commission would possibly also avoid considerable controversy in the Sixth Committee and elsewhere, so that there was a political justification for its approach. The situation was in reality much more complicated because an effective link might exist with several States and it all depended on how the concept was applied. The use of the connecting factor of habitual residence in the draft articles therefore presumably avoided many problems.

23. Mr. MIKULKA (Special Rapporteur) confirmed that he had avoided referring specifically to the idea of a genuine link because, as far as he knew, much of the doctrine was not favourable to the transposition of that idea from the context of diplomatic protection to other contexts. Consequently, the idea had been simply an underlying one and, as Mr. Brownlie had pointed out, the application of criteria such as that of habitual residence ensured a genuine link.

24. With regard to the idea of taking account of "persons originating" from a territory, he explained that his intention had been to limit Part II to provisions that were strictly necessary in order to avoid statelessness and deal with the problem of multiple nationality that might result from the application of the envisaged criteria. Otherwise, States could do what they wished, the sole exception being that, if they failed to respect certain rules listed in Part I, the nationality that they granted would not be recognized. As to the specific proposal made by Mr. Economides, he did not understand whether he thought that the successor State must have the obligation to extend its nationality to "persons originating", particularly those whose father had been born in the territory. The Commis-

sion had already decided in article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1, that no such obligation existed in respect of the persons concerned, whether or not they had originated in the territory, who had their habitual residence in another State and already had another nationality. As to the possible right of the State to extend its nationality to persons originating in it, but residing abroad, the option was always open to the successor State to extend its nationality to categories of persons other than those mentioned in Part II, subject, however, to the limits established in article 4, paragraph 2, which likewise applied to "originating" persons. The consideration of the issue thus revealed that no special treatment needed to be given to "originating" persons. If the fact that a person to whom a successor State granted its nationality was an "originating" person did not override the criterion of "genuine link", then that nationality would not be recognized. He therefore believed that the problem was taken care of in the draft articles as long as all the articles in their entirety were read together. He referred in that connection to paragraph (37) of the commentary to article 17, where the issue was clearly elucidated in the context of transfer of a part of the territory. In conclusion, he said it would be dangerous to attempt to list the whole range of opportunities available to States, for such a list might be incomplete and consequently give the impression *a contrario* that the State could do nothing else.

25. Mr. ECONOMIDES said that the concept of "resident" played an irreplaceable role in respect of State succession. As the Special Rapporteur had pointed out, however, it was also possible that a resident would not wish to acquire the nationality of the successor State. That might be the case if there was a genuine link with another State. In order not to impose nationality on such a person by force, something that would be contrary to human rights, that genuine link should be taken into account and the person should be granted the right of option on that basis. At the current time, however, the right of option was provided for only at the national level in various laws which might be mutually contradictory owing to the lack of specific reference criteria.

26. He said that the Special Rapporteur had understood the first part of his statement correctly, but not the last part. In his opinion, the State must—and that was an obligation—grant its nationality to persons originating from the territory under consideration, but on the condition that those persons request it. In a sense, that was a legitimate exception to article 4. The draft articles would not be complete unless provision was made for that possibility.

27. Mr. CRAWFORD said he wholeheartedly agreed with the analysis made by the Special Rapporteur and did not believe that the State should be obliged to grant its nationality to persons other than those referred to in article 4. Nevertheless, Mr. Economides had every right to express his point of view and to have it recorded.

28. The CHAIRMAN noted that that point of view was not shared by the majority of the members of the Commission. In view of the decision on article 20 adopted by the Commission at its preceding meeting, article 23 could not be retained as it stood. The problem was a complex one. The Special Rapporteur was obviously maintaining his

position and, in the light of the consideration of section 4, would like to go back to section 3. He himself did not wish to reopen the debate and was leaning towards considering that the decision adopted on section 3 applied automatically and naturally to section 4.

29. Mr. CRAWFORD said that the debate should not be reopened. The Commission must await the results of the work to be done by the Drafting Committee in accordance with the terms of reference it had been given.

30. Mr. MIKULKA (Special Rapporteur) said he did not think that two separate rules should be stated in articles 20 and 23, but he did not agree with the decision the Commission had adopted on article 20 and he wished to maintain article 23 as he had proposed. It was, of course, up to the Commission to decide the matter.

31. Mr. ROSENSTOCK endorsed the comments made by Mr. Crawford. The Commission should give the Drafting Committee specific instructions on the issue of "secondary nationality" so that it could adopt an informed decision without necessarily endorsing the idea put forward by Mr. Dugard on that subject. In any event, the approach taken must obviously be a uniform one.

32. The CHAIRMAN said he continued to believe that the position the Commission had taken at its preceding meeting on article 20 should be reflected in articles 23 and 24.

33. Mr. MIKULKA (Special Rapporteur) said that there seemed to be a misunderstanding about the interpretation of the expression "secondary nationality". Mr. Dugard understood it as a shameful discriminatory measure taken against a part of the population which, because it had inferior status, was deprived of the opportunity to have regular nationality. As he himself saw it, it was a practical means of regulating the conditions for nationality laid down in the legislation of a federal State and quite simply a reflection of the federal nationality, that is to say the one that was valid at the international level.

34. The CHAIRMAN said that, since the idea of "secondary nationality" was still vague, he would take it that the decision adopted at the preceding meeting not to use that term in article 20 and to delete subparagraphs (b) (i) and (b) (ii) was final.

35. Mr. GALICKI said that he was in favour of retaining article 24, but would like to make some comments on the form and substance.

36. First, since it was entitled "Withdrawal of the nationality of the predecessor State", it would be more logical to reverse the order of paragraphs 1 and 2 and to deal first with cases where the predecessor State withdrew its nationality and next with those where it did not withdraw its nationality.

37. Secondly, paragraph 1 referred to two cases where the predecessor State did not withdraw its nationality, but that obligation was self-evident in the case covered in subparagraph (a), that is to say that of persons having their habitual residence either in its territory or in a third State. It was true, as the Special Rapporteur had pointed out, that that was a provision aimed at protecting such persons by

preventing a State from using the pretext of separation of a part of its territory to justify the withdrawal of its nationality. As it stood, however, the provision was much too broad because it covered practically all persons having their habitual residence in the territory of the predecessor State. Under those circumstances, it might be better to restrict the scope of application of the article to the “persons concerned”.

38. Thirdly, with regard to the reference to “secondary nationality” in paragraph 1 (b), a final solution must be found that would also be applied in all the relevant articles.

39. Fourthly, he noted that, in paragraph 1, subparagraphs (a) and (b) were linked by the conjunction “and”, which was also used in article 23, whereas, in article 20, the conjunction “or” was used. The Drafting Committee might consider using the conjunction “or” in article 24. It should be noted that the 1978 Vienna Convention used the conjunction “or” most often. In any event, the conjunction “and” presupposed the simultaneous carrying out of obligations, and that was not the case in the current instance.

40. The CHAIRMAN reminded the Commission that the Special Rapporteur considered that, in principle, paragraph 1 of article 24 should be deleted.

41. Mr. ROSENSTOCK said that the word “persons”, as used in article 24, referred to persons who already had a nationality, but one they could not lose. The term “persons concerned” meant persons who had a nationality, but one they could lose. That was the definition and it should not be altered.

42. Mr. THIAM, reverting to the question of decolonization, noted that, in paragraph (4) of the commentary to article 24, the Special Rapporteur stated that there were certain similarities between decolonization and the category of succession of States called separation. He did not understand why he had not dealt with that point in the article itself. Unlike the Special Rapporteur, he was convinced that decolonization was a phenomenon of State succession that necessarily involved a separation of territory or of part of territory.

43. Mr. PAMBOU-TCHIVOUNDA said that, in his view, the dissolution of a State was a variant of the separation of States inasmuch as it was parts of the territory of a State A that separated from each other and that dissolution could, but did not necessarily, lead to the disappearance of State A.

44. The title of section 4 reflected reality to the extent that words had a meaning. What was the purport of such a distinction as it appeared from article 22 (Scope of application)? It was simply a case of decolonization.

45. The CHAIRMAN said that, in his view, Mr. Pambou-Tchivounda’s conception of decolonization was arguable in law. Under the Charter of the United Nations, the status of the territory of a colony or a dependent territory was distinct from that of the State that administered it. And it was because decolonization was a special phenomenon that he regretted the gap in the draft articles on that point. Article 22 did not cover cases of decolonization because a colony was not part of the territory of the State

that administered it. It was therefore impossible to say that it separated from it.

46. Mr. MIKULKA (Special Rapporteur) said he was convinced that the Commission would be ill-advised to revert to the codification work completed in the 1960s. At that time, the newly independent countries had unequivocally expressed the wish not to be deemed to have formed part of the territory of the colonizing country.

47. As the Chairman had rightly pointed out, separation was, in law, something entirely different from decolonization. It involved separation from a territory that had formed part of a State, whereas the dependent territories had never formed part of the territory of the colonizing State.

48. He had omitted cases of decolonization quite simply to give effect to an earlier decision of the Commission. That had not stopped him, however, from drawing, insofar as possible, on the practice of newly independent States, as was apparent from the commentary to section 4. That practice could assist the Commission in finding solutions to the problems of nationality posed by the separation of a part of territory or even by other cases of State succession.

49. He would formally request that the question whether or not provisions on decolonization should be included in the draft articles should be put to the vote. In the event that the majority of members were in favour, he was ready to submit cases of decolonization in his next report, on the understanding that the Commission, therefore, would not be able to complete the consideration of the draft articles on first reading at the current session.

50. The CHAIRMAN, noting that the Commission had already taken a position on the matter, said that the problems involved were important and he would prefer to defer any vote until the next meeting.

51. Mr. THIAM said that he was not asking for the “so-called” decision taken by the Commission to be questioned. He simply wanted it to be duly noted that he disagreed with the Special Rapporteur on paragraph (4) of the commentary to article 24.

52. Mr. KATEKA, speaking on a point of order, said he would remind the Commission that a decision had already been taken on the decolonization question, as attested to by the statement which had been made by the Chairman (2488th meeting) and which contained a good summary of the feeling in the Commission. The Special Rapporteur should bear that summary in mind and the debate should not be reopened.

*The meeting rose at 11.35 a.m.*

## 2494th MEETING

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

Chairman: Mr. Alain PELLET

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

### Welcome to participants in the International Law Seminar

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

### Cooperation with other bodies (*continued*)\*

[Agenda item 9]

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

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

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

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

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

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

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

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

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

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

\* Resumed from the 2490th meeting.

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

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

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

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

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

13. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that a number of substantive matters had been discussed at the Committee's thirty-sixth session, the first being the work of the Commission. In that connection, the secretariat had prepared a series of documents on the report on the work of the Commission at its forty-eighth session, together with notes on the five main items on the Commission's agenda at that time. It had also called attention to the fact that the Commission had completed the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind.<sup>4</sup> The Committee had considered: the United Nations Decade of International Law<sup>5</sup> and had

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

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

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

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

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

<sup>4</sup> See footnote 1 above.

<sup>5</sup> See 2491st meeting, footnote 6.

<sup>6</sup> A/CONF.157/24 (Part I), chap. III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34. He said that he noted that the *Essays on International Law* contained an article by Mr. Hans Kochler<sup>8</sup> of Innsbruck University, who was the Secretary of the International Progress Organization. He wished to know more about the Organization and asked whether the Committee could count on financial contributions from non-governmental sources such as the Organization to help it out of its financial difficulties?

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

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

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

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

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

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

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

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

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

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

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

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

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*concluded*)

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

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

ARTICLE 22 (Scope of application)

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

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

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

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

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

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

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

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

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

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

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

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

49. Throughout the draft he had scrupulously avoided using the term “tertiary nationality” as a way of designating a person’s ethnic origin. The European Convention on Nationality<sup>11</sup> quite rightly stipulated that “nationality” in no way referred to ethnic origin. It was true that the concept had to some extent been applied in the countries of Central and Eastern Europe, but the purpose had been primarily to enable individuals to claim, on the basis of their ethnic background, certain rights reserved under a State’s legislation for linguistic, ethnic, cultural or religious minorities. But that idea of “tertiary nationality” had no relevance to any of the draft articles on nationality currently being considered by the Commission, with the sole exception of article 12 (Non-discrimination).

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

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

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

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

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

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

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

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

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

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

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

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

<sup>11</sup> See 2477th meeting, footnote 7.

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

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

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

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

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

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

*It was so agreed.*

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

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

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

*The meeting rose at 1 p.m.*

## 2495th MEETING

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

*Chairman:* Mr. Alain PELLET

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

### Cooperation with other bodies (*continued*)

[Agenda item 9]

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

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

*It was so decided.*

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

3. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce its 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).

4. The titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee read as follows:\*

PART I

GENERAL PRINCIPLES

*Article 1 [1], paragraph 1]. Right to a nationality*

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

*Article 2 [footnote\*]. Use of terms*

For the purposes of the present draft articles:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "Third State" means any State other than the predecessor State or the successor State;

(f) "Person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

*Article 3 [2]. Prevention of statelessness*

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

*Article 4. Presumption of nationality*

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected

by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

*Article 5 [3, paragraph 1]. Legislation concerning nationality and other connected issues*

Each State concerned should, without undue delay, enact laws concerning nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

*Article 6 [3, paragraph 2]. Effective date*

The attribution of nationality in relation to the succession of States shall take effect on the date of such succession. The same applies to the acquisition of nationality following the exercise of an option, if persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

*Article 7 [4]. Attribution of nationality to persons concerned having their habitual residence in another State*

1. Subject to the provisions of article 10, a successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not impose its nationality on persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

*Article 8 [5]. Renunciation of the nationality of another State as a condition for attribution of nationality*

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

*Article 9 [6]. Loss of nationality upon the voluntary acquisition of the nationality of another State*

1. A predecessor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

*Article 10 [7/8]. Respect for the will of persons concerned*

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

\* 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>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

[Article 8]<sup>2</sup>

[Deleted]

*Article 11 [9]. Unity of a family*

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

*Article 12 [1, paragraph 2]. Child born after the succession of States*

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

*Article 13 [10]. Status of habitual residents*

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

[Article 11]<sup>3</sup>

[Deleted]

*Article 14 [12]. Non-discrimination*

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

*Article 15 [13]. Prohibition of arbitrary decisions concerning nationality issues*

1. Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, to which they are entitled in relation to the succession of States in accordance with the provisions of any law or treaty.

2. Persons concerned shall not be arbitrarily deprived of their right of option to which they are entitled in accordance with paragraph 1.

<sup>2</sup> Paragraphs 1 and 2 of article 8 appear as paragraphs 3 and 4 of article 10. Paragraph 3 of article 8 was deleted.

<sup>3</sup> The Drafting Committee decided to place the content of draft article 11 in the preamble to read as follows:

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

*Article 16 [14]. Procedures relating to nationality issues*

Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

*Article 17 [15]. Exchange of information, consultation and negotiation*

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other related issues regarding their status as a result of the succession of States.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

*Article 18 [16]. Other States*

1. Nothing in the present draft articles requires States to treat persons concerned having no genuine and effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating, for the purposes of their domestic law, persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

5. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had set itself the target of completing the consideration of the draft on first reading by the end of the current session. The proposed text could probably be further refined, but the Drafting Committee trusted that the Commission would not change the structure of the draft.

6. The Drafting Committee had held 12 meetings from 21 May to 12 June 1997. Its very first decision had been to maintain the structure and philosophy behind the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1).<sup>4</sup> The draft articles were therefore divided into two parts, but, at the current stage, the Drafting Committee was reporting only on Part I.

7. The Drafting Committee had decided to amend slightly the title to Part I (General principles) to make it clear that the draft articles applied only to the nationality of natural persons. It had been felt that it would be sufficient to introduce that clarification into the title and that there would be no need to include a separate article on the scope of application of the articles. The title of the topic, of course, remained unchanged, thus leaving open the possibility of considering the question of the nationality of legal persons at a later stage.

PART I

8. Introducing the first three articles, he said that the Drafting Committee had decided to retain only paragraph 1 of article 1 (Right to a nationality) and to set forth in it the right of an individual to a nationality in the

<sup>4</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

case of State succession. The text of the article was based on the Special Rapporteur's proposal, with some modifications. The words "in accordance with the provisions of the internal law of the predecessor State" had been replaced by the words "in accordance with the present draft articles" in order to make the point, first, that the issues arising in respect of nationality in the case of State succession must be resolved by giving priority to the rules and principles of international law even if national law was predominant in that context; and, secondly, that the right of individuals to a nationality in cases of State succession was confirmed even if it was not expressly treated as a human right. The title of article 1 remained unchanged.

9. With regard to "Use of terms", the Special Rapporteur had proposed a series of definitions, set out in a footnote to the title of the draft articles. In view of the importance of those definitions, however, the Drafting Committee had felt that they deserved to be the subject of a separate article. It had therefore been decided to include a new article, article 2. The Drafting Committee had given some consideration to its placement and, as it had been decided that the draft articles would take the form of a declaration, had felt it would be appropriate for the new article to come immediately after article 1. For the same reason, it had decided not to include an article on the scope of the draft articles.

10. The definitions in subparagraphs (a), (b), (c), (e) and (g) were identical to those in the 1978 and 1983 Vienna Conventions. The Drafting Committee had decided to leave those definitions unchanged so as to ensure a measure of uniformity between the draft articles and the two Conventions.

11. It had, however, been felt necessary to clarify two points in the commentary. First, with regard to the expression "succession of States", some members had observed that, unlike the Commission's previous work on State succession, the draft articles dealt with the effects of succession on individuals. It had therefore been necessary to explain that transfer of territory generally connoted transfer of its population, which was the subject of the draft. Secondly, with regard to the expression "predecessor State", it had been considered necessary to make it clear that, in some cases of succession, such as transfer of territory, the predecessor State would not be replaced in its entirety by the successor State but, only in respect of the territory affected by the succession.

12. The expression "State concerned" was not defined in the Vienna Conventions. The Special Rapporteur had felt it necessary to propose such a definition having regard to the variety of States it could cover, depending on the context. The Drafting Committee had agreed to keep the definition in subparagraph (d) very simple. It would be noted that it was formulated in the singular and that the plural, which had appeared in brackets in the draft article proposed by the Special Rapporteur, had been deleted. In the body of the draft articles itself, however, that expression sometimes appeared in the plural. The commentary would therefore explain the meaning to be given to the expression according to the type of succession concerned.

13. As to the expression "person concerned", the Drafting Committee had decided that it was preferable to

restrict the definition in subparagraph (f) to the clearly circumscribed category of persons who had in fact the nationality of the predecessor State. If necessary, the Drafting Committee would consider at a later stage whether to deal, in a separate provision, with the situation of persons who, having fulfilled the necessary substantive requirements for acquisition of a nationality, were unable to complete the procedural stages involved because of the occurrence of the succession. One member of the Drafting Committee had expressed reservations on the definition in subparagraph (f).

14. The Drafting Committee had also changed the order in which the definitions were presented. Thus, all the definitions dealing with States had been placed together, in a logical sequence, after the definition of the expression "succession of States". There then followed the definition of the expression "person concerned", which was widely used in the draft articles. Last came the definition of the expression "date of the succession of States". In the light of the views expressed in plenary, the Drafting Committee had decided not to define the term "nationality", to which very different meanings were attributed. In any event, such a definition was not indispensable for the purposes of the draft articles.

15. Article 3 laid down the obligation of States to prevent statelessness. It corresponded essentially to the text proposed as article 2 by the Special Rapporteur in his third report. The Drafting Committee had, however, replaced the words "all reasonable measures" by the words "all appropriate measures" which, in its view, strengthened the obligation of the State. As indicated by the Special Rapporteur in plenary, the obligation incumbent on the State under that article was an obligation of conduct and not of result as currently understood in the context of responsibility of States. That was still the understanding of the Drafting Committee.

16. The Committee had also made some editorial changes. In the first line, it had replaced the words "are under the obligation to" by the word "shall"; in the second line, it had replaced the words "to avoid" by the words "to prevent"; and, at the end of the sentence, it had replaced the words "said succession" by the words "such succession".

17. It would be noted that the phrase in article 2, subparagraph (f), reading "who, on the date of the succession of States, had the nationality of the predecessor State" in fact defined the term "persons concerned". For stylistic reasons, the Drafting Committee had decided to keep the definition itself, thus avoiding a juxtaposition of the expressions "States concerned" and "persons concerned". Lastly, the title of the article had been simplified and currently read simply "Prevention of statelessness".

18. The CHAIRMAN invited the members of the Commission to make general comments on the draft before considering the articles one by one.

19. Mr. LUKASHUK said that the Drafting Committee had done excellent work and that the product was quite acceptable as it stood. He had detected, however, what he thought was an error of logical sequence: the provisions establishing principles, namely, article 12 (Child born after the succession of States), article 14 (Non-discrimi-

nation) and even 15 (Prohibition of arbitrary decisions concerning nationality issues), should be combined.

20. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), explaining the logical order followed by the Drafting Committee, said that the case of persons of what might be termed "the first generation" concerned by the succession of States had been dealt with first. The question of the second generation, namely, children, had been left until afterwards.

21. The Committee had considered placing article 12, which dealt specifically with the case of children born after the succession of States, after article 6 (Effective date) or article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), but, wherever it was placed, it looked like an insertion. It had also been proposed that it should be restored to its position as the second paragraph of article 1, but it would then read like a footnote. Such a placement would furthermore minimize its importance, something that was extremely unwise at a time of rapid changes in the law relating to children's rights.

22. With regard to articles 13 (Status of habitual residents), 14 and 15, the Drafting Committee had followed the order proposed by the Special Rapporteur, thus abiding by an early decision not to change the structure of the text. There were many other ways of ordering the provisions, but the Commission doubtless wished to focus on matters of substance.

23. Mr. LUKASHUK said that he would revert to the question of the order of the draft articles when the Commission had completed its substantive consideration of the text.

24. Mr. SIMMA said that he found the order of the draft articles proposed by the Drafting Committee quite logical. After a general affirmation of the right to a nationality, the draft articles dealt in succession with persons concerned, their family and the related problem of residence, and went on to state the two general principles of non-discrimination and the prohibition of arbitrary decisions and to enumerate State obligations and the effects on third States. He was perfectly satisfied with that sequence.

25. Mr. THIAM said that he regretted that, as he had already noted, articles had been placed under the heading "General principles" which in no way corresponded to that definition, for example, articles 12 and 16 (Procedures relating to nationality issues).

26. The CHAIRMAN said that one way of getting round the problem was to refer to "Principles applicable to all cases of State succession" rather than to "General principles". He asked the Special Rapporteur for his opinion of that suggestion.

27. Mr. MIKULKA (Special Rapporteur) said that he had no objection to a change in the title of Part I, but wondered whether it was really necessary.

28. Mr. BROWNLIE said that he found the existing title perfectly adequate and consistent with previous usage.

29. The CHAIRMAN said that, if the Chairman of the Drafting Committee could specify the title chosen for Part II, it would shed further light on the matter.

30. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the title of Part II had not yet been finalized; however, to respond to members' concerns, it would be possible to insert an introductory sentence before the text of Part I stating exactly what was meant by "General principles". The title could then be kept brief.

31. Mr. PAMBOU-TCHIVOUNDA, endorsing Mr. Thiam's comments, expressed regret that the Drafting Committee had not kept the original title of Part I proposed by the Special Rapporteur. He considered that the title "General principles concerning nationality in relation to the succession of States" was in any case more appropriate than the version "Principles applicable to all cases of State succession" suggested by the Chairman.

32. Mr. LUKASHUK, also noting that not all the articles in Part I stated general principles, suggested changing the title to "General provisions".

33. The CHAIRMAN said that the title proposed by Mr. Lukashuk had the advantage of being identical to that of Part I of the 1983 Vienna Convention.

34. Mr. MIKULKA (Special Rapporteur) said that the Drafting Committee had considered that possibility, but concluded that, while the word "provisions" might be appropriate for a convention, it was not suitable for a declaration. At the same time, the notion of "principle" should not be treated as an absolute since it was open to several interpretations.

35. The CHAIRMAN said that it would still be appropriate to specify that general principles were principles applicable in all cases.

36. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) suggested that the question of the title should be re-examined more carefully by the Drafting Committee at the end of the discussion.

37. Mr. AL-BAHARNA, reverting to the comments by Mr. Lukashuk and the explanation by the Chairman of the Drafting Committee concerning the position of article 12, said that article 1 was the only other place in the text where an article on the nationality of the child could be inserted; it could be added as a second paragraph under that article, unless it was decided to insert it as article 2.

38. Mr. HE said that article 12 was in the right place after article 11 (Unity of a family), since article 1 dealt only with the general right of every individual to a nationality. The existing sequence of the draft articles seemed perfectly logical.

39. Mr. GOCO warmly commended the efforts of the Drafting Committee to achieve greater simplicity and concision: it could perhaps have gone further by combining in a single article certain general provisions such as those dealing with non-discrimination, prohibition of arbitrary decisions and exchange of information. He asked whether that possibility had been considered.

40. He wondered, however, whether the effort to simplify had been restrictive in the case of the right to a nationality provided for in article 1, resulting in certain groups of persons being denied that right. The text originally proposed by the Special Rapporteur had recognized the right to a nationality not only of every individual who, on the date of the succession of States, had had the nationality of the predecessor State, but also to every individual who “was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State”. The latter phrase had been omitted from the current version. He wished to know whether the omission was intentional or fortuitous.

41. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the matter had certainly not been overlooked, but discussed at length in the Drafting Committee. However, it had proved very difficult in practical terms to resolve the issue satisfactorily in the context of article 1. To avoid wasting time, therefore, the Drafting Committee had decided to shelve it for the time being on the grounds that the provisions generally applicable to persons already possessing the nationality of the predecessor State could also be made applicable—through appropriate amendments or additions—to persons entitled to claim such nationality. The phrase mentioned by Mr. Goco had not been deleted, but simply left pending so as not to hold up the proceedings.

42. With regard to the possible combination in a single article of the general provisions of articles 14, 15 and 17 (Exchange of information, consultation and negotiation), he said he would prefer the Commission to leave problems of that kind aside until the end of the discussion.

43. Mr. SEPÚLVEDA said that it might have been preferable if the Chairman of the Drafting Committee had begun his introduction by reading out the preamble. He noted, for example, that article 11, proposed by the Special Rapporteur in his third report, on the important subject of human rights and fundamental freedoms had been incorporated in the preamble, which the Chairman of the Drafting Committee had unfortunately omitted to mention.

44. His second comment was on a terminological matter. It would be noted that, in article 1 and in article 2, subparagraph (f), the Drafting Committee had used the word *individuo* in the Spanish version and the word *individu* in the French version, whereas the following articles referred to *personas afectadas* and *personnes concernées*. He wondered why the Committee had not maintained the expression *persona natural (personne physique)* originally used by the Special Rapporteur, probably with the intention of clearly establishing the distinction between natural and legal persons.

45. His third comment related to the decision to place the definitions of terms used in article 2 rather than in article 1, as would be logical. In reply to the objection that that type of presentation was habitual in declarations, he pointed out that it created an unfortunate break between article 1, which dealt with the right to a nationality, and article 3, which dealt with prevention of statelessness.

46. Lastly, he wondered whether the Spanish text should not be brought into line with the English and

French versions, which described both States and persons as being “concerned”, by using the adjective *involucrado* for both States and persons instead of referring to *personas afectadas*.

47. The CHAIRMAN, referring to Mr. Sepúlveda’s last comment, said that observations of a strictly linguistic nature could be drawn directly to the attention of the secretariat. With regard to the position of article 2 and notwithstanding the Commission’s decision not to reopen the discussion on the order of the articles, he also noted that article 2, on the “Use of terms”, created a break between articles 1 and 3. As a member of the Commission, he said that he would be in favour of placing that article at the end of the text, a solution that would be acceptable particularly if the draft was to be a declaration.

48. The problem of the harmonization of the terms *individuo* and *persona natural*, to which Mr. Sepúlveda had referred, arose not only in Spanish, but also in French, if not in the other languages.

49. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), replying to Mr. Sepúlveda’s first comment, said that, in view of the wide range of opinions expressed in plenary on the need for and the contents of a preamble, the Drafting Committee had decided not to tackle that issue until it had obtained a clearer overview after completing the consideration of the draft articles.

50. The CHAIRMAN invited the members of the Commission to state their views on Mr. Sepúlveda’s second question about the simultaneous presence in the Spanish and French texts of the expressions *individuo (individu)* and *persona natural (personne physique)*. So far as the French text was concerned, the problem arose mainly in article 2, subparagraph (f).

51. Mr. THIAM, recognizing the need to draw a distinction between the two concepts, said that he would prefer the expression *personne physique*, which had a broader and almost metaphysical meaning, to be retained in the text.

52. Mr. ROSENSTOCK said he doubted whether the coexistence in the text of the expressions “individual” and “natural person” would create any confusion. It was clear from the title that the draft articles related only to natural persons and, if the reader had the slightest doubt about the fact that an individual was a person, he needed only to refer to article 2, subparagraph (f). It was therefore not logical to have to repeat the expression “natural person” throughout the text.

53. The CHAIRMAN said that the Commission had six official languages and, while the expressions “individual” and “natural person” were practically synonymous in English, the same was not true of the corresponding terms in Spanish and French.

54. Mr. KABATSI suggested that the English text should be left unchanged and a separate decision reached for each of the other languages.

55. Mr. LUKASHUK said that the position in Russian was exactly the same as in English and there was therefore no problem.

56. The CHAIRMAN suggested that the word *individu* should be replaced by the words *personne physique* throughout the French text of the draft articles and that the corresponding change should be made in the Spanish text. The Arabic-speaking and Chinese-speaking members would, if necessary, bring the Arabic and Chinese texts into line with those two versions.

*It was so decided.*

57. The CHAIRMAN invited the Special Rapporteur to comment on the proposals that Mr. Sepúlveda and he, speaking as a member of the Commission, had made on the placement of article 2.

58. Mr. MIKULKA (Special Rapporteur) said that the matter had been exhaustively discussed in the Drafting Committee and the view had prevailed that the definitions should come immediately after article 1. The reason was the rather prosaic one that the last paragraph of the preamble would have to begin with the words: "The General Assembly solemnly declares . . .", and it was hardly conceivable that the General Assembly would solemnly declare a list of definitions.

59. Mr. PAMBOU-TCHIVOUNDA said that he had three comments to make on articles 1 to 3. The first related to the placement of article 2, which ought to appear at the very beginning of the text. Although the Special Rapporteur had recalled that the Commission was working on a draft declaration, he for his part reserved the possibility of stating in other forums that he would prefer the work to take the form of a convention. Secondly, he thought that, for the sake of terminological consistency and intellectual logic, the Commission should use the expression *posséder la nationalité*, which he considered better than the term *avoir la nationalité* in article 3, as well as in article 1 of the French text. His third comment, which related to substance, but also to the question of definitions, had to do with the concept of "having the right" to a nationality used in article 1. Should it be interpreted to mean "having the nationality" or "having the right to claim the nationality"? The terms in question formed a key group within the instrument and their meaning deserved to be clarified, not in the commentaries, but in the article on use of terms. If the plenary or the Drafting Committee agreed to the improvement he was suggesting, he would like it to be incorporated in a new subparagraph (h) of that article.

60. The CHAIRMAN, replying to Mr. Pambou-Tchivounda's second comment, suggested that the word *avaient* in the French text of article 3 should be replaced by the word *possédaient*.

*It was so decided.*

#### ARTICLE 1 (Right to a nationality)

61. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) confirmed that the word "had" could be maintained in the English version of article 3. In reply to Mr. Pambou-Tchivounda on the question of the meaning of the expression "to have the right to a nationality", in article 1, he said that the idea was to state as clearly, precisely and categorically as possible, at the very beginning of the part of the draft on general principles, the funda-

mental principle that, in order absolutely to avoid statelessness, every individual who had the nationality of the predecessor State on the date of the succession of States must have the right to a nationality after that date. The elements, modalities of exercise and consequences of that right were spelled out in the articles that followed.

62. Mr. PAMBOU-TCHIVOUNDA said that, if the text were maintained as it stood, at the end of the exercise, the reader would still be wondering what was meant by "having the right to a nationality". Even if his view was a minority one, he repeated that he would have liked the expression to be clarified.

63. The CHAIRMAN said that the modalities of the acquisition or, as the case might be, preservation of the right in question were made clear in the subsequent articles, in accordance with the spirit of article 1. Furthermore, the commentary would explain that the right to nationality was exercised in accordance with the modalities specified in other articles.

64. Mr. GALICKI, supported by Mr. LUKASHUK, said that the Drafting Committee had refrained from defining concepts which were not yet clearly determined, including that of the right to nationality. Although the expression appeared in certain international documents, it had never been defined. To avoid confusion, it should also be borne in mind that the Drafting Committee had, for example, decided to delete a provision of article 1 referring to entitlement to acquire a nationality, retaining only the general expression "right to a nationality". All the precise modalities of the exercise of that right were to be found in the statement of principles which followed. It would therefore be best to abide by that position, especially as the term "nationality" itself was not defined.

65. Mr. GOCO said that Mr. Pambou-Tchivounda had a point. The right to nationality could not be divorced from the modalities or procedures regulating its implementation. Nationality was not conferred automatically and the State or States concerned must adopt legislation or take the necessary steps to give effect to that right. Perhaps the text should read "the right to acquire the nationality".

66. Mr. BROWNLIE said that, in trying to achieve the objective of preventing statelessness, the Special Rapporteur had not wanted to impose unduly detailed obligations on States. He had had to provide for safeguards in very general terms, so that States would accept them. Article 1 had deliberately been drafted in general terms and he thought it would be useless to debate the meaning of the words "the right to the nationality", which had been left vague for a reason and should probably remain so.

67. Mr. HE, supported by Mr. LUKASHUK, said that he wondered whether the words "of at least" should be retained in article 1. They seemed to open the door to multiple nationality, something that was not desirable. Article 1 should set out the right to a nationality, not to several nationalities. Multiple nationality gave rise to difficulties for individuals, as well as for States, and created problems in relations among States. Questions of allegiance frequently arose, particularly when relations among the States concerned were hostile or they were engaged in conflict. The words "of at least" should therefore be deleted in order not to give the impression of encouraging multiple nationality.

68. Mr. MIKULKA (Special Rapporteur) said that Mr. He's interpretation of article 1 was wrong. The entire draft was designed in such a way as to encourage neither multiple nationality nor the prohibition of multiple nationality. States were free to choose their policies in that regard and a rule prohibiting multiple nationality could not be imposed on them. Perhaps Mr. He's concern could be met by indicating in the commentary that article 1 was in no way intended to encourage multiple nationality.

69. Mr. GALICKI said that he endorsed the Special Rapporteur's comments. The right to nationality was a human right and a person could in fact have the right to many nationalities. The right to nationality was not a privilege granted by the State. Article 1 in no way encouraged multiple nationality and the relevant safeguards were set out further on in the draft, specifically in article 8. Article 1 was neutral and took no position either in favour of multiple nationality or against it.

70. Mr. SIMMA said he took the opposite view that the words "of at least" seemed to encourage multiple nationality. The result of deleting them, however, would be even less satisfactory and it was necessary to choose the lesser of two evils. He was therefore in favour of the retention of the words "of at least".

71. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. He that article 1 seemed to encourage multiple nationality. In reply to the Special Rapporteur, he pointed out that the Commission was not obliged to remain neutral because it was responsible for developing the law and he was convinced that there was a very clear tendency within the international community to oppose the practice of dual or multiple nationality. It would therefore be better to discourage multiple nationality than to encourage it. That was why he also was in favour of the deletion of the words "of at least".

72. Mr. ROSENSTOCK said that the right of the individual to choose ran as a leitmotif throughout the draft, with the will of the individual being the primary consideration. The right of option was important in that connection, for it presupposed the right to more than one nationality. It would be inconsistent to take the opposite position in the very first article of the draft. There were various ways in which, elsewhere in the text, dual nationality could be discouraged, if that was what was desired. Without wishing to imply that dual nationality was a good thing, he did not think it was such a bad thing that the individual should be deprived of his right to choose it when it was a legitimate right, as it was throughout the draft. Unless completely neutral wording was found, the text as it stood should be retained, even if it did seem favourable to multiple nationalities, for it was completely in consonance with the rest of the draft.

73. The CHAIRMAN, speaking as a member of the Commission, said he did not believe that the only principle that served as a leitmotif throughout the draft was the right of the person concerned to choose. Although preventing statelessness was essential, the rights of States must likewise be preserved and the draft articles did so quite well. The text would be much more neutral if the words "of at least" were deleted.

74. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) recalled that the draft articles dealt with

nationality in relation to the succession of States. They were in no way intended to encourage multiple nationality. It had been precisely to take account of the opinion of Mr. He and other members that the Drafting Committee had deleted the words "Without prejudice to their policy in the matter of multiple nationality" at the beginning of article 7, which had become article 10. Determining what was State practice in cases other than those of succession of States was not part of the topic under consideration. The problem that arose in connection with article 1 could be solved either by amending the text of that provision or by indicating in the commentary that it was in no way intended to encourage dual or multiple nationality.

75. Mr. GOCO said that he endorsed the comments made by Mr. He; the problems of allegiance to which he had alluded were extremely important in practice. The words "of at least" should therefore be deleted.

76. Mr. HAFNER said that he agreed with the comments made by Mr. Rosenstock and the Special Rapporteur. Deleting the words "of at least" in article 1 might give rise to problems, for example, in the light of provisions that imposed on more than one State the obligation to grant its nationality. A distinction should be drawn between the right to nationality and possession of nationality.

77. Mr. THIAM pointed out that nationality was the purview not only of the individual, but also of States. The wisest course would probably be to retain article 1 as currently drafted.

78. Mr. HERDOCIA SACASA, supported by Mr. KABATSI, said that the Commission should retain the text as it stood. The wording was neutral and encouraged neither dual nationality nor multiple nationality.

79. The CHAIRMAN said that the majority of the members of the Commission seemed to wish to keep the text of article 1 as adopted by the Drafting Committee. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 1.

*Article 1 was adopted.*

*The meeting rose at 1 p.m.*

---

## 2496th MEETING

*Thursday, 19 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk,

Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/479, sect. C, A/CN.4/481 and Add.1,<sup>1</sup> A/CN.4/L.536)**

[Agenda item 3]

REPORT OF THE WORKING GROUP

1. Mr. YAMADA (Chairman of the Working Group), introducing the report of the Working Group (A/CN.4/L.536), said that it had been established with the mandate of considering how to proceed with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It had held two meetings at which it had reviewed the Commission's work on the topic since 1978. It had had before it the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-eighth session of the Commission,<sup>2</sup> comments made by Governments at the most recent discussion in the Sixth Committee (A/CN.4/479, sect. C) and the comments and observations received from Governments in reply to a note by the Secretary-General (A/CN.4/481 and Add.1).<sup>3</sup> Members of the Working Group had exchanged views and the Chairman of the Commission had submitted a paper setting out his personal views.

2. The Working Group had noted that the Commission was dealing with two issues under the topic, issues that were distinct but interrelated. The Working Group felt that, in future, the two issues should be dealt with separately. As the work on prevention was already at an advanced stage and many articles in that area had already been provisionally adopted by the Commission, the Working Group had been of the opinion that the Commission could proceed with that work and possibly complete its consideration on first reading of the draft articles on prevention in the next few years. The form and nature of the draft articles should be decided on at a later stage. On the other hand, a majority of the Working Group's members had been of the view, with varying nuances, that international liability was the core issue of the topic as originally conceived and that the Commission should retain that subject. There had been no unanimity on that point, but it had been agreed that the Commission needed to await further comments from Governments before it could make any decision on the issue. The Working Group had also noted the view that the title of the topic might need adjustment when a decision was taken on the scope and contents of the draft articles.

3. In paragraph 6 (a) of its report, the Working Group concluded that the Commission should proceed with its work on prevention under the sub-title "Prevention of transboundary damage from hazardous activities" and that a Special Rapporteur for this sub-title should be appointed as soon as possible, with the aim of completing the first reading of the draft articles by the fifty-first session in 1999. Though the timing of the appointment of a Special Rapporteur was not specified, if it was done at the Commission's fiftieth session in Geneva in 1998, he believed the Commission would still be in a position to complete consideration of the draft articles on first reading by the fifty-first session. The question of appointing a Special Rapporteur should be decided within the overall framework of the Commission's work programme for the current quinquennium.

4. The Working Group recommended, in paragraph 6 (b) of the report, that the Commission should defer its decision on the "international liability" aspect of the topic pending further comments by Governments in the Sixth Committee or in writing, and accordingly, the Commission should request comments by Governments if they have not yet done so on that aspect, in order to assist the Commission in making a decision in that regard.

5. He expressed gratitude to all the members of the Working Group for their cooperation and contributions.

6. Mr. KATEKA said that the two subjects of prevention and international liability were interconnected and should not be treated as separate items. His acceptance of the consideration of prevention as a topic was therefore without prejudice to subsequent treatment of the international liability aspect. Paragraph 5 of the report of the Working Group gave the wrong impression. No decision had been taken that the title might need adjustment: a view had merely been expressed to that effect. The title of the topic had been established many years ago and to use any other wording would be to fail to reflect the correct situation.

7. Finally, in the first sentence of paragraph 6 (b), the words "its decision" should be replaced by "further action".

8. Mr. KABATSI thanked the Working Group for its efforts and noted with satisfaction that study of the subject, especially the work on prevention, was to continue. However, the question of liability should not be left in abeyance and he entirely agreed with Mr. Kateka that the two subjects were not totally divorced from one another. When prevention failed, consequences arising out of State responsibility might be triggered. As the Chairman of the Working Group himself had pointed out, a majority of members had thought that international liability should continue to be studied. No service would be done to the international community or to the development of international law by the Commission's taking up only half of the topic. Accordingly, the Special Rapporteur who was to be appointed should deal with both subjects, as had been the case in the past.

9. Mr. ROSENSTOCK drew attention to a typographical error in paragraph 3 of the report of the Working Group; and said that some participants in the Working Group's discussions had expressed the opinion that the Commission should face the fact that it could not usefully

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> *Yearbook . . . 1996*, vol. II (Part Two), annex.

<sup>3</sup> See footnote 1 above.

attempt further work on prevention and international liability, as it lacked the special expertise required. Other participants had wanted to proceed with that work as in the past. Still others had felt that prevention was a topic fundamentally grounded in primary rules, while international liability, if it had any meaning, was based on secondary rules, and that to mix the two was to engage in self-deception. The report reflected a middle ground among those views, namely that prevention was something the Commission could possibly tackle now, without delay, since the relevant material had already been well developed. He acknowledged that the report was a reasonable compromise among a variety of opinions in the Working Group and thought it unlikely that agreement could be reached on a significantly different conclusion.

10. Mr. LUKASHUK congratulated the Working Group on a concise report representing a judicious compromise among the various positions expressed. He appreciated the views of Mr. Kateka and Mr. Kabatsi about the close interrelationship of the two aspects of the topic but, as he understood the report, there would be two stages in the process of codification. The first aspect to be dealt with was the one that appeared most ripe for codification, but work on it would speed up the analysis of the topic as a whole.

11. There was something illogical, from the legal point of view, in the title of the topic as originally worded, for the implication was that liability could arise for lawful acts. That contradiction should be scrutinized. On the whole, however, he supported the report of the Working Group.

12. Mr. SIMMA said that, although the title of the topic did not reflect the underlying issues, prevention not being necessarily a matter of liability for injurious consequences, the original title should nonetheless be retained so that Governments in the Sixth Committee would readily grasp what was being discussed. Like Mr. Rosenstock, he was sceptical as to whether liability could be adequately dealt with by the Commission in view of the expertise required in private international law and insurance law, expertise that was already available in other bodies. The Commission could, on the other hand, do useful work on the prevention aspect, and, if it was to do so, the title of the topic should be changed at the fiftieth session in 1998. He believed a Special Rapporteur should be appointed as soon as possible and that the formulation of paragraph 6 (b) of the report of the Working Group should remain unchanged, pending resolution of the question of whether the Commission would continue with the topic in the light of comments by Governments.

13. Mr. BROWNLIE congratulated the Working Group on its efforts. He could see a practical case for building on articles already adopted on prevention, which went a long way towards creating a regime on environmental risk. However, the fundamental conceptual difficulties had still not been addressed and, in the Sixth Committee, Governments had indicated their concern about those difficulties. Any value of the norms that would emerge from the work on prevention and associated problems would be diluted if there was no clear legal framework in which those norms were to appear. Admittedly the work on nationality in relation to the succession of States, for example, could

properly take the form of a draft declaration, but a precise legal framework had to be envisaged in respect of damage or risk to the environment, the obvious framework being State responsibility. If the Commission wished to develop rules therefor, all well and good; it should agree to do so. But to agree to develop some of the specific rules already drafted, without deciding on the framework within which the rules would operate, would be the worst of all worlds.

14. Mr. THIAM said that at the current stage it would be difficult to develop proposals acceptable to each and every member. The topic had been before the Commission for some 20 years, with very few results. At the outset, the Commission had had to decide whether to consider international liability as one aspect of State responsibility for wrongful acts or to treat it separately. A former Special Rapporteur on State responsibility, Mr. Ago, had not wished to combine the two subjects, owing to the technical differences between them. The Commission had thus been obliged to take up the subject independently from that of State responsibility, even though many members, including himself, would have had preferred the opposite approach. As the situation now stood, therefore, the Commission could not consider prevention in isolation from liability. What it must do was to see whether the Working Group's proposal was acceptable.

15. Preventive measures differed in different fields of human activity—air pollution, water pollution, military activities, and so on. Did the Commission have the necessary technical ability to handle prevention in all of its ramifications? He was not convinced that it did. Moreover, the topic seemed more closely related to that of State responsibility for wrongful acts than to international liability for injurious consequences. He had a slight preference for dealing with international liability, even though it posed seemingly insuperable problems. But if the Commission chose to tackle that issue, it should clarify the content and specify the nature of the rules it was to elaborate.

16. He was grateful to the Working Group for identifying the two aspects of the topic of international liability, but was not convinced that the General Assembly had given the Commission a mandate to deal with the two aspects separately.

17. Mr. HAFNER said he disagreed with the argument that the Commission was not the proper body for dealing with international liability and thought the technical and legal information required for dealing with both issues, prevention and liability, was similar. To study prevention, for example, the Commission would need extensive information on toxicity and dangerous activities and on the technical requirements for preventing damage. The Commission was eminently suited to dealing with liability, as had been demonstrated by the study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".<sup>4</sup>

18. Mr. LUKASHUK said that a matter of considerable significance for the Commission's future work had been raised. The Sixth Committee had submitted a whole new

<sup>4</sup> *Yearbook* . . . 1985, vol. II (Part One), *Addendum*, document A/CN.4/384.

range of subjects for the Commission's consideration, including environmental law and international economic law, which did not necessarily correspond with the Commission's special profile. Consequently, it was important to determine the Commission's place in the general work on the progressive development and codification of international law. Such a new approach could be tested in connection with preventing the fragmentation of international law in the process of its codification and progressive development. He agreed, however, that, in order to deal with all the questions involved, the Commission would have to cooperate with the international bodies which specialized in that field. The Commission's task was not to deal with matters of detail or to set technical parameters but to establish and define only general principles. That was the direction its future work must take. Above all, it must fulfil the mandate conferred upon it by the General Assembly, which included the obligation to prevent the fragmentation of international law.

19. Mr. HE said that the Commission should not abandon its work on the topic, which had been under study since 1978, but should rather decide how to proceed and make a fresh start on it. The problem was that, while there was agreement that the question of prevention should be dealt with, there were strong doubts whether the Commission was properly equipped to deal with the question of liability. The two problems could perhaps be combined and studied in the manner propounded by Mr. Hafner. At the same time, he endorsed the Working Group's recommendations, contained in paragraph 6 of its report, that the Commission should proceed with its work on prevention under the subtitle "Prevention of transboundary damage from hazardous activities" but should defer its decision on liability pending further comments by Governments.

20. Mr. YAMADA (Chairman of the Working Group) said he had endeavoured to report what had transpired in the Working Group as faithfully as possible and believed his report reflected the middle ground of the views taken by members. In particular, Mr. Kateka's opinion was reflected in paragraph 3 of the report.

21. His understanding was that the existing title of the topic would stand unless the Commission decided otherwise. The Working Group recommended, however, that the prevention aspect of the topic should be dealt with under a subtitle. No recommendation as to the possible adjustment of the existing title of the topic would be made until a decision on the question of international liability had been taken.

22. Mr. AL-KHASAWNEH said he was not persuaded by the argument that the Commission was ill-suited to deal with the topic because of the need for technical data. Perhaps it should establish some mechanism to compile such data and distil the relevant legal principles to regulate the area of international law in question.

23. From the very outset, there had been a fundamental question of conception which had not been resolved. The topic, which could be said to have been grossly misconceived, was in fact the product of the approach of the late former Special Rapporteur on State responsibility, Mr. Ago, to the question of circumstances where responsibility was precluded. Prevention, to his own mind, was

by definition a matter of prohibitions and as such would take the topic out of the realm of liability into the realm of responsibility.

24. It had been suggested that the existing title of the topic should stand but that, at the same time, work on prevention should proceed. In his view, however, the title should match the content of a topic and liability and prevention were entirely different things. In the circumstances, the Commission should not be unduly hasty about deciding to move ahead with the work on prevention, particularly if it was decided that the international liability aspect of the topic should be deferred pending further comment by Governments.

25. Mr. GOCO said it was clear from the mandate conferred on the Commission that the subject with which the General Assembly was primarily concerned was international liability for injurious consequences arising out of acts not prohibited by international law. Some 20 years had elapsed since that topic had first been taken up, during which time it had become bogged down in conceptual and theoretical difficulties. It was too late in the day, however, and would not create a very good impression, to divide the topic into two parts that could be dealt with separately. The main thrust of the topic was international liability and there should be no difficulty in treating the question of prevention in that context.

26. The CHAIRMAN pointed out that at the forty-fourth session, if memory served him correctly, the Commission had practically already decided to divide the topic into two parts.<sup>5</sup>

27. Mr. SEPÚLVEDA said that the topic as a whole was gradually being diluted and being turned from a general subject into a relatively minor issue. It was difficult to know how that gradual erosion could be explained to the General Assembly. The subject of liability for risk should be retained, although it could, if necessary, be examined in conjunction with the broader subject of international liability. If the subject of prevention was dealt with, it should be made clear that it was as but one chapter that fitted into the overall subject of liability for risk. That approach would be more in keeping with the Commission's mandate.

28. The CHAIRMAN said that, although the consensus in the Commission seemed to be that prevention was a relatively secondary aspect of the topic, the idea underlying the compromise reflected in the report of the Working Group seemed to be that, as the Commission had already adopted 11 articles on prevention in the past, it would be a pity if that could not be put to some advantage.

29. He would be grateful for the Commission's guidance. It was doubtful whether the Commission could avoid some form of compromise unless it were to proceed to a vote, which, on such an issue, would be disastrous for its image. The only other solution he saw would be for the Commission to refrain from taking a decision and to explain to the Sixth Committee that it was very difficult to take a position in the absence of some significant reaction from States. He trusted that the Commission would adopt

<sup>5</sup> See *Yearbook* . . . 1992, vol. II (Part Two), paras. 344 et seq.

the report of the Working Group: it was not possible to please everyone, but that was the disadvantage of a consensus.

30. Mr. BROWNLIE said that he found the debate extraordinarily depressing and not just because the difficulties involved had been around for a very long time. The rubric of international liability was peculiar in character. Normally, when the Commission refined and perhaps progressively developed an existing area of law on a topic, it was dealing with some recognizable juridical substance. In the case of international liability, it was not doing so. No textbook on existing law contained such a rubric; no digest of State practice employed such a rubric; nor did a collection of Japanese practice by two distinguished Japanese lawyers, one of whom was a judge at ICJ, employ the rubric.<sup>6</sup>

31. When Canada had made a claim for damage caused by the disintegration of a satellite owned by the former Union of Soviet Socialist Republics (USSR)<sup>7</sup>—a classic example of the kind of area with which the topic was supposed to overlap—it had not referred to the work of the Commission and the rubric of international liability. Not surprisingly, it had invoked the principles of State responsibility in general international law and the relevant multilateral convention. So, when the Commission decided to bifurcate the subject, treating prevention as a separate area, it was in fact working in a vacuum and it was very surprising that such a decision should be taken in the absence of some threshold decision on the legal character of the subject. Had the Commission decided to develop new principles regarding environmental risks, it would have been working on the basis of some existing juridical substance. For the time being, however, it had not done so and all that the report of the Working Group had achieved was a compromise that sought to put off the day when the juridical and practical value of the topic would have to be finally judged.

32. Mr. Sreenivasa RAO said that it would perhaps help the Commission to overcome its difficulties if the recommendations set forth in the report of the Working Group were slightly amended in two respects. In the first place, the phrase “with the aim of completing the first reading of the draft articles by 1999”, in paragraph 6 (a) seemed to send out a message that the Commission would focus on prevention alone and would not deal with liability. Therefore, the phrase should be deleted. Secondly, the first sentence of paragraph 6 (b) contained a hint that the topic of international liability would never be taken up. To correct that impression and achieve the right focus, the word “international”, in the first sentence of paragraph 6 (b), should be deleted.

33. The title of the topic should stand and the topic itself should encompass both liability and prevention. The views of those members who had made a special point that the work on liability must continue would, of course, be placed on record.

34. Mr. KATEKA said that he agreed with most of what Mr. Sreenivasa Rao had said but would propose one further amendment, namely, changing the words “defer its decision”, in paragraph 6 (b) to “defer action”.

35. Mr. ADDO said that, while he also broadly agreed with Mr. Sreenivasa Rao’s proposed amendments, he found the report of the Working Group balanced and acceptable. The idea of deferring a decision or action on international liability did not imply abandonment of the principle of such liability. The point was that the work on prevention should proceed pending the receipt of comments from Governments.

36. He disagreed with Mr. Brownlie that the principle of international liability was devoid of legal substance. In an era of proliferation of nuclear activities and transboundary movements of hazardous waste it was a highly relevant topic that should be dealt with as part of the corpus of international law. The advisory opinion of ICJ of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>8</sup> represented a significant statement of customary international law on environmental protection and was highly relevant to the topic. It stated in paragraph 29 that

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>9</sup>

37. Mr. SIMMA said he fully supported Mr. Sreenivasa Rao’s proposed amendments. He preferred the word “decision” to “action”, because the question of whether the Commission took action on the liability aspect or abandoned it should be left open.

38. Although he appreciated Mr. Brownlie’s view, he felt sure Mr. Brownlie would agree that international law already contained a solid body of material regarding prevention which might be condensed and codified by the Commission. Rules of prevention were primary rules that concretized the principle of due diligence. Where those rules were violated, State responsibility must come into play. He had himself worked on the prevention aspect of the peaceful use of nuclear energy in relation to nuclear power plants in border areas and had identified some 50 bilateral treaties that dealt with the issue of prevention in the form of, for example, information and consultation. In his opinion, it would be a useful topic for the Commission to tackle.

39. The CHAIRMAN said he had been handed a proposal in writing by Mr. Sreenivasa Rao which might allay concerns regarding the idea of taking a decision or deferring action. Mr. Sreenivasa Rao proposed replacing the words “making a decision” at the end of subparagraph (b) by “finalizing its view”. The beginning of the subparagraph would be reworded accordingly.

40. Mr. THIAM noted with concern that drafting changes were being proposed before agreement had been reached on the substantive question of whether to deal with prevention first and liability later.

<sup>6</sup> *The Practice of Japan in International Law, 1961-1970*, S. Oda and H. Owada, eds. (Tokyo, University of Tokyo Press, 1982).

<sup>7</sup> Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954 (*International Legal Materials*, vol. XVIII, No. 4 (May 1979), pp. 899-930).

<sup>8</sup> *I.C.J. Reports 1996*, p. 226.

<sup>9</sup> *Ibid.*, p. 242.

41. Mr. KABATSI supported the two deletions originally proposed by Mr. Sreenivasa Rao, namely the last phrase in subparagraph (a) and the word "international" in subparagraph (b). He further proposed replacing "defer its decision" in subparagraph (b) by "defer its work", on the analogy of "proceed with its work" in subparagraph (a).

42. The CHAIRMAN, speaking as a member of the Commission, said that, if a final decision were to be taken at that meeting that the Commission would take up the liability aspect, he would take a vote on the matter and express his opposition thereto.

43. Mr. BROWNLIE said he hoped Mr. Addo and Mr. Simma had not misunderstood his position. He agreed that certain principles of international liability existed. Indeed some of them had first been recognized in some of his own publications. However, the point was that when authoritative decision makers wished to support those principles, they did so without invoking the Commission's work or the rubric "international liability for injurious consequences arising out of acts not prohibited by international law".

44. Mr. ROSENSTOCK said that, whatever the final wording of the recommendation by the Working Group, the Commission would have to face up to the issue at the next session. He therefore suggested opting for Mr. Sreenivasa Rao's version, which was the most neutral.

45. With regard to Mr. Brownlie's comments, it should be placed on record that the outcome of the current meeting was without prejudice to the possibility for the new Special Rapporteur, if he so wished, to reopen the debate on the decision pushed through by the former Special Rapporteur on State responsibility, Mr. Ago, to the effect that the subject was not part of the law of State responsibility. At the same time, that should not be understood as incitement to the Special Rapporteur to reopen the debate. Mr. Brownlie's view, if he had understood it rightly, was that the subject would have a context if it was made part of the responsibility topic as a secondary rule, bearing in mind some aspects of common law and presumably civil law, pursuant to which there was no fault liability.

46. Mr. SEPÚLVEDA said that, while he appreciated the subtlety and tactfulness of Mr. Sreenivasa Rao's proposal, he wished to suggest the following further refinement:

"The Commission should proceed with its work on 'international liability', undertaking first the topic of 'prevention' under the subtitle 'prevention of transboundary damage from hazardous activities'. A special rapporteur for this subtitle should be appointed as soon as possible. The Commission should request comments by Governments if they have not yet done so on this aspect to assist the Commission in finalizing its work."

47. The CHAIRMAN said that, personally, he greatly preferred "finalizing its view" to "finalizing its work", for there was a considerable difference between the two.

48. Mr. GOCO said that he broadly agreed with Mr. Sepúlveda's proposal. He was concerned, however, that the Commission was deviating from the mandate assigned to it by the General Assembly. The reference to finalization of work should be deleted, so that the sentence would read: "Further, the Commission should request comments by Governments if they have not yet done so on this aspect to assist the Commission."

49. The CHAIRMAN invited Mr. Goco, Mr. Sreenivasa Rao and Mr. Sepúlveda to confer with Mr. Yamada, the Chairman of the Working Group, with a view to producing a mutually acceptable text for consideration by the Commission before the end of the meeting. The Secretariat would concurrently prepare a French translation of the text.

*The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.*

50. The CHAIRMAN invited the Commission to comment on the following text prepared by the informal drafting group:

"6. The Working Group accordingly recommends to the Commission that:

"(a) The Commission should proceed with its work on 'international liability for injurious consequences arising out of acts not prohibited by international law', undertaking first prevention under the subtitle 'prevention of transboundary damage from hazardous activities'. A Special Rapporteur for this subtitle should be appointed as soon as possible;

"(b) Further, the Commission should request comments by Governments if they have not yet done so on the issue of international liability in order to assist the Commission to finalize its view."

51. Mr. PAMBOU-TCHIVOUNDA submitted that the phrase *adopter un point de vue définitif* (finalize its view) in the French text was meaningless. He suggested *déterminer définitivement* as a more felicitous rendering of the English phrase.

52. Mr. THIAM said he was concerned at the reference to the appointment of a special rapporteur for "prevention", since it conveyed the impression that the two issues under the topic had been definitively separated. Would a second special rapporteur be appointed for the issue of liability or would the same person deal with both issues?

53. The CHAIRMAN suggested deleting the words "for this subtitle" at the end of subparagraph (a).

54. Mr. ROSENSTOCK said he had no objection to the appointment of a special rapporteur for the "prevention" subtitle, provided the appointment was without prejudice to the role to be played by the same or another special rapporteur if and when the other portion of the topic was finalized. He feared that deletion of the words "for this subtitle" would prejudice the outcome.

55. The beginning of subparagraph (b) should be amended, for stylistic reasons, to read: "Further, the Commission should reiterate its request for comments by Governments."

56. Mr. KABATSI said he was not sure what was meant by to “finalize its view”. Was the Commission working on a particular view that must be finalized? He would prefer to revert to the Working Group’s original wording: “to assist the Commission in making a decision in this regard”.

57. The CHAIRMAN said that the new wording could be described as “constructive ambiguity”.

58. Mr. KATEKA said that constructive ambiguity was called for as a form of compromise. He was not keen on “finalize its view”, but he could live with it.

59. As to Mr. Rosenstock’s insistence on retaining “for this subtitle”, was there a precedent for the appointment of a special rapporteur to deal with a subtitle?

60. The CHAIRMAN said that, to his knowledge, it was an innovation. However, the wording “a special rapporteur should be appointed as soon as possible” left open the question of whether a second special rapporteur would be appointed for the other subtitle—another example of constructive ambiguity.

61. Mr. PAMBOU-TCHIVOUNDA said he supported Mr. Thiam in his opposition to separating the issues of prevention and international liability, which were related and complementary. The second half of subparagraph (a), beginning with the word “undertaking” might be altered, so as to take account of the concerns of Mr. Sreenivasa Rao, Mr. Thiam and perhaps Mr. Kateka, to read: “undertaking first prevention of transboundary damage from hazardous activities. A special rapporteur should be appointed as soon as possible.” He stressed that the quotation marks in the original version should be omitted.

62. The CHAIRMAN noted that the proposed amendment radically changed the meaning of the recommendation. Personally, he was unable to accept it unless it secured unanimous support.

63. Mr. AL-BAHARNA said that he hoped the Commission would continue its work on the topic despite the difficulties involved. He would have preferred the Working Group’s original recommendation but, for the sake of compromise, would raise no objection to the revised version, as amended. However, he wondered whether, in order to avoid any misunderstanding, the last sentence of subparagraph (a) might not be transferred from that position to form a separate, unnumbered subparagraph at the end of paragraph 6.

64. The CHAIRMAN said that the suggestion would destroy the balance of the paragraph as a whole by prejudging an issue that the Commission did not wish to pre-judge.

65. Mr. GALICKI remarked that some of the proposed amendments, in particular the one by Mr. Pambou-Tchivounda, departed very considerably from the original proposal of the Working Group. In his opinion, the Commission should adopt the compromise draft, which followed the original text fairly closely while taking into consideration some of the observations made during the discussion. It was up to the Commission, and not to a

future special rapporteur, to define precisely what topic should be considered.

66. Mr. RODRÍGUEZ CEDEÑO supported the proposal to delete the words “for this subtitle” from subparagraph (a). The two subtopics were closely interconnected and it was desirable for both of them to be dealt with by the same special rapporteur. The revised text, as amended, allowed the Commission to decide at a future date whether the second part of the topic should also be taken up.

67. Mr. THIAM said he concurred with Mr. Rodriguez Ceneño. The Commission’s mandate related to international liability and not to prevention alone. A special rapporteur would have to be appointed for the topic of liability in general.

68. The CHAIRMAN invited the Commission to adopt the following text of paragraph 6:

“6. The Working Group accordingly recommends to the Commission that:

“(a) The Commission should proceed with its work on ‘international liability for injurious consequences arising out of acts not prohibited by international law’, undertaking first prevention under the subtitle ‘prevention of transboundary damage from hazardous activities’. A special rapporteur should be appointed as soon as possible.

“(b) Further the Commission should reiterate its request for comments by Governments if they have not yet done so on the issue of international liability in order to assist the Commission to finalize its view.”

69. Mr. BROWNLIE said that the wording of paragraph 6 (b) was inelegant to say the least and would have to be improved for purely linguistic reasons.

70. Mr. ROSENSTOCK asked for an assurance that the deletion of the words “for this subtitle” was without prejudice to whether the matter would be handled in the future by one or more special rapporteurs and without prejudice to the issues left in subparagraph 6 (b).

71. The CHAIRMAN said that he reiterated the assurances given to that effect. If he heard no objection, he would take it that the Commission agreed to adopt the report of the Working Group, as amended, which thus became part of the Commission’s report to the General Assembly. It was not his intention to reopen the issue when the Commission came to consider its report to the General Assembly on the work of the current session.

*It was so agreed.*

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

[Agenda item 5]

<sup>10</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>11</sup> (*continued*)

72. The CHAIRMAN invited the Commission to resume its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

PART I (*continued*)

ARTICLE 2 (Use of terms)

73. The CHAIRMAN recalled the decision (2495th meeting) that the adoption of article 2 would be without prejudice to the precise position of that article in the final draft. He also noted that it had been agreed to replace the word *individu* in the French version by the words *personne physique* and to amend the Spanish text accordingly.

*Article 2 was adopted.*

ARTICLE 3 (Prevention of statelessness)

74. The CHAIRMAN recalled that the words *personnes qui avaient* in the French text had been amended to read *personnes physiques qui possédaient*.

*Article 3 was adopted.*

ARTICLE 4 (Presumption of nationality)

75. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 4 (Presumption of nationality), had not been included in the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)<sup>12</sup> but had been drafted by the Drafting Committee in the light of comments made during the discussion, in particular by Mr. Brownlie (2476th meeting). The Committee had felt that the issue was of sufficient importance and generality to warrant a separate provision in Part I, on general principles. The new article reflected a trend in practice, namely, that in cases of State succession persons concerned who were habitual residents of the affected territory *usually* opted for the nationality of the successor State. It also provided a useful backdrop for some of the provisions of Part II, which addressed the issue in some measure.

76. It should be noted that the article provided only for a presumption and was further circumscribed by the opening clause reading: "Subject to the provisions of the present draft articles". In other words, the provision would operate on a residual basis where the need arose. The article was designed to serve as a reminder to successor States that persons concerned who were habitual residents of the affected territory should be deemed to have opted for their nationality and that due consideration

should be given to that issue in resolving questions of nationality. Accordingly, the article was without prejudice to the right of option to which such persons concerned were entitled. The opening clause clearly indicated that the effect of the article should be seen within the overall context of other articles dealing with the right of option and also, perhaps, the obligation to grant nationality in the case of transfer of territory.

77. Mr. THIAM said that, to his recollection, the title of Part I had been changed to "General provisions". If no decision on that point had been taken as yet, he would reserve his comments for later.

78. Mr. ROSENSTOCK said that he had no objection to article 4, on the understanding that the presumption in question was not only subject to the provisions of the current draft articles but was also rebuttable.

79. Mr. GOCO said that, reading article 4 in conjunction with article 5, he was concerned about the situation of persons concerned living in the predecessor State pending the enactment of the appropriate laws by the successor State. It was important to ensure that, in the intervening period, such persons would not be divested of the nationality of the predecessor State.

80. The CHAIRMAN pointed out that the problem mentioned by Mr. Goco was obviated by the fact that article 5 used the conditional "should" rather than the mandatory "shall".

81. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the presumption formulated in article 4 had not prevented and would not prevent persons having the nationality of the predecessor State from retaining that nationality. The presumption could not entail loss of nationality.

82. Mr. BROWNLIE said that the addition of article 4 had been motivated by two considerations, one being the need to limit the possibility of statelessness and the other being the wish to provide a sort of fall-back clause by way of residual protection in precisely the type of case envisaged by Mr. Goco.

*The meeting rose at 1 p.m.*

---

**2497th MEETING**

*Friday, 20 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*later:* Mr. João Clemente BAENA SOARES

<sup>11</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

<sup>12</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,

Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>2</sup> (continued)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

PART I (continued)

ARTICLE 4 (Presumption of nationality) (concluded)

2. Mr. SIMMA said that the text of article 4 (Presumption of nationality) proposed by the Drafting Committee had overcome his problem with the principle of the presumption of nationality, since that presumption was rebuttable.

3. Mr. PAMBOU-TCHIVOUNDA said that the word “provisions” was used for the first time in the draft in article 4 and recalled that Mr. Lukashuk had proposed that Part I should be entitled “General provisions”. Secondly, he wondered whether the words “Subject to” referred to the *lex specialis* dealt with in Part II? If so, that could be made clear by amending the beginning of the article to read: “Subject to the provisions of Part II of the present draft articles”.

4. The term “territory affected by the succession of States” was somewhat vague and it might be useful to specify what territory was meant. It could also be asked whether the presumption was not really a presumption of possession rather than a presumption of acquisition. If so, the words “are presumed to acquire” should be replaced by the words “are presumed to possess”.

5. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), referring to the first point raised by Mr. Pambou-Tchivounda, said that reference was being made not only to the provisions of Part II of the draft articles, but also to some provisions of Part I, such as those on the right of option. It would therefore be better to leave the text as it stood. On his second point, it would also be better not to

define what was meant by the “territory affected by the succession of States” in order to cover all cases of succession, including those affecting only a part of the territory of a State. As to the third comment on whether the word “possessed” should be used in preference to the word “acquire”, he said that, in English, the difference was minimal.

6. Mr. BROWNLIE said that “acquire” was the most appropriate word because it described the process of change that characterized the succession of States, whereas the word “possessed” meant something that already existed, and that was not the case.

7. Mr. MIKULKA (Special Rapporteur) said that Mr. Pambou-Tchivounda’s comment on the word “provisions” was entirely justified and should be taken into account during the consideration of the title of Part I of the draft articles. The expression “territory affected” referred, of course, to the territory described in article 2, subparagraph (a).

8. Mr. PAMBOU-TCHIVOUNDA pointed out that article 2 (Use of terms), subparagraph (a), did not define the words “affected territory”.

9. Mr. KABATSI said that he endorsed the comments made by Mr. Brownlie on the word “acquire”, which denoted a new situation and was therefore the appropriate term.

10. Mr. AL-BAHARNA said that, like Mr. Pambou-Tchivounda, he believed that the words “affected territory” should be defined in article 2. In addition, the words “are presumed to” should be replaced by the word “should”.

11. Mr. GALICKI said that the word “acquire” was entirely suitable because it described a situation that began with the succession of States. He also thought that the words “territory affected by the succession of States” must absolutely not be defined, so that article 4 would continue to be as flexible as possible. The only necessary definitions were those already contained in article 2.

12. Mr. GOCO said that he had expressed reservations about article 4, but could now accept it, since the presumption it provided for was rebuttable. The expression “territory affected” should be understood in the light of the definition of the words “persons concerned”.

13. Mr. ROSENSTOCK said that the “territory affected” was obviously the territory referred to in article 2, subparagraph (a).

14. Mr. AL-KHASAWNEH said that he did not understand how the presumption provided for in article 4 was rebuttable other than by virtue of the provisions of the draft articles. If that was the case, then its value might be questioned.

15. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the presumption was rebuttable solely by virtue of the words “Subject to the provisions of the present draft articles”.

16. Mr. ROSENSTOCK said that the text under consideration was to become a declaration and that States had to

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

be able to adapt its provisions. The will of the "persons concerned" also had to be taken into account. That was why the rebuttability of the presumption stated in article 4 must not be restricted to the provisions of the draft articles, but must also be based on other valid reasons.

17. Mr. BROWNLIE, replying to Mr. Al-Baharna, recalled that he had proposed using the word "should" in place of the words "are presumed to", but there had been no consensus on that proposal. The rule had therefore been stated in the form of a presumption.

18. The CHAIRMAN said that, having taken note of the reservations expressed and if he heard no objection, he would take it that the Commission wished to adopt article 4.

*Article 4 was adopted.*

19. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), introducing articles 5 (Legislation concerning nationality and other connected issues) and 6 (Effective date) adopted by the Drafting Committee, said that article 5 corresponded to article 3, paragraph 1, as proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1).<sup>3</sup> The Drafting Committee had considered it necessary to state explicitly that the legislation to be enacted by the States concerned should be "consistent with the present draft articles". That underscored the importance of respect for the principles set out in the draft articles, to which States were urged to give effect through their domestic legislation. A small drafting change had been introduced in the first sentence of the draft article: the phrase "without undue delay" now appeared after the word "should". The expression "necessary measures" had been replaced by the expression "appropriate measures", which better reflected the fact that the obligation envisaged was an obligation of conduct. The Drafting Committee had also felt that the word "effect" more accurately reflected the idea to be conveyed by the second sentence than the word "impact".

20. Paragraph 2 of article 3 proposed by the Special Rapporteur, as amended, now constituted a separate provision, namely, article 6. Indeed, the Drafting Committee had considered that the principle prohibiting retroactive effect of nationality applied not only to the acquisition of nationality by law, but also to the acquisition of nationality under the terms of a treaty. Because the reach of the principle was broader than article 5, which dealt only with national legislation, the Committee had felt it merited inclusion as a separate provision and had couched it in more general terms. Moreover, the first sentence had now been expressed in terms of an obligation, by the use of the word "shall" rather than the word "should", which was more consistent with the obligation of States to prevent statelessness under article 3 (Prevention of statelessness).

21. The Drafting Committee had considered that it was preferable to use the term "attribution", rather than a term such as "granting", to refer to the act by which a State accorded its nationality to an individual. It had been felt, in particular, that the term "attribution" best conveyed the point that the acquisition of nationality upon the succes-

sion of States was distinct from the process of acquisition of nationality by naturalization. The Committee had also decided to use the term "acquire" when reference was made to the voluntary act of an individual involving the exercise of the right of option. Article 6 was the first article in which those terminological distinctions were drawn and they were used consistently later throughout the text. Accordingly, whenever those terms occurred in the text, they should be understood in the same sense as they were in article 6.

ARTICLE 5 (Legislation concerning nationality and other connected issues)

22. Mr. FERRARI BRAVO said that the text of article 5 proposed by the Drafting Committee was extremely welcome. He nevertheless wondered about the use of the conditional tense, "should", in the two sentences composing the article. The first sentence established a fairly important rule aimed at States and there was no real reason to weaken it by the use of the conditional tense. The text should read: "Each State concerned shall . . . enact".

23. The second sentence should have been made into a separate paragraph. Since it dealt with the measures that States were supposed to take to provide information to persons concerned by a succession of States and since those measures were technical ones deriving from internal law, the conditional tense could be used: "It should take all . . . measures".

24. Mr. PAMBOU-TCHIVOUNDA said he noted that the term "connected issues" appeared in the title. Obviously it referred to issues that would be dealt with later in the article. But would it not be useful to define it in article 2?

25. The problem raised by Mr. Ferrari Bravo was very real and it derived from the scope of the instrument the Commission was in the process of drafting, in other words from its binding nature. As it had been decided to have a declaration, the text did not, strictly speaking, have legal force. In the circumstances, it would be better to couch the first sentence in mandatory terms, namely, "Each State concerned shall . . . enact". The same problem arose in the case of the word *corresponde* in the French text, since it was doubtful that States would be mandatorily required to bring their laws into line "with the present draft articles".

26. Contrary to what Mr. Ferrari Bravo had said, however, the second sentence should likewise be couched in mandatory terms for reasons of logic: if under the terms of the first sentence, States "shall" enact a particular law, then a fortiori they would be required to take further measures to implement that law. Once again, therefore, the mandatory form was required.

27. Accordingly, he proposed that article 5 should be worded to read:

"Each State concerned shall, within a reasonable time period, enact laws concerning nationality in relation to the succession of States and shall take the relevant measures that apply with respect to the persons concerned, for the purpose in particular of apprising

<sup>3</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

them of the right of option provided for under the said laws.”

28. Mr. THIAM, reminding members that it had been decided to avoid the conditional tense, said that there seemed no point in reverting to the matter. He endorsed Mr. Pambou-Tchivounda's idea that the article should be drafted to form a single sentence.

29. Mr. AL-BAHARNA said he shared Mr. Pambou-Tchivounda's concern about the term “connected issues”, which appeared in the title and which had no place there unless it was explained earlier. The title should read simply: “Legislation concerning nationality”, if only because the article itself was silent as to “connected issues”.

30. He endorsed Mr. Pambou-Tchivounda's views on the use of the words “shall” and “should”. For reasons of style, he would prefer the term “reasonable time” to the term “reasonable time period”, which now appeared in the second sentence.

31. Mr. ROSENSTOCK said he considered that the term “connected issues” should be retained as it covered a wide variety of situations, such as retirement pensions, military obligations and social benefits, which had a far-reaching effect on the lives of persons concerned by State succession. It was, however, a very difficult term to define and he therefore proposed that the necessary explanation should be given in the commentary. He shared Mr. Ferrari Bravo's view about the use of the words “shall” and “should”.

32. Mr. MIKULKA (Special Rapporteur) explained that the Commission had decided not to use the present indicative, but to make a distinction between “shall” and “should” depending on whether a customary rule or a recommendation was involved. In the version of article 5 proposed in the third report, as article 3, paragraph 1, the word “should” had been used systematically. There was no firm doctrine on whether a State really had an obligation to enact laws and, what was more, to do so “without undue delay”, as stated in the article. It had therefore seemed to him that wording which was more in the nature of a recommendation would be preferable in that case.

33. Mr. PAMBOU-TCHIVOUNDA said that, in his view, the State was being treated with sufficient consideration if it was allowed a “reasonable period” both to enact laws and to take the necessary measures to inform the persons concerned. It was important, from the population's standpoint, for the article to provide the persons concerned with the possibility of acquiring a nationality.

34. Mr. THIAM, endorsing the previous speaker's views, said that there was no need to treat States with excessive circumspection. After all, the Commission was merely making proposals and any States that did not subscribe to those proposals were at liberty not to adopt them.

35. Mr. HAFNER said that the Special Rapporteur had quite rightly reminded the Commission that, when he had raised the question of the use of the indicative rather than the conditional, particularly with regard to former article 3—now article 5—the majority of the members had been in favour of keeping the conditional. However, without denying the merit of Mr. Mikulka's arguments

concerning the advisability of using the indicative tense for customary rules and the conditional tense for recommendations, it seemed to him that arguments could also be found, in international law, in favour of using the indicative in the current case.

36. Mr. SIMMA said he too believed that the use of the indicative was justified in the current case, as the matter was one of urgent necessity. The replacement of the word “should” by the word “shall” did not necessarily mean that one was necessarily in the realm of codification.

37. Mr. MIKULKA (Special Rapporteur) pointed out that, if the word “shall” was used instead of the word “should” at the beginning of article 5, it would result in States having an obligation to enact “without undue delay” laws concerning not only nationality, but also connected issues. Was that what the Commission really wanted?

38. Mr. GALICKI said that he shared the Special Rapporteur's viewpoint. Another argument in favour of “flexible” wording was that enacting a law was not necessarily the only way of settling the nationality question, so that an obligation to enact legislation, particularly in the case of “connected issues”, could not be imposed on the State.

39. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), speaking as a member of the Commission, said that it might be asking too much of States if they were obliged to enact laws not only on nationality, but also on connected issues, since issues as varied and complex as, say, taxation and education could require lengthy negotiation. One way of getting over the difficulty would perhaps be to add the words “connected issues” to the second sentence, which would remain in the conditional. There would then be no reason why the first sentence could not be couched in the indicative tense.

40. The CHAIRMAN, taking due note of Mr. Sreenivasa Rao's suggestion, said he wondered whether the problem was not already settled by the words “without undue delay” in the first sentence. Obviously, the period of time for taking action which the State was allowed was proportional to the difficulty of the issues to be resolved and that applied in particular to connected issues.

41. Mr. KABATSI said that he too would prefer to retain the conditional tense. A wide variety of situations could arise depending in particular on the size of the territory transferred. If the territory was small and the number of persons concerned very limited, it might even not be necessary for the State concerned to enact laws. There was therefore no need to make it an absolute obligation. Furthermore, States could run into problems in enacting laws within a brief period of time, a fact that should be borne in mind. If the majority of the members of the Commission favoured the use of the indicative tense, however, he would raise no objection.

42. Mr. THIAM said that, since there appeared to be such a majority, it would be better to adopt the indicative tense and, to state in the commentary the reasons why some members had not been in favour of it.

43. Mr. HE, endorsing Mr. Kabatsi's view, said that he would like the Special Rapporteur's recommended solution to be adopted, with the indicative being used for customary rules and the conditional for recommendations. In the case under discussion, the rule in question should remain flexible.

44. The CHAIRMAN, having invited the members to voice their opinion by an indicative vote and having noted that a majority of members had expressed their support for retaining the conditional, he said he would take it that the Commission wished to keep the word "should" in the first sentence of article 5.

*It was so agreed.*

45. Mr. GOCO said that it might be better to delete the second sentence of article 5. The sentence was not very clear and did not indicate whether States were required to meet the obligation to apprise persons concerned through preliminary ratification or whether the arrangements for apprising persons concerned should be determined by the law itself, or else whether the sentence was simply a recommendation for a posteriori appraisal by means deemed appropriate by the State concerned. The obligation established by the first sentence seemed to him to be more than sufficient.

46. The CHAIRMAN, explaining that he had to leave the meeting, said that the title of article 6 of the French text should read *Date d'effet* instead of *Date effective*.

*Mr. Baena Soares took the Chair.*

47. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), replying to Mr. Goco, said that he did not see any real problem with the second sentence of article 5. The emphasis on the effect of legislation clearly showed that the sentence referred to a posteriori measures. Once the legislation had been enacted, it was natural that the State concerned should inform persons concerned of all the consequences that legislation would have so that they might be able to exercise their right of option in full knowledge of the situation. The sentence was simply a recommendation addressed to States.

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 5 as proposed by the Drafting Committee.

*Article 5 was adopted.*

#### ARTICLE 6 (Effective date)

49. Mr. LUKASHUK pointed out that the Drafting Committee used the expression "attribution of nationality" in the first sentence and the expression "acquisition of nationality" in the second. He thought the wording should be harmonized, especially in view of the wording of article 4, which referred to "acquiring" a nationality. In Russian, at any rate, the word for "acquisition" would be perfectly suitable whereas "attribution" would give rise to some problems.

50. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the idea of continuity which the regime being established was designed to ensure was

more clearly conveyed by the expression "attribution of nationality". To speak of "acquisition" as in article 4 would imply the exercise of the right of option, as provided for elsewhere in the draft. Mr. Lukashuk's comment would be taken into consideration by the Drafting Committee when it finalized the text.

51. Mr. GOCO thought that the difference was purely terminological. In his view, "attribution" had a more general meaning and, in the particular case of the exercise of the right of option, it was better to speak of "acquisition". It was thus perfectly appropriate to use the term "attribution" in the first sentence of the article and "acquisition" in the second.

52. Mr. THIAM said that, in his view, "acquisition" was better than "attribution" in the article under consideration. It was more logical to speak of the acquisition of the nationality taking effect on the date of the succession of States. The drafters should adopt the point of view of the person concerned at the time of the acquisition of nationality in question.

53. Mr. MIKULKA (Special Rapporteur), supported by Mr. ROSENSTOCK and Mr. AL-BAHARNA, said that the problem could be considered either from the point of view of the State, in which case "attribution" was the appropriate term, or from the point of view of the person concerned, in which case "acquisition" was appropriate. They were two aspects of the same thing.

54. Mr. GALICKI said that he shared that view, but recalled that the term "attribution" had originally been proposed by Mr. Crawford to replace the word "grant" which implied that the State enjoyed a certain privilege in that regard.

55. Mr. LUKASHUK said that, having consulted all the examples given by the Special Rapporteur in his third report illustrating the practice of States in that area, he had found that the term generally used was "grant" and that the word "attribution" never appeared at all. He hoped that the Drafting Committee would eventually take that usage into consideration.

56. The CHAIRMAN, speaking as a member of the Commission, said that he could understand that the acquisition of nationality could be considered either from the point of view of the State or from that of the person concerned, but had difficulty in seeing why the use of the term "attribution" meant adopting the point of view of the State.

57. Mr. THIAM said that the use of the term "attribution" was incorrect because the person concerned obtained the nationality not through an act of the State which granted that nationality, but through the fact of the succession of States.

58. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 6 as it stood, taking into account the amendment of the French text of the title.

*Article 6 was adopted.*

59. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), introducing articles 7 to 11, said that

article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), which corresponded to article 4 proposed by the Special Rapporteur, was related to article 1 in that it provided a limit to the obligation of States under that article. Although the content of paragraph 1 was implied in other articles, the Drafting Committee had agreed with the Special Rapporteur on the usefulness of maintaining the article in order to avoid any ambiguity in the interpretation of the articles under consideration. Three changes had been made in the article. First, the new opening phrase "Subject to the provisions of article 10" had been inserted in order to make it abundantly clear that the provisions of article 10 were exceptions to paragraph 1 of article 7. Secondly, the Drafting Committee had added the words "any other State" at the end of the paragraph because the provision was concerned with the situation of a person having the nationality of any State other than the predecessor State. Thirdly, in the interests of terminological consistency, the word "grant" had been replaced by the word "attribute", without prejudice, however, to the final decision that would be taken in that regard. Paragraph 2 remained unchanged except for the replacement of the words "such persons" by the words "persons concerned". The title of the article had been modified to correspond to changes made in paragraph 1.

60. Article 8 (Renunciation of the nationality of another State as a condition for attribution of nationality), corresponded to article 5 proposed by the Special Rapporteur, which had been generally supported by the Commission. The only change, which was of a drafting nature, consisted in the replacement of the words "granting" in the title and "acquisition" in the text of the article by the word "attribution".

61. Article 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State), corresponded to article 6 proposed by the Special Rapporteur. The Drafting Committee had deleted the words "in its legislation" from both paragraphs 1 and 2, considering them to be superfluous. In paragraph 2, it had also deleted the words "or the entitlement thereto" because it felt that, where the loss of nationality could not be precluded, then, a fortiori, the loss of the right thereto could not be precluded. Furthermore, where the entitlement referred to in the article was that of the nationality of the predecessor State *before* the succession of States, that was a matter which might, as already explained, be dealt with in a separate provision.

62. Article 10 (Respect for the will of persons concerned), resulted from the merging of articles 7 and 8 proposed by the Special Rapporteur. Article 7, which had received the support of the Commission, had dealt with the right of option and article 8 had dealt, in three paragraphs, with the consequences of choices made under article 7. Article 8, paragraph 1, had dealt with what a State had to do when a person opted for its nationality, namely, grant or attribute its nationality to that person. Paragraph 2 indicated what a State had to do when a person renounced its nationality, namely, withdraw its nationality unless the person would become stateless as a result of such withdrawal. Paragraph 3 had been concerned with preventing any possible abuse of paragraph 2 by stipulating that the person concerned should have

clearly expressed his wish to renounce the nationality or should at least have manifestly acquiesced in the loss of nationality by his conduct. It had also provided that national legislation spelling out clearly the consequences of opting for the nationality of another State was sufficient to satisfy the test of consent on the part of the individual in question. The Drafting Committee had decided to retain paragraphs 1 and 2 of article 8, but not paragraph 3. While recognizing the importance of that paragraph, it had felt that the ideas it expressed were either covered by other articles or were too complex to be stated clearly in one paragraph. The Drafting Committee had therefore decided to delete the paragraph with the expectation that the commentary would cover the ideas involved, including their human rights aspects.

63. Article 10 as finally approved by the Drafting Committee was composed of five paragraphs. Paragraph 1 corresponded to paragraph 1 of article 7 proposed by the Special Rapporteur. The introductory phrase "Without prejudice to their policy in the matter of multiple nationality" had been deleted to avoid explicit endorsement of that policy in relation to State succession. The commentary would, however, make it clear that article 10 was neutral with respect to internal policy on multiple nationality, which was left entirely to the discretion of States concerned. The Drafting Committee had also replaced the word "should" by the word "shall", thus imposing a stricter obligation on States concerned to take account of the will of persons concerned. A further simplification in paragraph 1 had consisted in replacing the phrase "is equally qualified, either in whole or in part" by the words "is qualified". The commentary would explain that States concerned should grant a right of option for their nationality under that paragraph even if, in a particular case, the person concerned fulfilled only some and not all of the conditions for acquisition. The Drafting Committee had also, for stylistic reasons, replaced the word "several" by the word "more". It should also be noted that the plural form had been employed in the whole of paragraph 10 to avoid using "he" or "she".

64. Paragraph 2 corresponded to paragraph 2 of article 7 proposed by the Special Rapporteur, simplified by the deletion of the explicit reference to agreements between States concerned and to national legislation. The commentary would explain that the right of option would be provided for under national legislation or an agreement between States concerned. The commentary would also explain that the term "option" was not limited to the more traditional notion of a choice *between* nationalities, but was used in a broad sense which also covered the option for two or more nationalities; moreover, it covered both making a positive choice ("opting in") and renouncing an automatically acquired nationality ("opting out"). The Drafting Committee had also felt that the right of option should be couched in terms of an obligation for the State, by changing "should" to "shall", in line with the obligation to prevent statelessness under article 3. Lastly, the notion of a "genuine link", referred to in paragraph 2 of article 7 as a criterion warranting the right of option, had been omitted because of its specific connotations; the Drafting Committee had found it preferable to use the more neutral expression "appropriate connection". As Part II of the draft articles spelled out in detail what con-

stituted an "appropriate connection" in a particular case, it had been deemed unnecessary to define the expression at the current stage.

65. Paragraph 3 corresponded to the first half of paragraph 2 of article 8 proposed by the Special Rapporteur and hence provided for the obligation of a State concerned to attribute its nationality to persons concerned who had opted for it. The changes were purely editorial.

66. Paragraph 4, which corresponded to the second half of paragraph 2 of article 8, provided for the obligation of a State concerned to withdraw its nationality from persons concerned who had renounced it unless such withdrawal would make them stateless. The Drafting Committee had made only minor stylistic adjustments to the paragraph, deleting the phrase "in accordance with these draft articles", which was deemed to be superfluous.

67. Paragraph 5 corresponded to paragraph 3 of article 7 proposed by the Special Rapporteur. Aside from purely editorial changes, the Drafting Committee had replaced the last phrase "any rights of option" by "the rights provided in paragraphs 1 and 2" in order to emphasize the broad scope of the word "option", which included both opting in and opting out. The commentary would elaborate on the meaning of a "reasonable time limit", which was a time limit that should ensure the effective exercise of the right of option. The idea of providing a time limit for the exercise of the right of option had been discussed, but it had been decided to leave its definition to the States concerned. The change of title from "The right of option" to "Respect for the will of persons concerned" was intended to reflect the broader understanding of the term "option".

68. Article 11 (Unity of a family), which corresponded to article 9 proposed by the Special Rapporteur, required States concerned to adopt all reasonable measures to maintain the unity of a family that might be impaired as a result of the acquisition or loss of nationality in the succession of States. The only material change made by the Drafting Committee consisted in deleting the phrase "the application of their internal law or treaty provisions concerning", which did not affect the substance. The English version of the title of article 11 had been changed from "Unity of families". The French version remained unchanged.

ARTICLE 7 (Attribution of nationality to persons concerned having their habitual residence in another State)

69. Mr. LUKASHUK asked the Chairman of the Drafting Committee whether he would consider replacing the verb "impose" in article 7, paragraph 2, by a less blunt term such as "grant", particularly in the light of article 10, which stipulated that consideration should be given to the will of persons concerned.

70. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that that suggestion had already been made during the discussion in plenary. The Drafting Group had therefore actually looked into the possibility of changing the term. But as the purpose of the paragraph was to place a restriction on the successor State and to protect persons against the granting of a nationality

against their will, the Committee had taken the view that, from the standpoint of the persons concerned, it really was a matter of ensuring that the nationality was not "imposed" on them. He therefore considered that the term was appropriate.

71. Mr. ROSENSTOCK said that the more the term was softened, the broader the restriction, which was exactly the opposite effect to that intended. It would therefore be better to keep the verb "impose".

72. Mr. THIAM said that he failed to understand the meaning of the draft article, which should be explained and then reworded.

73. Mr. ROSENSTOCK said that, after the United States of America had become independent, Great Britain had continued to treat American citizens as British nationals, particularly for service in the British navy. That was just one historical example of a State "imposing" its nationality on persons against their will.

74. Mr. KABATSI acknowledged that the verb "impose" was blunt, but it was justified by the fact that the State was acting "against the will" of the persons concerned.

75. Mr. BENNOUNA, referring to Mr. Rosenstock's example, said that comparable contemporary situations were sometimes regulated by international agreements. He thought, however, that the wording of article 7, paragraph 2, was clumsy and that, in particular, the combination of the verb "impose" with the words "against their will" was tautological. The paragraph should perhaps be reworded on the basis of the idea that, when persons concerned had their habitual residence in a particular State, they could renounce the nationality imposed on them by another State. In any case, given that the act was always unilateral, since it was a matter of a country's legislation, it was self evident that the persons concerned were not consulted.

76. Mr. MIKULKA (Special Rapporteur), supported by Mr. Sreenivasa RAO (Chairman of the Drafting Committee), proposed as a solution that the word "impose" should be changed to the word "attribute".

77. Mr. BENNOUNA said that such an amendment was fine in linguistic terms but did not solve the problem inasmuch as the text would lend itself to the contrary interpretation that nationality could be attributed only with the consent of the person concerned.

78. Mr. MIKULKA (Special Rapporteur) said that such a contrary interpretation was not possible and that the wording had been drawn from such eminent authors as O'Connell.<sup>4</sup>

79. Mr. THIAM said that the text as proposed was not comprehensible to everybody and should therefore be referred back to the Drafting Committee.

80. Mr. ROSENSTOCK expressed surprise that the question of lack of clarity had not been raised in plenary before article 7 was referred to the Drafting Committee.

<sup>4</sup> See 2475th meeting, para. 37.

The English version of paragraph 2 was clear; if there was a problem in one of the languages, it would suffice to bring it to the notice of the secretariat.

81. The CHAIRMAN proposed that the discussion should be continued at the following meeting.

*The meeting rose at 1.10 p.m.*

## 2498th MEETING

*Tuesday, 24 June 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. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>2</sup> (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1). He recalled that the Chairman of the Drafting Committee had introduced articles 7 to 11 at the previous meeting.

2. Noting that the Commission was making relatively slow progress on the topic under consideration, he appealed to members not to take the floor unless they had a serious objection to the Drafting Committee's text and to refrain from reopening issues already covered in the general debate. Members who had not been present during the consideration of certain articles were advised to consult the relevant summary records, which were already

available. Members who felt compelled to comment were enjoined to do so in a constructive spirit and to propose alternative solutions rather than merely criticize the text proposed by the Drafting Committee.

3. Mr. GOCO said that he fully endorsed the Chairman's comments. The Commission should eschew trivialities and confine itself to points of substance. An inordinate amount of time had been spent at the previous meeting on discussing the difference between "shall" and "should" and between "attribution" and "acquisition".

4. The CHAIRMAN said that he could not agree that the distinction between "shall" and "should" was a triviality. What he was asking members to do was to refrain from reverting to points which had already been discussed and decided upon in plenary, and he would not hesitate to interrupt speakers who ignored that request.

PART I (*continued*)

ARTICLE 7 (Attribution of nationality to persons concerned having their habitual residence in another State) (*concluded*)

5. Further to a comment by Mr. BENNOUNA, Mr. MIKULKA (Special Rapporteur) recalled that, at the previous meeting, some members had taken the view that it was tautological to say "impose its nationality on persons concerned" and "against the will of the persons concerned", in paragraph 2. He proposed that the words "impose . . . on" should be replaced by "attribute . . . to".

6. Mr. ROSENSTOCK said that, to his recollection, that suggestion had already been generally accepted and only the lateness of the hour had prevented the Commission from adopting article 7 thus amended.

7. Mr. BENNOUNA said he wished to place on record that he failed to see the point of the words "unless they would otherwise become stateless" at the end of paragraph 2. Quite apart from the clumsy drafting, did it mean that someone could choose to be stateless? However, he would not press the matter.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 7 with the proposed amendment to paragraph 2.

*Article 7, as amended, was adopted.*

ARTICLE 8 (Renunciation of the nationality of another State as a condition for attribution of nationality)

*Article 8 was adopted.*

ARTICLE 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State)

*Article 9 was adopted.*

ARTICLE 10 (Respect for the will of persons concerned)

9. Mr. PAMBOU-TCHIVOUNDA said that, while hesitating to take the floor in view of the Chairman's strictures, he felt obliged to confess that the substance and

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

meaning of the expression "appropriate connection" in paragraph 2 eluded him. It was not one normally found in connection with matters of nationality.

10. The CHAIRMAN said that observations on points of substance not already settled by the Commission were to be welcomed. Personally, he preferred the well-known legal term "genuine link".

11. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said Mr. Pambou-Tchivounda had raised an important point which had been thoroughly discussed in the Drafting Committee. It would be recalled that the expression originally proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)<sup>3</sup> was "genuine link". Committee members, feeling that a somewhat broader formulation would be more suitable in the context of what was, after all, a purely residual case of the kind dealt with in Part II of the draft, had come to the unanimous decision that the expression "appropriate connection", which was reasonable and not arbitrary, should be employed. In his view, the expression was adequate, but the decision lay, of course, in the hands of the Commission.

12. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the wording originally proposed by the Special Rapporteur.

13. Mr. BENNOUNA said that he could understand the Drafting Committee's objection to the expression "genuine link" in that particular context. "Appropriate" had a specific meaning in other branches of law, such as the law of the sea, and something that was essentially subjective was being presented as objective. Would it not be possible to dispense with the qualifying adjective and say something like "... persons concerned whom the State considers as having a link with it . . ." ? It was the State that would then take the decision.

14. Mr. ROSENSTOCK said that, though he had some sympathy for the remarks just made, he fully endorsed the statement by the Chairman of the Drafting Committee. To use a phrase like "genuine and effective links", taken from another context and generally used in a different sense, would not enhance the precision of the text and would merely confuse the issue. He would be open-minded towards any suggestion by Mr. Bennouna on wording to replace "appropriate connection", but thought it unlikely that any improvement on that phraseology could be found.

15. The CHAIRMAN said the problem raised by Mr. Bennouna might be resolved if the phrase "appropriate connection" was replaced by "connection that it deems appropriate".

16. Mr. SIMMA said he had no objection to that proposal, but could also accept the text as it stood. The most important consideration was that the phrase "genuine link" should be avoided, for the convincing reasons adduced by the Chairman of the Drafting Committee. The subjective element referred to by Mr. Bennouna was evident in the entire paragraph: States were to provide the

right of option if they considered that an appropriate connection existed.

17. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said the Chairman's suggestion would tip the balance slightly against the individual, for the State would be free not to consider that there was an appropriate connection between it and the individual. In the original wording, the discretionary power of the State was circumscribed and the power of the individual to seek nationality if he would otherwise be left stateless was enhanced. In paragraph 2, the right of option must be understood as meaning not that an individual had the right to choose between three or four nationalities, but that if a child born abroad to parents who were nationals of one of the States involved in State succession would otherwise be rendered stateless, he or she had the right to choose the nationality of one of those States. The *jus sanguinis* connection, of being born to parents who were nationals of a given State, was what was considered to be an appropriate connection.

18. Mr. BENNOUNA said he endorsed the comment just made concerning the Chairman's suggestion: it would tip the balance in favour of the power of the State. He would propose, conversely, that the phrase "who have appropriate connection" be replaced by "who are connected to it". That met the point made by the Chairman of the Drafting Committee and did not go into specifics about the nature of the connection.

19. Mr. GOCO suggested that the wording used in reference to citizenship should be employed and that the term "appropriate connection" should be replaced by "appropriate ties". It derived from the *vinculum juris* and covered both the *jus soli* and the *jus sanguinis* relationships.

20. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said the reason why "ties" could not be used was that it would reduce the relationship entirely to one of blood links. It would preclude the eventuality that, for the acquisition of nationality, positive discrimination was envisaged, in other words, that preference was to be given to certain categories of people. It would limit the connection to only one aspect of *jus sanguinis*, namely family ties. Perhaps the Special Rapporteur could provide examples of other appropriate connections, such as ethnic and religious connections.

21. On the other hand, deleting the word "appropriate" would make the scope of the provision too broad and render it less acceptable to States. It would be possible to define "appropriate" in the commentary, distinguishing it from the rigorous connection implied by the phrase "genuine link". An opportunity would be available to review the article on second reading.

22. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Pambou-Tchivounda's remarks and saw no reason, *pace* the Special Rapporteur, why the phrase "genuine link" could not be used. The commentary, which at the first reading stage must set out opposing views, should clearly reflect that situation and specify the scope of paragraph 2.

23. Mr. PAMBOU-TCHIVOUNDA said the underlying concept of paragraph 2 led him to wonder whether the

<sup>3</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

phrase “right of option” was being used in its usual sense. Normally, it meant the right to choose between several nationalities. But in paragraph 2, it seemed to refer, not to the right to choose, but to the right to have a nationality. If a person already had a nationality and did not choose the nationality offered by one of the successor States, how could that person become stateless? The entire first portion of the paragraph was conditioned by the final portion, namely “if those persons would otherwise become stateless . . .”.

24. The CHAIRMAN said those comments would be valid if the paragraph related only to cases of separation of States, but it likewise applied to instances in which a State disappeared following State succession, and in such cases there was indeed a danger of people becoming stateless.

25. Mr. MIKULKA (Special Rapporteur) said that he undertook to mention in the commentary the varying viewpoints on the term “appropriate connection”. For historical accuracy, however, it should be remembered that he had originally favoured the use of “genuine link”, but had bowed to the Commission’s express desire to find another formulation. He would like clarification as to whether, as he believed, paragraph 2 was to be given the widest possible interpretation, to give the broadest possible latitude for acquisition, through the right of option, of the nationality of the successor State by persons who would otherwise be in danger of becoming stateless. If the interpretation was more restrictive, some persons might well be excluded, and the number of people left stateless might rise. He asked whether members of the Commission were dissatisfied with the phrase “appropriate connection” simply because it was vague, or because it might give too many people the opportunity to acquire nationality.

26. The CHAIRMAN said that, personally, he remained unconvinced. In his opinion, what was being called “appropriate” should be termed “genuine”. The best course would be for the Special Rapporteur to prepare a commentary on the interpretation to be given to paragraph 2, on the understanding that members of the Commission would give their reactions in due course.

27. Mr. AL-BAHARNA said that, although he was convinced that the word “appropriate” was best suited to achieving a balance, the concerns expressed by Mr. Pambou-Tchivounda might be met if it was replaced by “legitimate”.

28. The CHAIRMAN asked whether there was any support for that proposal.

29. Mr. CRAWFORD pointed out that, in the English version, the word “an” should be inserted between “have” and “appropriate connection”.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, paragraph 2, with the amendment proposed by Mr. Crawford, on the understanding that the commentary would indicate that some members had expressed doubts about the use of the term “appropriate”, since they were of the view that there was no real distinction between the

meaning in which that term was used in the paragraph and what was commonly understood by “genuine link”.

*It was so agreed.*

31. Mr. LUKASHUK said that he wanted to ask the Drafting Committee to consider the possibility of amending paragraph 4 in such a way as to avoid the use of the expression “the State . . . shall withdraw its nationality from such persons” and replace it with a form of language such as “the State . . . shall recognize the loss of its nationality by such persons”. There were three very serious reasons for making that proposal. First, such wording was legally more correct and was more logical. Secondly, it implied an element of automaticity which was in keeping with actual practice. The Special Rapporteur himself spoke of “automatic acquisition of the nationality of the successor State” in paragraph (7) of the commentary to what had been article 8 as proposed in the third report. Last but not least, the wording as proposed by the Drafting Committee was bound to give rise to objections in the Sixth Committee because withdrawal of nationality was prohibited by the Constitutions of a number of States, including the Russian Federation. Thus, the article would either be amended in the Sixth Committee or, if maintained, would discourage a number of States from accepting the draft as a whole.

32. The CHAIRMAN said he supported that proposal and would suggest that the French version should read *constate la perte de la nationalité*.

33. Mr. FERRARI BRAVO said he, too, supported the proposal, which he understood to mean that the State whose nationality had been renounced would take note of the fact that the person concerned had exercised his or her right of option, thereby creating a new situation.

34. Mr. GALICKI said the proposal would have the effect of according all decision-making powers to the individual. He believed, however, that caution should be exercised before virtually eliminating the role of the State in withdrawing nationality. While he was sympathetic to the idea, he feared that its time had not yet come, and that its practical application could create problems. The views that States would express on that provision would in all likelihood be a cause for concern.

35. Mr. SIMMA said he endorsed those comments. Despite the growing emphasis on human rights and the right to a nationality, the fact remained that nationality was something that was attributed by States and withdrawn as an *actus contrarius*. He did not see the procedure as being the automatic acquisition by an individual of a nationality through the exercise of the right of option, but rather, as one entailing an obligation upon a State to attribute nationality. If, conversely, an individual opted out of a nationality, the State was obligated under the draft article to withdraw that nationality. Under current international law, individuals could not opt in and opt out: there always had to be a constitutive act on the part of the State concerned.

36. Mr. LUKASHUK said his proposal would not in reality modify the legal content or practical application of the provision. As the article now stood, the State did not make a decision, it merely fulfilled an obligation to with-

draw its nationality. The difference between the original and proposed versions was purely one of drafting. The world was now living in the era of human rights and, with all due respect to States, it was something that had to be acknowledged. If the emphasis was to be on the will of individuals, then that had to be reflected in the text, which in its current form gave absolute control to the State.

37. Mr. MIKULKA (Special Rapporteur) said the article dealt precisely with respect for the will of the persons concerned and with the need for States to give effect to the expression of that will. He asked whether there was anything in it that ran counter to human rights. The Universal Declaration of Human Rights<sup>4</sup> referred not only to the right to a nationality, but also to the right to change a nationality. How could a person change nationality if it was impossible to renounce nationality?

38. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said the danger was that multiple nationality could be the result of Mr. Lukashuk's proposal. If a State recognized the loss of its nationality by a person who had initially held it, that did not necessarily mean the State withdrew that nationality. The original version of the text, although perhaps somewhat forceful, seemed to him to put across the right message more clearly than did Mr. Lukashuk's proposal.

39. The CHAIRMAN said that there seemed to be little support for the proposal. He said that, if he heard no objection, he would take it that the Commission agreed that the paragraph should be left unchanged and that a reference to Mr. Lukashuk's proposal, with the reasons, should be inserted in the commentary.

*It was so agreed.*

40. Mr. GOCO said he was concerned, not about the wording, but about the practical application of paragraph 4. When a person opted for the nationality of another State, he should not be entitled to retain the nationality he had thereby renounced. Under the right of option provided for in paragraph 4, a State whose nationality had been renounced needed to postpone giving effect to that renunciation by withdrawing its nationality, in the interests of preventing statelessness. He agreed that the individual should have the right of option, but believed that once the nationality of a given State had been selected, the State whose nationality had been renounced had no business with the person concerned.

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, as a whole, as amended.

42. The CHAIRMAN reminded members of the Commission that paragraphs 1 and 2 of article 8 as proposed by the Special Rapporteur appeared as paragraphs 3 and 4 of article 10. Paragraph 3 of article 8 had been deleted.

*Article 10, as amended, was adopted.*

<sup>4</sup> See 2475th meeting, footnote 8.

#### ARTICLE 11 (Unity of a family)

43. Mr. HE said he continued to wonder whether article 11 had a place in the draft, mainly because the concept of family differed from one country to another. It had been suggested that the word "family" should be used to denote only a husband and wife and their children, as in the European Convention on Nationality.<sup>5</sup> But the provisions of that Convention were not suitable for many Asian, African and Arab countries where the notion of family was much wider. In any event, the subject of the article was more a matter for private and internal law and did not really fall within the scope of State succession. He therefore proposed that the article should be deleted.

44. The CHAIRMAN appealed to members not to repeat what they had already said during the first round of discussions on Part I of the draft, but rather to state simply that they maintained any reservations they had expressed on that occasion.

45. Mr. SIMMA said that he wished to voice a heartfelt plea to retain the article, particularly since State succession would inevitably take place in a specific geographical or regional context where the countries concerned would have comparable, if not identical, concepts of the family.

46. Mr. FERRARI BRAVO said that he maintained the reservations he had already expressed during the first round of discussions and reserved the right to revert to the matter when the Commission came to take up the commentary to the article.

47. Mr. BENNOUNA said that the article reflected soft law in the full sense of the term, since it did not lay down any legal obligation but merely expressed a pious wish. It was not clear whether the words "shall take all appropriate measures to allow that family to remain together" meant that the members of the family should be granted a nationality or whether they should just be issued with a residence permit while retaining their status as aliens. He was not at all satisfied with the article from the legal and technical standpoint, but had no firm proposal to make.

48. The CHAIRMAN, speaking as a member of the Commission, said that he too maintained his earlier reservations and for reasons similar to those expressed by Mr. Bennouna. Unity of a family was not a question of nationality and he failed to see what the article was doing in the draft.

49. Mr. SIMMA said that he failed to see how a provision which started with the words "Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family" could be seen as not having anything to do with nationality.

50. Mr. MIKULKA (Special Rapporteur) reminded members that the Commission had decided to deal with the question of nationality in relation to the succession of States and also with related matters. Consequently, the question of the unity of a family did have a place in the draft.

<sup>5</sup> See 2477th meeting, footnote 7.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 11 on the understanding that the various points of disagreement would be reflected in the commentary to the article.

*Article 11 was adopted.*

52. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 12 to 18.

53. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 12 (Child born after the succession of States) corresponded to paragraph 2 of article 1 as proposed by the Special Rapporteur. It dealt with the very special situation of the children of persons concerned who were born after the date of succession and remained without a nationality because their parents had not, for one reason or another, exercised their right of option. A primary concern of the draft articles was, of course, to prevent statelessness in a case of State succession. Exceptional situations could nonetheless arise, for example, where a person concerned who had had a child after the date of the succession died before exercising his or her right of option and, as a result, the child could remain stateless. In the interests of clarity, the Drafting Committee had reworded the provision to stipulate that a child who had remained stateless in those circumstances had the right to the nationality of the State on whose territory he or she was born. However, that right was granted only where the child was not covered by any other nationality. The purpose and rationale of the article would be explained in the commentary.

54. Members would recall that the Special Rapporteur had proposed an article 11 on guarantees of the human rights of persons concerned. In that connection, the Drafting Committee had agreed with the suggestion put forward in plenary that, in view of its general nature, the article should be incorporated in the preamble. The Committee had considered that the purpose of human rights laws and instruments was to safeguard certain fundamental rights for individual human beings, regardless of where they were located. It had also considered that the placement of article 11 as proposed by the Special Rapporteur could result in an *a contrario* interpretation. Accordingly, the Drafting Committee had reworded that article as a paragraph to be placed in the preamble. The proposed text was set forth in a footnote.<sup>6</sup>

55. Article 13 (Status of habitual residents), which corresponded to article 10 as proposed by the Special Rapporteur, had been the subject of lengthy discussion in the Drafting Committee. The Drafting Committee had taken the view that the article should, in addition to elaborating the human rights aspect of the question, clearly state, above all, the basic rule that the status of habitual residents as such was not affected by State succession. As elsewhere in the draft, habitual residence was a very important criterion in determining rights to nationality in the event of State succession. It was therefore important to provide that a person concerned who was a habitual resident of a territory on the date of the succession would continue to have such status, in particular in order to

determine his or her nationality. That was the purpose of paragraph 1, which, in view of the scope of the draft articles, dealt only with persons concerned.

56. Paragraph 2 consisted of paragraph 1 of article 10 as proposed by the Special Rapporteur, save that the two sentences had been consolidated in one so as to simplify the text. The question of the status of a person concerned as a habitual resident, addressed in paragraph 1, differed, of course, from the question whether such person might or might not retain the right of habitual residence depending on the nationality attributed following the succession.

57. There had been general agreement in the Drafting Committee on the principle, set forth in paragraph 2 of article 10 as proposed by the Special Rapporteur, that a successor State had the obligation to preserve the right of habitual residence in its territory of persons concerned who did not acquire its nationality *ex lege*. Views in plenary had, however, differed considerably on the question whether the same should apply in respect of persons concerned who had lost such nationality voluntarily. Some members had pointed out that, under current international law, a State could require the latter category of persons to transfer their habitual residence outside its territory, but they believed it was important to ensure that persons concerned should be allowed a reasonable time in which to transfer their residence. That approach was reflected in paragraph 3 of article 10 as proposed by the Special Rapporteur. Other members had been of the opinion that the requirement as to transfer of residence did not take account of human rights law at its current stage of development and that the draft article should prohibit States from imposing such a requirement even if that meant moving into the realm of *lex ferenda*. In the light of those considerations, the Drafting Committee had decided not to include any provision on the matter in the draft, thus opting for a solution that affected neither position and allowing scope for some advances to be made in State practice and development of the law in the future.

58. The Drafting Committee had not changed the content of article 14 (Non-discrimination), which the Special Rapporteur had proposed as article 12, but had reworded it to express the idea more emphatically and also to make the notion of discrimination, which had been included in the title but not in the body of the text, explicit. The central object of the article was to prohibit discrimination on any ground. The illustrative list of grounds set forth in the earlier draft had been removed, so that the article could be applied in a wide variety of instances and an *a contrario* interpretation was thereby avoided. Some of the more common grounds of discrimination would be listed in the commentary.

59. With regard to article 15 (Prohibition of arbitrary decisions concerning nationality issues), which corresponded to article 13 as proposed by the Special Rapporteur, the scope of application of paragraph 1 had been restricted to persons concerned, to bring it into line with the scope of the draft articles. Otherwise, only minor changes of a drafting nature had been made to the article.

60. With regard to article 16 (Procedures relating to nationality issues), which corresponded to article 14 as proposed by the Special Rapporteur, the Drafting Com-

<sup>6</sup> See 2495th meeting, footnote 3.

mittee had opted in favour of addressing the obligations laid down in the article directly to States concerned rather than leaving it to those States to ensure that they were fulfilled, as had been proposed earlier. It had further simplified the text by removing the illustration of what the words "relevant decision" might include. The commentary would contain a clear statement that it covered both positive decisions, such as attribution of a nationality, and negative decisions, such as refusal to issue a certificate of nationality. The Drafting Committee had also added the word "effective" before the words "administrative and judicial review" to clarify the standard such a review must meet.

61. Article 17 (Exchange of information, consultation and negotiation) was based on what had been proposed by the Special Rapporteur as article 15. Paragraph 1 of article 15 as proposed by the Special Rapporteur had dealt with the basic issue of the obligation of States concerned to consult with a view to identifying any adverse effects of a succession of States on the persons concerned, in a spirit of positive cooperation and good faith, and to provide solutions, if necessary, through negotiations to any problems involved. Paragraph 2 of that article had dealt with the situation that could arise from non-cooperation or lack of agreement between States concerned regarding the matters involved and had provided for unilateral dispensation for the State concerned in order to be consistent with the provisions of the draft articles. Underlying the two paragraphs had been an attempt by the Special Rapporteur to indicate the basic difference, in nature and purpose, between the provisions of Parts I and II. The Drafting Committee had decided, on the basis of the views expressed in plenary, to delete paragraph 2, which raised more questions than it solved. It had also decided to deal with the underlying issue of the difference between Parts I and II separately, at the beginning of Part II.

62. Article 17 was therefore based solely on paragraph 1 of article 15 as proposed by the Special Rapporteur, which then had been separated into two paragraphs for the sake of clarity. Paragraph 1 of article 17 imposed an obligation on States concerned to exchange information and to consult with a view to examining and identifying the negative repercussions a particular State succession could have on the lives of the persons concerned in such matters as pension, social security, military conscription and so on. The Drafting Committee's view was that exchange of information was an essential component of any meaningful examination of those effects of succession on persons concerned and paragraph 1 of article 17 had therefore been drafted to include an express requirement to exchange information. Paragraph 2 provided that, when necessary, States concerned must seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement. It was nevertheless worthwhile to note two points. First, the obligation to negotiate to seek a solution was not automatic and did not apply where it was not necessary. Clearly, States did not have to negotiate where there were no adverse effects on the lives of persons concerned. Secondly, while States could, if needed, conclude an agreement to eliminate or mitigate such negative effects, it should not be presumed that every negotiation would

inevitably lead to the conclusion of an agreement. The object could be achieved, for instance, by reinforcing national legislation with reciprocal effects or by other administrative decisions.

63. Article 18 (Other States) corresponded to article 16 as proposed by the Special Rapporteur and had been the subject of lengthy debate in both the plenary and the Drafting Committee. With regard to paragraph 1, views had differed on whether the draft articles should deal with the question of the non-opposability vis-à-vis third States of nationality attributed in the absence of a genuine and effective link. It had finally been decided to cover the point in paragraph 1 of the article, although some members had maintained their reservations. The paragraph had therefore been redrafted as a savings clause and simplified. Its scope was strictly limited to persons concerned. The commentary would explain that the words "nothing in the present draft articles" were designed to emphasize that the article was concerned only with the acquisition or retention of a nationality without a genuine and effective link in the context of a succession of States. The word "link" was now qualified by two adjectives, "genuine" and "effective", which had been used in that connection by ICJ in the *Nottebohm* case.<sup>7</sup> To avoid any possible *a contrario* interpretation of the provision, the commentary would also explain that the issue of opposability or non-opposability of a nationality attributed when a genuine and effective link did in fact exist fell outside the scope of the draft articles.

64. The Drafting Committee had also decided to include paragraph 2, even though some members had maintained their reservations on that score. It had been redrafted as a savings clause and its application confined to persons concerned. Since the primary objective was to prevent statelessness, it had been decided not to restrict the paragraph to situations where statelessness was a result of a violation by a State of the principles set forth in the draft articles, as had originally been suggested by the Special Rapporteur. In addition, the Drafting Committee had added the words "for the purposes of their domestic law" to clarify the circumstances in which a State could treat a person concerned as a national of a particular State concerned. It had also replaced the words "in the interest of" by "beneficial to" so as to indicate that such treatment was permitted only when it was, in effect, beneficial to the individual concerned.

65. Lastly, he commended the articles in Part I of the draft for the Commission's approval. Should any minor consequential adjustments be required in the light of the subsequent consideration of Part II, they would of course be referred to the Commission for consideration.

66. The CHAIRMAN thanked the Chairman of the Drafting Committee for his lucid exposé of the changes introduced into Part I of the draft by the Drafting Committee.

ARTICLE 12 (Child born after the succession of States)

*Article 12 was adopted.*

<sup>7</sup> See 2475th meeting, footnote 6.

## ARTICLE 13 (Status of habitual residents)

67. Mr. CRAWFORD said he felt that article 13, paragraph 2, exceeded the scope of the draft articles. However, he would not oppose its content, since it appeared to be reasonably ancillary.

*Article 13 was adopted.*

## ARTICLE 14 (Non-discrimination)

68. Mr. CRAWFORD observed that the provision regarding non-discrimination in article 14 was somewhat limited. He asked whether consideration had been given to the question of whether there should be a prohibition of discrimination against persons who had acquired their nationality through State succession as distinct from other methods. If a problem did arise in practice, he would propose new wording to the effect that "States shall not discriminate against persons on the ground that they acquired their nationality by reason of succession". Otherwise, he would be content with the version of article 11 as proposed by the Special Rapporteur, which tied in with general principles of non-discrimination and was to be placed in the preamble.

69. Mr. MIKULKA (Special Rapporteur) said that, while he had not found any practical instances of such discrimination in his research, he could not rule it out. However, it was a type of discrimination that occurred after the acquisition of nationality, whereas article 14 dealt with discrimination during the process of acquiring a nationality. A possible solution would be to state in the commentary that the discrimination issue had not been exhausted in article 14 and that the Commission had taken note of a problem that might arise at a later stage and was prepared to take it up on second reading. States could then respond and perhaps provide examples of the type of discrimination in question.

70. Mr. FERRARI BRAVO said that the wording of articles 14 and 15 was not sufficiently incisive. Acts by States that were discriminatory on any ground were wrongful acts and hence the appropriate penalty was to declare them null and void. He deferred to the opinion of the Drafting Committee, which had opted for less vigorous wording, but proposed that the commentary should refer to the existence of a radical alternative which insisted on the nullity of such acts.

71. Mr. MIKULKA (Special Rapporteur) suggested that the commentary to article 18, paragraph 2, would be a more appropriate place, since the paragraph provided for a form of "penalty". The question of nullity had been discussed by the Working Group in previous years and eventually rejected. The Working Group had viewed it as a consequence of the non-conformity of legislation with the draft articles. A comment might be made to the effect that some members had advocated an approach which would view such acts as null and void. Although he did not share that view in substance, he recognized its validity.

72. The CHAIRMAN asked Mr. Ferrari Bravo whether such a course would be acceptable, provided reference

was made, *inter alia*, to acts that were not in conformity with articles 14 and 15.

73. Mr. FERRARI BRAVO said that he had no objection to the idea in principle.

74. Mr. PAMBOU-TCHIVOUNDA proposed that the phrase *en opérant des discriminations* in the French version of article 14 should be simplified to read *par des discriminations* or *au moyen de discriminations*.

75. He was concerned at the somewhat vapid flavour of the phrase "discriminating on any ground". Article 12 as proposed by the Special Rapporteur had contained a more explicit reference to the type of discrimination envisaged. He proposed that the phrase should be replaced by "discrimination based on, *inter alia*, ethnic, linguistic, religious or cultural considerations".

76. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the references to the type of discrimination contained in article 12 as proposed by the Special Rapporteur had been deleted after a lengthy discussion in the Drafting Committee. Some members had initially felt that the list was incomplete, and that had led to differences of opinion over which criteria were more important and which might be omitted. It had further been noted that, if some were mentioned and others were omitted, a certain order of priority would be established. The Committee had eventually agreed that the process of identifying categories was unproductive and that it was preferable, and also a more emphatic statement of principle, to outlaw discrimination on any ground. The most common grounds on which discrimination was possible would in any case be listed in the commentary.

77. The CHAIRMAN said he hoped that the list would contain a reference to discrimination based on sex.

78. Mr. GALICKI said he agreed with the Chairman of the Drafting Committee. The broad scope and progressive character of the anti-discrimination formula could actively be viewed as a significant achievement.

79. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 14.

*Article 14 was adopted.*

## ARTICLE 15 (Prohibition of arbitrary decisions concerning nationality issues)

80. Mr. CRAWFORD said he had some difficulty understanding the meaning of article 15, paragraph 1, which seemed to say that, if persons were entitled to a nationality in accordance with a treaty, they were not to be arbitrarily deprived thereof. The word "arbitrarily" was surely superfluous in the context of a treaty obligation, although it might have some foundation in the case of a law, which a State could change.

81. The CHAIRMAN observed that it would have been preferable to raise that difficulty during the discussion of article 13 as proposed by the Special Rapporteur, the wording of which was virtually identical.

82. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had linked the words "shall not be arbitrarily" more to the phrase "denied the right to acquire the nationality of the successor State" than to the preceding phrase "deprived of the nationality of the predecessor State". If there was a problem of syntax, the formulation could be reworded by the Drafting Committee.

83. The CHAIRMAN said he thought that Mr. Crawford's problem was of a more substantive nature.

84. Mr. MIKULKA (Special Rapporteur) said that the purpose of the article was to obviate the risk that some persons might not be covered by legislation or a treaty and hence be deprived of the right to acquire a nationality. Moreover, a law or treaty might be fully consistent with the article yet be applied in an arbitrary fashion. Article 15 was intended to address such cases and might be applied, for example, to action by an individual bureaucrat.

85. Mr. SIMMA drew attention to the saying *lex posterior derogat priori*, which meant in essence that a later legislator might be wiser than an earlier one. The same could be true of the members of the Commission, even within such a short period as the current session. He shared Mr. Crawford's concern regarding an issue of possibly fundamental importance that could not be resolved simply by drafting. He asked the Special Rapporteur whether the bureaucrat he had had in mind could deprive a person with a right to a nationality of that entitlement in a non-arbitrary way. Surely, there was a general prohibition on depriving somebody of a nationality to which he or she had a right. Arbitrariness would constitute an additional element of illegality.

86. The CHAIRMAN said he understood that the point being made by Mr. Crawford and Mr. Simma was that prohibition of the arbitrary exercise of State powers implied recognizing that such powers existed notwithstanding the rights of the persons concerned.

87. Mr. BENNOUNA, speaking on a point of order, said that he objected to the way in which the discussion was being conducted. All members of the Commission should be afforded the opportunity to express their views on a subject before the presiding officer offered his comments.

88. The CHAIRMAN said that he took note of the point of order.

89. Mr. CRAWFORD said that he fully understood and accepted the Special Rapporteur's explanation of the purpose of article 15. He suggested that the following rewording of paragraph 1 might preclude any misinterpretation:

"In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, to which they are entitled in relation to the succession of States."

The emphasis would then be shifted to the application of laws or treaties.

90. Mr. BENNOUNA said that, as a jurist, he experienced difficulty with the idea of prohibiting "the arbitrary", which appeared to be a great discovery. Indeed, arbitrary acts were prohibited in all circumstances, as a fundamental legal principle. The same procedure should be followed as in the case of article 11 as proposed by the Special Rapporteur: the content of article 15 should be reformulated as a paragraph of the preamble which would emphasize the need to refrain from any arbitrary acts. Even that was labouring the point.

91. To his mind, the article related to a limited discretionary power offered to the State rather than a State's right exercised pursuant to the provisions of a law or treaty. If it related to a right, Mr. Crawford's comment was perfectly justified. If it referred to a limited discretionary power, such power could and should be exercised when certain conditions were fulfilled, but the State could not exercise it arbitrarily. The wording of the article might therefore be improved by introducing that notion.

92. Mr. PAMBOU-TCHIVOUNDA said that Mr. Ferrari Bravo, in speaking of wrongful acts, had drawn attention to what should have been the object of article 15. The acts in question were undoubtedly illegal. However, he was unhappy with the word "arbitrary". Legally speaking, the term "arbitrary" referred not only to what was contrary to the law but also to what was not substantiated. Where the State considered that the conditions for non-attribution of nationality existed and it substantiated its decision, who was to say whether its action was arbitrary or not. The underlying idea was to prohibit and punish wrongful and illegal acts in situations covered by specific laws and international treaties. He added that it would be logical, in his view, to move article 15 and place it immediately after article 10, on respect for the will of persons concerned.

*The meeting rose at 1.05 p.m.*

## 2499th MEETING

*Wednesday, 25 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Bahama, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,

Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>2</sup> (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

**PART I (*concluded*)**

**ARTICLE 15 (Prohibition of arbitrary decisions concerning nationality issues) (*concluded*)**

2. Mr. LUKASHUK proposed that the words “or general international law” should be added at the end of paragraph 1, since human rights issues were essentially a matter of general international law rather than of treaty law. Moreover, since the Commission was engaged in drafting a “soft law” instrument which would be incorporated in international law once its rules had been recognized as being rules of customary law, it was important to ensure that the provisions of article 15, paragraph 1, did not stand in the way of the implementation of the articles thus drafted.

3. Mr. SIMMA said that, in his view, the right of a person to acquire a certain nationality was by no means a matter of general international law and that the words “any law or treaty” were correct and should be retained.

4. Mr. ROSENSTOCK, referring to Mr. Lukashuk’s proposal, said that, in his view, it would be better to delete the words “in accordance with the provisions of any law or treaty”. One of the advantages of doing so would be that general international law would not, for the future, be expressly excluded.

5. Mr. BROWNLIE said he agreed with Mr. Simma that general international law was without relevance to the paragraph. He was not greatly in favour of deleting the last part of paragraph 1, which he considered to be useful. However, the words “any law” were too general and the Commission should request the Drafting Committee to look into ways of making them more specific.

6. Mr. SIMMA recalled that some members, including Mr. Crawford and himself (2498th meeting), had raised the question of the interpretation of the word “arbitrarily” and, in particular, had wondered whether persons could be deprived of their nationality otherwise than arbitrarily. One way of avoiding the ambiguity would be to amend the article to read: “No one shall be deprived of his or her entitlement to nationality through an arbitrary application of the provisions of any law or treaty”. In that case, the reference to the “provisions of any law or treaty” would be essential.

7. Mr. PAMBOU-TCHIVOUNDA said that, notwithstanding the general nature of the terms used, the paragraph dealt specifically with a legality directly related to the topic, in other words, to nationality or to statelessness. Retaining the reference to the provisions of laws or treaties somewhere in the paragraph might make it possible to delete the word “arbitrarily”, which he found subjective.

8. Mr. AL-BAHARNA said that any ambiguity would be removed if the last part of paragraph 1 was deleted and explanations were included in the commentary on the provisions of laws, treaties or general international law.

9. The CHAIRMAN suggested that the Commission should refer the article back to the Drafting Committee with the request that it should be reviewed in the light of the amendments proposed in plenary.

10. Mr. MIKULKA (Special Rapporteur) said that referring article 15 back to the Drafting Committee should be based on very serious reasons, whereas the problems raised were quite minor. In the first place, some of those problems arose from an imperfect knowledge of the provisions of other relevant instruments, including article 15 of the Universal Declaration of Human Rights,<sup>3</sup> paragraph 2 of which referred to the concept of arbitrary deprivation of nationality. Secondly, as to the interpretation of the Commission’s precise intention in the article under consideration, he thought that Mr. Crawford’s proposal (2498th meeting) that the last part of the paragraph should be moved to the beginning and that the words “in accordance with” should be replaced by the words “in the application of” was acceptable. He had the impression that it had received the support of many members.

11. Mr. CRAWFORD read out the text he was proposing to replace article 15, pointing out that the new version had only one paragraph:

“In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State or arbitrarily denied the right to acquire the nationality of the successor State or any right of option to which they are entitled in relation to the succession of States.”

12. Mr. LUKASHUK said that he had no basic objection to a provision which merely proclaimed a general prohibition of any arbitrary decision on issues of nationality. The wording nevertheless chosen seemed to restrict that principle, since it could be interpreted to mean that persons concerned should not be arbitrarily deprived of nationality only “In the application of the provisions of

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

<sup>3</sup> See 2475th meeting, footnote 8.

any law or treaty". In his view, it would be best to delete those words.

13. Mr. ROSENSTOCK, Mr. GALICKI and the CHAIRMAN, speaking as a member of the Commission, said that they were also in favour of the deletion of those words, which were unnecessarily restrictive.

14. Mr. MIKULKA (Special Rapporteur) said that discussion on article 15 had at first focused on the question of where it was to be placed in the draft. He had explained that, unlike other provisions, article 15 dealt with the stage subsequent to the entry into force of a treaty, that is to say that of the implementation of the treaty's provisions. It was at that point that any arbitrary decision on the part of national administrations had to be avoided and that was what the words in question were designed to make clear. If they were deleted, he would have no other choice but to reproduce them, without change, in his commentary.

15. Mr. GOCO proposed that articles 14, 15 and 16 should be combined in a single article which would be entitled "Non-discrimination, prohibition of arbitrary decisions and processing of applications without delay". For reasons of clarity, he would also have preferred that the words expressing the idea that persons concerned were entitled to nationality in relation to the succession of States should appear at the beginning of the paragraph.

16. Mr. CRAWFORD said that the best solution would be to redraft the paragraph completely so as to state that nationality could not be arbitrarily denied to persons concerned who were entitled: (a) to the nationality of the predecessor State; (b) to the nationality of the successor State; or (c) to the choice of their nationality.

17. Mr. ADDO said that it would not be wise to make such a change.

18. Mr. PAMBOU-TCHIVOUNDA said that he also had doubts about the words "In the application of the provisions of any law or treaty", whose meaning he did not understand in the current context. He had reservations about the ambiguity of the vague concept of legality.

19. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with Mr. Pambou-Tchivounda: he also did not see what exactly was meant by "provisions of any law".

20. Speaking as Chairman, he said that, as he understood it, the Commission had not taken up Mr. Goco's suggestion that articles 14, 15 and 16 should be combined; did not wish to delete the words "In the application of the provisions of any law or treaty" from the text proposed by Mr. Crawford; and, if he heard no objection, he would take it that the Commission agreed to adopt the new text of article 15 as proposed by Mr. Crawford.

*Article 15, as proposed by Mr. Crawford, was adopted.*

#### ARTICLE 16 (Procedures relating to nationality issues)

21. Mr. PAMBOU-TCHIVOUNDA said that, unless the title of Part I of the draft was amended, articles 16 and 17

(Exchange of information, consultation and negotiation) were out of place because they were not principles.

22. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "administrative or judicial" should be deleted because he was not sure whether the word "or" was appropriate.

23. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the result of a review might sometimes be legally not binding. The qualifying phrase "administrative or judiciary" at least had the merit of clearly circumscribing the review as a process whose result was enforceable in internal law.

24. The CHAIRMAN said that his problem was with the word "or", which implied that the two kinds of review were mutually exclusive, whereas it ought to be possible, where necessary, to carry them out successively.

25. Mr. BROWNLIE said that he was in favour of retaining the current wording, which attempted to combine common law modes of review with those of civil law. The essential point, in his view, was that the review mechanism should be directly invocable by the person concerned.

26. The CHAIRMAN said that that point was already covered by the word "effective".

27. Mr. GOCO proposed that the end of the article should be reworded to read: "shall be open to appeal and/or review" because the word "review" implied that there had been an abuse of discretion amounting to lack of jurisdiction, whereas the word "appeal" referred to a process in internal law that did not necessarily have that connotation.

28. The CHAIRMAN pointed out that that proposal introduced a new element.

29. Mr. ADDO said that he supported the idea of retaining the words "administrative or judicial" for the reasons put forward by the Chairman of the Drafting Committee and also because the person concerned should be given a choice between the two types of review or should be able to use them consecutively.

30. Mr. RODRÍGUEZ CEDEÑO said he supported the text proposed by the Drafting Committee, but thought that, in Spanish, the word *revisión* should be replaced by the word *recurso*.

31. The CHAIRMAN confirmed that, in Spanish, *recurso* was the most suitable term.

32. Mr. PAMBOU-TCHIVOUNDA said he hoped that the Commission would retain the two adjectives to describe the nature of the remedies, but proposed that the word "effective" should be deleted. It was meaningless, since the article dealt with a possibility that could not be effective until it had been realized.

33. Mr. HAFNER said that he was in favour of retaining the text as it stood, for the reasons put forward by the Chairman of the Drafting Committee. The solution of replacing the word "or" by the word "and" would be even less acceptable. It would be better to retain the word "or"

and to explain in the commentary that that was not to be taken as an exclusive alternative. An explanation of the meaning between “review” and “appeal” could be given in the commentary. The word “effective” had to be kept in order to cover the case brought up by Mr. Brownlie.

34. The CHAIRMAN, supported by Mr. Sreenivasa RAO (Chairman of the Drafting Committee), said the proposal that the text should be left as it stood and that it should be explained in the commentary that the word “or” did not involve any exclusion was a reasonable solution.

35. Mr. GOCO referred again to the need to draw a distinction between an appeal, which raised questions of law, and a review, which did not necessarily do so.

36. Mr. DUGARD pointed out that the problem arose from the fact that different legal systems had differing approaches to what constituted an appeal or a review. Rather than amending the article, however, it would be better to provide an explanation in the commentary.

37. Mr. HE said that he wished to place on record his reservations about the word “effective”.

38. The CHAIRMAN pointed out that, in the English text of the Convention for the Protection of Human Rights and Fundamental Freedoms, the term used was “review”. He suggested that the Commission retain that term in article 16, it being understood that its meaning would be explained in the commentary.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 16.

*Article 16 was adopted.*

ARTICLE 17 (Exchange of information, consultation and negotiation)

40. The CHAIRMAN said he took it that the Commission agreed to adopt article 17 as proposed by the Drafting Committee.

*Article 17 was adopted.*

ARTICLE 18 (Other States)

41. The CHAIRMAN, speaking as a member of the Commission and supported by Mr. PAMBOU-TCHIVOUNDA, said that, in paragraph 1, he would like to see the word “genuine” deleted because it was inappropriate: it was enough to describe the link as “effective”. The Chairman of the Drafting Committee had explained that the word had been taken from the judgment of ICJ in the *Nottebohm* case,<sup>4</sup> but only the word “effective” was used in the French language version of that judgment, which was the original text.

42. Mr. RODRÍGUEZ CEDEÑO, supported by Mr. CANDIOTI, said that the same problem arose in the Spanish text. The word *efectivo* would be enough.

43. Mr. LUKASHUK said that the terminology used in Russian was also deficient. A single word would suffice, as in French and Spanish.

44. Mr. BROWNLIE said that the *Nottebohm* case had been one of abuse of the right to grant nationality or of fraudulent naturalization, hence the use in English of the words “genuine and effective”.

45. Mr. ADDO said that those two words were perfectly clear in English and he did not see why one of them should be deleted.

46. The CHAIRMAN said he had checked the terminology used in the *Nottebohm* case: the word *effectif* had been translated variously, as “genuine”, “genuine and effective”, “real and effective” and “effective”. He asked the English-speaking members of the Commission whether they would have any objection to the use of the word “effective” alone.

47. Mr. MIKULKA (Special Rapporteur) said the Commission could indicate in the commentary that the word “effective” referred to the concept dealt with by ICJ in the *Nottebohm* case.

48. Mr. BROWNLIE said that the use of the word “effective” alone was entirely satisfactory and that a link that was not “genuine” would not be “effective”.

49. The CHAIRMAN said he took it that the Commission agreed to use only one adjective to qualify the word “link” in article 18, paragraph 1, namely, *effectif* in the French version, “effective” in the English and *efectivo* in the Spanish, and the corresponding term in the other languages, it being understood that it would be made clear in the commentary that the term covered all the words used cumulatively by ICJ in its judgment in the *Nottebohm* case.

*It was so decided.*

50. Mr. CRAWFORD said that, in paragraph 2, he urged that the words “for the purposes of their domestic law” should be deleted because they implied, *a contrario*, that States were not allowed to treat the persons concerned as nationals of any State for any purposes other than those of their domestic law. Yet it was precisely for the purposes of international law that States needed to be able to treat such persons as nationals of a given State. For example, residents of bantustans had been considered by States to be nationals of South Africa for the purposes, not of domestic law, but of international law, under which the policy of apartheid had been illegal. The paragraph as currently drafted privileged a State that did not treat certain persons as nationals when it ought to, or vice versa, over States that acted in conformity with international law.

51. Secondly, the cases in which such issues had arisen in the past had almost always involved a conflict of laws, for example, when the courts of one State had applied the racially discriminatory laws of another State. That had not been a purely domestic issue.

52. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) pointed out that an underlying theme of the text was that nationality had essentially to be provided for in internal law, that internal law must be in accordance

<sup>4</sup> *Ibid.*, footnote 6.

with certain international standards and principles and that States did not have total discretionary power in that regard. If the words were deleted, paragraph 2 could be interpreted as authorizing third States to adopt a position contrary to that of the State concerned on a matter of nationality, and, in the absence of any qualifications or explanations, that would mean that internal law would be entirely subordinated to international law, something that States would never accept.

53. Mr. CRAWFORD pointed out that paragraph 2 was a savings clause. It would be odd if States, the majority of which wanted to do what the provision gave them the right to do, should disarm themselves in the face of unlawful conduct on the part of the State concerned. As a savings clause, the paragraph struck a reasonable balance, leaving open broader issues which in any event were outside the scope of the draft articles because they involved fundamental illegality, while reserving, and rightly so, the right of other States to respond for the purposes of their domestic law.

54. Mr. BROWNLIE pointed out that, since the draft articles dealt with nationality in relation to the succession of States, they were not directly related to acts that were fundamentally invalid under international law. That was the real problem to which the paragraph gave rise. The fact was that some conferments of nationality were invalid because they were contingent on invalid acts by States affecting other States. Although paragraph 2 did not deal with that type of problem, there seemed to be some confusion. Perhaps another proviso should be incorporated in the text to take care of that specific issue.

55. Mr. ROSENSTOCK said that he would have no objection if it were made clear in the preamble that the draft articles dealt only with legitimate State succession. Also, as paragraph 2 was a savings clause, the Commission need not be afraid to delete the words "for the purposes of their domestic law".

56. Mr. GALICKI said his concern was that the effect of Mr. Crawford's proposal would be to widen the scope of the savings clause in paragraph 2. He would therefore prefer to keep the text as drafted. Although the paragraph embodied a savings clause, it invited States to undertake certain activities that could be regarded as "unfriendly" and might therefore cause problems. As the Commission had stressed that questions of nationality were a matter mainly for internal law, it should limit the effect of acts carried out by other States in that area to the domestic law of those States. If such acts had international effects, the paragraph might not be accepted by States.

57. Mr. CRAWFORD said that Mr. Galicki's view could be reflected in the commentary. The Commission should not, however, avoid taking positions of principle, particularly on first reading, out of concern that they would be unacceptable to States. It was of course true, as Mr. Brownlie had said, that it was not a matter of looking at the validity of the State succession, but, even in the case of valid succession, fundamentally unlawful acts could be carried out: a State could, for instance, deny its nationality to certain persons on ethnic or racial grounds. Third States should not be defenceless in the face of such a situation.

58. Mr. MIKULKA (Special Rapporteur) said that he naturally endorsed Mr. Crawford's proposal: the restrictive clause in question had not appeared in the original draft article he had proposed in his third report (A/CN.4/480 and Add.1).<sup>5</sup> The problem was that, as it stood, the paragraph could be misinterpreted so that it limited the possibility of completely lawful action by third States in the face of unlawful situations created by the State concerned.

59. As to those who opposed the proposed deletion on the ground that paragraph 2 could authorize States to intervene in the domestic affairs of the State concerned, that paragraph provided for the situation of stateless persons and so did not come within the jurisdiction of that State; accordingly, there could be no intervention in the domestic affairs of a State that should have granted its nationality, but had not done so.

60. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that he was entirely in agreement with Mr. Crawford. States must have the right to assess when wrong was done by other States and, in such a case, there must be a remedy. If the expression in question was deleted, the article would mean that a State could substitute its discretion for the discretion of another State that had wrongfully denied its nationality to persons concerned.

61. Mr. BROWNLIE proposed that paragraph 2 should be deleted in its entirety. It was an inefficient provision and could even have damage in it. It dealt with the problem of the invalidity of acts of State in international law—a problem the Commission had decided to leave on one side.

62. Mr. GALICKI, Mr. ADDO and Mr. RODRÍGUEZ CEDEÑO said they too considered that paragraph 2 should be deleted.

63. Mr. DUGARD said he considered, on the contrary, that it was important to keep the paragraph. The Commission had debated at some length the principle whereby the nationality of no person could be removed on racial or ethnic grounds. If the paragraph were deleted, that would dispel the consensus reached on the matter, which in fact had never been closely examined and on which State practice remained uncertain. The Commission must have the courage to deal with it in its draft.

64. The CHAIRMAN, having sounded out the Commission, noted that it was in favour of retaining paragraph 2 of article 18 and of deleting the words "for the purposes of their domestic law". He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 18, as amended.

*Article 18, as amended, was adopted.*

*Part I, as amended, was adopted.*

*Mr. Baena Soares took the Chair.*

<sup>5</sup> For the text of the draft articles proposed by the Special Rapporteur, *ibid.*, para. 14.

**Reservations to treaties (*continued*)\* (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>6</sup> A/CN.4/479, sect. D, A/CN.4/L.540)**

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

65. The CHAIRMAN reminded members that 1997 was the fiftieth anniversary of the establishment of the International Law Commission and that the Sixth Committee was all the more likely to pay much more attention to its work. It would therefore be desirable to reach some concrete, albeit provisional, conclusions, on the basis of the Special Rapporteur's second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

66. He would suggest that the Commission should proceed to discuss that report in four stages and, in that connection, he invited the members of the Commission to focus on each of the four parts in turn and to refrain from speaking on other matters. He would also draw attention to the fact that the Commission was short of time. The discussion should end on 1 July.

67. Mr. KATEKA said he regretted that the Commission had to discuss such a rich report in haste. Rather, it should reflect at leisure on a vast problem that it had barely started to consider. Also, while the idea of examining the report in four stages was perhaps interesting, that mode of procedure should not prevent members wishing to make a general statement from being heard by the Commission. It had before it not a set of draft articles that could be analysed article by article, but a general study on which he for one intended to make general comments in the near future.

68. Mr. ROSENSTOCK and Mr. ADDO said they too trusted that members of the Commission would not be deprived of the possibility of making a general statement if they considered it useful.

69. The CHAIRMAN said that his suggested way of proceeding had been proposed by the Special Rapporteur and approved by the Commission. He was therefore surprised that what had been agreed with regard to the arrangements for the discussion was being questioned. In any event, all members were always free to make the comments they wished.

70. Mr. PELLET (Special Rapporteur), introducing chapter II of his second report, said that, unlike chapter I, which had contained solely background information, chapter II dealt with two substantive, and closely linked, questions that were highly sensitive and controversial; first, the question of the unity or diversity of the rules applicable to reservations to treaties and, secondly, the more specific question, which was actually covered by the first question, of reservations to human rights treaties.

71. For reasons he would return to later, he very much hoped that the Commission would not simply comment

on that part of the report, but that it would infer from that chapter conclusions which were as firm and clear as possible and which he had tried to summarize in the draft resolution that appeared at the end of the second report.

72. The "old" members of the Commission would remember that he had already introduced the same report in 1996.<sup>7</sup> In the introduction he proposed to make for the new members, he would endeavour to take account of the reactions to which his statement had given rise in the Commission itself and in the Sixth Committee and also to express a few new ideas. In that connection, he again invited all members of the Commission to indicate any oversights they may have noted in the bibliography, in annex I to the second report, and which prompted one remark of interest: out of the some 300 titles it included, approximately 60 titles of works or articles related to reservations to conventions on human rights or humanitarian law. That showed, if indeed it were necessary to do so, how important and topical the question of reservations to treaties in that field was. There were many recent works on the matter, including an excellent study by a former member of the Commission, Mr. B. Graefrath, entitled "Reservations to human rights treaties—new drafts, old issues".<sup>8</sup> Also, Mr. Crawford had organized a seminar in Cambridge in March 1997 in collaboration with Professor Philip Alston<sup>9</sup> and an even more recent symposium of the Société française pour le droit international had been held on relations between general international law and human rights.

73. The human rights treaty monitoring bodies had not been inactive, even though they had recently shown more circumspection following the irritation their vehemence had caused some States. That was attested to, for example, by the fact that, in January 1997, the Committee on the Elimination of Discrimination against Women had considered a report of the Secretariat on reservations to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>10</sup> The Committee had, however, not taken any decision on that report, pending the Commission's work on the matter.

74. States had also continued to take a stand in the matter, both in their treaty relations and in their relations with the competent human rights bodies: the relative abundance of replies he had received to the questionnaire<sup>11</sup> he had addressed to them was evidence of their interest. He extended special thanks to all those who had provided him with detailed information about their practice in that regard.

75. Those new elements had, however, not caused him to make any radical change in his initial analysis and the reactions of the members of the Commission and of rep-

<sup>7</sup> See 2487th meeting, footnote 3.

<sup>8</sup> Freely translated from the German ("Vorbehalte zu Menschenrechtsverträgen—Neue Projekte und Alte Streitfragen", *Humanitäres Völkerrecht*, vol. 9 (1996), No. 2, pp. 68-75).

<sup>9</sup> The seminar was co-sponsored by the European University Institute and the Research Centre for International Law, Cambridge University.

<sup>10</sup> See Report of the Committee on the Elimination of Discrimination against Women (Sixteenth and seventeenth sessions) (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 38 (A/52/38/Rev.1)*), para 353.

<sup>11</sup> See 2487th meeting, footnote 16.

\* Resumed from the 2487th meeting.

<sup>6</sup> See *Yearbook* . . . 1996, vol. II (Part One).

representatives of States in the Sixth Committee had tended to strengthen the positions he had taken at the forty-eighth session, save perhaps for some minor points which related to the competence and role of the monitoring bodies and which he had decided to alter slightly.

76. As he had already explained (2487th meeting), he had tried to answer the following two key questions: first, should the reservations regime be adapted to take account of the object and/or nature of the treaty concerned (a question dealt with in chapter II, sections A and B) and, secondly, should specific rules regarding reservations be applied in the case of human rights treaties (section C)?

77. If the first question was answered in the negative, that is to say, if it was felt that the reservations regime was and should remain homogeneous, the answer to the second question seemed to follow as a matter of course: there was no reason to exempt human rights instruments from the general rules governing reservations. It would perhaps be wise, however, to establish that such was really the case and to investigate whether there might not be grounds for making an exception in that area, as advocated by human rights specialists. But that still left an aspect of the problem unsettled since, even if the second question was answered in the negative, the extent and limits of the powers vested in the growing number of bodies established to monitor the implementation of those instruments must still be determined.

78. He said that, on the question whether the legal regime applicable to reservations to treaties was and should remain homogeneous, he noted that the legal regime was based on the 1969 Vienna Convention, the provisions of which were reproduced in the 1986 Vienna Convention. It sufficed to read articles 19 to 23 of the 1969 Vienna Convention to conclude that there was no categorical answer to the question because the Convention stipulated that special rules were applicable to certain treaties. Thus, article 20, paragraphs 2 and 3, laid down specific conditions governing the validity of reservations to treaties concluded by a limited number of States or to the constituent instruments of international organizations. That clearly indicated that the authors of the 1969 Vienna Convention had not been unaware of the problem of the unity or diversity of the applicable rules, since they had not hesitated to differentiate the reservations regime where it was deemed to be appropriate. It was interesting to note, however, that they had found it unnecessary to make an exception for non-synallagmatic treaties such as codification conventions and human rights instruments, which he would refer to for convenience sake as "normative treaties". When they had looked into the question whether the non-contractual nature of such treaties should have implications for the legal regime applicable to reservations, they had obviously concluded that it did not. The only article of the 1969 Vienna Convention that provided for special treatment for humanitarian treaties was article 60 on termination or suspension of the operation of a treaty as a consequence of its breach.

79. The problem had, however, resurfaced in the meantime and a number of authors had argued that the "Vienna regime" (as established by articles 19 to 23 of the 1969 and 1986 Vienna Conventions) was not suited to normative treaties in general and to codification conventions and

human rights instruments in particular. The idea of a separate reservations regime had gained ground, especially in human rights bodies, and, in that context, the Commission could not possibly fail to discuss the subject. He had therefore decided to devote the bulk of chapter II of his second report to the subject. In chapter II, section A, he noted that the "normative treaties" category, which broadly corresponded to the former "law-making treaties" category, was extremely diverse. Not only did "normative treaties" exist in a variety of different fields (human rights instruments, but also codification conventions, private international law conventions establishing uniform law, ILO conventions, conventions on the law governing armed conflicts, certain technical treaties), but it was also unusual for a treaty to be entirely normative or entirely synallagmatic: in most cases, a single treaty contained both "contractual clauses" in which States recognized mutual rights and obligations and "normative clauses". That was also true in the area of human rights, even in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, which most authors—and ICJ, judging by its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>12</sup> and its judgment in 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>13</sup>—viewed as the quintessential normative treaty. The term "normative treaty" must therefore be understood as referring in reality to treaties in which normative provisions, that is to say provisions that were neither contractual nor reciprocal, prevailed in quantitative and qualitative terms.

80. Those findings led the Special Rapporteur to conclude that, if a special regime should be applied in the normative field, it would actually be applicable to "normative provisions" because the notion of a "normative treaty" was not very convincing in legal terms.

81. The problem was therefore whether the Vienna regime governing reservations to treaties was suited to "normative provisions" as opposed to contractual or synallagmatic provisions. That was the question to which he had endeavoured to reply both *de lege lata* and *de lege ferenda* in chapter II, section B.

82. In chapter II, section B.2, of his second report, he believed he had demonstrated that, although the authors of articles 19 to 23 of the 1969 Vienna Convention were aware of the fact that a general rule was probably not applicable under ideal circumstances to all treaties, they had conceived those articles as being applicable to all treaties that did not contain contrary provisions (except for limited treaties and constituent instruments of international organizations). Early in its proceedings, the Commission had itself recognized the desirability of formulating a rule that would be applicable to the largest possible number of cases and had concluded in its report to the General Assembly on the work of its fourteenth session that the rules it proposed referred to all multilateral treaties except those between a small number of States for which unanimity was the rule.<sup>14</sup> The United Nations Con-

<sup>12</sup> See 2487th meeting, footnote 7.

<sup>13</sup> See 2478th meeting, footnote 3.

ference on the Law of Treaties<sup>15</sup> had endorsed those views for excellent reasons that he had endeavoured to set forth in chapter II, section B.3 (b) of his report. The main reason was that the Vienna regime, influenced by Latin American practice, was highly flexible and adaptable: firstly, by prohibiting States from formulating a reservation that was incompatible with the object and purpose of the treaty, article 19, subparagraph (c), of the 1969 Vienna Convention guaranteed that a State could never deform a treaty by means of a reservation. The pitfall of rigidity had been avoided through the decision to make the admissibility of a reservation dependent on a treaty's object—hence on its very essence rather than its integrity. Article 20, paragraphs 4 and 5, as well as articles 21 and 22, also established a liberal system, allowing States parties to remain “unaffected” by the reservation, since they could decide to object to it and to adjust the extent of their objection. Lastly and most importantly of all, it should be noted that the Vienna regime was strictly residual and applicable *only if* the negotiators had not made provision for different rules or supplementary filtering mechanisms in the text they had drafted. It followed that the regime should be viewed not as a yoke, but as a safety net providing assurances that, even in the absence of specific provisions, the rule applicable to a particular case would be clear. The regime could be set aside by States which so wished, *inter alia*, in the light of the particular nature of the treaty concerned. But the fact that that option was rarely used, even for human rights instruments, seemed to indicate that the Vienna rules were not only adaptable, but also well suited to existing needs. The appropriateness of adding “model clauses” to the draft articles in all cases where the Commission saw fit to suggest possible variations on the Vienna rules was thereby confirmed.

83. The two major conclusions to be drawn from that analysis were, first, that the endless debate on whether or not reservations to treaties should be allowed served no useful purpose: reservations to treaties were a fact of life that must be endured and, with all due respect to the pessimists, a reserving State that accepted part of a treaty was preferable to a State that simply refrained from signing. After all, the Vienna regime preserved the vital elements while guarding against any deformation of the treaty. The second conclusion was that there was no reason why the Vienna regime should not be applied to so-called “normative” treaties. There again, even if the existing rules authorized breaches of the integrity of the treaty, they did not on any account allow a breach of its object or its purpose and it was always permissible to derogate therefrom if, in a particular case, it was considered that the integrity of the treaty must be preserved at all costs. The argument that the Vienna rules were incompatible with the—by definition—“non-reciprocal” nature of normative treaties was peculiar to say the least, since the chief criticism levelled against reservations was that they negated reciprocity, a paradoxical line of argument in the case of commitments which were by their very nature non-recip-

rocal. In any case, it was not quite true to say that there was no element of reciprocity whatsoever in normative treaties, which were predicated at the very least on two States consenting to the same rules and hence applying them to their nationals. Lastly, the argument based on the supposed breach of equality between the parties to a normative treaty was equally specious: the degree of inequality was incomparably more pronounced between, on the one hand, a State party to a normative treaty and a State that was not a party thereto and, on the other, between two States parties one of which had entered a reservation, particularly since the “other” State could always restore the original balance by objecting to the reservation or by taking action under article 20, paragraph 4 (b), of the 1969 Vienna Convention to prevent the treaty from entering into force between itself and the reserving State.

84. He therefore upheld the position he had taken in the conclusion to chapter II, section B, of his second report: he was convinced that the Vienna regime was homogeneous and could and should remain so and that, by virtue of its flexibility, it was perfectly suited to the particular characteristics of normative treaties.

*The meeting rose at 1.05 p.m.*

---

## 2500th MEETING

*Thursday, 26 June 1997, at 10.05 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

---

### Reservations to treaties (*continued*) (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>1</sup> A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

#### SECOND REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of chapter II of his second report

<sup>15</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

<sup>1</sup> See *Yearbook . . . 1996*, vol. II (Part One).

on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) said that he had not originally intended to introduce chapter II of his report at that point in the proceedings, but had deferred to the views of members who wished to comment on general aspects of the report instead of proceeding section by section. He would therefore introduce the part dealing with the specific question of reservations to human rights treaties, but requested in return that members refrain from commenting on the separate and, in his view, very different issue of the competence of human rights treaty monitoring bodies until after he had introduced that item.

3. Was the Vienna regime applicable to human rights treaties and, if so, was it suited to that particular category of treaty? If it was not, special rules applicable to reservations to such normative treaties of a particular kind must be devised. He mentioned the problem as a precautionary measure, so that nothing was left in the dark, because the arguments advanced by authors and some members of human rights bodies in favour of making an exception for human rights treaties were exactly the same as those advanced in the case of normative treaties, of which human rights treaties were a particular kind. He was firmly convinced that such arguments were invalid for normative treaties in general and equally invalid for human rights treaties unless more specific arguments to the contrary were advanced, which he thought unlikely.

4. At a recent symposium on the relationship between general international law and human rights organized in Strasbourg by the Société française pour le droit international, a number of participants, including Professor Cohen-Jonathan, the eminent expert on the Convention for the Protection of Human Rights and Fundamental Freedoms, had argued forcefully for a special regime to govern reservations to human rights treaties. He had been struck by the fact that Professor Cohen-Jonathan's arguments were basically unspecific. While he had focused on human rights treaties, arguing that their particular characteristics warranted a separate reservations regime, he had in reality complained of deficiencies and ambiguities in the general reservations regime, the very deficiencies which, on a general plane, justified the exercise in which the Commission had been engaged for the past three years.

5. The point was that there were two issues which must be kept separate. The first concerned the imperfections of the existing reservations regime, which affected both human rights treaties and all other treaties, especially normative treaties. The second was more specific and concerned the supposed singularities of human rights treaties that warranted special treatment of reservations to those treaties. The Commission was concerned solely with the latter issue at that juncture. It was agreed that the Vienna regime should be refined and expanded, and the refinements and additions should include some that related specifically to reservations to human rights treaties. But what the Commission must decide was whether there were cogent arguments against applying the existing rules—however inadequate—to human rights treaties. His own reply to that question, contained in chapter II, section C.1, of his second report, was emphatically in the negative.

6. The controversy had begun with a problem concerning reservations to a quintessential human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, as noted by ICJ in its judgment of 11 July 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (see particularly paragraphs 22, 31 and 34).<sup>2</sup>

7. The authors of the 1969 Vienna Convention—and when he spoke of the 1969 Convention he included the 1986 Vienna Convention—had not neglected to include specific rules where they were warranted by a particular category of treaty. Under article 60, paragraph 5, of the 1969 Vienna Convention, a material breach by a State party of provisions relating to the protection of the human person contained in treaties of a humanitarian character did not entitle the other States parties to terminate or suspend the treaty, as was the case for other categories of treaties. The authors of the Convention had not, however, provided for a special regime in the matter of reservations. It could be inferred that that was not an oversight and they had considered that there was no decisive reason to establish such a regime for human rights treaties.

8. Judicial practice showed that neither States, as authors of and parties to human rights treaties, nor treaty monitoring bodies had ever contested the applicability of the Vienna regime to human rights treaties. Express reservation clauses in the case of many human rights treaties either referred to articles 19 et seq. of the Vienna Conventions or referred to the basic criterion of the object and purpose of the treaty. The *travaux préparatoires* of other instruments often showed that the absence of a reservation clause was to be interpreted as an implicit referral to the regime set forth in the 1969 Vienna Convention. Moreover, the monitoring bodies tended to apply the Vienna regime in such cases without questioning its adequacy. Where reservation clauses expanded on its provisions, as in the case of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Vienna regime was superimposed on such a special regime and the Council of Europe bodies made explicit reference to the object and purpose of the treaty, namely the decisive criterion set out in article 19 of the 1969 Vienna Convention. Lastly, it could be inferred from cases such as those mentioned in chapter II, section C.1, of his report, in which States parties to human rights treaties explained the reasons for their objections to reservations, that inter-State relations were based on the Vienna regime in the field of human rights as well as in other areas.

9. Nothing, therefore, in the international practice of States, courts or monitoring bodies was conducive to the view that a special regime was required for reservations to human rights treaties. Should further evidence be needed, he drew attention to general comment No. 24 (52) of the Human Rights Committee,<sup>3</sup> in which the Human Rights Committee, despite its highly unorthodox views in several other respects, had repeatedly referred to the rules of the Vienna Conventions, viewing them as useful guidelines and a reflection of the rules of general international law.

<sup>2</sup> See 2478th meeting, footnote 3.

<sup>3</sup> See 2487th meeting, footnote 17.

10. He therefore saw no serious obstacle to the application of the Vienna regime to reservations to human rights treaties. However, he wished to add two riders. First, it was not at all inconceivable that States parties would quite legitimately wish to make exceptions or additions to the reservations regime in the case of a particular treaty. It would therefore be a wise precaution in future, when States concluded a general human rights treaty, such as the International Covenants on Human Rights, to state expressly whether an outright denial of one of the freedoms protected by the treaty constituted a violation of the object and purpose of the treaty, since a priori he was unsure whether a clear answer to that question existed, at least in current positive law. Furthermore, a dialogue with reserving and objecting States, proposed on a number of occasions by Austria and Portugal, would probably prove particularly useful and productive in the area of reservations to human rights treaties. Special provisions could also be included for that purpose in future treaties. He suggested that the Commission should consider drafting appropriate model clauses. Such specific provisions and model clauses would be one way to help create the balance which had been advocated in the Sixth Committee during the fifty-first session of the General Assembly, in 1996, by the representative of Italy, between what he had called the unicity of the reservations regime and the specificity of human rights instruments.<sup>4</sup>

11. Secondly, his conclusion that there was no need to forge a special regime for reservations to human rights treaties did not concern the role of human rights treaty bodies in relation to reservations. If such bodies were required to take a decision on the matter, they must, in the absence of specific reservation clauses in the treaty for which they were responsible, apply the Vienna rules, and that was invariably what happened in practice. He would consider the conclusions to be drawn from the action of the monitoring bodies and the application of the Vienna rules at a later stage, since it was, in his view, an entirely different problem. Moreover, it was not restricted to the area of human rights inasmuch as the debate on the competence of monitoring bodies applied in the same terms to other bodies called upon to rule on the admissibility of reservations to any category of treaty.

12. He would reiterate his request to members of the Commission to defer their comments on that aspect of the topic until a later meeting. He very much hoped that the discussion would deal initially and exclusively with the three basic conclusions that he had presented so far: first, the Vienna regime had been conceived as uniform rules to be applied to all treaties, save for the two exceptions carefully defined in the 1969 Vienna Convention after thorough reflection; secondly, there were no convincing grounds for shattering that uniformity for reservations to "normative" treaties; and thirdly, there were no conclusive grounds for making an exception for reservations to human rights treaties. While some writers had expressed opinions to the contrary, neither human rights bodies nor the vast majority of States had done so. That was borne out both by the response of members of the Commission during the brief debate on the subject at the forty-eighth session of the Commission and by the reaction of State

representatives in the Sixth Committee at the fifty-first session of the General Assembly in 1996. Of the 11 States that had addressed the issue, one only—Venezuela—had raised the possibility of a special regime for human rights treaties.<sup>5</sup> All the others had opposed the idea, noting that the flexibility of the Vienna rules afforded sufficient guarantees. He suspected that even Venezuela was thinking more in terms of reservation clauses than of a specific derogation regime.

13. At all events, there was no reason why the Commission should not discuss the issue, since a review of the grounds leading to those conclusions would assist the Special Rapporteur in his future work, as the problems taken up from the specific standpoint of reservations to human rights treaties touched on wider problems relating to treaties in general.

14. Mr. KATEKA said that the reservations regime established by the 1969 and 1986 Vienna Conventions had worked reasonably well, despite problems created by lacunae and ambiguities. The Commission should therefore refrain from taking any action that might upset the balance thus established. The Special Rapporteur had noted that reservations to treaties were a fact of life, a view that was borne out by State practice.

15. He did not wish to become involved in doctrinal disputes between the opposability and permissibility schools of thought nor would he take sides on the equality and reciprocity issues raised by reservations. He would merely restate the fact that treaty relations were based on the free will of the parties concerned. States could not be bound by treaties without their consent. The flexibility of the Vienna regime allowed them to make reservations that facilitated their accession to treaties. The regime struck a balance between the integrity of treaties and the desirability of universal accession.

16. Whether or not reservations were in conformity with the object and purpose of a treaty was a matter for States parties to decide, unless they had agreed or provided otherwise. He found it difficult, therefore, to accept the powers assumed by the monitoring bodies established under human rights instruments. Unless a particular instrument clearly mandated the treaty body to interpret the applicability and validity of reservations, he strongly felt that such bodies should not arrogate to themselves powers they did not possess.

17. He agreed with the Special Rapporteur's conclusion at the end of chapter II, section B, of the second report that the Vienna reservations regime applied to all multilateral treaties, whatever their object, and was suited to normative treaties, including human rights instruments, the only exception being restricted treaties and constituent instruments of international organizations.

18. There were too many United Nations treaty bodies dealing with human rights. He had counted at least eight. Their proliferation and unjustified assumption of powers not included in their mandate could create even more confusion than already existed in the reservations regime. A role comparable to that of regional treaty bodies was

<sup>4</sup> *Official Records of the General Assembly, Fifty-first Session, Sixth Committee, 41st meeting, para. 44.*

<sup>5</sup> *Ibid.*, 39th meeting, para. 22.

unacceptable in the absence of clear and explicit authorization by specific provisions of international human rights treaties. The European Court of Human Rights and the Inter-American Court of Human Rights had interpreted the legal effects of reservations to the respective regional human rights conventions. The States parties concerned—albeit under protest in some cases—had accepted the role of those courts. That was not true of, for example, the Human Rights Committee, particularly following its general comment No. 24 (52). The Committee was a political rather than a legal body. His fears were borne out by the comment on the legal effect of some reservations made by the chairpersons of the human rights treaty bodies and mentioned by the Special Rapporteur in chapter II, section C.1, of the second report. He asked who had given them the mandate to make such remarks.

19. The monitoring bodies in question ought to request the competent organs of the United Nations, under Article 96 of the Charter of the United Nations, to ask ICJ for an advisory opinion on the permissibility of reservations. Such a procedure would be more amenable to States than an approach that discouraged them from acceding to treaties.

20. To make matters worse, some treaty bodies invoked the concept of the “severability” of a reservation, on the grounds that it was undesirable to exclude States parties. In purporting to separate the offending reservations, treaty bodies called into question a State’s consent, which was a *sine qua non* of treaty relations. It had even been suggested in chapter II, section C.2 (b), of the report that the binding force of the findings of a monitoring body would depend on the powers with which the body was invested. It was not desirable for treaty bodies to make findings that were merely of persuasive value. The so-called “intermediate solution” of treaty bodies asking a State party to modify or withdraw its reservation amounted to interference with a State’s sovereign rights, which was totally unacceptable. Monitoring bodies should tread carefully in dealing with reservations to treaties in view of the serious legal consequences for States parties and the ensuing disruption of treaty relations. It was for States parties themselves or dispute settlement mechanisms to decide on the validity of reservations.

21. The draft resolution proposed at the end of the report was premature, since the Commission and Member States had not yet discussed the topic of reservations in depth. It telescoped many issues in a manner likely to prejudice their future consideration by the Commission. Paragraphs 5 and 7 of the draft resolution made highly controversial assumptions and paragraph 9 was unduly optimistic, expressing the hope that the principles set forth in the resolution would help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights. Even if the Commission agreed on the substance of the draft resolution, it would be for the General Assembly, and not the Commission, to adopt it. Paragraph 10, which suggested to the General Assembly that it “should bring the . . . resolution to the attention of States and bodies which might have to determine the permissibility of such reservations”, was greatly mistaken.

22. Further to comments by Mr. KABATSI, Mr. SIMMA and Mr. LUKASHUK, the CHAIRMAN

said that he would invite speakers to make general statements before opening the floor for debate.

23. Mr. ADDO, after congratulating the Special Rapporteur on his excellent work, said that since he had not had the opportunity to express his views on chapter I of the second report, he would comment on it briefly. Noting that, regrettably, none of the States with a national in the Commission had replied to the questionnaire addressed to them by the Special Rapporteur,<sup>6</sup> he said the reason why Ghana had not replied to the questionnaire was simply that a copy had not reached his desk. He was the legal adviser to his country’s Foreign Ministry and all matters relating to treaties were handled by the department he headed. The topic of reservations to treaties was therefore of special interest to him. If the Special Rapporteur could arrange to provide him with a copy of the questionnaire, he would ensure that most if not all of the questions would be promptly answered so far as the practice of Ghana was concerned.

24. He entirely agreed with the Commission’s decision at its forty-seventh session to draw up a guide to practice in respect of reservations<sup>7</sup> and also shared the view that there were insufficient grounds for amending the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. He also agreed with the Special Rapporteur’s proposal concerning the final form the guide to practice should take. In his view, the Vienna regime on treaties should be left intact and be allowed to apply to all treaties without distinction, including those relating to human rights. Any departure from that principle would be impractical and would not necessarily enhance the prospects of wider acceptance. It should be recalled that the 1969 Vienna Convention had taken 11 years to enter into force, while neither the 1978 nor the 1986 Conventions had as yet attracted the number of parties needed for them to become operative. To add to the existing predicament by creating a new special reservations regime for human rights treaties, thus importing confusion into an already confused area of the law, might not be wise.

25. Whatever the weaknesses or drawbacks of the Vienna system, there were surely ways of dealing with them without opening the Pandora’s box of a completely new regime, one such way was the guide to practice in respect of reservations being contemplated. A special regime for human rights treaties might well be succeeded by another dealing with the no less important category of arms control treaties, and before long there would be a proliferation of special regimes that would undermine the achievements of the Vienna system. In his view, prudence dictated that the current Vienna regime be left as it stood.

26. As all members were aware, reservations to treaties had been in use since the emergence of the great multilateral treaties towards the end of the nineteenth century. Thus, France had entered a reservation when it had signed the General Act of the Brussels International Conference, dealing with the abolition of slavery in 1890,<sup>8</sup> and the

<sup>6</sup> See 2487th meeting, footnote 16.

<sup>7</sup> See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, para. 487 (b).

<sup>8</sup> France, Ministère des affaires étrangères, *Conférence internationale de Bruxelles, 18 novembre-2 juillet 1890, Protocoles et Acte final* (Paris, Imprimerie nationale, 1891), Protocole n° 33, p. 468 et seq.; see also *British and Foreign State Papers, 1889-1890*, vol. LXXXII, pp. 55 et seq.

practice of making reservations had also been generally adopted at The Hague Peace Conferences of 1899 and 1907.<sup>9</sup> Today, reservations were, of course, regulated by articles 19 to 23 of the 1969 and 1986 Vienna Conventions and article 20 of the 1978 Vienna Convention which reflected the advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>10</sup> the human rights treaty par excellence.

27. The great question was whether the test of permissibility provided in article 19 of the 1969 Vienna Convention could be maintained in the absence of an authoritative means of determining whether or not the reservation was compatible with the object and purpose of the convention or treaty. State parties were, in effect, left to judge whether or not a reservation was so compatible, and if they reached different conclusions the unity of the treaty was in danger of being destroyed. In the absence of compulsory judicial settlement or of an alternative third-party dispute settlement mechanism, the test of permissibility was in danger of losing what practical significance it possessed. Those were some of the problems that bedevilled the current reservations regime, and it was to be hoped that the projected guide to practice in respect of reservations would address some of them with a view to making the situation clearer.

28. Furthermore, the rules on reservations contained in the Vienna Conventions were difficult to understand and interpret. As an illustration, one could take a hypothetical case of a multilateral treaty with a large number of States parties and with no prohibition regarding reservations. If State A sought to ratify the treaty with a reservation modifying article 10 of that treaty, what would be the treaty relations of State A if State B accepted the reservation, State C rejected it but did not object to State A becoming a party, and State D objected to the reservation and did not want the treaty to enter into force between it and State A? Under the Vienna Conventions, the result would be as follows: between States A and B the treaty would be in force as modified by State A's reservation to article 10; between States A and C, the treaty would be in force but article 10 would be inapplicable; between States A and D the treaty would not be in force; and the treaty relations between States B, C, D and all other parties and their obligations *inter se* would be unaffected by State A's reservation. The situation would become still more complicated if many of the other States parties in turn made other reservations. In other words, under the existing rules, reservations could transform a multilateral treaty into a complicated network of interrelated bilateral agreements.

29. The example he had chosen showed that, although the Vienna regime had functioned well in the past, the rules were not altogether satisfactory, first, because they made it far too easy to make reservations, and, secondly, because they were complex and opaque. Accordingly, States concluding new multilateral treaties would appear to be well advised to regulate the question of reservations by means of special provisions incorporated in the treaty

itself. The reservations provisions contained in articles 309 and 310 of the United Nations Convention on the Law of the Sea were a case in point. He was not advocating, of course that all multilateral treaties should prohibit reservations as did the United Nations Convention on the Law of the Sea; his point was that the technique of adopting a reservations regime at the negotiating stage was preferable to seeking to establish a special reservations regime for whole categories of treaties, such as those dealing with human rights.

30. He could not agree with the Special Rapporteur's statement (2487th meeting) that currently, reservations were used mainly by third world countries on human rights issues. He did not know what statistics the Special Rapporteur had to back up that assertion, but recalled that, as far back as 1890, when signing the General Act of the Brussels Conference—in essence, a human rights treaty—France had entered a reservation excluding the right to search ships<sup>11</sup> and, in more recent times, France's instrument of ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, submitted 21 years after the entry into force of that instrument, of which France had been one of the original signatories, had been accompanied by reservations relating to two articles and a declaration of interpretation relating to two further articles of the Convention.<sup>12</sup> As for the International Covenant on Civil and Political Rights, the United Kingdom of Great Britain and Northern Ireland had entered a reservation to article 1,<sup>13</sup> which set forth the right of peoples to self-determination. On the other hand, no reservations had been appended by any of the 42 States parties to the African Charter on Human and Peoples' Rights, which had come into force on 21 October 1986.

31. The truth was that reservations often served purely political ends and were made by States of all categories to protect what they considered to be their interests. The interests of States differed enormously, as did their status in terms of wealth, size, population and resources, not to mention ideology. Major differences of outlook and different attitudes towards the content of international law and the nature of the international system were therefore to be expected. To make a reservation was not in itself a bad thing; what was bad, to put it simply, was to make a reservation which was inconsistent with the object and purpose of the treaty.

32. As to the question of the power of treaty monitoring bodies to determine the permissibility or otherwise of reservations to the treaties in question, he shared the Special Rapporteur's view that treaty bodies must of necessity have such power in respect of the treaties they were monitoring, even if that power had not been expressly vested in them by a provision of the treaty. Otherwise, if one State made a reservation, some of the existing States parties might accept it and consider the reserving State to be a party to the treaty, while other existing parties might

<sup>11</sup> France, Ministère des affaires étrangères, *Conférence internationale de Bruxelles. Documents diplomatiques, juillet-décembre 1891* (Paris, Imprimerie nationale, 1891), document No. 12, pp. 22-23.

<sup>12</sup> Council of Europe, *Yearbook of the European Convention on Human Rights, 1974* (The Hague, Martinus Nijhoff, 1976), pp. 2-6.

<sup>13</sup> For the declarations and reservations made upon signature by the United Kingdom, see United Nations, *Treaty Series*, vol. 999, p. 287.

<sup>9</sup> J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition (New York, Oxford University Press, 1918).

<sup>10</sup> See 2487th meeting, footnote 7.

object to the reservation and consider the reserving State not to be a party. The applicability of the treaty's provisions would thus be thrown into doubt, as also would the question of which States were parties and which were not, a matter that could give rise to problems with regard to the entry into force of the treaty.

33. In order to fulfil its functions properly, the State or organization designated as the depositary of the treaty, which was also responsible for maintaining the official list of the parties thereto, had to know the exact scope of the obligation undertaken by a party to the treaty. Where the depositary determined that a reservation was not compatible with the object and purpose of the treaty and was therefore void, the reserving State had to be given an opportunity either to withdraw the reservation or to reformulate it in a manner compatible with the treaty's object and purpose, or, if it was unwilling to be bound by the treaty without the benefit of its reservation, to terminate its adherence to the treaty. Since depositaries or monitoring bodies generally decided on the permissibility of reservations after the reserving State had been a party to the treaty for some time, the question arose whether the withdrawal of a State would take effect *ex nunc* or *ex tunc*. That was an issue the Special Rapporteur might wish to address. A mechanism for enabling the reserving State to reformulate its reservation, or even to enter a new reservation after ratification, might have to be established.

34. Inasmuch as compatibility with the treaty's object and purpose was the essential criterion of permissibility, the concept of "object and purpose" needed to be clarified. He had no doubt that the Special Rapporteur would give due consideration to that question in his future work.

35. As for the question of interpretative declarations, he firmly believed that the problem should not be excluded from the Commission's study. In a hypothetical case in which a State attached an interpretative statement to its ratification which showed that the State would become a party to the treaty only if its interpretation was accepted, and if that interpretation appeared to be inconsistent with the treaty's provisions, he wondered what the other States parties were to do: whether they were to consider the interpretative statement to be a reservation and to reject it if they did not agree. He asked if an interpretative statement was not accepted by other parties, whether it excluded the provision in question or prevented the treaty from entering into force between the State making the declaration and the States objecting to it. It was to be hoped that the Special Rapporteur would delve in greater detail into those and similar pressing questions.

36. The guide to practice in respect of reservations, accompanied by a commentary and model clauses, would undoubtedly prove a valuable tool and a point of reference for all practitioners of international law, especially those in the foreign ministries of States whose duty it was to interpret and apply treaties on a daily basis. It would fill the gaps in the current regime and would, in the course of time, become a *locus classicus* on matters left unaddressed or unsaid in the 1969 Vienna Convention. The project was undoubtedly worthwhile and he wished to lend his support to the Special Rapporteur's endeavours to bring it to fruition. While endorsing the principles set forth in the draft resolution at the end of the second report,

he was not sure that a draft resolution was the best way of conveying the Commission's views to the General Assembly. The correct practice was surely for the Commission to submit a report on the conclusions reached during the current session and for the General Assembly to adopt a resolution on that report. But there might be good reasons for departing from that procedure, and if he could find one such reason he would be prepared to go along with the idea of a draft resolution.

37. Mr. LUKASHUK said that, in defiance of traditional practice, he proposed to open his remarks with an expression of disagreement with the Special Rapporteur. In his introductory remarks, Mr. Pellet had described himself as a "bad professor". His brilliant presentations, both oral and written, of the topic under consideration surely refuted that uncomplimentary view. On the subject of Mr. Pellet's character he was, perhaps, a little more inclined to agree, albeit with some reservations.

38. Before proceeding any further, he wished to raise as a matter of principle the question of the role of a special rapporteur and members' relations with him. In his view, the special rapporteur was a central figure in the Commission and, as such, had a claim to due respect both for his personality and the results of his work. After all, what a special rapporteur placed before the Commission was like a child long carried in the mother's womb and born in torment. It sometimes seemed as if torture, although prohibited by international law, was authorized within the Commission. In one particular case he could remember, it had driven a special rapporteur to the verge of nervous collapse. He appealed to his fellow members to be more humane, not by refraining from making criticisms, but by making their criticisms more thoughtful and constructive.

39. As for the report before the Commission, speaking as someone who had been concerned with the topic of reservations to treaties for many years, he felt bound to say that nothing he had come across in the past few years came up to the level of Mr. Pellet's excellent and impressive work, whose blend of detail and profound thought he particularly admired.

40. Leaving aside for the time being the question of the competence of treaty bodies to determine the permissibility of reservations, some issues of a more theoretical nature should be raised. The view was widely held in academic circles that human rights treaties did not regulate relations between States but, rather, those between a State and the people living on its territory. The point was touched upon in chapter II, section B.3 (b), but it was to be hoped that the Special Rapporteur would state his position more clearly when replying during the debate. While endorsing the structural plan outlined by the Special Rapporteur, he agreed with Mr. Kateka that the proposed procedure of dealing with a highly complex specific problem—that of reservations to human rights treaties—before considering the problem as a whole was somewhat unusual. The Special Rapporteur explained that procedure by the urgency of the matter, and he was inclined to agree as far as the sequence of the discussion was concerned. He doubted, however, whether the Commission—which, unlike the Special Rapporteur, had not yet studied the whole topic and whose views, as the Special Rapporteur himself recognized, could change in the course of the

debate—had the moral right to adopt a draft resolution on a specific aspect of the topic.

41. He had no objections of principle to the contents of the draft resolution. Like other members, he wished to underscore the central provision reaffirming the general applicability of the Vienna regime. As a participant in the United Nations Conference on the Law of Treaties,<sup>14</sup> he could confirm that no one present had considered, either in writing or verbally, the possibility of allowing reservations to treaties of a normative character.

42. He said that, noting that the Special Rapporteur was proposing to complete his work within four years, the Commission would thus have spent a total of seven years on the topic. That was not a particularly long time considering that some of the Commission's drafts had taken decades to complete. However, in view of the rather special position in which the Commission found itself currently, and notwithstanding the complex nature of the draft, he wondered whether other members would agree to join him in appealing to the Special Rapporteur to do his utmost to speed up the work so as to enable the Commission to submit a draft to the General Assembly as soon as possible.

43. Mr. SIMMA, noting that the third paragraph of the preamble of the draft resolution proposed by the Special Rapporteur in his second report spoke of the voice of international law being heard in the discussion, said that his own wish was for the voice of human rights law to be heard rather more loudly than in the statements just made. First of all, however, he fully agreed with Mr. Addo that the use of reservations was not a North/South issue and that there was no reason for Western States or Western international lawyers to be complacent and point a finger in any other direction.

44. As to the central question raised by the Special Rapporteur, that of the unity or diversity of the juridical regime for reservations, he agreed that the Vienna regime had no alternative in *lex lata*, but unlike the Special Rapporteur, he considered such unity to be a case of *faute de mieux*, the regime being, in his view, far from satisfactory, particularly with regard to human rights treaties. For one thing, the question whether the Vienna regime was applicable only to reservations which were permissible—in other words not incompatible with the object and purpose of the treaty—or applied to impermissible reservations as well was not answered in the Convention itself. In the former case, it had to be recognized that the 1969 Vienna Convention contained no rule on how to counter an impermissible reservation. It was surely a major lacuna and he refused to be satisfied with such a state of affairs. If, on the other hand, the regime set out in article 21 of the 1969 Vienna Convention applied to inadmissible reservations as well, the resulting situation would be like that described in Mr. Addo's example. In other words, the system would be premised on multilateral treaties consisting of bundles of bilateral legal relationships or inter-State obligations between pairs of States. Such a system worked quite satisfactorily in the case of a multilateral treaty which was really bilateral in application. If, say, the Vienna Convention on Diplomatic Relations had an arti-

cle on the inviolability of the diplomatic pouch, and if a State made a reservation saying that it would X-ray the diplomatic luggage of other States, such an impermissible reservation could be countered reciprocally by another State on a bilateral basis.

45. In the case of human rights treaties, however, the system was utterly unworkable, first, because it was legally impermissible, since reciprocal non-application of a clause of a human rights treaty could not be limited to relations with the reserving State and constituted a treaty violation vis-à-vis other States which had not made the reservation, and secondly, because such a course of action would be factually absurd. If, for example, a State refused to grant women the right to vote, another State could hardly counter that impermissible reservation by endeavouring to follow a similar course.

46. He had therefore concluded that, while the Special Rapporteur was right in saying that a unitary regime of reservations currently existed, it was far from satisfactory. The Special Rapporteur had emphasized (2499th meeting) that the Vienna regime was a residual one, that State parties to particular treaties could replace it with a custom-made system, and had asked, rhetorically, why States had not done so. According to the Special Rapporteur, it was because they were satisfied with the existing regime. The proposed draft resolution reflected complete satisfaction with the 1969 Vienna Convention and indicated, in paragraph 4, that it was the human rights treaty bodies that had created problems. In his own view, it was the unsatisfactory applicability of the Convention to human rights treaties that had created the problems, and the comparative silence of States and the absence of *leges speciales* in human rights treaties were attributable to causes other than satisfaction with the legal solutions of the Convention.

47. Until the late 1980s, the activities and effectiveness of the treaty bodies had been hampered by the Cold War. It was only in the last few years that United Nations treaty bodies had been able to steer a more courageous course. Only then had an alternative come into view, demonstrating that the inter-State mechanism of reservations to treaties and objections to such reservations was unsatisfactory. The real reason for the apparent complacency among States was a lack of initiative and energy. In the words of Rosalyn Higgins: "one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged."<sup>15</sup>

48. The situation cried out for a better solution. The Special Rapporteur and Mr. Addo, among others, had mentioned the desirability of establishing custom-made regimes in the form of model clauses. He favoured such an approach, but thought the usefulness of such clauses might be minimal in practice. There was a consensus within the human rights community that the time to adopt standard-setting treaties was currently past and that the emphasis should be rather on implementation and enforcement of those already in place. If no new human rights treaties were to be adopted, then there would be no call for model clauses to incorporate in them.

<sup>14</sup> See 2499th meeting, footnote 14.

<sup>15</sup> "The United Nations: still a force for peace", *The Modern Law Review*, vol. 52, No.1 (January 1989), p. 12.

49. He asked about amendments to the existing human rights treaties. The time factor mentioned by Mr. Addo came into play. Such treaties took years, even decades to come into force, and amending them was likely to be an equally lengthy process. He asked why use was not made, instead, of the means already available, namely the treaty bodies. They could be engaged in a dialogue on how to find a solution that was acceptable both to sovereign States and to the human rights community.

50. The CHAIRMAN reminded members of the Commission that the Special Rapporteur had not yet introduced either chapter II, section C, of his second report, concerning treaty monitoring bodies, or the proposed draft resolution. He urged members to refrain from commenting on those parts of the report until they had been introduced.

51. Mr. HE said he joined in expressing appreciation to the Special Rapporteur for his cogent views on the extensive background material concerning the important issue of reservations to treaties. Chapter II of the second report, concerning unity or diversity of the legal regime for reservations to treaties, displayed particularly well the Special Rapporteur's insight into the subject.

52. He agreed with the conclusion that the Vienna system had been applied in a satisfactory and uniform manner to all treaties, irrespective of their purpose, and that there was no reason to encourage a proliferation of regimes. The Special Rapporteur had rightly pointed out that the basic characteristics of the Vienna regime were flexibility and adaptability. The regime struck a good balance between two apparently contradictory interests: broadening the acceptance by States of the 1969 Vienna Convention and maintaining its integrity. It met the particular needs of all types of treaty provisions and ruled out exceptions, excluding only certain conventions among a limited number of parties and the constituent instruments of international organizations. Its flexibility was thus suited to the particular characteristics of normative treaties and human rights treaties.

53. That regime must not be abandoned in favour of the positions adopted by some international human rights bodies, which emphasized that human rights treaties were a special case. Admittedly, there were ambiguities and lacunae in the 1969 Vienna Convention, but not in respect of normative treaties and human rights treaties, and the gaps could be filled within the existing system. The positions of the human rights treaty bodies deviated too sharply from generally accepted rules of international law and might hamper the development of protection of human rights through treaties by discouraging States from becoming parties to them. In any treaty negotiations, it had always been possible to make sure that essential rights and obligations were not subject to derogation. If the view was taken that reservations must be prohibited, the parties to the treaty were entirely free to rule them out by including an express clause in the treaty, a procedure that was perfectly compatible with the Vienna system. Accordingly, there was no need to draw distinctions between human rights treaties and other treaties, and it was neither necessary nor desirable to establish a special reservation regime for human rights treaties.

54. Another problem raised by the Special Rapporteur was the possibility of formulating reservations to bilateral treaties. The 1969 Vienna Convention did not prohibit such reservations, nor had the Commission reached any unanimous conclusion on whether reservations should be limited to multilateral treaties alone. In view of the new trend towards reservations to bilateral treaties, as mentioned by Mr. Lukashuk, and since the topic was entitled "Reservations to treaties", implying both multilateral and bilateral treaties, the issue should be dealt with as suggested by the Special Rapporteur, namely, to proceed deductively, raising questions and seeing what the answers should be.

55. He agreed that the issue of interpretative declarations should be addressed by defining such declarations and distinguishing them from valid reservations under the Vienna regime. States were resorting to interpretative declarations more and more often, particularly when a treaty prohibited reservations, but they should be given no excuse to use such declarations as disguised reservations.

56. Mr. FERRARI BRAVO said it was a great pleasure to join with members who had congratulated the Special Rapporteur on the clarity and relevance of his report which gave an accurate view of international law on the topic from the standpoint of the big Powers. But should the Commission confine itself to summarizing the current state of international law, or should it rather try to chart a course for the future? Up until now, articles 19 to 23 of the 1969 Vienna Convention had been the definitive texts, but they had their defects and represented a compromise further to the well-known advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. They reflected the atmosphere of the Cold War, a time fraught with insurmountable difficulties. The ringing "nyet" of one State had obviated the need for many other States to say "no", and now that the "nyet" was no longer audible, or was more subtle, the "no's" of other Powers were being pronounced in connection with certain positions adopted in the field of human rights. It was no coincidence that the issue of reservations had resurfaced in the Commission as a result of certain occurrences within human rights bodies.

57. He agreed to some extent with Mr. Simma's remark about whether the existing regime was really the most appropriate one. Another question was whether reservations to bilateral treaties should be addressed. Again, interpretative declarations, the effect of intervention by national parliaments, and so on, all deserved to be explored, even if they were not specifically part of the topic.

58. ICJ had adopted the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* because of reservations concerning the Convention's jurisdictional provisions and, subsequently, those reservations were withdrawn. Articles 19 to 23 of the 1969 Vienna Convention, which had been adopted in the shadow of the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, which had still existed at that time, were a baroque construct. In them, the United Nations Conference on the Law of Treaties had expanded upon ICJ's

position, taking into account some inter-American experience. But a nearly unanimous judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* betrayed ICJ's great discomfort with the issue. The Court had had no choice but to apply an article from the Convention which was probably not suited to the actual problem before it. The Convention had envisaged a system comprising, alongside ICJ, an international court for war crimes. Yet such a court had not existed when the judgment had been handed down. As a result, the scope of the clause on the Court's jurisdiction had been expanded. If in future the Court were called upon to rule on the substance of the issue, it would be going beyond the limits of the jurisdiction envisaged for it in the Convention, and would rule on war crimes per se. That was only one of the real problems that arose with regard to reservations in connection with human rights.

59. Since attempts were being made to establish regimes stronger than traditional treaty regimes, it might prove necessary to consider whether ad hoc regulation of reservations to such regimes was required. If model clauses were elaborated, their application to several different regimes might be problematic. The Convention for the Protection of Human Rights and Fundamental Freedoms, for example, provided for a "horizontal" system of human rights protection through rules applicable to all States under the umbrella of the Council of Europe, the European Commission of Human Rights and the European Court of Human Rights. The fact that the jurisdiction was muscular, and the relevant obligations particularly weighty had been illustrated by France's understandable yet long-standing resistance to joining the system. When an international organization "administered" human rights rules, it inevitably created a strong system. Did the Convention for the Protection of Human Rights and Fundamental Freedoms system actually establish a special regime for reservations? He did not think so, but believed that it operated in parallel with, and more intensively than, the general rules on reservations.

60. The Commission should study the topic of reservations from every angle. However, instead of setting out a single rule on reservations applicable throughout the world and adopting a nice resolution—which would simply bury the matter—it should look into what had to be added to the existing regimes.

61. Mr. HAFNER said the topic of reservations to multilateral treaties was one of the most fundamental issues of international law, touching on such principles as *pacta sunt servanda*. He was therefore grateful to the Special Rapporteur for such an extensive report, which obviated the need to search through the relevant literature for practice and decisions.

62. It could be argued that the 1969 Vienna Convention was not able to cope with all the complexities of multilateral treaties and reservations to them, for the former were a fairly recent phenomenon. He shared the view expressed by Mr. Addo and others that the issue of reservations, particularly to human rights treaties, did not fall into the category of North-South opposition. Many northern States, for example, had made reservations to the International

Covenant on Civil and Political Rights. Some had made reservations to human rights treaties that could to some extent be considered inadmissible, while the content and scope of others, particularly those invoking the priority of constitutional provisions, were difficult to pinpoint.

63. Various categories of multilateral treaties undoubtedly existed, for example, treaties of a synallagmatic nature, instruments such as human rights treaties which obliged States to observe a certain legal standard and other treaties in which an obligation had to be carried out in respect of all other parties, *erga plures*. There were even differences among those categories. However, the second and third of those categories could be combined under the common designation of normative treaties. But he did not share the view that the category of normative treaties was identical to that of law-making treaties, which could also be of a synallagmatic nature, like the Vienna Convention on Diplomatic Relations. The obligations under that Convention were, however, owed to certain other States and he would therefore hesitate to call it a normative treaty. Furthermore, treaties that were provided with a body to monitor implementation, to which the report also referred, undoubtedly formed a special category of treaty whose efficiency was likely to be affected by the existence of a compliance mechanism. Yet that difference was not relevant for the purpose of deciding whether or not such treaties should be subject to the same reservation regime as any other multilateral treaty.

64. The report also dealt at some length with the question of reciprocity under human rights treaties and the Special Rapporteur had concluded that article 21, paragraph 3, of the 1969 Vienna Convention did not apply to such treaties. It was not altogether certain that that conclusion was correct. Different functions of a norm had to be distinguished. First, a norm prescribed the attitude to be adopted by the States bound by that norm. But account also had to be taken of a further function of a norm, for the purposes of State responsibility, since it provided the basis for claiming that a violation had occurred and defined when a course of conduct was unlawful. That was where reciprocity came into play. Thus, if State A excluded the operation of a certain provision by entering a reservation, State B, as a party to the relevant treaty, was no longer entitled to allege a breach of that norm by State A. At the same time, by virtue of the principle of reciprocity, State A was itself not entitled to invoke a breach of the norm by State B, even though State B had made no reservation. From that standpoint it was arguable that the principle of reciprocity had a say even in the case of normative treaties. And State B would, of course, remain bound in relation to all other States. The conclusions reached in at the end of chapter II, section B, of the report were correct, therefore, only insofar as they related to the immediate effect of reservations, namely, to the exception from the duty to observe a certain norm.

65. He subscribed to most of the conclusions set forth at the end of chapter II, section B, of the report. With regard to the second conclusion, however, he was not certain that it was possible to speak of the flexibility of the Vienna regime, since that would mean the regime could be adapted to different categories of treaties except for those mentioned in article 20, paragraphs 2 and 3. It was interesting to note in passing that article 60, paragraph 5, of the

1969 Vienna Convention, which referred expressly to treaties of a humanitarian character, had been included not by the Commission but only at the plenipotentiary conference, so that it was doubtful whether a conclusion could be drawn therefrom with regard to their absence in the regime on reservations.

66. In his view, the reason why the regime could be applied to all the different categories of treaties was that it was formulated in broad, indeed unclear, terms that permitted application to normative treaties. Moreover, since human rights treaties were treaties within the meaning of the 1969 Vienna Convention, the latter applied to them and also to the reservations made to them. It would be difficult to devise a solution for human rights treaties that departed from the Vienna regime and hence there was no choice other than to fill in the lacunae in that regime.

67. Again, he was not inclined to agree with the unequivocal statement in subparagraph (b) of the conclusions contained at the end of chapter II, section B, of the report that normative treaties "are not based on reciprocity of the undertakings given by the parties". Certainly, reciprocity was not so important in the case of those treaties as in that of synallagmatic treaties. On the other hand, he agreed fully with subparagraph (e), though, in the European context, some ideas had been advanced with a view, for instance, to restricting the period of the validity of reservations or the obligation to review them after a given time. Such matters should be left to the international bodies under whose auspices certain conventions were drawn up or to the authors of the individual conventions. The Commission's task was to formulate rules of general application to resolve either anticipated or existing conflicts of a legal nature and to provide States with guidance on the settlement of situations for which there was no clear legal regime. Such a situation was exemplified by the modern practice of reservations to human rights treaties.

68. Lastly, he would ask the Special Rapporteur whether the conclusions reached in regard to reservations to human rights treaties that were inadmissible because they were contrary to the object and purpose of the treaty would also apply to reservations that were inadmissible by virtue of article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention, whereby the reservation was prohibited by the treaty or the treaty provided that only specified reservations, not including the reservation in question, might be made.

69. Further to a query by the CHAIRMAN, Mr. PELLET (Special Rapporteur) said that he would prefer to answer all questions raised by members at the end of the discussion. He found the turn of the debate somewhat disturbing, however. In his capacity as Chairman, he had tried to encourage a more lively approach in the Commission with a view to developing a dialogue on specific points. It was a great pity that was not happening in the current case.

70. The CHAIRMAN said that, while he agreed with the idea of lively discussions, in some cases a more traditional approach was indicated.

71. Mr. DUGARD, commending the Special Rapporteur on an excellent second report, said that there was an

evident need for a review of the Vienna system. In the first place, both Mr. Hafner and Mr. Ferrari Bravo had already highlighted the historical context in which the 1969 Vienna Convention had been adopted and ICJ had delivered its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, when the influence of the Cold War was to be detected. Secondly, it was not possible to ignore the jurisprudence of the European Court of Human Rights in decisions such as those in the *Belilos*<sup>16</sup> and *Loizidou*<sup>17</sup> cases, nor the impact of general comment No. 24 (52) of the Human Rights Committee, which had undoubtedly given rise to expectations among non-governmental organizations and in the human rights community that had to be considered.

72. The main reason for a review, however, was that, although the Vienna system might seem excellent in theory, the fact had to be faced that it had proved a failure in the case of human rights treaties. It was necessary to take account of the fact that States frequently and deliberately made reservations that were contrary to the object and purpose of the treaty, knowing that other States would not challenge those reservations. In that way, they were able to create the impression that they were supporters of human rights. As Mr. Addo had rightly observed, such behaviour was not confined to States from the South, but applied to States from all regions. Another factor was that there was no sanction in respect of such reservations because States, not wishing to disturb good relations with other States, did not object to them. Thus the inter-State system simply did not work in the case of human rights treaties, at either the regional or the universal level. Insofar as the enforcement of human rights treaties had succeeded, it was largely because of the right of individual petition. There had been very few inter-State disputes, even under the European system, and none whatsoever under the universal human rights system. He therefore suggested that the Commission should study the practice of States under human rights conventions before drawing conclusions about the success or failure of the Vienna system: if he had any criticism of the Special Rapporteur's second report it was that he had failed to examine adequately the evidence of human rights monitoring bodies or human rights reservations.

73. As a matter of policy, it would be very unwise for the Commission simply to endorse the Vienna system, since that would send a clear message to the international community that the European Court of Human Rights, the United Nations Human Rights Committee and other monitoring bodies had exceeded their powers. In other words, it would be construed as a rebuke. It was a matter that required very careful consideration and the Commission could not escape its responsibility.

74. Given the extensive debate on the Vienna system as it applied to human rights conventions it was essential for

<sup>16</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *judgment of 29 April 1988* (Registry of the Court, Council of Europe, Strasbourg, 1988).

<sup>17</sup> *Ibid.*, vol. 310 (*Preliminary Objections*), *judgment of 23 March 1995* (Registry of the Court, Council of Europe, Strasbourg, 1995) and *judgment of 18 December 1996 (merits)*, *Reports of Judgments and Decisions 1996-VI* (Registry of the Court, Council of Europe, Strasbourg, 1996).

the Commission to consider adopting a resolution. He did not agree with all the elements in the Special Rapporteur's proposed resolution but nonetheless considered that, together with the background material furnished by the Special Rapporteur, it would provide a sound basis for discussion. He would also suggest that the secretariat should make available to members of the Commission the various reservations entered to the human rights treaties. The Commission would thus be able to embark on a study that, hopefully, would guide the international community in the matter of reservations, while making an important contribution to the progression of development of international law.

75. Mr. BROWNLIE said he wished to join other members in congratulating the Special Rapporteur on his excellent work, which reflected high professional standards.

76. The topic, which was concerned with clarification of the Vienna system, was of obvious practical value and he agreed with much of what Mr. Addo had said on that score. If the Commission was to go into the business of distinguishing between reservations, properly so called, and interpretative declarations, there might be a substantial overlap with the topic of unilateral acts of States. He saw no harm in that, although possibly some cooperation in the work on the two topics was indicated. Also, he very much sympathized with what Mr. He and Mr. Ferrari Bravo had said about not ignoring bilateral treaties, of which there was an astonishing variety—those dealing with frontier regimes being but one example. It would be a little artificial to exclude such experience.

77. On the question of the relationship between the topic as a whole and human rights instruments, the Special Rapporteur had rightly placed considerable emphasis on recent experience. There was, however, a certain ambivalence about the way in which that relationship was treated in different parts of the report—an ambivalence reflected in the very varied views of members of the Commission on the subject. The Special Rapporteur, especially in his conclusion of chapter II, section C, on the coexistence of monitoring mechanisms, tended to be rather bland, taking the general line that there was such coexistence and that there was no negative relationship between the work of the monitoring bodies and the general approach underlying the Vienna regime. At the same time, there was a considerable amount of what he would term coat-trailing, in that the second report seemed to imply something should perhaps be done in response to developments, rather than just say they were compatible with the Vienna regime.

78. His own feeling was that the Commission must take such recent experience into account with a view to ascertaining the extent to which it influenced the content of the proposed draft resolution. There were certain dangers, however. What, for instance, was the Commission supposed to do when the European Court of Human Rights adopted a certain approach in the *Loizidou* case, referring to the public order of Europe and refusing to deal with the problem of the Turkish reservations in a general framework? It could not really tell the European Court of Human Rights, either expressly or by implication, that it did not have the power to do that and it would be equally

presumptuous of the Commission to tell the European Court of Human Rights or other similar bodies, that it approved—if indeed it did. He agreed with Mr. Simma that those were important developments and the Commission must not be seen to upstage them, as it were, or criticize them. He was not hostile to the *Loizidou* case: indeed he had been counsel for the successful applicant on the merits. But the question was what could the Commission do in the case of what were, to some extent, self-contained regimes. The Commission, after all, was not the “European Law Commission” but the International Law Commission.

79. Again, he disagreed somewhat with the Special Rapporteur, who had said in his presentation, that the monitoring bodies normally applied the Vienna regime. The fact was that what they had done tended to be compatible with the Vienna regime. However, it was not really true that, in decisions like those in the *Chrysostomos* and *Loizidou* cases,<sup>18</sup> the European Court was applying the Vienna regime: it was really proclaiming that the Convention for the Protection of Human Rights and Fundamental Freedoms was in a number of respects a self-contained regime and it was applying rather special standards. Hence the express reference by the European Court of Human Rights to the public law of Europe. In his opinion, the Commission should be rather neutral in regard to the doings of the monitoring bodies. They were autonomous and the Commission should proceed with caution. Nevertheless, such an approach was not incompatible with the need to look at such experience and see to what extent it influenced views on the general regime of reservations.

80. Mr. CRAWFORD said that the provisions on reservations in the 1969 Vienna Convention were among the least satisfactory in one of the major post-war law-making treaties. He agreed entirely, however, that nothing better would be achieved and that any attempt to amend those provisions would simply make matters worse. For all that, the unsatisfactory nature of those provisions should at least be acknowledged within the framework of a study that was designed not to amend them but rather to make them more workable. They were unsatisfactory, for example, in their failure to deal with reservations to bilateral treaties. It was because no one really thought it possible to have reservations to bilateral treaties that the issue had not been addressed, although that was in keeping with a convention that hardly attempted to draw distinctions. The word “bilateral”, for instance, occurred only once in the 1969 Vienna Convention, in article 60, paragraph 1, in the context of termination. It should be made clear that a reservation, properly so called, to a bilateral treaty was a refusal to enter into that treaty and that certain consequences would ensue. Certainly, nothing should be done to encourage the practice of making reservations, properly so called, to bilateral treaties in the guise of interpretative statements.

<sup>18</sup> Council of Europe, Application Nos. 15299/89, 15300/89 and 15318/89, *Metropolitan Chrysostomos, Archimandrite Georgios Papachrysostomou and Titina Loizidou v. Turkey*, decision of 4 March 1991 on the admissibility of the application, *Yearbook of the European Convention on Human Rights*, 1991, vol. 34 (Dordrecht, Martinus Nijhoff Publishers, 1995), pp. 35-60.

81. The 1969 Vienna Convention was also unsatisfactory in its treatment of multilateral treaties. It failed completely to make clear whether the conditions on the formulation of reservations as set forth in article 19 were to be resolved through the procedure of acceptance of and objection to reservations laid down in article 20 or whether they were threshold legal requirements after which the procedures of acceptance and objection had a place in respect of reservations that passed through the threshold. His own opinion was that article 19 was a threshold requirement, which placed him firmly in the permissibility rather than the opposability school. There were a number of reasons why he took that view. In the first place, article 21, paragraph 1, referred to reservations established in accordance *inter alia* with article 19, implying that article 19 established independent conditions for the admissibility of reservations in addition to articles 20 and 23.

82. Secondly, article 19 of the 1969 Vienna Convention drew no distinction between reservations that were incompatible with the object and purpose of the treaty and reservations that were prohibited by the treaty itself. It seemed to him inconceivable that a State which, for some reason or other, remained silent in the face of a prohibited reservation was nonetheless deemed to have accepted it. Often, States did not express their views on that, and other matters, but in international law silence was not consent. Consequently, a State that did not express a view, for whatever reason, on a prohibited reservation must nonetheless be taken to have reserved its rights under general international law as formulated in article 19. If that was true of prohibited reservations, it must also be true of reservations that were incompatible with the object and purpose of the treaty (art. 19, subparagraph (c)).

83. A third reason for his view was that when in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ paved the way for reservations, it did so subject to the condition that reservations must pass the threshold test. Practice since that time had not established any broader view of the "permissibility", as it were, of impermissible reservations. On that view of things, the procedure of acceptance and objection still had a considerable role to play in the context of permissible reservations and the procedures laid down in articles 20 et seq. of the 1969 Vienna Convention had ample room to operate. Hence there was an objective question that would have to be determined concerning the threshold question of admissibility.

84. The rather embryonic character of the regime laid down in the 1969 Vienna Convention and its failure to address such critical issues meant that, while there was only a single general law regime of reservations to multilateral treaties, that regime, because of its general and residual character, must allow for special regimes to develop within particular frameworks. It would be very odd if the result of the Commission's work was a finding that States could do anything they liked in the context of reservations save accept a system in which their reservations were subject to judicial review. If States parties to the Convention for the Protection of Human Rights and Fundamental Freedoms saw fit to accept the procedures applied by the European Commission of Human Rights

and the European Court of Human Rights, then that was all part of the system of flexibility. It was not possible to accept a theory of reservations in which States could react only permissively but could not react in the context of accepting the special regime which Europe at least, and the American system as well, was coming to embody.

85. Human rights treaties were different in one critical respect, anyway: when States accepted a human rights treaty they were agreeing not to engage in certain conduct with reference to individuals and it was nonsense to say that they had agreed that such conduct could be divided up as against one State or another. ICJ had not accepted that States would be allowed to commit genocide in regard to State A but not in regard to State B. They were simply not allowed to commit genocide: not because genocide was a norm of *jus cogens*—which concept had not been invented at the time—but simply because it was the nature of the obligation. The nature of reservations to human rights treaties was therefore preliminary. It was a question of defining the obligation a particular State might have assumed and whether other States might or might not have the standing to object in respect of those obligations. The underlying obligation of a human rights character had to be unitary; it simply could not be divided up in the way in which obligations with regard to the treatment of diplomats, diplomatic bags and other inter-State apparatus could be divided up. That particular feature of a human rights treaty might well have a role to play in the way in which the general system of reservations evolved.

*The meeting rose at 1.05 p.m.*

---

## 2501st MEETING

*Friday, 27 June 1997, at 10.05 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

---

**Reservations to treaties (continued) (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>1</sup>A/CN.4/479, sect. D, A/CN.4/L.540)**

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. The CHAIRMAN invited the Commission to continue its discussion on chapter II of the second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PAMBOU-TCHIVOUNDA said that he again commended the Special Rapporteur on the quality and depth of his work, which had been unanimously applauded. There was no denying, however, that, even if chapter II was meant to be more specific than chapter I, which had been introduced at the forty-eighth session,<sup>2</sup> it was so dense and technical that it did not make for clarification of what was rightly regarded as a complex topic. The task of the members of the Commission would perhaps have been facilitated if the Special Rapporteur had tried to summarize more.

3. In order not to complicate matters himself, he would follow the discussion plan the Special Rapporteur had advocated (2487th meeting) and would focus his comments in particular on the question of the unity or diversity of the Vienna rules on reservations, having regard in particular to the special nature of normative treaties. On that question, he wondered whether the framework adopted by the Special Rapporteur was really appropriate and whether he had been right to exclude from the scope of his study the so-called “limited” treaties which were covered by article 20, paragraph 2, of the 1969 Vienna Convention and which he considered should be the subject of separate treatment so far as reservations were concerned. Although those treaties were “limited” to a small circle of parties, they were nonetheless not bilateral treaties, but genuine multilateral treaties like some of the major disarmament treaties, which could in fact lay down general and objective regulations. In that connection, it should be noted that, in article 20, paragraph 2, the 1969 Vienna Convention linked the criterion of the limited number of parties directly to the criterion of the object and purpose of the treaty by using the conjunction “and”. The second criterion was therefore certainly regarded as the complement of the first and it might be asked whether it did not rank above it. It was therefore not certain that the provisions of the 1969 Vienna Convention settled once and for all the question of reservations in the case of treaties of a limited nature and it would probably be a good idea to clarify, if not supplement, them in that regard. The Commission seemed to be the appropriate framework in which to deal with the matter and, from that standpoint, chapter II, section A.1, of the report would perhaps have benefited had it been more subtle.

4. It was also regrettable that the Special Rapporteur had not further developed his analysis of the role of international organizations, which was dealt with belatedly in

chapter II, section B.2. From a triple standpoint—because they could equally well be parties to a normative multilateral treaty as authors of reservations or “administrators” of reservations entered by other parties—international organizations were actors which had to be reckoned with so far as a possible breakdown in the Vienna rules was concerned. The grounds that determined their policy in the matter of reservations differed, of course, from those by which States were guided, for their attributes were not the same. Consequently, international organizations would appear to be a factor of relativization in the apparent “homogeneity” of the Vienna rules.

5. Furthermore, as multilateral treaties were a very heterogeneous group, the Vienna regime could very well turn out, when it was tested in practice, to be unsuited to some of them, even if it had originally been designed for general application.

6. It was, of course, clear from the preamble to the 1969 Vienna Convention that, in the thinking of the authors, the codified rules, even if still residual, had been deemed to have normative value. The object was to regulate the international treaty as a genre having regard to its “fundamental role . . . in the history of international relations”. But that formal approach concealed the fact that treaties, whether normative or synallagmatic, were and remained the product of a balance of power which had an effect on all their clauses, including the most substantive ones. Even if that balance was not immutable (hence article 62 on fundamental change of circumstances), it was always there in the background and it was that balance which gave a definite meaning and content to the elastic notions of the object and purpose of the treaty. Bearing in mind that there were as many “objects” as treaties, and in the matter of human rights as well, the protection of those “objects”—which was naturally a key element in the reservations regime—called, in his view, for the development of differential regimes. Given their residual character, the Vienna rules obviously did not stand in the way, but, if it was hoped to retain their value as a reference regime, they should perhaps be developed with due account for the alarm signals that had been raised, in particular by the human rights monitoring bodies.

7. Different solutions could be envisaged. For instance, should quantitative thresholds be provided for the purpose? Should the discretion of the parties in defining the content of reservations be restricted? Probably, States jealous of their sovereignty would find it hard to consent to that. Or should that twosome—the object and purpose of the treaty—be dissociated? He did not know the answer to those questions, but believed it was useful to ask them.

8. Mr. PELLET (Special Rapporteur), summing up the debate on sections A and B of chapter II of his second report, said that the reactions of the members of the Commission had been very instructive even if some of the comments seemed to him to relate more to chapter I than to chapter II.

9. With regard, first, to questions of method, he wished to reassure Mr. Lukashuk: far from being rent apart by the criticisms of his work, he appreciated the fact that the members of the Commission shed a different light on problems he perhaps no longer viewed with sufficient

<sup>1</sup> See *Yearbook . . . 1996*, vol. II (Part One).

<sup>2</sup> See 2487th meeting, footnote 3.

detachment because he had examined each detail of them closely.

10. He had therefore been only too willing to start altering his views somewhat in the light of the comments made. He could not, however, agree to Mr. Lukashuk's request (2500th meeting) that he should expedite his work and undertake to finish it in four years at the most. The documentation on the topic was vast and it was impossible to proceed more quickly. Mr. Dugard (*ibid.*) had in fact reproached him for not having given sufficient details on the positions of the competent human rights bodies and Mr. Pambou-Tchivounda (2487th meeting) would have liked him to analyse the question of limited treaties in greater depth.

11. The suggestion by Mr. Simma and Mr. Brownlie (2500th meeting) that cooperation should be established with human rights bodies in view of the importance of the problem of reservations to treaties in that field was excellent, in his view, and entirely in keeping with the spirit of article 17, paragraph 2 (*b*), of the statute of the Commission. In that connection, he would suggest that the draft resolution which appeared at the end of his second report should be transmitted to those bodies for comment after it had been duly revised by the Drafting Committee and adopted on first reading by the Commission in such form as it deemed appropriate.

12. Turning to substantive questions, he noted that Messrs. He, Ferrari Bravo, Brownlie and Crawford (*ibid.*) had raised the question of reservations to bilateral treaties. Even though, from the technical standpoint, one could not really speak of "reservations" in such a case, there was a problem and it required further study.

13. He also wished to reassure Mr. Addo and Mr. He (*ibid.*) that he had absolutely no intention of neglecting the problems raised by interpretative declarations, as, incidentally, was apparent from the provisional general outline of the study he proposed in chapter I. The question was in fact dealt with at the end of section B.2 and also in the questionnaire<sup>3</sup> he had addressed to States and international organizations; he trusted that Mr. Addo and Mr. He had received a copy.

14. It was gratifying that the remarks made by some members afforded him an opportunity to stand back and view matters from the angle of legal philosophy. The remarks in question related, on the one hand, to the political basis of international law and, on the other, to the relationship between general international law and regional systems.

15. So far as the political basis of international law was concerned, he had been surprised at certain remarks which implied that he had a hostile approach to that of the third world and that his report reflected a vision of international law which was typical of the major powers. That misunderstanding perhaps arose from one of the statements he had made (*ibid.*) on the number of reservations entered, respectively, by third world countries and by western States in connection with human rights. He had, in the interim, managed to verify, from the volume enti-

tled *Multilateral treaties deposited with the Secretary-General*,<sup>4</sup> that the number was higher in the case of the former than in the case of the latter, but he wished in particular to explain what his intent had been at the time. What he had wanted to say was that human rights ideology was in the main Western in origin and that, either for ideological reasons or for reasons relating to their stage of development, the third world countries had difficulty in applying human rights instruments in their entirety; hence the use of the technique of reservations, which showed that those States took the treaties to which they acceded seriously. He would note in passing that it was not very elegant to blame a Special Rapporteur for the mistakes of his own country and would point out that, in the particular case, he was not the last to criticize France when it seemed to him to deserve it. What was more, at the fifty-first session of the General Assembly, France had probably been the State that had been most critical of his report during the discussion in the Sixth Committee.

16. Viewing the matter in more fundamental terms, he wished to express his agreement with several members about the political ulterior motives, or strategies, of States when entering reservations or drafting treaties. That also applied to the 1969 Vienna Convention, including the clauses relating to treaties, which, as Mr. Hafner had rightly pointed out (*ibid.*), had been adopted as part of a last-minute compromise. That compromise, called "wobbly" by one member, had nonetheless enabled the system to operate satisfactorily, as attested to by the solid consensus within the Sixth Committee, which took the view that nothing in it should be changed. That political intrusion to some extent justified the statement that articles 19 to 23 of the 1969 Vienna Convention were the reflection of international law as seen by the major powers but that statement applied equally to all the rules of international law, which were de facto engendered by the balance of power to which the previous speaker had referred. At the same time—and it was what gave law its special character—the scope of that finding should not be exaggerated since, once a norm had been adopted, it applied to all including the large and the very large powers. Lastly, it was certainly not just the major powers or industrialized countries that upheld the Vienna regime: among their ranks some doubts were expressed, whereas the third world States seemed to value the regime the most.

17. The second fundamental problem, which had been raised by Mr. Brownlie and to which he had perhaps not given sufficient attention in his report, concerned the way in which the Commission should take account of regional trends. At the general and theoretical level, general international law was enriched by the contribution of regional innovations, as, for example, in the case of Latin American practice with regard to the rules applicable to reservations. Conversely, where there was no such osmosis, it had to be recognized that the regional rules could derogate from the universal norms by virtue *mutatis mutandis* of the principle *specialia generalibus derogant*. With regard more specifically to reservations to human rights instruments, the Commission should, in his view, bear in mind the practices of regional bodies, which could, from the

<sup>3</sup> See 2487th meeting, footnote 16.

<sup>4</sup> United Nations publication (Sales No. E.97.V.5), document ST/LEG/SER.E/15.

standpoint of progressive development in particular, be of great interest. Nonetheless, so far as the substance of the applicable rules was concerned, it could not be claimed that the monitoring bodies, whether regional or universal, had in any way objected to the Vienna regime.

18. He would consider next the positions taken by members of the Commission on the matters that had been the subject of the debate, namely, the unity or diversity of the rules applicable to reservations, on the one hand, and their adjustment to reservations to human rights instruments, on the other.

19. He had first noted the firm “unitary” convictions expressed, in particular, by Mr. Addo, whose comments on the practical difficulties he encountered as legal adviser to his country’s Ministry of Foreign Affairs confirmed the need to spell out, supplement and clarify rather than to change the existing rules of ordinary law and the appropriateness of including specific clauses to that effect in future treaties. He also shared in abstract terms Mr. Crawford’s idea that the general regime should—and could—permit the development of specific regimes; in practice, however, he was inclined to think that such was not the case at the normative level, since the Vienna regime enjoyed, at least in broad terms, universal support, also from the human rights treaty monitoring bodies.

20. Mr. Simma and Mr. Dugard had certainly taken the most critical view of the Vienna regime, coming to the defence of the “voice of human rights”; while conceding that the reservations regime was uniform in positive law, they both nevertheless argued that it was unsatisfactory in the area of human rights and that uniformity “for want of a better alternative” should be questioned. Such a morally and politically generous approach was attractive, but he failed to see how its proponents hoped to translate it into practical rules of law. At the normative level, he had made three findings.

21. First, neither Mr. Simma nor Mr. Dugard seriously questioned the fact that the human rights treaty monitoring bodies applied the Vienna rules and had never challenged their soundness, first and foremost that of article 19, subparagraph (c), of the 1969 Vienna Convention, which stated the basic principle of respect for the object and purpose of the treaty. Secondly, it was true, as Mr. Simma had observed, that the 1969 Vienna Convention failed to solve the fundamental problem of the fate of reservations contrary to the object and purpose of the treaty—a problem to be dealt with later by the Commission, but that shortcoming did not by any means exist only in the area of human rights: the problem arose in the same terms for all other multilateral treaties. Thirdly, Mr. Simma, supported by Mr. Crawford, had argued that, by contrast, the problems raised by the application of article 21 of the 1969 Vienna Convention related specifically to human rights instruments inasmuch as the non-application of a human rights treaty provision could not entail practical consequences, since the objecting State was still obliged to comply with the provision in question. While he did not dispute that point, he felt he had provided a preliminary response in chapter II, section B.3 (b), of his report and in his oral introduction. Mr. Hafner had put forward a weighty additional argument, at least in explanatory terms, by showing that the article 21 mecha-

nism established a type of reciprocity system, even for normative treaties, by depriving reserving and objecting States of the possibility of invoking the rule to which the reservation related. Even allowing, as seemed correct, that there was no possibility of reciprocity in respect of reservations to human rights instruments, the fact was that nobody wished to revert to *lex talionis* and that any attempt to amend the 1969 Vienna Convention in order to introduce some form of reciprocity would, in practice, be a step backwards.

22. With regard to the other three points raised by Mr. Hafner, he took note of the fact that the latter disputed the admittedly too general equation he had established between normative treaties and law-making treaties, just as he took note of Mr. Pambou-Tchivounda’s comments on the special characteristics of limited treaties and the constituent instruments of international organizations, which he confessed to having studied somewhat too hastily. Secondly, while it was true that article 60, paragraph 5, had been included in the 1969 Vienna Convention at the United Nations Conference on the Law of Treaties,<sup>5</sup> it was also true that the problem of human rights instruments, raised intermittently before the Commission, had not been omitted from the *travaux préparatoires*. He acknowledged that Mr. Hafner had raised an extremely interesting and thought-provoking issue when he had said that the problem of reservations contrary to the object and purpose of a treaty arose on the same terms as that of reservations prohibited by the actual wording of the treaty; he noted, however, that the problem was not confined to human rights instruments in that case either.

23. He had listened with interest to Mr. Ferrari Bravo’s statement, but was not fully convinced of the need for the ad hoc regulation of individual situations, since such an approach would be a negation of general international law.

24. In conclusion, he admitted that he had been somewhat perturbed by Mr. Simma’s scepticism about the appropriateness of resorting to the model clause procedure to solve the human rights problems which he thought he had detected, because the heyday of the adoption of human rights instruments was, in his view, over. The latter opinion was probably correct, but, if the existing human rights instruments really gave rise to serious problems, they could always be amended. In any case, he did not see what kind of normative action the Commission could take with regard to the instruments in force, since, as Mr. Kateka had rightly stated (2500th meeting), treaty relations were based on the free will of the parties concerned.

25. Before introducing the last part of his second report, he was willing to listen to—and perhaps take part in—a debate on his summing-up.

26. Mr. LUKASHUK said that he was perfectly satisfied with the Special Rapporteur’s clarifications, especially as to the preliminary nature of the draft resolution, which would be discussed before being transmitted to the Commission on Human Rights. He wished to provide some purely factual details about the type of compromise

<sup>5</sup> See 2499th meeting, footnote 14.

reached on article 19 of the 1969 Vienna Convention, which could not be described as a “package deal”. The delegation of the United States of America had supported the text which had been drafted by the Commission and which amounted to a stipulation that “reservations may not be formulated unless”, whereas the delegation of the former Union of Soviet Socialist Republics (USSR) had supported the wording which had become that of the 1969 Vienna Convention, namely, that “A State . . . may . . . formulate a reservation unless”. In other words, the compromise had already formed part of the substance of the text.

27. Mr. CRAWFORD welcomed the Special Rapporteur’s proposal on the procedure applicable to the draft resolution. If the Commission actually decided to consult the competent human rights bodies, it would be easier for him to defend his position. In general, the Commission’s future work would, in his view, require closer coordination and collaboration with other United Nations bodies, many of which rightly or wrongly claimed to have a kind of monopoly in their field. One way of maintaining the integration of international law was to challenge that monopoly, especially through consultations.

28. Mr. BENNOUNA said that he had not detected an operational perspective in the Special Rapporteur’s presentation of the topic. In particular, he failed to understand why the Special Rapporteur, having started out with the idea of making proposals to States to remedy certain defects in the Vienna regime, had digressed on the question of human rights instruments before proposing the quite unusual procedure of a resolution, which was tantamount to offloading the human rights issue. It was preferable to adopt a uniform approach to the topic, dropping the draft resolution and reverting to the Commission’s customary procedure, consulting experts and relevant bodies, if need be, but, at all events, moving beyond the bounds of a mere doctrinal exercise.

29. Mr. PELLET (Special Rapporteur), introducing chapter II, section C.2, of his second report, said that, although the role of the treaty monitoring bodies in respect of reservations was certainly the most controversial issue dealt with in his second report, he would nevertheless try to be fairly succinct and confine himself to a brief overview of the broad lines. In doing so, he would focus on certain changes of emphasis in relation to his report that he wished to make in the light of his reading and, more importantly, the discussions of the Commission at its forty-eighth session, in 1996, and those of the Sixth Committee, an observation that also applied to the draft resolution he was proposing.

30. As he had said at the forty-eighth session, there were two opposite views on the topic. One side held that the human rights treaty monitoring bodies had no authority to assess the permissibility of reservations. When a reservation was formulated, they must accept the consequences without querying its permissibility or validity. That was the position of the three States which had criticized general comment No. 24 (52) of the Human Rights Committee<sup>6</sup> and it was also the traditional position of the Legal Counsel of the United Nations and of the human rights bodies themselves until the early 1980s in the case of the

European and inter-American regional bodies and until the early or mid-1990s in the case of the international bodies. It was also the position adopted by certain authors. The other side and, in particular, the competent bodies more recently and authors specializing in human rights held that the bodies concerned had the right and duty not only to assess the permissibility of reservations, but also to take whatever action was indicated, even if it meant deciding that a State whose reservation was impermissible was bound by the treaty as a whole, including the provision or provisions to which the reservation related.

31. In his view, neither of the extreme positions was satisfactory, not on grounds of appropriateness—in that respect, he would opt for the position of the human rights experts—but on the basis of a strictly legal argument. The “right” answers in legal terms seemed to him to be the following. First, the human rights bodies had the authority and even the duty to assess the permissibility of reservations formulated by States on the basis of treaty reservation clauses where they existed or the Vienna regime where they did not; on that score, he unhesitatingly shared the by now virtually unanimous positions of the bodies themselves, which had met with a favourable response on the part of some States, particularly Germany and Austria, during the debate in the Sixth Committee. Secondly, he nevertheless remained convinced that the jurisdiction of those bodies went no further and that they could not arrogate to themselves the right to decide that a State which had entered an impermissible reservation was bound by the treaty as a whole.

32. Before proceeding with the argument which, in his view, justified his position, he felt he should explain why the problem related specifically to reservations to human rights instruments. On the one hand, it was human rights instruments which most frequently established supervisory and monitoring bodies, and, on the other, it was human rights bodies which had provided the main setting for the problem in recent years. That did not mean, however, that the problem related specifically to reservations to human rights instruments. The problem did not arise because human rights were at issue, but because those instruments established bodies responsible for monitoring their enforcement. The same thing could happen in other fields, for example, disarmament, arms control or the environment.

33. One could even go a step further: where a dispute arose between States concerning the application of a treaty, the question whether a reservation by one party to the treaty was valid could arise, although it was not the ground for the dispute; a case in point was the dispute between France and the United Kingdom of Great Britain and Northern Ireland in the *English Channel* case.<sup>7</sup> The question on that occasion seemed to be couched in much the same terms as in the current instance. Could the body responsible for settling the dispute, which might have decision-making powers, as, for example, in the case of ICJ when it ruled on a dispute or in the case of an arbitral tribunal, or might not have such powers, as in the case of

<sup>6</sup> See 2487th meeting, footnote 17.

<sup>7</sup> *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978 (UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271).

a conciliation or mediation commission or ICJ in an advisory capacity, assess the permissibility of the reservation? In his view, the answer was clearly affirmative. The body to which the case had been referred could and should, pleading exceptional circumstances created by inadmissibility, assess the regularity of the reservation, since, otherwise, it would be unable to perform its task of settling the dispute in accordance with international law, that is to say in accordance with the treaty, in the form in which it had been ratified, of course, but on condition that the ratification, including reservations, was in conformity with international law and hence that the reservations were permissible.

34. That argument could be applied, *mutatis mutandis*, to the jurisdiction of human rights bodies or, more generally, to the jurisdiction of bodies responsible for monitoring the implementation of any treaty whatever. The bodies were established by the parties, voluntarily and consciously, to ensure that States actually fulfilled their obligations under a treaty, in the form in which it applied to them, including reservations. The reservations must be permissible, however, because, otherwise, they could not be applied unless international law was to be regarded as a big joke.

35. The monitoring bodies therefore clearly should not have broader jurisdiction for determining the permissibility of reservations than they had in their main areas of responsibility. If, like ICJ, they had decision-making power in respect of disputes, they could determine whether a reservation was permissible or not and act accordingly for the purposes of the settlement of a dispute submitted to them. If they had only advisory or recommendatory powers, however, they could adopt a position on the permissibility of the reservation, but that position would not be binding on the reserving State—or, for that matter, on the other States parties; those States would have to give sincere consideration to the opinion handed down or the recommendation made, but that opinion or recommendation would not be binding on them. Nothing in the practice of arbitral tribunals (the *English Channel* case), ICJ or the human rights bodies, either at the regional or international level, including general comment No. 24 (52) of the Human Rights Committee, contradicted that position and he himself agreed with it. It was subsequently, at a later stage, that he had more difficulty understanding their position, although, as he had indicated at the beginning of his statement, he had refined his position slightly compared with that of the previous year.

36. What happened if and when a reservation was found to be impermissible? The human rights bodies basically took the view that the State whose reservation had been declared impermissible must be deemed to be bound by the treaty as a whole, notwithstanding the reservation. He did not think that position was tenable. A treaty, by definition, was a consensual instrument that derived its force solely from the will of the State as the State had expressed it “by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”, as provided for in article 11 of the 1969 Vienna Convention. Of course, however, reservations were consubstantial with the expression of consent. A State accepted a treaty, but with

the reservation or reservations to which it subordinated that consent and which could be the absolute precondition for such consent that could be imposed by its Parliament, by its Constitution or by pressing domestic policy reasons.

37. Only the State could know that, however, and since treaty monitoring bodies did not, in principle, know that, they claimed the right to impose a treaty on a State that the State, when all was said and done, did not “want”, and it thus became, not a treaty, but a piece of international legislation. He did not believe that the international community was ready for that and he was not even sure that it was desirable: why should experts, however distinguished they might be, know better than Governments what was good for States and peoples? What legitimacy would such decisions have? Although it might be regrettable, it was also a fact that there was no world government. Was bureaucratic despotism on a world scale preferable?

38. He had indicated at the beginning of his statement that he had somewhat changed his views after having written his report and on a matter of some importance: it might well be true, as Mr. Brownlie had maintained (2500th meeting), that the foregoing comments did not apply to regional human rights bodies, at least when they had the power to make binding decisions. Solidarity within the European and inter-American frameworks was stronger than international solidarity and the States of those regions had established mechanisms reflecting that “extraordinary” solidarity by giving the mechanisms extensive powers which States seemed, in practice, to accept. Even in such contexts, however, one might question the grounds for the solution used by the European Court of Human Rights in respect of Turkey in the *Loizidou* case.<sup>8</sup> Even Switzerland had consented, after much hesitation, to remain a party to the Rome Convention after the *Belilos*<sup>9</sup> and *Weber*<sup>10</sup> cases, and that showed that the situation was still evolving. In the final analysis, however, the problem was not or was no longer the same at the European and inter-American regional levels and paragraph 6 of the draft resolution at the end of the second report would probably have to be amended slightly.

39. On the other hand, he was convinced that regional solutions could not be transposed to the international level and to bodies such as the Human Rights Committee, which did not have compulsory jurisdiction vis-à-vis States. Nothing justified the assertion in paragraph 18 of general comment No. 24 (52) of the Human Rights Committee that, if the Committee determined that a reservation was impermissible, that reservation must be considered “severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation”. In the absence of a customary exception on a regional basis that was accepted as law, such an assertion was contrary to general international law. If a reservation was impermissible, it was up to the reserving State to consider the consequences. Those consequences were referred to at the end of chapter II, section C.2 (b), of the

<sup>8</sup> See 2500th meeting, footnote 17.

<sup>9</sup> *Ibid.*, footnote 16.

<sup>10</sup> European Court of Human Rights, *Judgments and Decisions, Series A*, vol. 177, judgment of 22 May 1990 (Registry of the Court, Council of Europe, Strasbourg, 1990).

report and could be summed up in the following way. First, the reserving State could do nothing if, as was the case with nearly all existing international bodies, such bodies had no binding power, but a law-abiding State could be expected not to behave that way, even in the absence of a legal obligation *stricto sensu*. Secondly, it was obvious that a State could quite simply withdraw its reservation, thereby solving the problem. Thirdly, the State could also terminate its participation in the treaty, to which it had never actually been a party because its consent had been invalidated by the impermissibility of its reservation. Fourthly, another possibility which seemed more satisfactory and justifiable from the legal point of view, despite some difficulties, was that the reserving State could “regularize” its situation by replacing its impermissible reservation by a more limited, permissible one. That was nothing new and had been done by Switzerland and Liechtenstein after the judgment in the *Belilos* case. There were other examples of “reservation substitution” as a result, *inter alia*, of objections by States.

40. One last comment was called for on that point. There was an aspect of general comment No. 24 (52) of the Human Rights Committee with which it was hard, in good conscience, to agree, namely, the naturally quite excessive claim by the Committee that it was the sole judge of the permissibility of reservations. There was no doubt that it could have an opinion about permissibility, but it did not have a monopoly in that area. Like the other human rights instruments, the International Covenant on Civil and Political Rights was and continued to be a treaty among States; they could, and did, formulate objections to reservations and he did not see any disadvantage to that dual monitoring system. On the contrary, it effectively guaranteed the monitoring of the permissibility of the “necessary evil” represented by reservations; for the time being, at least, the objections of States were more effective than monitoring by the Committee, inasmuch as, for the reasons given by Mr. Hafner (2500th meeting), objections led to a certain reciprocity that could perhaps constitute another not insignificant means of exerting pressure. They could also serve as useful guidelines for the Committee itself because, while States parties must certainly take the Committee’s views duly into account, the opposite was also true.

41. Turning to the draft resolution at the end of his report, he said he did not think it would be helpful to comment on the substance in detail, since it reflected the main conclusions that could be drawn from the report itself. Paragraph 1 restated a conclusion reached by the Commission in 1995.<sup>11</sup> Paragraphs 2 and 3 reaffirmed the principle of the unity of the reservations regime and paragraph 4 referred to specific problems arising out of the establishment of human rights bodies and should perhaps be supplemented by an indication that such problems could also arise in other areas. Paragraphs 5, 6 and 7 reflected the comments just made on the competence of those bodies, while paragraph 8 invited States to include reservation clauses in the treaties they concluded in order to dispel any ambiguity in future.

42. It might be useful to recall why it seemed appropriate to adopt such a resolution and to explain the choice of

that form. In the second and third paragraphs of the preamble and in paragraph 9, he had tried to explain the need for and usefulness of such a resolution. PCIJ and, subsequently, ICJ had defined themselves as “the international law body” and, although he did not want to rob the Court of that title, he thought that, while the Commission was not “the” international law body, it was at least, in its own way, “one” of the international law bodies. It would be unfortunate if the Commission were to remain silent in the debate currently going on on the question of reservations to normative treaties and, more specifically, to human rights treaties, when the topic of reservations to treaties was part of its programme of work and it could thereby contribute to the codification and progressive development of international law by showing an interest in a topical issue that was clearly within its jurisdiction.

43. Certain specific events made it necessary and urgent for the Commission to consider the matter; they were referred to at the beginning of chapter II of the report and there was perhaps no need to refer to them again. In January 1997, moreover, the Committee on the Elimination of Discrimination against Women had considered a report by its secretariat on reservations to the Convention on the Elimination of All Forms of Discrimination against Women whose implementation it was responsible for monitoring; the report referred to the Commission’s work. The Committee had refrained from adopting a position on the question precisely because it was waiting for the final text of the Commission’s resolution. He had reason to believe, although his information had not been confirmed, that the chairpersons of the human rights treaty bodies had also decided not to resume the consideration of the issue of reservations to those instruments until the Commission’s position was known. That position was being awaited and the Commission must take care not to disappoint those who were waiting. The discussion in the Sixth Committee also showed that States took an interest in the matter.

44. Turning to the question of form, he recalled that the idea of drafting a resolution had been supported at the forty-eighth session and by some members of the Commission (2500th meeting), whereas others, without being categorically opposed, had expressed doubts as to whether the form chosen for the proposal was well founded. He was maintaining his proposal, but did not consider it to be of overriding importance. It was true that the Commission was not in the habit of expressing itself through resolutions and that it would be the first time that it had done so. Habit was not a valid argument, however. It was not because the Commission had never done something that it should refrain from doing so for evermore. For example, it had never invited the President of ICJ to visit, but it had done so in 1997, and that was a good thing.

45. In his view, the issue of reservations was particularly well suited to that form of “communication”, but it did fit into the usual mould of draft articles accompanied by commentaries. It was not a matter of establishing rules, but of adopting positions on fairly general problems of “legal policy”. Nevertheless, if the word “resolution” scared some members, he was not attached to it enough to fight a lengthy battle on its behalf. He was in favour of it for the reasons he had given and was convinced that it would be good for the Commission’s image. But if a

<sup>11</sup> See *Yearbook . . . 1995*, vol. II (Part Two), para. 487 (d).

majority of members preferred that the Commission should adopt “recommendations” or “conclusions”, he would bow to their wishes with good grace. In any event, the question did not seem to warrant a lengthy discussion and the best thing might be to take an indicative vote on the issue after the members had had a chance to express their views if there were any objections to that approach.

46. Whatever form the Commission adopted, he repeated the proposal he had made earlier in response to the informal suggestions by Mr. Simma and Mr. Brownlie: the Commission must act rapidly, but without undue haste, and in consultation with the human rights bodies, simply adopting on first reading at the current session a draft that it would send for comments, not only to the General Assembly, as usual, but also to the bodies in question. It was only after having heard their reactions that it would take a final decision. It went without saying that the Commission would have to append an explanatory note to the draft. He would be prepared to submit a draft note once the text of the draft resolution had been considered by the Drafting Committee.

47. Mr. ROSENSTOCK said that, for the most part, he endorsed the reasoning and conclusions of the Special Rapporteur. Thus, he entirely shared the view that rules applicable to reservations to treaties were applicable to all treaties, whatever their object. He was puzzled, however, by some of the Special Rapporteur’s comments about reservations to bilateral treaties, as he did not think it plausible to speak of a reservation to a bilateral treaty. That point might have to be discussed further at a future date.

48. With regard to the draft resolution proposed in the report, he did not consider it necessary for the Commission to reach agreement on all the points raised by the Special Rapporteur or any other member. That was true, for example, of General Comment No. 24 (52) of the Human Rights Committee. The simplest solution would perhaps be to delete paragraphs 5 and 7, as well as a part of paragraph 4, from the draft resolution and to endorse the rest, possibly amending paragraph 6 to take account of the specific role of regional organizations. It should therefore be possible to adopt a resolution which had appeared in the report of the Commission on the work of its forty-eighth session<sup>12</sup> and on which the human rights bodies had had plenty of time to reflect.

49. There were, however, two points on which the Special Rapporteur did not seem to have followed his premises and reasoning to their logical conclusion.

50. First, the Special Rapporteur argued persuasively that States could not make reservations on provisions of a treaty which simply restated a rule of customary law. States could reject certain procedural provisions, but such a reservation did not of itself constitute a unilateral decision to opt out of the rule or, if accepted, an agreement to such a decision. It was difficult to see why the same analysis would not apply a rule of *jus cogens*. While it was true that a State could not opt out of such rules, that did not mean that a State could not make a reservation to a rule of *jus cogens* expressed in a treaty. There was nothing inherent in the nature of a rule of *jus cogens* that required

a State to agree to its inclusion in any and every procedural context. It was doubtless true that there were not likely to be many instances when reservations to a preemptory norm would not be contrary to the object and purpose of the treaty. But such a reservation, one that was contrary to the object and purpose of the treaty, would be invalid because of article 19, subparagraph (c), of the 1969 Vienna Convention and not because a preemptory norm was involved.

51. The other matter on which he disagreed with the Special Rapporteur was the latter’s apparent acquiescence in the view that monitoring bodies had the competence to “determine” the permissibility of reservations formulated by States. The bodies in question could indeed express a view, they could deplore something, but that was not tantamount to “determining” the permissibility of a reservation. The determinative role of such bodies *de lege ferenda* was debatable, but to suggest that such a role could be asserted *de lege lata* was simply wrong. The conclusion that the Human Rights Committee could not “determine” the permissibility of a reservation flowed, *inter alia*, from the conclusion reached by the Commission two years earlier<sup>13</sup> that there was no need to challenge the regime established by articles 19 to 23 of the 1969 Vienna Convention.

52. Remarks about the Vienna regime being a failure could not be endorsed. The adoption of the key human rights instruments predated that of the 1969 Vienna Convention. Article 20, paragraphs 2 and 3, of the Convention even provided for the possibility of fine-tuning the reservations regime for some types of treaties. The absence of a special provision applicable to human rights instruments was a conscious omission, but to attribute it to the fact that the Convention had been drafted during the cold war and to suggest, as had been done, that it was part of a political deal was misleading. On the other hand, the regime that had been enshrined in the 1969 Vienna Convention had been known to States at the time of the adoption of the human rights instruments. Thus, the absence of special provisions in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights had been deliberate, as had been made abundantly clear *a contrario* by the presence of a special regime concerning the compatibility of a reservation with the object and purpose of the International Convention on the Elimination of All Forms of Racial Discrimination. The flexibility of the Vienna regime was seen by some as an element which could work to the detriment of the integrity of a treaty. It would surely be no less useful to recognize that the flexibility of the Vienna regime permitted States to innovate in the treaties concerned, as they had done in the case of the International Convention on the Elimination of All Forms of Racial Discrimination. It followed that, when States had not done so, it was not because they had been barred by the 1969 Vienna Convention or by ignorance of its contents. Special regimes could, of course, exist, as Mr. Crawford had said (2500th meeting). It was up to States whether or not to create such regimes. So far, they had refrained from doing so.

<sup>12</sup> *Yearbook* . . . 1996, vol. II (Part Two), para. 136 and footnote 238.

<sup>13</sup> See footnote 11 above.

53. In his report, the Special Rapporteur dismissed too lightly the authoritative 1976 opinion of the United Nations Legal Counsel<sup>14</sup> that it was for States parties, and not for a monitoring body, to determine the validity of a reservation. The results in the *Temeltasch*,<sup>15</sup> *Belilos* and *Loizidou* cases did not affect the strength of that opinion or in any other way provide a basis for finding that the Human Rights Committee had a right to make “determinations”. Those cases were invalidated as precedent inasmuch as, according to article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the purpose of the mechanism created by that Convention was to “ensure the observance of the engagements undertaken”. No such language was to be found in the global treaties establishing such bodies. Moreover, the Convention for the Protection of Human Rights and Fundamental Freedoms created a court, and it was plausible to conclude that States which consented to the establishment of a court implicitly consented to a committee with extensive authority. In such a context, it was plausible to argue, as the European Commission did in the *Temeltasch* case, that “the very system of the Convention”<sup>16</sup> conferred competence upon it.

54. In addition to those differences which deprived the European precedents of weight in the global context, it was far more likely that members of a regional system such as the European Community, the Council of Europe or the inter-American system would be more willing—in the regional context—to assign sovereign rights, such as the right of consent to be bound by a regional instrument or of consent to a reservation to such an instrument, than members of the international community as a whole.

55. The fundamental issue to which it was necessary to return again and again, the pivot upon which the law of treaties turned, was the consent of States. To ignore the role of consent in the decision of States to be bound by an instrument was to undercut the principle of *pacta sunt servanda* and to ignore the role of consent in the decision of States to object to a reservation as being contrary to the object and purpose of the treaty, but, at the same time, to accept the reserving State as a party to the treaty was to ignore the practice of States and thus the will of the international community.

56. Even assuming that the Human Rights Committee had the authority to determine the inadmissibility of a reservation—an authority he did not believe it had—it was quite another matter to assert that it had authority to determine, not that the reserving State was not a party because its consent was invalid, but, rather, that it could ignore those elements of the State’s consent which it did not like and, in effect, treat the counter-offer as an acceptance. The approach of borrowing the notion of severability from the relationship between a reservation and the treaty itself and trying to apply it to the relationship between a reservation and the elements by which the reserving State intended to consent to be bound was very unconvincing. Paragraph 6

of the draft resolution proposed by the Special Rapporteur and the reasoning behind it were entirely persuasive.

57. Going on to refer to an article in which Redgwell discussed various ideas on how States could bring existing divergent State practice into line with the Vienna regime,<sup>17</sup> which itself recognized the possibility of individual treaty regimes explicitly departing from its residual rules, he said that, in its future work on the topic, the Commission would be well advised to build on the suggestions by Catherine Redgwell and others in considering what instruments, model clauses or provisions States could use, if they so wished, to enhance the “integrity” of the regime of human rights and other treaties while respecting the rights of States and the integrity of the system itself, and thus the force of the fundamental principle *pacta sunt servanda*. Would the elaboration of protocols be as labourious as it was if States were willing to legitimize or endorse a determinative role for the report-receiving bodies? Everything possible should, of course, be done to strengthen the regime of human rights treaties and the rights of the individual against the State, but to do so at the expense of the law of treaties was likely to do more harm than good.

58. Mr. CRAWFORD said that Mr. Rosenstock had introduced an interesting point by referring to the special case of rules of *jus cogens*. According to his argument, reservations had meaning only in relation to treaty law. That was so, perhaps, because treaty law was related to customary international law. But the effects of a reservation which was accepted by another State could override customary law between the two States concerned. That was the case, for example, with the treatment of diplomats; the manner in which two States agreed to treat their respective diplomats was a matter of *jus dispositivum*. The same was obviously not the case with human rights or with *jus cogens*. The rules of *jus cogens* remained peremptory whatever States might say or do under a treaty. In most cases, the restatement of a rule of *jus cogens* in a treaty was formulated in such a way that any attempt to vary from it would be incompatible with the object of the treaty in question. General norms of customary international law had the same status. Human rights norms, which formed part of customary international law, could not be applied relatively or selectively and two States could not agree between themselves that they would not comply. For example, they could not agree between themselves to practise torture, even with respect to their own nationals. It followed that what Mr. Rosenstock had said of the rules of *jus cogens* was equally true of rules of general international law which were not *jus dispositivum* as between the two States concerned.

59. Mr. Sreenivasa RAO said that he endorsed most of Mr. Rosenstock’s well-constructed and well-documented statement and shared most of its conclusions, in particular, that a reservation relating to a rule of *jus cogens* was null and void because of the mere fact that it was inconsistent with the object of the treaty and not because it varied from customary international law. The question still remained, however, as to what constituted customary

<sup>14</sup> United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 219-221, at p. 221.

<sup>15</sup> Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch v. Switzerland*, vol. 31 (Strasbourg, 1983), pp. 138-153.

<sup>16</sup> *Ibid.*, p. 145, para. 65.

<sup>17</sup> “Reservations to treaties and Human Rights Committee general comment No. 24 (52)”, *International and Comparative Law Quarterly*, vol. 46 (April 1997), Part 2, p. 390.

international law. Some rules were unanimously accepted by States, while others were accepted by some States and rejected by others. As an example, he cited the case of the law of the sea, where opinions on the subject of the delimitation of the continental shelf were far from unanimous and where many of the applicable rules did not fall in the category of customary law properly speaking, but, rather, in that of the progressive development of international law. In fact, it could be said that reservations were a reflection of doubts as to what constituted customary international law.

60. Mr. LUKASHUK said that he found Mr. Rosenstock's and Mr. Sreenivasa Rao's comments on the subject of customary international law extremely interesting and took the opportunity to recommend that the Commission should place that highly important topic on its agenda.

61. Mr. ADDO said that he entirely agreed with the comments just made by Mr. Crawford. He doubted whether a reservation which was incompatible with the object of a treaty could be accepted by another State party. Such a reservation was inadmissible and, in his view, consent by the other State party was null and void for that reason.

62. Mr. ROSENSTOCK said that, as he saw it, a reservation was not prohibited by the mere fact that it concerned a rule of *jus cogens*. It was prohibited because it was incompatible with the object of the treaty in question. To some extent, that applied to reservations to human rights treaties; such a reservation did not give the reserving State the right to ignore the rule, but only the right not to apply it as a rule of treaty law.

63. Mr. GOCO said that he shared what he understood to be Mr. Rosenstock's position on the proposal to consult the human rights treaty monitoring bodies. He felt that the Commission should steer its own course and arrive at its own formulations. The bodies in question had already adopted a very intransigent position on reservations. To consult them would not be useful in practical terms.

*The meeting rose at 1.10 p.m.*

## 2502nd MEETING

*Tuesday, 1 July 1997, at 10.10 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

*later:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,

Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma.

### Reservations to treaties (*continued*) (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>1</sup> A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI expressed appreciation for the Special Rapporteur's work and for his introduction to a difficult topic and said he agreed with the conclusion that, mainly because of its flexibility, the Vienna regime was suited to the requirements of all treaties, whatever their object or nature. As the Special Rapporteur had also recognized, however, account had to be taken of certain new developments since 1969 which had created special problems in regard to reservations. The main problem undoubtedly lay in the machinery established to monitor many human rights treaties and especially certain specific activities gradually developed by treaty bodies in determining the permissibility of reservations formulated by States. Although that determination function had not been expressly entrusted to the treaty bodies under the relevant treaties, it could be deemed to derive from such instruments as the Convention for the Protection of Human Rights and Fundamental Freedoms and the Pact of San José which stipulated that the jurisdiction of the European Court of Human Rights and the Inter-American Court of Human Rights extended to all cases pertaining to the interpretation and application of both Conventions. The exercise of such a function, moreover, formed part of the developing practice of those bodies. That was, however, a regional practice and it should not become global. Despite general comment No. 24 (52) of the Human Rights Committee,<sup>2</sup> the Committee's competence was not, generally speaking, mandatory in character and, in any event, its functions in regard to the permissibility of reservations were not comparable to those of the regional courts.

2. One question appeared to be the extent to which the functions of the treaty bodies in determining the permissibility of reservations could replace the relevant powers of States under the 1969 Vienna Convention. The matter was further complicated by another problem, not solved by that Convention, namely, the mutual inter-dependence between the permissibility and the acceptability of reservations, under articles 19, subparagraph (c), and 20, paragraph 4, of the Convention. He tended to favour the opposability doctrine whereby the final decision rested with the true masters of the treaties, the States parties. It seemed that the acceptance of reservations by another

<sup>1</sup> See *Yearbook* . . . 1996, vol. II (Part One).

<sup>2</sup> See 2487th meeting, footnote 17.

contracting State should have a decisive role and that the so-called compatibility test should serve only as a guiding principle for acceptance of or objection to a reservation. On the other hand, if the human rights treaty bodies were able to question the admissibility and validity of a reservation, even years after the reservation had been formulated, that could threaten the stability of the treaty relations and create uncertainty.

3. Again, it did not seem acceptable—as had happened with some decisions of the European Court of Human Rights—for any body to have a right to decide that a State which formulated an inadmissible reservation was bound by the whole treaty. States had protested vigorously against such tendencies, even among bodies that had only recommendatory powers, as the United States of America and the United Kingdom of Great Britain and Northern Ireland had done, for example, in the case of general comment No. 24 (52) of the Human Rights Committee. Interestingly, it was a fairly rare occurrence for States that objected to reservations to human rights conventions on the ground that they were incompatible with the object and the purpose of the treaty to exclude treaty relations with the reserving States. Any activity undertaken by the treaty body retroactively in that sphere could also be questioned. In short, it could be said that, on the regional scale, bodies which monitored human rights treaties, with the consent of States, were seeking to fill a gap in the 1969 Vienna Convention—the gap being constituted by the lack of any mechanism to decide on the impermissibility of reservations and its consequences. But that approach should not be adopted at the global level. In that connection, the proposed draft resolution, which appeared at the end of the second report by the Special Rapporteur (A/CN.4/477 and Add.1 and A/CN.4/478), and which properly reflected the existing situation, was designed to strike a balance between the traditional powers of States and the newly emerging powers of international bodies.

4. Close cooperation between States and treaty bodies in determining the permissibility of reservations was highly desirable and specific clauses to that effect should be incorporated in multilateral normative treaties, including human rights treaties. That would complete the Vienna regime by filling in certain gaps in the system while preserving the regime's binding character. A good example of a solution to the difficulties stemming from lack of precision in the 1969 Vienna Convention was provided by article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, whereby a reservation was regarded as incompatible if at least two thirds of the States parties to the Convention objected to it. The advantage of such a collegiate approach was, first, that States parties were directly engaged in the process of making final decisions concerning the admissibility of reservations, and secondly, it harmonized the traditional difference of views concerning the interrelationship between the permissibility and acceptability of reservations.

5. Mr. GOCO said that he wished to extend his congratulations to Mr. He, representing the People's Republic of China, on the events of the previous day in connection with Hong Kong.

6. He commended the Special Rapporteur for his excellent work on a complicated topic, which gave rise to a wide range of concerns. They included the permissibility of reservations, their compatibility with the object and purpose of the treaty or with human rights instruments, the effect of the reservation on the obligation of the reserving State, the role of the monitoring bodies in determining questions of the permissibility of reservations and the allied question of whether or not they were performing judicial or quasi-judicial functions in that connection, and the corollary question of whether the provision to which the reservation had been made could be severed from the treaty itself. There was, however, one all-pervasive and possibly threshold issue, on which there were conflicting views, and it concerned reservations to human rights treaties which were not covered by the Vienna Conventions and which, being of a special character, perhaps called for different treatment.

7. The Special Rapporteur seemed to take the view that, because of that apparent vacuum, rules should be formulated to serve as a guide to States parties. While that might be advisable in the case of bilateral or multilateral treaties in general, to include human rights in the current study could open the floodgates to all sorts of comment and criticism not only from the established human rights monitoring bodies but also from non-governmental organizations responsible for the promotion and protection of human rights. Regardless of any justification for the inclusion of human rights in the study, and of the status the Commission enjoyed in the field of international law, such organizations would still find fault with any attempt to clarify the position concerning the provisions on reservations which many regarded as an anathema.

8. He remembered that when, as a human rights advocate under the regime of President Marcos, he had advised that the Government should ratify the International Covenant on Civil and Political Rights he had always met with the stock answer that to do so might constitute an infringement of sovereignty. Subsequently, the Government had, under pressure, agreed to ratify the Covenant, but with the proviso that it would invoke the provisions on derogation, in the interests of national security. In the event, the Covenant had been ratified not by the Marcos regime but by the new Aquino Government, which had also ratified the Optional Protocol. As Solicitor-General under the current administration he had again had occasion to reject the suggestion that the provisions on derogation should be invoked in the case of the internal problems that had arisen in the south of his country. The point was that, in the matter of human rights, derogation or reservation was a bad word. If the Commission were currently to tinker with the provisions on reservations, it could encounter many challenges. In the case of the topic at hand, therefore, it would be better to preserve what had been achieved.

9. The Human Rights Committee had adopted an intransigent stand on the issue of reservations, as evidenced by its general comment No. 24 (52) from which it was easy to sense the feeling that, notwithstanding the provisions on derogation in many human rights instruments, ratifying States should not be released from their obligations under the International Covenant on Civil and Political Rights. It was important, however, to distinguish between

the word “derogation”, on the one hand, and “reservation”, on the other. The former was used in many human rights instruments, and specifically in article 4 of the Covenant, to mean suspension of the observance by a State party of its obligations, but only for the period of a public emergency. A similar provision on derogation appeared in article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 27 of the Pact of San José, though not in the African Charter on Human and Peoples’ Rights.

10. The word “reservation”, on the other hand, as defined in article 2, subparagraph (d), of the 1969 Vienna Convention, meant a “unilateral statement” which—unlike a derogation—purported “to exclude or to modify” the legal effect of certain provisions of the treaty in their application to the State that made such a statement. It was important to bear that distinction between derogation and reservation in mind when drafting the proposed guide to practice in respect of reservations to treaties,<sup>3</sup> and also in the case of human rights instruments. In that connection, he agreed with the statement in chapter I, section B.2, of the Special Rapporteur’s second report that the guide to practice should take the form of general rules which should be purely residual and should not be binding.

11. Mr. HE expressed appreciation to those members who had congratulated him on the handover of Hong Kong to China. China looked forward to cooperation with other countries in promoting Hong Kong’s prosperity and stability and also to a bright future for Hong Kong.

12. He said that the establishment of bodies to monitor human rights treaties had not, of course, been envisaged at the time the 1969 Vienna Convention had been drafted. Later, when those bodies had been set up by treaty, they had not been intended to assume the role of determining the permissibility of reservations. Only in the late 1980s, and in particular with the adoption of general comment No. 24 (52) by the Human Rights Committee in 1994, had the problem risen in an acute form. It was important to remember that the role vested in the monitoring bodies by the treaties that had created them was only to monitor the implementation of the provisions of the treaty. Those bodies therefore had no power other than that conferred on them by States parties. In other words, they had to function within their mandate. In particular, they could in no circumstances determine the permissibility of reservations made by States. Accordingly, in the absence of a clause in human rights treaties allowing the monitoring bodies to make such a determination, the Vienna reservation system should be observed in its entirety. It was for the reserving State to draw any conclusions regarding the incompatibility of its reservations with the object and purpose of the treaty, and for the State objecting to the reservation to draw any conclusions regarding its decision on the maintenance of the treaty link between itself and the reserving State. The reality of international relations required that it should be left to the States parties to determine the legal value of reservations and the legal relations between States. Under the Vienna system no issue as to the severability of impermissible reservations in the context of human rights treaties would arise. That had rightly been criticized by the Special Rapporteur as contrary to

the consensual principle which lay at the very basis of any treaty undertaking.

13. The Vienna system had functioned satisfactorily and hence there seemed to be no need to introduce dualism in the form of two parallel systems for determining the permissibility of reservations, or what might be termed a “diversity in unity” system. The main elements of the latter were embodied in the core paragraph—paragraph 5—of the Special Rapporteur’s proposed draft resolution, which, on the one hand, recognized the determination function of treaty bodies in regard to the exercise of control over the permissibility of reservations but, on the other, provided that that did not exclude the traditional modalities of control by the contracting parties or, where appropriate, the settlement of disputes by the relevant organs.

14. Paragraph 5 of the Special Rapporteur’s proposed draft resolution, moreover, was connected with paragraphs 7 and 9 which, respectively, called on States to cooperate fully with the bodies responsible for determining the permissibility of reservations, and expressed the hope that the proposed principles would help to clarify the reservations regime applicable to human rights treaties. Dualism, or a combination of two reservation systems, was not really necessary or acceptable and would make it difficult for those who subscribed to such views to endorse the draft resolution despite its good intentions and carefully weighed wording.

15. Mr. CRAWFORD said it was true that treaties did not specifically confer on treaty bodies a particular determinant role with regard to reservations and objections. It was also true that the process of making reservations and formulating objections, was a matter for States parties. On the other hand, treaty bodies did have a role in monitoring the obligations of States under treaties and, in order to do that, it was absolutely necessary for them to form a view as to the extent, or indeed existence, of the obligations of States under the treaties. The position, as ICJ had said on a number of occasions, was that a body established by a treaty had at least the powers that were necessary to enable it to fulfil its role. It followed that the treaty bodies must necessarily form a view as to the obligations of States. It might be that, under international law, the way in which they did so was primarily by reference to the attitudes taken by States in responding or not responding to reservations. But that was a different question, namely, the question of what the law relating to reservations was. If he had understood correctly, Mr. He was actually denying any role to treaty bodies. That seemed to go too far, since treaty bodies, in order to perform their designated function, had to form a view about the existence and extent of obligations of the States parties under the treaty. Otherwise, they would fail to discharge their functions.

16. Mr. BENNOUNA said he concurred with Mr. Crawford. He almost regretted that the Special Rapporteur had involved the Commission in the current debate on institutional rather than normative matters, since there was a clear-cut distinction between the reservations regime and the functions of international treaty monitoring bodies. The competence of such bodies was determined by the object and purpose of the treaty whose implementation they were required to monitor and even

<sup>3</sup> See 2500th meeting, footnote 7.

by the customary rules that they developed in the practical discharge of their duties. They were entitled to interpret the treaty within that context. The Commission should confine its discussion to the normative aspects of the reservations regime and endeavour to draft model rules under that heading for the guidance of States.

17. Mr. ROSENSTOCK said that the Commission, when dealing with the topic of reservations, could not ignore bodies which arrogated to themselves the right to determine matters relating to reservations and which reached conclusions that seemed to be inconsistent with the existing regime. The question was not whether such a body was entitled to have or express a view on reservations but whether it could make a determination and, if so, on what possible basis. There was a limit to how far the principle of effectiveness could be taken. *Ut res magis valeat quam pereat* did not justify anything and everything. It could be seen from a comparison with the formulations in the Convention for the Protection of Human Rights and Fundamental Freedoms and the Pact of San José and the structures set up thereunder that the context and basis were quite different in the case of the Human Rights Committee, which had exceeded its review function and sought to establish rules of law regarding reservations to treaties. He did not agree that the Commission should refrain from commenting on what was actually an interesting and challenging endeavour if it was well-founded and which might jeopardize the Vienna Convention process if it was not. The Commission had decided to endorse that process and its determination to do so had been approved by the General Assembly. It must exercise caution, therefore, before deciding not to deal with an aspect that had direct implications for the work it had undertaken to accomplish.

18. Mr. ADDO said that he fully agreed with Mr. Crawford. The monitoring bodies, if they were to operate effectively, must establish the extent of the obligations that had been incurred by States parties. In the event of reservations which seemed inconsistent with the object and purpose of a treaty, the monitoring bodies must be able to draw them to the attention of the States concerned. In doing so, they were not assuming dictatorial powers even if there was no explicit provision regarding such a role for them in the treaty concerned. If a State party agreed that a reservation was inconsistent with the treaty's object and purpose, it could either recast the reservation or withdraw from the treaty.

19. Mr. KABATSI said that he endorsed Mr. Rosenstock's remarks. Monitoring bodies should not be allowed to provide advice or make determinations regarding reservations unless the relevant treaties expressly conferred such powers on them. Their role consisted solely in monitoring compliance with the obligations entered into by States. Where a State made a reservation, the human rights monitoring bodies had absolutely no power to rule on an obligation which, then, was not applicable to the State concerned.

20. Mr. KATEKA said he agreed with Mr. Rosenstock and Mr. Kabatsi. As soon as treaty monitoring bodies were allowed to interpret reservations, even for the purpose of notifying States parties, the possibility arose of "creeping jurisdiction", with all its attendant dangers.

21. Mr. PELLET (Special Rapporteur) asked Mr. Rosenstock whether he recognized his views in what had been said by Mr. Kabatsi and Mr. Kateka, because his own understanding was very different from theirs.

22. Mr. ROSENSTOCK said that he detected a general commonality of approach in spite of differences on some minor details.

23. Mr. ADDO, noting that reservations to bilateral treaties must be taken into account in the study of the reservations regime, said that, in his opinion, there was not a great deal to occupy the Commission under that heading. Such reservations were straightforward and perhaps for that reason had not been dealt with under the Vienna regime. They implied either that the parties had failed to agree and that, accordingly, no treaty had come into existence, or that a modified treaty had come into being by reason of its acceptance by the other party. An attempt to modify a bilateral treaty by a reservation undermined the parties' original understanding of the agreement and amounted to a counter-offer and a reopening of negotiations. If the modification was rejected by the other party, the treaty would fail. If it was accepted, a new treaty would come into being.

24. Mr. KATEKA said he agreed that the Commission should not concern itself unduly with bilateral treaties. The Special Rapporteur should certainly examine the matter, but with a view to dismissing it as largely irrelevant to the topic under discussion.

25. Mr. GALICKI said that, while he broadly agreed with the comments made by Mr. Addo and Mr. Kateka, the problem of reservations to bilateral treaties could not be excluded since the phenomenon, particularly in the form of so-called interpretative declarations, had arisen in international relations in recent years, for example in connection with ratification of the Concordat between Poland and the Holy See. There was a need to establish the precise character of such declarations and to decide whether they actually amounted to reservations. On the whole, however, it was a matter that went beyond the scope of the Commission's mandate and related to different fields of State activity.

26. Mr. SIMMA said that his approach to the topic was influenced by the fact that he had served as a member of a United Nations human rights treaty body for 10 years. Whereas he had felt somewhat uneasy during that period with his status as a human rights generalist, in the light, or possibly darkness, of the current debate in the Commission he was beginning to feel like a human rights lawyer. He shared Mr. Bennouna's concern about the inclusion of that aspect of the topic in the Special Rapporteur's second report. The Special Rapporteur's pugnacious and impetuous character had perhaps impelled him to take up an issue that was on everybody's mind following the adoption of general comment No. 24 (52) by the Human Rights Committee, placing it under the relatively innocuous heading of the "Unity or diversity of the legal regime for reservations to treaties" (title of chapter II). In his view, such a controversial issue should have been left to the end of the Commission's study, since it was only after careful consideration of the possibility for inter-State reactions and objections to reservations that an adequate picture of

the feasibility and desirability of treaty body action such as that outlined in general comment No. 24 (52) could be formed.

27. If States parties had followed the example set by Austria and Portugal, reacting regularly and forcefully over the past 10 years to reservations by other States parties so that the objection process became a form of dialogue on the precise content of reservations, general comment No. 24 (52) might never have been adopted. It had been adopted not in a spirit of aggression but because the quantity and quality of sweeping reservations had become intolerable and State reactions to manifestly incompatible reservations had been infrequent and restrained.

28. The Special Rapporteur and others had made much of the applicability of the Vienna regime to human rights treaties and of the flexibility of that regime. But the 1969 Vienna Convention coped very poorly with the problems and challenges faced by human rights treaties. There was no regime for inadmissible reservations and the provision for objections to reservations lacked the necessary bite in the case of such treaties. If that was what was meant by "desirable flexibility", then it was preferable to opt for the ultimate flexibility of having no rules at all.

29. Article 60, paragraph 5, of the 1969 Vienna Convention, dealing with breaches of treaties, used the language of humanitarian law applicable to armed conflicts and had been inserted at a late stage in the United Nations Conference on the Law of Treaties,<sup>4</sup> on the urging of Switzerland and probably ICRC. What the proponents had had in mind was not human rights treaties in general but the Geneva Conventions of 12 August 1949 and humanitarian law. It was not very convincing, therefore, to cite article 60 as evidence that the United Nations Conference on the Law of Treaties had been thinking of human rights treaties at a time when very few such treaties had existed.

30. Mr. Rosenstock had asked, in connection with the alleged usurpation of jurisdiction by human rights treaty bodies, why the latter should be supposed to know better than Governments what was good for the people of the country concerned. That was not the point. The question was whether treaty obligations had been performed adequately and whether reservations were admissible, which was a perfectly legitimate function.

31. While general comment No. 24 (52) of the Human Rights Committee contained many welcome elements, he agreed that the most controversial, namely, the severability of inadmissible reservations, was not in line with the law of treaties as embodied in the 1969 Vienna Convention. That did not, however, exclude the possibility of developing international law in the direction of the severability doctrine, a development which he would welcome and which had already occurred under the Convention for the Protection of Human Rights and Fundamental Freedoms. Since 1961, the Council of Europe bodies had been developing the doctrine of "objective duties" under the Convention, that is to say obligations that were non-reciprocal or were not only reciprocal. The doctrine of collective enforcement of the Convention had led to a series of

cases and the resulting jurisprudence had been accepted by States parties. The difference was, of course, that the monitoring bodies under the Convention could hand down binding decisions.

32. At all events, the regional international law thus developed was difficult to square with the traditional law of treaties and the same was true of European Community law. Indeed he perceived a convergence between law and practice under the Convention for the Protection of Human Rights and Fundamental Freedoms and European Community law. Judgments by the European Court of Justice had shocked member States in much the same way as the Commission was shocked by general comment No. 24 (52). Mr. Brownlie had asked (2500th meeting) how the Commission should react to those developments. For his own part, he considered that they should not be censured by a United Nations body. The European approach was undeniably more progressive and more effective than the Vienna regime and the Council of Europe institutions did not need a recipe on how to deal with reservations. He therefore proposed that in chapter II, section C.2, the first paragraph of the subsection on "The reactions expected from the reserving State" should be deleted from the Special Rapporteur's second report, because it simply was not the Commission's business.

33. It had been suggested that the Commission should challenge the monopoly of treaty bodies. To date, the Commission had dealt with human rights issues only incidentally. Human rights law had been developed by other bodies and there were many other voices of international law which deserved a hearing, particularly the United Nations human rights institutions. The Commission's response to general comment No. 24 (52) should not strike an antagonistic note but set out to be helpful and cooperative. Consultations with human rights treaty bodies were desirable and feasible. Chapter III of the Commission's statute was devoted to cooperation with other bodies. He endorsed the Special Rapporteur's statement that he would welcome such consultations and that the Committee on the Elimination of Discrimination against Women (CEDAW) had already expressed a wish for dialogue.

34. To sum up, the Commission should not behave like a bull in the china shop of human rights law, which was fragile and permanently under threat, not least from false friends. The Commission should tone down the title, form and substance of the product of its discussion. It should transmit an opinion rather than a draft resolution to the General Assembly and its content should be based on the suggestions made by the Special Rapporteur.

35. Mr. ROSENSTOCK suggested that the proposed draft resolution should be referred to the Drafting Committee for a review of its form and content. No decision was necessary for the time being on whether it should be presented in the form of a conclusion, recommendation or resolution. Although amendments and deletions were necessary, there was a certain basis for common ground.

36. He had not implied that Governments knew more about human rights than did the Human Rights Committee. The question was who possessed authority under

<sup>4</sup> See 2499th meeting, footnote 14.

existing legislation. The unwarranted arrogation of authority was unlikely to enhance respect for international law in the long run or to advance the cause of human rights as protected by international law.

37. It was debatable whether the Commission should discuss the adequacy of existing treaty mechanisms at the beginning or the end of its work on the topic. However, it could be argued that if such bodies had decision-making authority, the problem of reservations might be alleviated and it might no longer be necessary to recommend, for example, that Governments should consider drafting a protocol to existing covenants expressly granting such power. The Commission would be ignoring the magnitude of the problem involved in achieving the results advocated by Mr. Simma if it postponed its discussion of the adequacy of existing mechanisms until the end of its work. It must first scrutinize those mechanisms, determine whether it could support existing action by them and, if not, seek alternative ways of achieving the desired goal. Accordingly, it would be better to look at the matter earlier than later.

38. Article 60 of the 1969 Vienna Convention had not been cited as evidence of an attempt to deal definitively with human rights treaties but as evidence that the United Nations Conference on the Law of Treaties had been fully aware of the possibility of making special provisions if it was so desired. Failure to make such provisions was not a sign of incompetence or ignorance but rather of a determination that a special provision was not necessary for areas that were not expressly mentioned.

39. Mr. KATEKA said that he wanted to dispel any false impression that might have arisen to the effect that some members of the Commission were against human rights. That was far from the truth, at least as far as his own position was concerned. Like Mr. Rosenstock, he thought the point at issue was the legality of the body determining the permissibility of reservations. Regional bodies, particularly in Europe and Latin America, might of course be more advanced than international ones; some such bodies had undoubtedly made great strides in recent years and their decisions had been accepted by countries in their region. If at some stage they achieved similar acceptance at the international level, he would consider changing his position. It was to be hoped, however, that long before that time, the vagueness about the interpretative powers of international treaty bodies would have been cleared up.

40. Mr. CRAWFORD said he agreed broadly with Mr. Simma, but would simply point out that the Special Rapporteur was free to say what he liked in his reports and could then be criticized, appropriately or inappropriately, on the floor of the Commission.

41. Mr. GALICKI said that, while he appreciated Mr. Simma's experience in regard to regional systems of protection of human rights, he could not share his optimism as to the operation of regional human rights bodies, especially in connection with the admissibility of reservations to treaties. It should not be forgotten that in the *Belilos* case,<sup>5</sup> a most unhappy situation in the European family of nations, namely, the denunciation of the Con-

vention for the Protection of Human Rights and Fundamental Freedoms by Switzerland, had been avoided by just one vote in the Swiss Federal Council. Even within a regional system, the interventions of human rights treaty bodies could give rise to serious conflicts between States. He agreed with the Special Rapporteur that regional systems should not be left outside the range of the Commission's observation and evaluation. Experiences of that kind should not be overlooked in the endeavour to produce a set of global guidelines interpreting the Vienna regime.

42. Mr. BENNOUNA said that he tended to agree with Mr. Simma. The existing reservations regime should not be elevated to the status of a sacrosanct rule. It was, in fact, no more than a technique employed to make up for the lack of another. If, in the matter of reservations, the Convention for the Protection of Human Rights and Fundamental Freedoms was more advanced as well as more progressive than the 1969 Vienna Convention, that was surely no reason to mistrust it. He failed to understand the strong feeling apparently running within the Commission on the question whether the views of human rights treaty bodies were to be sought. The power of States to draw whatever consequences they wished from those views was not in doubt, but neither was the right of international or regional bodies to develop their own practices and create their own precedents. If that right was universally accepted in the case of the Security Council, then he asked why it could not also be recognized in the case of human rights bodies.

43. Mr. DUGARD stressed the importance of the question of the extent to which the Security Council and other bodies of the United Nations and other institutions were entitled to interpret their own charters so that the law might evolve to take account of new problems and practices. It would be recalled that, in connection with the interpretation of Article 27, paragraph 3, of the Charter of the United Nations, the Security Council had, for reasons of effectiveness, developed a practice whereby abstentions were not treated as a veto. That practice had continued informally until it had received the imprimatur of ICJ in 1971.<sup>6</sup> The situation which the Commission was facing currently was to some extent a similar one, some human rights monitoring bodies having, as it were, asserted their implied powers in order to cope with serious problems arising with regard to human rights treaties. It was common knowledge that States made far-reaching reservations to such treaties without a response from other States and the monitoring bodies in question had sought to respond to that situation by developing new rules and practices. The Commission thus had before it the difficult jurisprudential question of how to address a problem largely concerned with the implied powers of human rights monitoring bodies. The point raised by Mr. Simma was indeed an important one: he asked whether it was the Commission's function to put back the clock or was it to acknowledge the new situation and seek to recognize it within the framework of the Vienna regime. The draft resolution proposed by the Special Rapporteur addressed

<sup>5</sup> See 2500th meeting, footnote 16.

<sup>6</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 22, para. 22.*

that difficult issue, one which the Commission should not sidestep, yet should accept that it was broader than the matter of reservations to treaties.

44. Mr. GOCO said that he felt reassured by the statement in chapter I, section B.2, of the report to the effect that the rules to be incorporated in the future guide to practice would be purely residual and non-binding. With those parameters, the Commission was on safe ground in deciding to proceed with the study of the topic. He was also attracted to the draft resolution proposed by the Special Rapporteur at the end of the second report and impressed by Mr. Simma's argument invoking article 25 of the Commission's statute. However, since certain decisions had already been taken by other, sometimes intransigent, bodies, the Commission would have to accept those decisions and procedures if it cooperated with the bodies in question. He asked whether it would be possible to adopt the draft resolution without venturing into such a dangerous area as human rights. He did not doubt that some areas of the Vienna regime needed to be addressed, but asked whether it was appropriate for the Commission to enter into communication with human rights treaty bodies before defining its own position. A more independent approach would perhaps be preferable.

*Mr. Kabatsi took the Chair.*

45. Mr. ECONOMIDES warmly congratulated the Special Rapporteur on his remarkable work. Needless to say, he shared the central concern of preserving what had been achieved by the 1969 Vienna Convention, but he also recognized that the Vienna regime had lacunae and inconsistencies which deserved thorough consideration by the Commission. For example, article 19 of the 1969 Vienna Convention said nothing about the effects of prohibited reservations. In particular, it was, of course, quite illogical that a reservation should have the same consequences for a State which accepted it as for the State which did not and which made an express objection.

46. It would be premature to adopt the draft resolution proposed by the Special Rapporteur before the Commission had considered the crucial matter of the legal effects of impermissible reservations, a point not dealt with in the 1969 Vienna Convention. The proper time to adopt a position on the substance of the problem would be after completing the consideration of that important issue of customary international law.

47. His second reason for hesitating to support the draft resolution related to the substance of the problem. The rules of the 1969 Vienna Convention were, of course, purely residual in nature. States were entirely free to enter reservations in regard to some categories of treaties, particularly those in the human rights field, where the element of the "integrity" of the treaty clearly prevailed over that of universality, at least at the regional level. In such cases, strong systems could be—and were—established and bodies could be given implicit powers to deal with reservations considered to be unlawful and could do so on the basis of regional law or of customary international law. He did not see, however, why the invalidity or "separability" of a reservation would not be an appropriate sanction, if the sanction was ordered by a body that had jurisdiction to do so. Another reason for hesitating to

support the draft resolution was that it was rather unusual for a subsidiary body like the Commission to take the initiative of addressing a resolution to the General Assembly, especially on a difficult and delicate matter which, moreover, was not devoid of political significance.

48. Lastly, the draft resolution might be seen by some, including many human rights theoreticians, as flowing against the stream, namely towards granting greater respect for human rights. He shared the views expressed in that connection by Mr. Bennouna, Mr. Simma and Mr. Dugard and, for all the reasons stated, he could not support the draft resolution, at least for the time being.

49. Mr. PELLET (Special Rapporteur) said that, while members of the Commission had the right, on the one hand, to express their views and, on the other hand, to be absent from meetings, he felt that those who availed themselves of the latter right should be reasonable in exercising the former. He could not help feeling irritated by those who, like Mr. Bennouna and Mr. Economides, adopted positions without taking any account of what the Special Rapporteur had said.

50. The CHAIRMAN said that the Special Rapporteur was entitled to criticize members of the Commission as much as they were entitled to criticize him.

51. Mr. PAMBOU-TCHIVOUNDA said that the theoretical discussion about the implicit powers of treaty bodies seemed to him to leave a great deal unsaid. He asked what the precise nature was of the bodies in question; whether they were consultative bodies, or political ones; if they adopted political positions; and what their position was within the framework of the United Nations. After all, the United Nations itself was not a State, still less a super-State. He asked why then should the Human Rights Committee and other similar bodies be treated as if they were more important than a State. He did not in the least want to see the human rights treaty bodies silenced, but only reduced to their true proportions. As to Mr. Economides' comments, he found it difficult to go along with the remarks about current trends in jurisprudence and customary law.

52. Mr. BENNOUNA said that he agreed with the remarks addressed by the Chairman to the Special Rapporteur. The right to criticize was a fundamental one, and Mr. Pellet's remarks constituted a reservation incompatible with the object and purpose of the statute of the Commission.

53. Mr. ECONOMIDES said that it was true that he had been absent earlier and had had no previous opportunity to express his views, but if he had irritated the Special Rapporteur he wished to present his excuses.

54. Mr. HAFNER said that the idea that the Vienna regime had formed part of a package deal made at the United Nations Conference on the Law of Treaties had been contested. On the basis of that view, it could even be concluded that the existing regime did not form a politically motivated compromise. Yet one had to acknowledge that the existing regime reflected to a large degree the Soviet position on reservations, according to which reservations were strictly unilateral acts derived from the sov-

ereignty of States. That idea had been put forward in the proposal by the Union of Soviet Socialist Republics,<sup>7</sup> which had combined draft articles 16 and 17 in a single provision and had completely transformed the meaning of objections to reservations. The idea had also been related to the purely politically motivated notion of the principle of universality. The authors of Soviet textbooks on international law in the 1950s and 1960s had expressed the opinion that the right to make reservations was not restricted by the imperatives of compatibility with the object and purpose of a treaty. Obviously, their view was that any reservation was permitted, and the compromise represented by articles 19 et seq. of the 1969 Vienna Convention reflected that view. The central provision of draft article 17, which had later become article 20, had been adopted only at the second session of the United Nations Conference on the Law of Treaties in 1969,<sup>8</sup> since in 1968 it had not proved possible to adopt the whole package of which it was part. He therefore stood by the views he had already expressed on the matter.

55. On the other hand, he concurred with Mr. Rosenstock and Mr. Crawford about the lack of effect of reservations so far as proof of the existence of a norm of customary international law and *jus cogens* was concerned. He would merely add that a reservation would not exclude the applicability of a norm of customary international law to the reserving State, provided that State had not acted as a persistent objector. Accordingly, the existence of reservations to a provision of a codification treaty could hardly serve as proof of the non-existence of such a norm—a matter that had once been extensively discussed in the literature.

56. It was regrettable that the chapters of the report which were to follow were not available for the current discussion. Consensualism as the basic concept behind the draft and similar matters deserved further consideration for the purposes of the matter at hand.

57. In chapter II, section C, the Special Rapporteur dealt with the object and purpose of the treaty, a notion that escaped any definition. Any attempt to establish one would lead nowhere. It would certainly not suffice to refer merely to the interpretation of the treaty, since such interpretation presupposed the object and purpose of the treaty that one was trying to define. It would be better to follow the practice of replacing substantive rules by procedural ones, or at least, to place greater emphasis on procedural rules as the device whereby States defined the treaty's object and purpose. That meant following the path chosen by the Special Rapporteur: the procedural device could be decentralized or centralized, the former resulting from the individual reactions of individual States to a given reservation, and the latter being reflected in some centralized or monitoring body. The Special Rapporteur had been right to refer in that connection to environmental law, which did offer a parallel.

<sup>7</sup> A/CONF.39/C.1/L.115.

<sup>8</sup> *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6), eleventh plenary meeting, pp. 36 et seq.

58. The Special Rapporteur described the decentralized procedure as the ordinary law inter-State system, as reflected in article 20 of the 1969 Vienna Convention. But the connection with article 20 did not seem to be correct in all cases. One illustration was to be found in the reactions of States to Chile's reservation,<sup>9</sup> later withdrawn, to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Two States out of those that had considered the reservation to be incompatible with the treaty's object and purpose had formulated their reaction in such a way as to give no indication of what they deemed to be the consequences. Fourteen of those States had declared that the objections to the reservation should not prevent the establishment of treaty relations, and three of them had declared that the reservation had no legal effect at all and did not affect the obligations incumbent upon Chile. Austria had been one of the three and its declaration had been made by the Head of State further to a decision by the Government.

59. That approach did not rely on article 20 of the 1969 Vienna Convention, which was deemed to apply only to admissible reservations, but sought to make it clear to the reserving State that a decision to ratify a treaty must be taken not only for the benefits to be derived from becoming a party but also out of a willingness to assume the essential obligations under the treaty. In other words, the approach was intended to avert situations where States could hope to derive only benefits from being a party to the treaty, for example by participating in the treaty's administration, without being obliged to carry out the corresponding obligations. The approach already constituted the practice of States; accordingly, in chapter II, section C.2 (a), of the report, the subparagraph concerning the ordinary law mechanism was incorrect. The case of the Chilean reservation was remarkable in that, of all the conclusions reached by objecting States none had excluded a treaty relationship with Chile, even though its reservation had been qualified as being incompatible with the object and purpose of the treaty. Hence, there was still no proof that such a reservation could be considered to affect the existence of a legal nexus between the relevant States.

60. When reservations were more general, relying on notions such as the Shari'ah or on constitutional provisions, without further details, approaches like the one pursued by Austria towards Chile could no longer be used, since the real meaning of the reservation was uncertain. In such cases, Austria lodged a preliminary objection, stating that the reservation was inadmissible, unless the reserving State, by providing additional information or through subsequent practice, ensured that the reservation was compatible with the provisions essential for the implementation of the treaty's object and purpose. Austria thus sought to escape the risk of acquiescence to the reservation and tried at the same time to establish communication with the reserving State, which should also be afforded an opportunity to withdraw its reservation. Denmark had taken a similar position and asked the Governments of Djibouti, the Islamic Republic of Iran, Pakistan and the Syrian Arab Republic to reconsider their reserva-

<sup>9</sup> *Multilateral Treaties Deposited with the Secretary-General* (see 2501st meeting, footnote 4), p. 189 and p. 198, footnote 11.

tions to the Convention on the Rights of the Child.<sup>10</sup> So far, there had been no reaction from any of the reserving States. Nevertheless, that kind of procedure had been endorsed by a group of States which had looked into the matter, although they had been unable to come to agreement on the legal consequences of inadmissible reservations.

61. Although desirable, it was questionable whether the various centralized bodies could be considered as being empowered to decide on the admissibility of a reservation. It was highly unlikely that a system that was appropriate in the European context could be transposed to a global level. As in environmental law, the various existing and possible compliance mechanisms might differ substantially. They could consist of independent experts or representatives of States, act only if requested by a State or on the complaint of an individual, or even *proprio motu*. In all those cases, their pronouncements would have differing effects. For example, if an individual brought a case before an institution and it adopted a binding ruling on the admissibility of a reservation, that ruling could be said to have an *erga omnes* effect. But if a State resorted to such an institution, the ruling would have effect only for the parties to the dispute, according to rules like those embodied in Article 59 of the Statute of ICJ, and an inadmissibility ruling would have a bilateral effect. If the possibility of endowing monitoring bodies with similar powers were to be accepted, it nevertheless remained highly debatable whether their findings would have any legal effect and it was unlikely that they would be able to generate a harmonized position on the part of States.

62. The precedence of bilateralism in respect of the inadmissibility of reservations was confirmed by the fact that not even instruments aimed at harmonizing the reactions of States to reservations to multilateral treaties were functioning in practice, so that, even in such cases, the ultimate decision lay with individual States. At the global level, it would be too progressive to rely on those bodies to determine the admissibility of reservations with an *erga omnes* effect. That did not mean, however, that the granting of such competence was undesirable.

63. The draft resolution proposed by the Special Rapporteur should be submitted to the General Assembly as a draft recommendation in order to test its acceptability. Paragraph 5 seemed to go too far, particularly in regard to the attribution of competence, something that also applied to paragraph 7. However, paragraph 5 could be reformulated so as to become more acceptable. The second sentence of paragraph 6 should take into account the practice of certain States which regarded an inadmissible reservation as having no effect at all. Paragraph 8, which rightly sketched out a future-oriented approach, should also refer to the fact that a determination concerning the permissibility of reservations made by a treaty monitoring body should have an effect on all States parties.

64. One fundamental item was not addressed, but presumably it would be dealt with at length at the fiftieth session, namely, what was to be done if States did not follow the advice set out in the draft resolution. Mr. Simma had already pointed out that the time for the adoption of

human rights conventions was past, and he shared that view. It was also unlikely that the existing conventions would be given stronger compliance mechanisms. It was therefore necessary to live with the existing instruments and to find solutions in them to the problem of inadmissible reservations. Such solutions would undoubtedly be advanced at the Commission's next session. For that reason, it should be made perfectly clear that the draft resolution or recommendation was not the Commission's final word on reservations, but that it addressed only part of a very complex subject.

65. Mr. LUKASHUK said that he had come to two basic conclusions in the light of the discussion. First, the competence of treaty bodies merited consideration in connection with the topic of reservations to treaties. Secondly, the general position adopted by the Special Rapporteur was a balanced one, reflecting a common denominator among the views expressed by various members of the Commission.

66. The competence of treaty bodies should be studied not in isolation, but as an aspect of the law of international organizations. Taken from that standpoint, many elements fell into place. After an arduous debate at the United Nations Conference on International Organization, held at San Francisco in 1945, it had been decided that every United Nations organ should determine its own competence. Indeed, any other solution would have been impossible, since such bodies could not function if the scope of their competence was not defined. The treaty bodies themselves frequently stressed that fact, as had been the case in general comment No. 24 (52) of the Human Rights Committee. He could therefore agree with the statement by the Special Rapporteur in chapter II, section C.2 (a), of the report that general international law gave treaty bodies the right to determine their own competence. He would even add that that right fell in the category of an essential rule: *jus necessarium*.

67. The problem was not whether treaty bodies had the right to determine their own competence, but rather where the limitations of such competence should lie. What were the boundaries beyond which a decision by a treaty body was illegal and an act *ultra vires*? It was the treaty that should set out those boundaries, but not all of them did so. In practice, treaty bodies sometimes acted outside those boundaries, and such non-compliance was not always deemed an act *ultra vires*. By way of example, one could cite the adoption by the Security Council of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as the "International Tribunal for the Former Yugoslavia").<sup>11</sup> and the statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (hereinafter referred to as the "International Tribunal for Rwanda").<sup>12</sup>

<sup>10</sup> *Ibid.*, pp. 205-212 and p. 220, footnote 17.

<sup>11</sup> Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

That had represented great progress in the development of international law, but the Charter of the United Nations could not be said to provide the justification for such action. Indeed, the relevant report by the Secretary-General<sup>12</sup> advanced arguments on the Security Council's competence in that area that were not entirely convincing, with the exception of one: that there had been no alternative. Unless the Security Council had established the International Tribunals, they would never have come into being.

68. In his view, the juridical basis for the Security Council's decision was the consent of States: by their silence, they had acknowledged the legality of the Security Council's action. That view was corroborated in article 31, paragraph 3, of the 1969 Vienna Convention which indicated with regard to the interpretation of treaties that, together with the content, account should be taken of any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation.

69. The Special Rapporteur appeared to concur when he stated that the extent of the competence of the monitoring bodies should be verified on the basis of the consent of the States parties and of the general rules of the law of treaties—and, he himself would add, of the law of international organizations. The situation was complicated where there was no general consent or where sharp criticism was levelled by a number of States parties. It seemed to him that in such circumstances, States parties must have the final say, and in that connection he agreed with Mr. Galicki and Mr. He. In view of the specialized nature of human rights treaties, there should be a special regime under which it would be obligatory for a majority, or at least a relative majority, of States parties to consent to the decisions made by the monitoring bodies. A precedent could be seen in article 20, paragraph 2, of the Convention on the Elimination of All Forms of Racial Discrimination, which provided that a reservation was to be considered incompatible with the object and purpose of the Convention if at least two thirds of the States parties to the Convention objected to it. Objection by two thirds of the States parties could thus be used as a solution, both for reservations to treaties and for objections to such reservations.

70. Those who sought to justify the elaboration of special provisions concerning reservations to human rights treaties usually argued—as had the Government of France, for example—that, if the right to make reservations was restricted, a great many States would simply not become parties. Though that argument seemed convincing at first glance, States would in practice be encouraged to make reservations that would effectively nullify the effect of the treaties. Examination of the reservations to the International Covenant on Civil and Political Rights, for instance, revealed that, using such reservations, States assumed absolutely no obligations under the Covenant, even while formally adhering to it.

<sup>12</sup> Security Council resolution 955 (1994) of 8 November 1994, annex.

<sup>13</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), *Official Records of the Security Council, Forty-eighth Year, Supplement for April, May and June 1993*, document S/25704 and Add.1.

71. In chapter II, section C, of the report concerning the competence of treaty bodies, one central aspect of the problem had not been addressed, namely, the degree to which States could justify their reservations on the basis of internal law. The majority of reservations to the International Covenant on Civil and Political Rights cited such law. The 1969 Vienna Convention prohibited States from invoking internal law, but the question arose as to whether that prohibition applied to reservations.

72. An affirmative response was given in the objection by the Government of Finland to reservations to the International Covenant on Civil and Political Rights made by the United States of America,<sup>14</sup> where Finland had referred to the general principle of treaty interpretation according to which a party could not invoke the provisions of its internal law as justification for failure to perform a treaty. There was a distinction, nevertheless, between failure to perform treaty obligations and the will of a State to modify a provision in a treaty. In the two instances, different rules and criteria should be adopted. The report, however, failed to discuss that very complex issue.

73. A number of writers and Governments considered recourse to internal law to be entirely unacceptable. In its objection to the reservations made by the United States of America to the International Covenant on Civil and Political Rights, the Government of Portugal<sup>15</sup> had stated that reservations in which a State limited its responsibilities under the Covenant by invoking general principles of national law could create doubts on the commitments of the reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of international law.

74. While it was unlikely that reservations would be made to the provisions of treaties setting out rules of general international law, such a possibility could not be excluded. He agreed with Mr. Hafner that such reservations might be permissible. A State might decide that a rule of general international law, as used in a given treaty, was unacceptable. If other States acknowledged the reservation, then that would signify consent, which made possible derogations *inter se* from the rules of general international law, as long as they were not rules of *jus cogens*.

75. The draft resolution proposed by the Special Rapporteur could be adopted only on a preliminary basis. He would favour the deletion of paragraph 4, because it was at variance with the statements in paragraphs 1 and 2 about the applicability to all treaties of the Vienna regime.

76. Finally, members of the Commission might be interested to learn that under the Russian Federation's law on international treaties, reservations and objections by the Russian Federation to reservations by foreign States must be formulated as a law. The adoption of that sort of legislative provision was unprecedented and suggested a pro-

<sup>14</sup> *Multilateral Treaties Deposited with the Secretary-General* (see 2501st meeting, footnote 4), pp. 130-132.

<sup>15</sup> *Ibid.*, p. 133.

cedure whose implementation in practice could not be considered desirable.

*The meeting rose at 1.05 p.m.*

## 2503rd MEETING

*Wednesday, 2 July 1997, at 10.05 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, 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. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

### Reservations to treaties (*continued*) (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>1</sup> A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. CRAWFORD said that he was not sure about the legal nature of the procedure relating to the determination of the impermissibility of a reservation to a treaty which was either prohibited by the provisions of the treaty itself or incompatible with its object and purpose.

2. He recalled that, in the *Belilos* case,<sup>2</sup> the issue had been not whether the particular reservation was or was not incompatible with the object of the Convention, but, rather, since the Convention allowed only for certain reservations, whether the Swiss declaration had or had not been one of the permissible reservations. Under article 19 of the 1969 Vienna Convention there was no difference between impermissibility resulting from a breach of the provisions of a treaty and impermissibility as a result of incompatibility with the object of the treaty.

3. The Special Rapporteur approved of the situation in which a State whose reservation had been deemed incompatible with the object of a treaty redefined its relationship to that treaty either by withdrawing its reservation or by reformulating it in order to make it compatible, or by accepting that it was not actually a party to the treaty. That was a situation, however, that called for further analysis. The 1969 Vienna Convention codified methods of formulating and withdrawing reservations, but did not provide for withdrawal from a treaty by a State which had made an impermissible reservation. A State that withdrew from a treaty was simply clarifying the attitude that it was regarded as having had at the time of its acceptance, in conformity with the underlying principle of consent. That State was thus shedding a kind of retrospective light on the position it was considered to have held at the time it had become a party. If such were indeed the case, the State could not have “carte blanche” to reformulate its reservation so as to rewrite its obligations. If it consented to become a party to the treaty, it then had certain obligations from which it could not unilaterally resile. By reformulating its reservation, therefore, it confirmed its status as a State party.

4. It might perhaps be useful for the Commission to reflect further on the exact modalities of that procedure, which was presumably a customary procedure not expressly provided for in the 1969 Vienna Convention.

5. The draft resolution proposed by the Special Rapporteur at the end of the second report (A/CN.4/477 and Add.1 and A/CN.4/478) should be referred to the Drafting Committee, even though, as Mr. Economides had said, it was perhaps premature to give it the form of a final resolution. The Drafting Committee must have the opportunity to come up with a generally accepted text, as it would be a shame to submit a resolution to the General Assembly on which the Commission still had divergent views.

6. Mr. ROSENSTOCK, referring to the situation of a State that formulated a reservation subsequently deemed to be invalid because it violated a specific prohibition of the treaty or because it was incompatible with the object and purpose of the treaty, as well as the legal relationship which the State would, according to Mr. Crawford, maintain with the treaty in question, said Mr. Crawford believed that the State had less latitude to react to that decision of impermissibility because it had previously been regarded as a party to the treaty. In his own view, that State was, rather, in exactly the same situation as one which had not yet taken any decision on the treaty.

7. Mr. CRAWFORD said that the situation was somewhat artificial, insofar as, upon the rejection of its reservation, the State was simply specifying what it should have specified from the outset. That was what Switzerland had done, in the *Belilos* case, formulating a reservation upon its acceptance of the Convention for the Protection of Human Rights and Fundamental Freedoms which had not been in conformity with article 64 of that Convention and then modifying the reservation when it had been challenged.<sup>3</sup>

<sup>1</sup> See *Yearbook* . . . 1996, vol. II (Part One).

<sup>2</sup> See 2500th meeting, footnote 16.

<sup>3</sup> See Council of Europe, *Yearbook of the European Convention on Human Rights*, vol. 31 (1988), p. 5.

8. According to the assumptions made by the Special Rapporteur, if a State's consent to a treaty was unequivocally conditioned by a reservation so that it was clear that it was becoming a party to the treaty only on that condition and the condition was unacceptable, there was no question of severing the reservation from the treaty; it was a question of interpretation of the State's intentions. At the global level, it was extremely difficult to "sever" a reservation and it was the intentions of the particular State that must be questioned: if it was seeking to become a party to the treaty, it could reformulate the terms of its consent to make them acceptable. That reformulation was, as it were, retroactive in effect. Otherwise, its initial acceptance would have to be considered void and all of the constitutional procedures required for it to participate in the treaty would have to be undertaken anew. Those procedural questions were considerably complex and should be studied further.

9. Mr. LUKASHUK said that, in the specific case of the human rights instruments, the legal position of the State whose reservation had been judged impermissible was that of a putative State party. If that State had indicated that it agreed to be bound by the obligations of the treaty, it could be presumed that it wished to participate in the treaty and that it was doing so up to the moment at which the problem of the permissibility of its reservation had been raised. If the problem was solved by excluding the reservation, the State's participation was clearly cancelled, but, before the decision was taken, the State must be considered to be a party to the treaty.

10. Mr. Sreenivasa RAO said that the enormous problem of reservations to treaties seemed to have taken on a life of its own and was leading the Commission into extremely complex areas, such as the relevance of reservations to the definition of customary international law, the competence of monitoring bodies to determine the permissibility of reservations, the legal authority and effects of the conclusions of those bodies on the position of reserving States and so forth. He wondered whether it was appropriate for the Commission at the current stage of its work to delve further into all those questions. He asked whether it would not be better to proceed with much more circumspection rather than attacking them head on.

11. Equal caution should be shown in the choice of the text the Commission would eventually submit to the General Assembly, whether it was a declaration, a resolution or much more nuanced recommendations. The subject under study was very important and would certainly retain the attention of several of the large bodies that would also deal with it, such as the human rights bodies and the Assembly itself. That was why the draft proposed by the Special Rapporteur should be referred to the Drafting Committee to consider not only its content, but also the form it should take. The best solution would probably be to make it an "opinion" or "conclusions" or, ideally, "preliminary views", to which the Commission could return after hearing the comments of the Assembly and other bodies.

12. He drew attention to what he thought was a contradiction: if it were concluded that the Vienna regime was universally applicable to all treaties, human rights instruments could not be treated separately at the same time

because, at the current stage in the Commission's thinking, they did not yet constitute a separate case. Whatever the solution, it would have far-reaching effects: if the Commission considered that the human rights treaty monitoring bodies were entitled to exercise their competence to determine the permissibility of a reservation, it provided them with a confirmation which was useless, but which would certainly create a lot of excitement in the General Assembly; if it decided that they were not so entitled, it would be calling several things into question. That was also another reason why the Commission should limit itself to "preliminary" conclusions, with the possibility of returning at a later date to the problem raised by those bodies.

13. The competence of the monitoring bodies could be evaluated only in terms of the particular instrument. Those bodies had a mandate, which was to monitor the promotion and respect of the instrument from which they emanated, but also to monitor the behaviour of each State in terms of its acceptance of that instrument. It should be recalled that, in most cases, reservations did not constitute the *sine qua non* for accepting a treaty, but simply an indication of the circumstances, time periods and conditions under which a State, for reasons related to its social and political situation and so forth, would fulfil its contractual obligations. He was inclined to think that the bodies in question did an excellent job when it came to the promotion of human rights. They were competent to decide on the manner in which States parties conducted themselves with regard to the treaty, to make comments to those States and to guide them. It could be observed that States generally respected their conclusions, and that attested to the efficiency of the system.

14. He fully endorsed the conclusions set forth by the Special Rapporteur at the end of chapter II, section B, of his second report. He also endorsed those contained in the draft resolution to be referred to the General Assembly. However, it seemed to him that too peremptory an approach should be avoided, for example, with regard to general comment No. 24 (52) of the Human Rights Committee,<sup>4</sup> the relevance of reservations to customary international law and various other questions which it was not for the Commission to resolve.

15. Mr. CRAWFORD said he was under the impression that, in Mr. Sreenivasa Rao's opinion, the Commission should not deal with the relationship between reservations and customary international law. He would not go into detail, but, whatever form it took, the final text should imply that, regardless of whether States became parties to a treaty or to certain of its provisions, customary international law continued to govern the subject-matter of the treaty. Any situation which suggested that the fact of making a reservation to a treaty authorized the reserving State to derogate unilaterally from customary international law should be avoided at all costs.

16. Mr. RODRÍGUEZ CEDEÑO said he wished to refer to the role that should be played by human rights treaty monitoring bodies in evaluating the admissibility of reservations to human rights instruments.

<sup>4</sup> See 2487th meeting, footnote 17.

17. It would be useful for the specific nature of human rights instruments to be taken into account, particularly with regard to reservations. It was true that the Vienna regime was adaptable to those treaties, but there were lacunae in that regime which should be filled. For example, additional rules could be drawn up for those treaties, calling on the monitoring bodies to participate more or less directly in determining the permissibility and admissibility of reservations. That function should naturally be seen from a viewpoint which, while open-ended, would remain compatible with the general function stipulated in the instrument under consideration. In no case were those jurisdictional bodies that would be able to take the place of States in determining the permissibility of reservations. Their opinion would simply carry the weight of a recommendation.

18. As provided for in the draft resolution at the end of the second report, specific clauses could be included in the future instrument in order to settle the question.

19. Mr. PELLET (Special Rapporteur), summing up the discussion on chapter II, section C, of his report, said that he had not had enough time to give detailed consideration to all the extremely interesting comments made during the discussion, but he had taken note of a number of substantive issues.

20. The first issue related to the possibility that States could formulate reservations to treaty provisions that reproduced either customary norms or rules of *jus cogens*. If he had correctly understood Mr. Rosenstock's comment on the subject, while agreeing that nothing prevented a State from formulating a reservation to a customary norm, he wondered why the same was not true in respect of *jus cogens*. Upon reflection, the same principles could be found to apply in both cases, those principles being: that, while a State could not, by means of a reservation to a treaty, evade the application of a rule of international law that would otherwise be applicable to it, as Mr. Crawford and Mr. Sreenivasa Rao had quite rightly pointed out, it could object to the actual inclusion of the rule in a treaty, with the consequences that such inclusion would have, particularly with regard to the monitoring of the application of that rule by the treaty body possibly set up. It therefore followed that a State could formulate a reservation to a treaty rule embodying a peremptory norm, but that such a reservation could not apply to the substance of the law; it could apply only to the consequences of the inclusion of the rule in the treaty. The State did have a bit more latitude with regard to reservations to treaty provisions that incorporated a customary norm. There was no denying the fact that it could formulate a reservation on the actual substance of the norm if, persisting in its objection, it felt the need to make its continued objection known; and that reservation could be accepted by the other States under the same conditions to which any other acceptance would be subjected because, as he had pointed out in chapter II, section B.3, of his second report, States could always derogate from customary norms by agreement *inter se*. That was not the case of peremptory norms.

21. Mr. Crawford, Mr. Rosenstock and Mr. Lukashuk, *inter alia*, had had an interesting exchange of views on whether a State that had made a reservation that ultimately proved to be impermissible or contrary to the pur-

pose or object of the treaty should nevertheless be considered to be bound by that treaty from the outset. In his view, only the State itself could answer that question. If the State acknowledged a posteriori that it had made an impermissible reservation and agreed to withdraw or modify it, it was fully entitled to consider itself as being bound by the treaty from the outset, but, if it considered that its acceptance of the treaty was conditional on its reservation and that reservation had not been accepted, it could take the view that it had never been bound by the treaty, without prejudice to the attitude it would ultimately adopt. In any event, it was for the State and the State alone to decide, and not for the experts, either in the Commission or in ICJ.

22. Another point of which he had taken note was the question whether a compromise had been reached at the United Nations Conference on the Law of Treaties,<sup>5</sup> on the issue of reservations. He would not take sides in the discussion that had pitted Mr. Lukashuk and Mr. Rosenstock against Mr. Hafner, the two sides perhaps having seen the problem from different angles. The proceedings of the United Nations Conference on the Law of Treaties seemed to indicate that there had been no public "bargaining" on reservations and that it had been at the very last minute that the Union of Soviet Socialist Republics (USSR) had finally won the inclusion of the extraordinary paragraph 3 of article 21 which had the paradoxical result that an objection could have the same effect as acceptance. Like Mr. Hafner, however, the view could be taken that it had essentially been to avoid destroying the balance in a structure that had been built up so painstakingly that many States, particularly the Western countries, had refrained at that time from challenging the reservations regime.

23. As to the already much discussed issue of the specific nature of human rights treaties, he came back to Mr. Simma's comment (2502nd meeting) that article 60, paragraph 5, of the 1969 Vienna Convention did not refer to human rights instruments. Not only did he think that was incorrect, for the wording of that provision was broad enough to include such instruments, but he also found it *strange to wish to confine those instruments to a narrow category from which humanitarian conventions would be excluded*. The problem of reservations arose in exactly the same way in respect of human rights treaties *stricto sensu* and of humanitarian treaties, since any form of reprisals was obviously excluded in both cases. In his opinion, and, on that point, he shared Mr. Rosenstock's views, the main conclusion that could be drawn from article 60, paragraph 5, as well as from article 20, paragraphs 1 and 2, of the 1969 Vienna Convention was that, when the authors of the Convention had found it necessary to establish a separate regime for treaties with a specific object, they had not hesitated to do so.

24. Those considerations brought him to the question of the unity of the reservations regime. While no one appeared to have questioned such unity, at least in general terms, the opinions of the members of the Commission had been more divided on the need for or advisability of establishing a special regime for human rights instru-

<sup>5</sup> See 2499th meeting, footnote 14.

ments. Although some members, such as Mr. Kateka and Mr. He, who could hardly, in as much, be accused of hostility to human rights, had been categorically opposed to doing so, others, including Mr. Simma and Mr. Dugard, were very clearly in favour of allowing such specificity. In order to do so, however, they had to move from the normative to the institutional level for lack of normative arguments, something which two members had not failed to point out.

25. Even if that was an institutional problem, the Commission must not refrain from discussing it, if necessary. The consideration of the issue was required by the machinery of the Vienna regime, which established a system to "monitor" reservations by means of objections. One of the biggest problems raised by the involvement of human rights bodies in that area was to determine whether "their" system, that is to say the system they wanted to have States accept, could and should replace the one established by the instrument concerned, for that was precisely the implication of general comment No. 24 (52) of the Human Rights Committee. For reasons he had gone into at length in his second report, he did not think that that was acceptable.

26. However, he did not think that the monitoring bodies could be prohibited from giving their opinion on the permissibility of reservations, even if certain members of the Commission seemed shocked by that possibility. He had gone into that question as well at length in his second report, but was grateful to Mr. Lukashuk for having provided him with additional arguments based, *inter alia*, on the general law of international organizations.

27. He wished to open a terminological parenthesis on that very subject of the treaty bodies. In English, the term was "treaty bodies", literally meaning or "bodies established by the treaties", which seemed to be an excellent name. It did not, moreover, apply only to human rights instruments and helped to define the elements of the problem.

28. As many speakers, including Messrs. Bennouna, Crawford, Hafner, Kateka, Pambou-Tchivounda, Sreenivasa Rao and Rosenstock had pointed out, the term meant that the "treaty bodies" could not be said to have greater powers in respect of reservations than those they had been given to carry out their primary function of monitoring the implementation of a treaty. As indicated in the conclusion of chapter II, section C, of the report, the legal force of the findings made by these bodies in the exercise of that determination power cannot exceed that resulting from the powers given them for the performance of their general monitoring role. In other words, while those bodies were indeed entitled to determine the permissibility of a reservation within the framework of their mandate, their findings had binding force only if they had been accorded decision-making powers in one way or another. To his knowledge, however, and even if certain passages in general comment No. 24 (52) of the Human Rights Committee seemed to imply the opposite, no international human rights body had been given such powers.

29. The situation was perhaps different in certain regional systems, such as the inter-American system or the European one. But those cases were too specific to

serve as valid examples, for the solutions adopted at those levels to be transposable to the international level or for the Commission to use them as models. That did not mean, however, that such trends should not be taken into account, even if, as Mr. Galicki had quite rightly pointed out (2502nd meeting), the trends were not always as well defined as some members affirmed.

30. Most members of the Commission seemed to agree with him that it would not be wise to get bogged down in regional human rights rules.

31. Some speakers had also taken the view that the Commission must likewise not concern itself with the problem at the international level, while other speakers had indicated that they had some doubts in that regard. The first of the two main arguments given was that such an exercise would be premature as long as there was still a great deal of uncertainty about the legal regime of reservations. He did not dispute the fact that that question was well founded and he was entirely in agreement with members of the Commission such as Messrs. Galicki, Economides, Hafner and Lukashuk, who had rightly emphasized that the relationship between article 19 and articles 20 and 21 of the 1969 Vienna Convention was not at all clear. It was, after all, the crux of the debate about permissibility and opposability, which would be the subject of the fourth report that he intended to submit later on. All throughout the second report, however, he had carefully avoided taking a position on that issue because he sincerely believed that that was not essential at the current stage of analysis for the purposes proposed in the draft resolution. Whatever system was adopted, the Commission was currently concerned with the power of the treaty bodies to make findings, and its limitations; it was on that aspect that he would like the Commission to focus its thinking. Since a start had to be made somewhere, he had, with the approval of nearly all members of the Commission, thought that the Commission could adopt a position on that aspect without necessarily making a final pronouncement on the entire issue. The second major argument against the idea of taking positions was that that would be a blow to the excellent progress currently being made on the initiative of the monitoring bodies. That view had been defended primarily by Mr. Simma and Mr. Dugard, who both seemed to be in favour of the idea of the draft text, but, like Mr. Economides, had reservations about the content.

32. While he agreed that nothing must be done to strike a blow against human rights, he did not think that that meant the Commission, which was responsible for the codification and progressive development of international law, should play Pontius Pilate in a debate of which it could not but be aware and not be fully involved in that debate or, most importantly, that, by issuing a reminder that human rights instruments were treaties, that is to say instruments based on the consent of States, something which was self-evident, the Commission was doing any harm to the noble cause of human rights. Quite the contrary, by adopting a position that was too intransigent and rigid, the monitoring bodies risked discouraging well-disposed States and dissuading reticent ones. He would have no objection, however, if the Drafting Committee considered ways of improving the text so that the future would be secure and he was ready to take part in that effort.

33. One of the final points was whether the text should take the form of a resolution, a draft resolution—and, if so, whether it should be a draft resolution of the Commission or addressed to the General Assembly—a recommendation, conclusions or even a preliminary opinion, as Mr. Sreenivasa Rao had suggested. In introducing the last part of his second report, he had explained why he thought that nothing prevented the Commission from adopting a resolution and some members had supported that point of view. Nevertheless, he had no fixed ideas on the matter; what was important was not so much the name the Commission would give to the text, but the fact that it would be taking a position. A resolution simply offered the advantage of stressing how much importance the Commission attached to the topic.

34. Furthermore, for reasons connected with his last point, he did not think it very urgent for the Commission to take a decision on that question. As he had indicated when introducing the last part of the report, it would, in his view, be wise if the Commission formally consulted the competent human rights bodies because, while it was certainly involved in the debate and had a duty to adopt a position, as those bodies themselves expected it to do, it was not the only party concerned and therefore had to establish a dialogue with the other parties. His answer to the fear repeatedly expressed by Mr. Goco that the Commission would run into the intransigence of those bodies was, first, that that was a risk to be taken and that refraining from consulting those bodies would not make them any less intransigent and, secondly and more importantly, that he did not think their intransigence was as radical as some people claimed. If the Commission's arguments were sound, the bodies in question would study them and, in trying to respond to them, would perhaps realize that they had to some extent gone a little astray; they might also be all the more receptive if the position the Commission took was a balanced one, that is to say as far removed from the excesses of general comment No. 24 (52) of the Human Rights Committee as from those of the States which had indignantly criticized the positions adopted by the Committee, the United States of America, France and the United Kingdom of Great Britain and Northern Ireland foremost among them. He therefore believed that the Commission had to try to obtain the reactions of the human rights bodies operating within the framework of the United Nations which Mr. Kateka had listed so painstakingly in his first statement (2500th meeting).

35. As to whether the Commission was empowered to do so, he said that article 16, subparagraph (e), article 17, paragraph 2 (b), and article 26 of its statute obviously implied that it was and that, as Mr. Simma had pointed out, article 25 expressly provided that it was. Article 25, paragraph 1, read:

The Commission may consult, if it considers it necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

There could naturally be no question of bypassing the General Assembly and it went without saying that the text which the Commission would adopt would have to be included in its report and that the comments of Governments in the Sixth Committee would, as always, be most useful and welcome. He saw no reason why the Commission should forego the opinion of the bodies which had set

the debate in motion or why it should be so arrogant as to fail to consult them when its statute invited it to do so or to fail to meet their expectations concerning a possible review of the whole issue. On the question of form, he was prepared to go along with any solution except that of draft articles accompanied by commentaries, to which the topic really did not lend itself. In his view, the discussion on the question of form could wait, but the Commission did have to take a prompt decision on whether to refer the text to the Drafting Committee, failing which it would find itself unable to consult anyone about anything.

36. The CHAIRMAN said that, as it neared the end of an intense and frank debate on chapter II of the Special Rapporteur's second report, the Commission was called upon to make observations and reach certain conclusions on the topic of reservations to treaties. Those observations and conclusions would, of course, be only of a provisional nature. Given that the Commission had had the Special Rapporteur's first report on the topic before it since the forty-seventh session in 1995, it would seem timely to present some interim results to the General Assembly and the draft resolution prepared by the Special Rapporteur provided a suitable working basis. There were, of course, substantial differences of opinion among members on both the content and the form of the proposed draft, but, in his view, it contained the elements necessary for the continuation of the Commission's work. He therefore proposed that the Commission should refer the draft resolution to the Drafting Committee as a working basis. The Drafting Committee would be expected to reflect on and ponder all the views expressed in plenary, decide what observations could be made and conclusions drawn at the current stage and consider a suitable form in which those observations and conclusions might be drafted. The Drafting Committee would submit its report to the Commission, which would then be in a position to take a decision.

37. Mr. BENNOUNA noted with interest the Chairman's suggestion that, if the Commission referred the proposed text to the Drafting Committee, it would be up to the latter to decide on the question of its form. It was apparently not certain that the form of a draft resolution would be finally maintained. He recalled that, except in the case of the resolution on confined transboundary groundwater attached to the draft articles on the law of the non-navigational uses of international watercourses,<sup>6</sup> the Commission had never followed such a procedure. While he had doubts about the question of form, he endorsed the proposal that the Commission should adopt a position on the topic.

38. Mr. PELLET (Special Rapporteur) said that it was not for the Drafting Committee to determine the form the draft should take and, in fact, the Commission itself did not need to adopt a final decision in that regard at the current session. It would be up to the Drafting Committee to adopt a position on a text which would in any case represent an opinion of the Commission. The Commission would decide later what it wanted to do with the text.

39. Mr. SIMMA said that it would be difficult for the Drafting Committee to arrive at a result in the absence of

<sup>6</sup> *Yearbook* . . . 1994, vol. II (Part Two), p. 135.

any preliminary decision on the form of the text. The type of wording used would depend largely on that decision; the wording of a conclusion would be more restrained, that of a resolution more emphatic. That meant that the outcome of the first consideration in the Drafting Committee would have to be referred back to it later to enable it to take account of the final decision the Commission would have taken on the form of the text.

40. Mr. HE said that he wished to place on record his reservations, based on his disagreement on certain paragraphs, about the proposal that the text should be referred to the Drafting Committee.

41. Mr. ROSENSTOCK said that, although he did not agree with certain paragraphs, the resolution seemed to him to provide an excellent possible format. There were, however, other possibilities and, recognizing that the substance was somehow related to the form, some measure of balance would perhaps need to be struck to encompass all the views expressed. He agreed that the text should be referred to the Drafting Committee as a working basis and believed that, in the light of the discussion in plenary, the Drafting Committee would have a sense of where the centre of gravity lay.

42. Mr. LUKASHUK, noting the very strong objections raised by several members to parts of the proposed draft resolution, appealed to Mr. He and the Special Rapporteur, in particular, to try to reach a compromise.

43. Mr. ECONOMIDES reminded the Commission of his reservations about referring the matter to the Drafting Committee. As the draft resolution markedly favoured the so-called "State" approach, moreover, he pointed out that the Commission might eventually reach the conclusion that the institutional approach was more conducive to the progressive development of international law. In the case of the conventions related to the law of the sea, for example, the institutional approach could be considered more positive than the classical State approach. He therefore thought that the Drafting Committee should keep open the possibility of such a change of emphasis.

44. Mr. ADDO said that, in his view, the Commission should give the Drafting Committee the mandate of determining what the form of the text should be.

45. Mr. KATEKA said that, by and large, he endorsed the content of the draft text, but had doubts about the proposed form of a draft resolution of the Commission; a draft recommendation to the General Assembly, or conclusions of the Commission would be acceptable, however.

46. The CHAIRMAN, replying to a question by Mr. GOCO, confirmed that the draft text that would be sent to the Drafting Committee was a working basis for the Committee, which would devote two or three meetings to it in order to enable the Commission to adopt a final decision the following week.

47. Noting that there were no serious objections to his proposals, he said that he would take it that the Commission decided to refer the draft resolution to the Drafting Committee.

*It was so decided.*

*Mr. Pellet took the Chair.*

### **Cooperation with other bodies (concluded)\***

[Agenda item 9]

#### VISIT BY A MEMBER OF THE INTERNATIONAL COURT OF JUSTICE

48. The CHAIRMAN welcomed Mr. Shi Jiuyong, a Judge of the International Court of Justice, who had come to visit the Commission as a representative of the Court in the absence of its President, Judge Schwebel, who was unable to travel for health reasons. He recalled that Mr. Shi Jiuyong had previously been a member and Chairman of the International Law Commission.

49. It would be noted that, while judges of ICJ had sometimes honoured the Commission with personal visits, Mr. Shi Jiuyong's visit was a first because he was representing the Court. The idea that the two institutions should create opportunities to meet and exchange views had seemed useful and worthwhile. By virtue of its Statute, ICJ was the principal judicial organ of the United Nations; more modestly, the Commission was a subsidiary organ of the General Assembly, but one of its oldest organs. The Court had celebrated its fiftieth anniversary in 1996; that of the Commission, whose establishment dated back to 21 November 1947,<sup>7</sup> would be celebrated in 1998.

50. Recalling that the Commission was the organ through which the General Assembly principally, although not exclusively, discharged its functions under Article 13 of the Charter of the United Nations, namely, that of the progressive development and codification of international law, and that, while ICJ applied international law, the Commission tried to contribute towards crystallizing it, he said he was convinced that the two "international law bodies" could engage in a fruitful dialogue. In that connection, he expressed two hopes. The first was that the visit would have a follow-up and that, in particular, informal and mutually useful exchanges would be planned in the form, for example, of suggestions by the Court on the topics which the Commission intended to include in its agenda and symposia or workshops on subjects of common interest or concern. The second was that the exchanges would not be confined to mere formalities, but would pave the way for a genuine dialogue.

51. Mr. SHI (Judge at the International Court of Justice), extending his best wishes to the members of the Commission, explained that the President of ICJ, who was unable to travel for reasons beyond his control, had requested him to represent him. As a former member of the Commission, he was glad to be thus reunited with his former colleagues and friends.

52. In the past five years, ICJ had been busier than ever before in its history. It had recently had as many as 13 cases on its docket and it currently had 9. That figure might sound modest, but it was not when it was recalled

\* Resumed from the 2495th meeting.

<sup>7</sup> General Assembly resolution 174 (II).

that only States could be parties to contentious cases before the Court and that the potential pool of litigants therefore did not exceed 190. To that should be added the United Nations and its specialized agencies, which could request advisory opinions of the Court; they had done so on 23 occasions over the years, the most recent and most important being the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>8</sup> in response to a question of the General Assembly. Moreover, as the members of the Commission were well aware, the contentious jurisdiction of the Court was consensual; the parties had to agree or to have agreed to the Court's jurisdiction. In many international legal disputes, they did not accept it. Despite those limitations, the Court's current docket was substantial and the nine cases on the list were important ones related to many different areas.

53. The first case, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*,<sup>9</sup> involved problems of the delimitation of maritime boundaries and the resolution of territorial claims, questions in which the Court had specialized with outstanding success. The second, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*,<sup>10</sup> and the third, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*,<sup>11</sup> dealt with the interpretation of the 1971 Montreal Convention in relation to the alleged involvement of the Libyan Arab Jamahiriya in the Lockerbie air disaster. They raised questions of the powers of the Security Council in relation to treaty rights of a party to a multilateral treaty and questions of extradition and terrorism.

54. In the fourth case, *Oil Platforms (Islamic Republic of Iran v. United States of America)*,<sup>12</sup> the Islamic Republic of Iran alleged that the United States had violated a bilateral Treaty of Amity, Economic Relations and Consular Rights by destroying Iranian oil platforms during the Iran/Iraq war. It raised questions not only of treaty interpretation, but of aggression, self-defence, neutrality and the law of war.

55. The fifth case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*<sup>13</sup> stemmed from allegations by Bosnia and Herzegovina that Yugoslavia had violated the Convention on the Prevention and Punishment of the Crime of Genocide by directing and promoting acts of "ethnic cleansing" in Bosnia and Herzegovina.

56. The sixth case, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>14</sup> which had been referred to the Court as a compromise, concerned the termination by Hungary on environmental grounds of a treaty with

Czechoslovakia, to which Slovakia claimed to be the successor, providing for the construction of dams on the Danube in Slovakia and Hungary. The case raised questions of the law of treaties, State responsibility, State succession and environmental law.

57. The seventh case, *Land and Maritime Boundary between Cameroon and Nigeria*,<sup>15</sup> concerned sovereignty over the peninsula of Bakassi and the demarcation of the boundary between Cameroon and Nigeria.

58. The eighth case, *Fisheries Jurisdiction (Spain v. Canada)*,<sup>16</sup> related to Canada's seizure of a Spanish fishing vessel on the high seas in an area in which Canada claimed the right to take protective measures to preserve fish stocks.

59. In the ninth case, *Kasikili/Sedudu Island (Botswana/Namibia)*,<sup>17</sup> referred to the Court on the basis of a compromise, the latter had been asked to determine the legal status of a fluvial island.

60. In 1996, the Court had issued a judgment upholding its jurisdiction in the *Oil Platforms* case, a judgment upholding its jurisdiction in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and an order of provisional measures in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. It had also handed down two advisory opinions, one finding that WHO lacked authority to request an advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,<sup>18</sup> and the other dealing in terms that could not be summed up in one phrase with the complex and sensitive question of the *Legality of the Threat or Use of Nuclear Weapons*. It was currently working on the complex *Gabčíkovo-Nagymaros Project* case, for which the oral hearings had recently been completed. For the first time since PCIJ had visited the banks of the Meuse 60 years previously, the Court had paid an on-site visit to the disputed dam sites on the Danube.

61. It could be gathered from the description of its role and most recent decisions that ICJ had a heavy workload. In recent years, disputes from every continent had been referred to it. But the General Assembly and the Secretary-General had cut the Court's budget for the 1996-1997 biennium so sharply that its functioning was impaired. In particular, it lacked sufficient funds to translate pleadings and provide interpretation for hearings, although, under the terms of its Statute, the Court, its members and parties to cases could work either in English or in French. The root cause of the slashing of the Court's budget—which was of the order of US\$ 10 million a year—was the financial crisis in the United Nations due to the failure of a number of Member States, led by the United States of America in terms of the scale of its arrears, to pay their assessed contributions. The Court, as the principal judicial organ of the United Nations whose budget was entirely funded by the latter, had suffered, like the Organ-

<sup>8</sup> See 2496th meeting, footnote 8.

<sup>9</sup> Order of 1 February 1996, *I.C.J. Reports 1996*, p. 6.

<sup>10</sup> Order of 22 September 1995, *I.C.J. Reports 1995*, p. 282.

<sup>11</sup> *Ibid.*, p. 285.

<sup>12</sup> Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 803.

<sup>13</sup> See 2478th meeting, footnote 3.

<sup>14</sup> Order of 20 December 1994, *I.C.J. Reports 1994*, p. 151.

<sup>15</sup> Provisional Measures, Order of 15 March 1996, *I.C.J. Reports 1996*, p. 13.

<sup>16</sup> Order of 8 May 1996, *I.C.J. Reports 1996*, p. 58.

<sup>17</sup> Order of 24 June 1996, *I.C.J. Reports 1996*, p. 63.

<sup>18</sup> Advisory Opinion, *I.C.J. Reports 1996*, p. 66.

ization, from financial deprivation and was working intensively with the Secretary-General and his colleagues to mitigate its financial difficulties. If the Court was adequately funded, it could deal more effectively with certain problems. The publication of judgments and advisory opinions, and especially of pleadings, was very much behind schedule. The Court was short of staff to give its work due publicity. When the written pleadings in a case had been completed, the parties were sometimes kept waiting too long for the oral argument; the hearings were also affected by disquieting delays. The judges of the Court, unlike those of other international courts and some national courts, had no clerks and little personal legal assistance. The legal staff of the Court's Registry was small and assisted the Court as a whole, not the individual judges. Even the judges of the International Tribunal for the Former Yugoslavia<sup>19</sup> were assisted by a clerk, who was paid, of course, by the European Union.

62. At the same time, the Court's working methods were not speedy. They were rightly designed to enable a universal court of 15 judges, representing the world's principal legal systems and civilizations, to deal with cases in such a way as to ensure that the views of all 15 judges were taken into account. Some of those working methods should be reviewed to enhance the Court's productivity without impairing the quality of its work. It was another challenge that the Court was trying to address and, like most of its problems, might not be easy to resolve.

63. On 21 November 1997, the International Law Commission would celebrate the fiftieth anniversary of its establishment. On behalf of the Court, he associated himself with that celebration and paid tribute to the members of the Commission. The Commission's work was of a legislative nature and it had made truly remarkable contributions over the years to the codification and progressive development of international law. A number of law-making or codification conventions adopted under the auspices of the United Nations had been based on drafts prepared by the Commission, in particular the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the 1969 Vienna Convention. The Geneva Conventions on the Law of the Sea were also based on drafts prepared by the Commission and many of their provisions were included in the United Nations Convention on the Law of the Sea.

64. ICJ had always held the Commission's work in very high esteem. It viewed the draft articles produced by the Commission and the reports prepared for it as sources at least as authoritative as the writings of the most eminent publicists. In its decisions in either contentious or advisory cases, the Court often referred to the draft articles formulated by the Commission, the commentaries to the draft articles and sometimes even the reports prepared for the Commission and the records of its plenary meetings. All of them bore witness to the excellent quality of the Commission's work and the fact that the Court viewed the products of that work as evidence of the state of international law.

65. It was also well known that the members of the Court were frequently drawn from the Commission and that the membership of the two bodies was often interchangeable. Mr. Ferrari Bravo, for instance, a former judge of the Court, was currently a member of the Commission. In addition, many members of the Commission often served as counsels for the parties in proceedings before the Court. They were all well acquainted with the procedure and jurisprudence of the Court so that relations between the Court and the Commission were excellent and based on mutual respect. It was to be hoped that the excellent relations between the two would be further strengthened in the years ahead.

66. Mr. FERRARI BRAVO said that he had been a member of the Court for a relatively short period, adding that he had usually voted in the same way as Mr. Shi; he recalled in particular the adoption of the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which had been such a divisive case in the Court. The influence of ICJ extended far beyond its judgments or advisory opinions in that, even when it ordered preliminary measures or indicated provisional measures, it shaped the action taken by States, encouraging them in some cases to continue and in others to discontinue the proceedings. There were instances in which preliminary requests and objections were designed to test the Court, one such case probably being the *Oil Platforms* and another that concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The latter case could be viewed as an attempt to extend the scope of the Convention and to place the Court on the same footing as a war crimes tribunal. However varied the cases referred to the Court and the questions it was called upon to answer, the work of the Commission had always been a source of inspiration. That was undoubtedly the most important aspect of cooperation between the Court and the Commission.

67. Mr. Sreenivasa RAO said that, just as the Court, according to Mr. Shi, sometimes based certain decisions on the Commission's work, the Commission in turn frequently referred in its own work to the Court's judgments and opinions. The mutual respect felt by the two institutions could be attributed to common interests, the consensual element in the work of both, the persuasion that they used to secure the recognition and application of international law and the culture of promotion of the rule of law and justice that they shared.

68. Mr. HE, thanking Mr. Shi for his statement, said that he deserved particularly warm congratulations on his role in the negotiations between China and the United Kingdom on the return of Hong Kong to China. He commended the major legal contribution that had been made to the success of the transfer.

69. Noting the recent creation of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda<sup>20</sup> and the establishment of the International Tribunal for the Law of the Sea,<sup>21</sup> he inquired about future relations between the Court, which had often considered law of the sea cases in the past, par-

<sup>19</sup> See 2502nd meeting, footnote 11.

<sup>20</sup> *Ibid.*, footnote 12.

<sup>21</sup> See SPLOS/14, paras. 13-31.

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. Candiotti, 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.

## 2505th MEETING

Friday, 4 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. Candiotti, Mr. Crawford, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>2</sup> (*continued*)

#### PART II (*continued*)

#### SECTION 2 (Unification of States) (*concluded*)

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

1. The CHAIRMAN invited the Commission to continue its consideration of draft article 21 contained in 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).

2. He recalled that, in articles 21, 22 and 23 of the French text, it had been decided that the words *deux États ou davantage* should be replaced by the words *deux ou plusieurs États*. It had also been asked whether the phrase “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” was needed in the text of the article itself. There were only two solutions, either simply to delete that phrase or to place it in the commentary, the second solution being by far the best. The Special Rapporteur had indicated that that phrase did not appear in either the 1978 or the 1983 Vienna Conventions, but had been taken word for word from the commentary to those Conventions.

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles see 2504th meeting, para. 28.

3. Mr. HAFNER said the phrase should be retained in order to indicate that article 21 applied to the cases to which it referred. The question had arisen whether the 1978 and 1983 Vienna Conventions applied to such cases, for example, to the case of Germany. It was all the more necessary to retain the phrase because the Commission was working on a draft declaration and the reader of a declaration was less inclined to turn to the commentary than the reader of a convention. He did not see how it could cause a problem in the interpretation of the 1978 and 1983 Vienna Conventions. The second of those Conventions was slightly different from the first and that had not adversely affected the interpretation of the first Convention. In any event, only the 1978 Vienna Convention had entered into force.

4. Mr. CRAWFORD asked whether the words “shall attribute” were peremptory in nature.

5. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that those words were not peremptory.

6. The CHAIRMAN recalled that all the “shall”s in Part II (Provisions relating to specific categories of succession of States) were to be understood as “should”s, since article 19 provided that “States shall take into account the provisions of Part II”. The obligation to take something into account was not an obligation to implement it.

7. Mr. CRAWFORD said the rule embodied in article 21 was an obligation under international law.

8. Mr. GOCO asked whether the Commission was formulating a draft declaration or a draft convention.

9. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the Commission was formulating draft articles in the form of a declaration, but had not yet adopted a final decision on the form the results of its work on the topic would take.

10. The CHAIRMAN pointed out that in paragraph 88 (b) of its report to the General Assembly on the work of its forty-eighth session,<sup>3</sup> the Commission had indicated that

for present purposes—and without prejudicing a final decision—the result of the work on the question of the nationality of natural persons should take the form of a declaration of the General Assembly consisting of articles with commentaries.

11. Mr. MIKULKA (Special Rapporteur), endorsing the statement made by Mr. Crawford, said he had always considered that article 21 embodied a rule that already formed part of customary international law. The fact that that rule was incorporated in Part II of the draft articles should not be misconstrued. The rules in Part II were intended as guidelines addressed to the States concerned for use in negotiations, but, when two or more States were united into one, there were no negotiations, since a single State emerged from the process. That State did not have the possibility of amending the rule by means of an international agreement. In accordance with Part I, it was a binding legal obligation for States to prevent cases of statelessness. A State resulting from the uniting of two or

<sup>3</sup> See 2479th meeting, footnote 6.

more States had no other choice than to grant its nationality to all the persons concerned because, otherwise, it would not be fulfilling that obligation.

12. The CHAIRMAN, speaking as a member of the Commission, said that, since article 19 (Application of Part II) had been adopted, the Commission could not go back to it, but it might have been useful to specify in that article that the provisions of Part II could be applied for other reasons, for example, because they were part of customary law. That would certainly have to be spelled out in the commentary to article 19, perhaps by listing the provisions in Part II, aside from article 19, that were binding on States.

13. Speaking as Chairman of the Commission, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 21, it being understood that, in the French text, the words *deux États ou davantage* would be replaced by the words *deux ou plusieurs États*.

*Article 21 was adopted.*

14. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) recalled that, in the third report (A/CN.4/480 and Add.1), the Special Rapporteur had proposed articles 19 and 22, on the scope of sections 3 and 4, respectively.<sup>4</sup> The Drafting Committee had, however, found it preferable to integrate provisions concerning the scope of those sections into the text of the relevant articles in each section. It had felt that such an insertion would, without diminishing the priority of the articles, have the added advantage of harmonizing the style of sections 3 and 4 with that of sections 1 and 2. That was why it had decided to delete articles 19 and 22.

### SECTION 3 (Dissolution of a State)

15. Turning to section 3, he said that the provisions on the scope of that section had been incorporated in the first article of that section, article 22 (Attribution of the nationality of the successor States). That article therefore corresponded to articles 19 and 20 as proposed by the Special Rapporteur. The first part of the opening clause of the article defined the dissolution of a State, while the second part provided that each successor State, subject to the provisions of article 23 (Granting of the right of option by the successor States), must attribute its nationality to certain categories of persons concerned, as stated in subparagraphs (a) and (b) of article 22.

16. He recalled that subparagraph (b) of article 20 as proposed by the Special Rapporteur, had been the subject of a lengthy debate in plenary, following which the Commission had requested the Drafting Committee to redraft that paragraph by merging the two subparagraphs and finding an alternative formulation for the phrase "secondary nationality" used by the Special Rapporteur in his third report. The Drafting Committee, after due consideration of the matter, had concluded that it was preferable, for reasons of clarity, to keep the two subparagraphs separate. One of them applied to persons concerned irrespec-

tive of their place of residence and the other to persons concerned who had their habitual residence in a third State.

17. In article 22 proposed by the Drafting Committee, the Committee had reversed the order of subparagraphs (b) (i) and (b) (ii). That did not in any way indicate that the criterion referred to in subparagraph (i) was per se more important than the criteria listed in subparagraph (ii). The reason was simply that, in view of the redrafting of the former provision, the new order was more logical. Indeed, where subparagraph (a) was applicable, the majority of persons concerned would fall into that category, and subparagraph (ii) would come into play only with respect to persons not already covered by subparagraph (i).

18. A new formulation was currently proposed in subparagraph (b) (i) for the concept of "secondary nationality". The scope of the provision was broader than the concept of "secondary nationality", as it did not specify a particular type of "appropriate connection" with a constituent unit of the predecessor State. In that provision, the "appropriate connection" with a constituent unit meant a legal bond between the person concerned and the constituent unit, established under the internal law of that unit. Such a bond was close to provisional citizenship. The Drafting Committee had considered, indeed, that other possible connections to constituent units of a State, analogous to "secondary nationality", which could exist under the internal law of the State, should also be covered by the provision. It should be noted, moreover, that subparagraph (b) (i) applied not only to constituent units of a federal State, but also to other types of constituent units, such as municipalities within a unitary State.

19. Concerning subparagraph (b) (ii), the Drafting Committee had considered that the two criteria originally envisaged therein might not be sufficient to cover all cases that the provision was intended to cover. It had therefore introduced the phrase "or having any other appropriate connection of a similar character with that State" to cover additional categories of persons concerned, if any.

20. Lastly, the Drafting Committee had introduced some minor editorial changes in the *chapeau* of the article and had replaced the term "permanent residence" in subparagraph (a) by the term "habitual residence" for purposes of consistency and correctness.

21. The second article of section 3 was article 23 and corresponded to article 21 proposed by the Special Rapporteur. Paragraph 1 of the article remained as proposed by the Special Rapporteur. It provided for the right of option by persons concerned who were entitled to acquire the nationality of two or more successor States, irrespective of whether they had their habitual residence in one of those States or in a third State. Persons concerned were given the right to choose between the successor States. The verb "to grant" had been used in accordance with the Drafting Committee's decision to use that verb in connection with "a right of option".

22. Article 23, paragraph 2, required successor States to grant a right to opt for their nationality to persons concerned who were not covered by the provisions of article 22. The Drafting Committee had changed the article slightly in view of the changes it had made in

<sup>4</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

article 22. For example, the paragraph currently referred to the whole of article 22 rather than only to subparagraph (b) thereof. Similarly, the qualification that the persons concerned should have “their habitual residence in a third State” had been deleted because that requirement was already covered by the reformulation of article 22. Paragraph 2 was intended to cover whatever else was not covered by article 22. The Drafting Committee had made no change in the title of article 23.

ARTICLE 22 (Attribution of the nationality of the successor States)

23. Mr. AL-KHASAWNEH, referring to the *chapeau* of article 22, asked whether the words “and the various parts of the territory of the predecessor State formed two or more successor States” were really necessary.

24. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the intention was to specify that the dissolution of a State could entail the forming of more than two successor States. However, the phrase could be dropped without much harm being done.

25. Mr. MIKULKA (Special Rapporteur) said that the term came from article 31, paragraph 1, of the 1983 Vienna Convention. He recalled that the Commission had decided to follow the text of that provision.

26. Mr. PAMBOU-TCHIVOUNDA said that the expression “dissolves and ceases to exist” was a tautology. He failed to see how a State might dissolve and not cease to exist. While realizing that the formulation was reproduced from earlier conventions, he thought that the Commission, one of whose functions was the progressive development of international law, sometimes tended to be too conservative.

27. The term “appropriate connection” used in article 22, subparagraph (b), was unfortunate whether it applied to the succession of States or to nationality. It should be spelled out with greater precision or perhaps replaced by a more legal term. Furthermore, the term “constituent unit” used in subparagraph (b) (i) was appropriate only if the predecessor State in question had been a federal State and inappropriate if it had not.

28. The CHAIRMAN noted that the English text of article 22 was taken from article 31 of the 1983 Vienna Convention cited by the Special Rapporteur, but that was not so in the case of the French text, which should be brought into line with the wording of the Convention.

29. Mr. MIKULKA (Special Rapporteur), referring to the expression “dissolves and ceases to exist”, said that what seemed obvious to the Commission today had not necessarily been so 20 years previously. Indeed, the Commission had been criticized, in the observations of Member States on the draft articles on succession of States in respect of treaties,<sup>5</sup> for dealing with dissolution and separation in the same article. States had taken the view that there was a substantial difference between a situation in which the predecessor State continued to exist, as in cases

of separation of one or more parts of its territory, and one where it ceased to exist. That was why the Commission had used the wording in question. Moreover, as had been the case recently, there could often be some confusion in practice about the distinction between dissolution and separation. Specifying that section 3 dealt with cases where the predecessor State had ceased to exist was therefore justified, for the same reason as 20 years previously. Taking the example of the dismemberment of the Austro-Hungarian Empire, he pointed out that certain States had come into being as the result of a separation of the territories of the double monarchy, which had itself ceased to exist when Austria and Hungary had been established as independent States. Thus, even if the term “dissolves and ceases to exist” seemed in theory to express something that was self-evident, the arguments in favour of retaining it were, in practice, more convincing than those in favour of its deletion.

30. Mr. BENNOUNA said that he was not convinced by Mr. Mikulka’s arguments. Respect for precedent, though no doubt legitimate, was not a legal argument. In his view, the words “ceases to exist” would be sufficient and the word “dissolves” was not a legal term.

31. Mr. THIAM and Mr. AL-KHASAWNEH said that they associated themselves with Mr. Bennouna’s comments.

32. The CHAIRMAN said that he nevertheless understood that a majority of the members of the Commission were in favour of retaining the term “dissolves and ceases to exist”.

*It was so decided.*

33. Mr. THIAM said that the disagreement on that point should be reflected in the commentary to article 22.

34. Mr. MIKULKA (Special Rapporteur) said that the matter was entirely one of drafting and would be out of place in the commentary to a draft article.

35. Mr. ROSENSTOCK said he also thought that the commentary should be reserved for substantive questions. The inclusion of explanations on drafting problems would make it heavier and the provision in question all the more difficult to interpret, and that was the exact opposite of the desired effect.

36. The CHAIRMAN said he understood that the Commission nevertheless wanted the necessary explanations to be provided in the commentary.

37. Mr. LUKASHUK noted that the words “constituent unit” were used in subparagraph (b) (i), whereas the term “territory” was to be found elsewhere. He requested an explanation of that distinction.

38. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the concept of a constituent unit was useful in the context of secondary nationality, a problem that the Commission had already discussed extensively. It was one of the elements of the legal connection which existed between certain individuals and a certain entity (federal State, province, municipality) and which distinguished those individuals from others belonging to the same State, but having a connection with another entity.

<sup>5</sup> *Yearbook* . . . 1974, vol. II (Part One), p. 313, document A/9610/Rev.1, annex 1.

The term "territory" was used in the context of the cessation, secession, dissolution or partition of States.

39. Mr. CRAWFORD said that the problems arising from the use of the words "appropriate connection" in subparagraphs (b) (i) and (b) (ii) was further complicated by the qualifying phrase "of a similar character" in subparagraph (b) (ii). In that provision, such "similarity" referred back to the concept of "habitual residence", which, in turn, referred back to article 14 (Non-discrimination), whereby any discrimination in the recognition of the right to a nationality was prohibited.

40. Mr. ECONOMIDES said that, although the concept of "appropriate connection" played a key role in the draft articles, no definition of it was to be found in the text and that, in his view, was a serious weakness. The interpretation of what was "appropriate" was therefore left to the States concerned, with national lawmakers being responsible for giving a meaning to that criterion.

41. The Drafting Committee had been right to add a clause to the text proposed by the Special Rapporteur for subparagraph (b) (ii). It had thus broadened the definition of persons to whom the nationality of the successor States could be attributed, but its reasoning broke down over the concept of "similar character". He asked whether the term meant that the connection in question was limited to considerations of residence. He would be in favour of the deletion of the qualifying clause.

42. Mr. BENNOUNA said that he shared Mr. Economides' view. Some explanation of the term "of a similar character" could perhaps be provided in the commentary. Some definitions at the beginning of the text could also be added on second reading. In any event, he wished to place on record his serious reservations about the term in question.

43. Mr. GOCO asked for an explanation of the meaning of the term "appropriate connection", which gave rise to problems, especially in subparagraph (b) (ii) which was subject to the condition expressed in its *chapeau* ("without prejudice to the provisions of article 7"). Article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), on which he recalled having spoken with some force, provided that a successor State was not required to attribute its nationality to persons concerned who had their habitual residence in another State. Despite that non-obligation, article 22 recognized that the attribution of nationality could apply to persons who were not resident in the State concerned, provided that they had an "appropriate connection" with that State. The question was therefore what type of "appropriate connection" could reverse the non-obligation of the State.

44. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the comments made by Mr. Economides and Mr. Bennouna. In his view, "appropriate connection" was meaningless in legal terms. As he had already explained, he would personally prefer "effective connection" but the Commission had not fallen in with that suggestion. He therefore proposed "legal connection". He likewise shared Mr. Economides' opinion of the qualifying phrase "of a similar character", which he thought should be deleted.

45. Mr. MIKULKA (Special Rapporteur) said he thought that the term "legal connection" proposed by the Chairman, speaking as a member of the Commission, would do very well in subparagraph (b) (i), but not in subparagraph (b) (ii). As there seemed to be problems with the words "of a similar character", he proposed that, in subparagraph (b) (ii), the words "or having any other appropriate connection of a similar character with that successor State" should be deleted. The persons referred to in the deleted phrase would still be covered in any case by article 23, paragraph 2, which referred to "persons concerned who are not covered by the provisions of article 22".

46. The term "appropriate connection" was also used in article 10 (Respect for the will of persons concerned), paragraph 2, but with a slightly different meaning: in that context, it meant that any connection between a person and a State concerned could be invoked where the aim was to avoid statelessness.

47. Mr. ECONOMIDES said that he found the term "legal connection" better than the term "appropriate connection", although what the new term covered was not very clear either. The mere fact of having a bank account in a State could amount to a legal connection. To be more precise, the term "appropriate legal connection" should be used.

48. With regard to the phrase "or having any other appropriate connection of a similar character with that successor State", the deletion of which was proposed by Mr. Mikulka, he held to the view that its inclusion had been an intelligent move on the part of the Drafting Committee. He was therefore against its deletion because, in that case, the only remaining criteria for the attribution of nationality to the persons referred to in subparagraph (b) were birth and habitual residence, whereas the aim should be to broaden the circle of such persons. The words "of a similar character", however, introduced an undesirable element of ambiguity into the wording.

49. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to use the term "appropriate legal connection" in article 22, subparagraph (b) (i).

*It was so decided.*

50. Mr. BENNOUNA, referring to the phrase, the deletion of which was proposed by Mr. Mikulka, said he agreed with that proposal, since the phrase referred to persons whose situation was already covered by other provisions of the draft articles. Its deletion would also make the sentence less unwieldy.

51. Mr. ECONOMIDES said that he objected to the deletion of the phrase. As he saw it, subparagraph (b) established two criteria: birth in the territory of the State concerned or habitual residence in that territory, both of which came under *jus soli*. But the *jus sanguinis* hypothesis should not be ruled out. He mentioned by way of illustration the case of a son of Greek parents who neither lived nor worked in Greece but who, in the event of a new Greek State being established, would opt for the nationality of that new State. He could lay claim to it by claiming "another appropriate link", that is to say *jus sanguinis*. If

that possibility was ruled out, the person concerned could, of course, invoke article 23, paragraph 2, but, in his view, that paragraph was not a normative provision, but a mere safety valve.

52. Mr. MIKULKA (Special Rapporteur) said that, taking article 22 as currently worded, it was possible, on the basis of each of the criteria for the attribution of nationality set forth in subparagraphs (a) and (b), namely, habitual residence in the territory, an appropriate legal connection with a constituent entity of the predecessor State (that is to say secondary nationality), birth in a territory or previous residence in that territory, to establish exactly which successor State must attribute its nationality to the person concerned. In the case of Czechoslovakia following its dissolution, for example, it would be found that application of each of the above-mentioned criteria would indicate whether it was appropriate to attribute Czech nationality or Slovak nationality to the person concerned. On the other hand, if the *jus sanguinis* connections mentioned by Mr. Economides were invoked, there would be absolutely no way of knowing to which successor State a third-generation emigrant whose parents and grandparents were Czechoslovak should be attached because the *jus sanguinis* connections were actually connections with the predecessor State. It was logical that the third-generation emigrant should be able to choose himself between the successor States, which would automatically place him in the category of persons covered by article 23. He asked Mr. Economides how the criterion he was seeking to establish could be used to attribute the nationality of State A rather than State B to that person and vice versa and why he felt that the case was not sufficiently well covered by article 23, paragraph 2.

53. Mr. ECONOMIDES said that, while the criteria of place of birth or former habitual residence set forth in subparagraph (b) (ii) were precise, the criterion of an appropriate connection with the successor State was much less precise. It could refer to a connection with the territory of either successor State through family origin, but also to an ethnic, linguistic or simply historical connection. It was for the State to legislate one way or the other and it should not be deprived of that option.

54. The CHAIRMAN said he thought that the words "of a similar character" covered exactly the kinds of cases mentioned by Mr. Economides. He therefore failed to understand why he wanted them to be deleted. As an alternative, he proposed that the last phrase of subparagraph (b) (ii) should be reworded to read ". . . other appropriate connection with that successor State and of a similar character" or else, as Mr. Economides suggested, that the commentary should specify very clearly that a connection with the territory of the successor State was meant.

55. Mr. CRAWFORD said that the main objection to Mr. Economides' argument was that, as Mr. Goco had rightly noted, article 22 imposed an obligation on the successor State. It was perhaps not very appropriate under those circumstances to force that State to grant its nationality to persons who simply had an "appropriate connection" with it, that is to say basically, to a totally indeterminate category of persons. He would personally prefer that the Special Rapporteur's proposal should be

adopted and that the last phrase, following the words "successor State", should be deleted.

56. Mr. GALICKI said that, in view of the problems raised by the last phrase, that seemed to be the most reasonable solution, since cases that were not covered by article 22 would in any case be covered by article 23, paragraph 2.

57. Mr. SIMMA said that, if he had correctly understood Mr. Economides, his point was that the provisions of article 23 did not adequately cover the case of persons who had some kind of special connection with the successor State. That had perhaps also been the Drafting Committee's interpretation and he wondered whether it might be preferable to keep the text as it stood.

58. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) acknowledged that it was not by chance that the Drafting Committee had decided to emphasize such *jus soli* criteria in article 22 as place of birth or place of habitual residence and that it had avoided introducing *jus sanguinis* considerations. In practice, the concept of "person concerned" obviously had *jus sanguinis* connotations, but that had never been explicitly stated. At no stage had the members of the Drafting Committee considered that *jus sanguinis* criteria could be placed on the same level as *jus soli* criteria, primarily for the reasons stated by the Special Rapporteur. The latter had rightly noted that a situation such as that mentioned by Mr. Economides could not be covered by article 22 and that article 23, paragraph 2, was the relevant provision in the case in point. That having been said, by including the highly flexible criterion of an appropriate connection with the successor State in article 22, the members of the Drafting Committee had wished to leave the door open to *jus sanguinis* considerations and that position could perhaps be stated explicitly in the commentary.

59. Mr. MIKULKA (Special Rapporteur) said that, on reflection, he realized that Mr. Economides was not really proposing that *jus sanguinis* should be introduced into the article, but wished instead to have criteria of ethnic connection taken into consideration. That went no way towards solving the problem, however, since inter-ethnic marriages were common in certain cultures and societies, so that it would be as difficult as ever to determine the appropriate successor State to which a third-generation emigrant from a mixed marriage between persons belonging to two different ethnic groups in the predecessor State should be attached.

60. The CHAIRMAN, having summed up the various proposals made during the debate and having taken an indicative vote on the retention of the words "of a similar character", noted that a large majority of members were in favour of deletion.

61. Having taken an indicative vote on the deletion of the last phrase of subparagraph (b) (ii), he noted that the Commission wished to retain that phrase.

62. Mr. CRAWFORD said that, in the context, article 14 of Part I was predominant.

63. Mr. THIAM said that he objected to the term "appropriate connection" because the word "appropriate" was not defined.

64. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that he shared Mr. Crawford's view about the dominant nature of non-discrimination, which was a very important criterion for the application of Part II. He nevertheless thought that the principle of non-discrimination was taken into account by the fact that article 19, which was the first article of Part II, expressly referred to the provisions of Part I.

65. The CHAIRMAN said that the various points of view expressed would be duly reflected in the commentary.

66. He suggested that the Commission should adopt article 22 with the following two amendments: in subparagraph (b) (i), the word "legal" should be inserted between the word "appropriate" and the word "connection"; and, in subparagraph (b) (ii), the words "of a similar character" should be deleted.

*It was so decided.*

*Article 22, as amended, was adopted.*

#### ARTICLE 23 (Granting of the right of option by the successor States)

67. Mr. ECONOMIDES proposed that the word "all" before the word "persons" in paragraph 1 should be deleted in order to bring the wording into line with that of articles already adopted. Since the words "who are qualified to acquire" were rather vague, he shared the view expressed by another member that the Commission should make an effort to adopt more precise wording on second reading. As a consequence of the amendment of article 22, subparagraph (b) (ii), he proposed that article 23, paragraph 2, should be redrafted to read: "Each successor State shall grant the right to opt for its nationality to persons concerned who are not covered by the provisions of article 22 and who would otherwise be stateless".

68. The CHAIRMAN, replying to a question by Mr. ROSENSTOCK, said that the proposed amendment to paragraph 1 was simply a drafting change and that the commentary would make it quite clear that the paragraph related to all persons concerned. He suggested that the Commission should adopt the proposed amendment, namely, the deletion of the word "all" before the word "persons".

*It was so decided.*

69. Mr. MIKULKA (Special Rapporteur) said that he objected to the amendment proposed to article 23, paragraph 2, since the intention was precisely to go a little beyond the prevention of statelessness. Persons not covered by article 22 had to have a right to opt for the nationality of a successor State in order, for example, to carry out projects undertaken in relation to the predecessor State. Moreover, a reference to statelessness would duplicate article 10, paragraph 2.

70. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) confirmed that the purpose of preventing statelessness was only one of the aspects of the paragraph, which related to persons concerned who had the nationality of the predecessor State and who, wherever they might be, were not covered by article 22. It was, in fact, an abundant caution provision, the discussion having shown that, whatever precautions might be taken, some case was nearly always overlooked.

71. Mr. ECONOMIDES said that he withdrew his proposed amendment to paragraph 2.

72. Mr. BENNOUNA said that, for reasons of legal technique, he had doubts about keeping paragraph 2 at all. Having broadly defined certain categories in article 22, the Commission was introducing a third, undefined category of persons concerned in article 23. Trying to make the draft cover everything could make it useless and irrelevant.

73. The CHAIRMAN said that article 2 (Use of terms), subparagraph (f), defined "persons concerned".

74. Mr. SIMMA said that, in the case of the dissolution of a State, the basic idea was that all nationals of the predecessor State should eventually have the nationality of one of the successor States. In that respect, the Commission had gone as far as it could to ensure that no one was overlooked. Having regard to the extremely broad scope of article 22, he wondered what were the categories of persons who were not covered by that article and would therefore come under article 23, paragraph 2.

75. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that, while the deletion of the words "of a similar character" in article 22, subparagraph (b) (ii), had indeed helped to broaden the range of persons concerned covered by that article, article 23, paragraph 2, was specifically concerned with *jus sanguinis* in the case of persons who, having been born and residing abroad, were not covered by that provision of article 22 and should therefore be able to obtain a right of option. That was the only category which came to mind, but the purpose of retaining paragraph 2 had been to avoid any ambiguity or uncertainty.

76. Mr. SIMMA said that the amendment to article 22, subparagraph (b) (ii), amounted to deleting any reference to a territorial element and, consequently, to having *jus sanguinis* covered by that article. He still failed to understand what specific category of persons would come within the scope of article 23, paragraph 2.

77. Mr. MIKULKA (Special Rapporteur) recalled that the last part of article 22 spoke of "any other appropriate connection" with "that successor State", in other words, with either State A or State B. It could happen that a person had no appropriate connection with either of the successor States, but did have a genuine link with the predecessor State by virtue of *jus sanguinis*. If the "appropriate connection" criterion led one of that person's parents to successor State A and the other to successor State B, the result was total confusion. All that could be done in such a case was to formulate an obligation for both successor State A and successor State B to offer a right of option to that person, who had been overlooked

and was therefore in danger of not acquiring the nationality of any successor State.

78. Mr. SIMMA said that he was currently convinced of the advisability of retaining article 23, paragraph 2.

79. Mr. GOCO said that he had no objections to the substance of the text, but wondered whether, generally speaking, the Commission should not consider the possibility of curtailing the practice of cross-references, which often caused confusion. Moreover, since the right of option had been defined as having two aspects, one positive and the other negative, he asked the Chairman of the Drafting Committee to explain how article 23, paragraph 2, tied in with the right to opt out and, in particular, with article 7, paragraph 2.

80. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that, from the technical point of view, cross-referencing was designed to guarantee respect for the basic objectives of the draft. There were too many cross-references, but that was inevitable on first reading. If, when drafting specific provisions such as those in Part II, the Commission refrained from referring to the draft's basic objectives, there was a risk that the provisions it adopted might result in statelessness, multiple nationality or a nationality being imposed on persons against their will. In the particular case of articles 22 and 23, the objective was to ensure that the persons concerned obtained the nationality of one of the successor States. However, if one such person was habitually resident abroad and did not wish to be a national of one of the successor States, the nationality of that State could not be automatically imposed on that person. That had to be spelled out so that one of the basic objectives of the text would not be meaningless. Cross-references were thus a necessity at the current stage, but, on second reading, the Commission could look into better ways of achieving the desired end.

81. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 23 with the amendment to paragraph 1.

*Article 23, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

---

## 2506th MEETING

*Friday, 4 July 1997, at 3.05 p.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Bennouna, Mr. Candiotti, Mr. Crawford, Mr. Economides, Mr. Ferrari*

*Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosentock, Mr. Simma, Mr. Thiam.*

---

### Closure of the International Law Seminar

1. The CHAIRMAN invited Mr. von Blumenthal, Director of the Seminar, to address the Commission on the occasion of the closing ceremony of the thirty-third session of the International Law Seminar.

2. Mr. von BLUMENTHAL (Director of the International Law Seminar) expressed gratitude to all those who had helped to make the Seminar a meaningful event. He said that special thanks must go to the Governments which had donated the necessary funds without which it would not have been possible to ensure equitable geographical distribution among the participants, and also, of course, to the Chairman and members of the Commission, the experts from international organizations who had given lectures and the many members of the secretariat who had lent their support in various ways.

3. At a time of financial crisis, when the work and mandates of many United Nations bodies were being questioned, the International Law Seminar could not escape scrutiny of its objectives, methods and value. Constructive criticism and suggestions by Commission members as well as by participants in the Seminar were both necessary and welcome. Within tight financial and material limits, the active involvement of members of the Commission remained vital. For 33 years, the Seminar had provided a unique opportunity to successive generations of young lawyers from all regions and legal systems to acquaint themselves with the techniques of codification of vital topics of international law. Many previous participants had since taken up important positions in government and international relations, and some had become members of the Commission. He hoped that the participants in the thirty-third International Law Seminar would also go on to perform important functions and trusted that the three weeks of intensive exposure to the work of the Commission would remain a lasting source of inspiration to them in their commitment to bridging differences and conflicts through the unifying force of law and dialogue. In conclusion, he wished the participants every success in their future endeavours.

4. Ms. DOUKOURE, speaking on behalf of the participants in the International Law Seminar, thanked the Chairman and members of the Commission, the Director of the International Law Seminar and all members of the secretariat who had contributed to the successful holding of the Seminar. Attending the Commission's plenary meetings had given participants a better insight into problems in the codification and progressive development of international law as well as into the Commission's working methods. The lectures given by members of the Com-

mission and officials of United Nations specialized agencies had provided enriching opportunities for exchanges of views among lawyers from different cultures and legal systems. The participants had greatly appreciated the variety and topicality of the subjects covered by the lectures and, in particular, the opportunity to ask questions on topics currently under consideration by the Commission. They would have wished, however, to be allowed a closer view of the working methods of the Drafting Committee, the veritable linchpin of the Commission's work. In conclusion, she again thanked all concerned and emphasized the value of the instruction so generously dispensed to the participants, as well as the many human ties they had been able to establish.

5. The CHAIRMAN said he joined in the good wishes addressed to the participants by the Director of the International Law Seminar and thanked the participants for their courtesy and the lively interest they had shown in the Commission's work. With reference to the point just raised by their spokeswoman, while he appreciated the wish to gain a better insight into the work of the Drafting Committee, he felt that all persons other than Drafting Committee members should continue to be excluded from the Committee's meetings, complete privacy being, in his view, essential to the efficacy of the Committee's work.

*The Chairman presented participants with certificates attesting to their participation in the thirty-third session of the International Law Seminar.*

6. The CHAIRMAN invited International Law Seminar participants and members of the Commission to proceed to an informal exchange of questions and answers.

7. Mr. KABATSI and Mr. SIMMA said that they sympathized with the Seminar participants in their wish to attend meetings of the Drafting Committee and saw no reason why the presence of distinguished young professionals should disturb the Committee's work.

8. Mr. ROSENSTOCK said that he basically agreed with the Chairman, but would have no objection if Seminar participants were admitted to one Drafting Committee meeting during each session.

9. Mr. CANDIOTI said that, as a member of the Commission who had previously participated in an International Law Seminar, he thought that access to some meetings of the Drafting Committee and the working groups could prove very useful to young lawyers. He suggested that, in future, participants might be asked during the Seminar to engage in some research on topics related to the work of the Commission.

10. The CHAIRMAN recalled that at an earlier Seminar the participants had, on the initiative of the then Chairman, Mr. Tomuschat, set up four working groups, each of which had produced a paper on some aspect of the work of the Seminar.<sup>1</sup> He was not sure why the practice had been discontinued and hoped it would be revived next year.

<sup>1</sup> See *Yearbook . . . 1992*, vol. II (Part Two), p. 56, document A/47/10, para. 386.

11. Mr. BENNOUNA urged participants in the Seminar to put forward their ideas on topics for the Commission's future work.

12. Mr. KATEKA said he supported the suggestion by one participant that the Commission should take up the topics of corruption and extraterritorial application of national legislation. The comment that members of the Commission were sometimes encumbered by their personal background or national affiliation was true.

13. Mr. OPERTTI BADAN said the international community clearly needed to provide for some kind of solution to the problem of corruption. So far, the only legal system that had offered a formal response was the inter-American one, with the signing of the Inter-American Convention against Corruption, which set out a number of extremely important categories, such as influence-peddling and unjust enrichment. Usually, corruption did not touch one State alone, but relied on mechanisms for hiding funds in a number of countries. The Commission should make a formal decision to take up the topic and thereby show that it was capable of responding to concerns of great importance in the modern world.

14. Mr. ROSENSTOCK said the topic of corruption represented an interesting possibility for the Commission's future work, but the initiative for considering it should come from comments by representatives of Governments in the Sixth Committee, rather than from the Commission itself. Governments were unlikely to be interested in the views of international legal experts on extraterritorial jurisdiction, because it was not an issue in which technical legal issues were paramount: economic and political issues predominated.

15. Mr. LUKASHUK said it was interesting that a number of the topics for the Commission's future work suggested by Seminar participants coincided with those on the Commission's long-term programme of work, such as corruption, international terrorism, extradition and extraterritorial application of criminal law. The participants were people of some experience and it might be useful to mobilize their experience to deal with the problems with which the Commission itself was grappling. The Seminar should operate, not on the basis of lectures alone, but also through small working groups on particular subjects.

16. Mr. CRAWFORD said he agreed with Mr. Rosenstock's comments on extraterritorial jurisdiction. Corruption was a social problem with diverse legal ramifications and it would be useful for the Commission to have some incentive from representatives of Governments in the Sixth Committee. Clearly, something more than a regional approach was required, since the fruits of corruption tended to end up in regions other than those in which the corruption had occurred.

17. The CHAIRMAN observed that, although members of the Commission were independent experts, they were at the service of the international community with a view to fostering the codification and progressive development of international law. They would not be properly performing their mission if they were to take up a topic that Governments were not prepared to see progress on. That was true with extraterritoriality, and he agreed with Mr. Rosenstock's comments on that point.

18. In response to a question as to whether the Commission envisaged a revision of the Vienna Convention on Diplomatic Relations in the light of the growing tendency towards lack of respect for diplomatic immunity, he pointed out that at its forty-third session in 1991 the Commission had adopted a set of draft articles on jurisdictional immunity of States and their property.<sup>2</sup> The General Assembly was scheduled to respond, at its fifty-third session in 1998, to the submission of the draft, for the purposes of adopting a convention.

19. Mr. BENNOUNA added that in a situation of growing disregard for diplomatic immunity, very little good could be achieved, and some damage might be done, if the Commission were to revise or supplement existing rules. Moreover, the Commission had at one time taken up the issue of the immunity of international organizations, but had not proceeded further with the matter.

20. Mr. ECONOMIDES said the real problem in connection with diplomatic immunity was the attitude taken by States. When a diplomat committed a crime, the State of which he or she was a national should of its own volition renounce the absolute diplomatic immunity it was allowed under the Vienna Convention on Diplomatic Relations. It was shocking that States did not do so, and he believed it was above all the moral stance of countries that needed to evolve.

21. Mr. THIAM, replying to a question concerning feedback from Governments, said that, although the Commission had repeatedly invited comments from Governments on the topics under discussion, there was usually very little response. African States attributed their failure to respond to a lack of technical resources in the legal departments of Ministries of Foreign Affairs.

22. Mr. LUKASHUK said that the influence of African States on the process of codification and development of international law was an important issue which should be addressed by regional organizations such as OAU and the League of Arab States.

23. Mr. Sreenivasa RAO said that Governments' views were expressed not only in the form of written comments but also in their statements to the Sixth Committee. Some Governments were reluctant to express their views on work in progress, since that would leave them with less scope to comment on the final product. On the practical side, difficulties included few staff resources and the need to consult a number of different government departments and coordinate their views.

24. Mr. MIKULKA said that manpower and financial problems were no excuse for failing to provide the Commission with extracts from national legislation, for example on nationality in relation to State succession. That could only be described as negligence on the part of the Member States concerned.

25. The CHAIRMAN said that, as Special Rapporteur on the topic of reservations to treaties, he had been very gratified to receive replies to his questionnaire from 30 out of 185 Member States, which was apparently a record for the Commission.

26. Mr. LUKASHUK, replying to a question about the relationship between national and international law, said

that a topic which featured on the Commission's long-term agenda was the preparation of model legislation which could be used by individual States when they were unsure how to address particular contemporary issues.

27. Mr. ECONOMIDES said that the Venice Commission, a Council of Europe body, had undertaken a systematic comparative study of international and internal law, focusing on general principles, customs and judicial decisions, in order to establish how international law was applied within States. The study contained recommendations to the member States of the Council of Europe.

28. Mr. MELESCANU said some countries had arranged for the automatic incorporation of international human rights treaties in domestic law. For example, under article 20, paragraph 2, of the Constitution of Romania, the provisions of human rights treaties ratified by Romania could be invoked in domestic courts and prevailed over internal law in the event of a conflict between the two.

29. The CHAIRMAN said that the same was true of the French system of constitutional monism established in 1946 and developed in 1958.

30. Mr. LUKASHUK said that the Russian Constitution had opted for a radical solution to the problem, stipulating that generally accepted human rights principles and standards ranked higher than the Constitution.

#### Visit by the Secretary-General

31. The CHAIRMAN said that the Commission was particularly honoured to welcome the Secretary-General, whose presence denoted his interest in the cause of international law and its progressive development and codification. His visit also had symbolic status on the eve of the Commission's fiftieth anniversary.

32. The members of the Commission and of the International Law Seminar had been joined for the occasion by the President and members of the United Nations Administrative Tribunal, members of the United Nations Compensation Commission and representatives of diplomatic missions accredited to Geneva.

33. Mr. ANNAN (Secretary-General) said he regretted that a busy schedule in Geneva prevented him from spending more time with the Commission, as international law was a subject to which he attached the greatest importance.

34. He congratulated the Commission, as it prepared to celebrate its fiftieth anniversary, on its great achievements in the codification and progressive development of international law. The United Nations remained guided in its major reform efforts by the Commission's common heritage and commitment to the principles and purposes on which the Organization was founded. That foundation was the law, and also the idea that the conduct of States and the relations between them should be governed by one law that was equally applicable to all.

35. Mankind was living through a remarkable period in the advancement of international law. Great strides had been made in refining its writ, expanding its reach and enforcing its mandate. The challenges of the future in areas such as narcotics, disease, crime and international

<sup>2</sup> *Yearbook . . . 1991*, vol. II (Part Two), p. 13, para. 28.

terrorism were increasingly recognized as international challenges. As that recognition grew, so too had the realization that international law was a viable tool in the global effort to meet the challenges. For nearly 50 years the Commission had been in the forefront of that endeavour. It had succeeded greatly in setting forth basic rules in most of the key areas of international law. Those rules had in turn served as the basis for global treaties governing State activities in many areas. Indeed, some of the treaties drafted by the Commission, such as those regulating diplomatic matters, had laid the very foundation of the modern practice of international relations.

36. The occasion of the Commission's fiftieth anniversary afforded an opportunity not only to celebrate the Commission's achievements but also to evaluate the state of international law and to project its work into the next millennium. The General Assembly had requested him to make appropriate arrangements to commemorate the fiftieth anniversary through a colloquium on the progressive development and codification of international law to be held later in the year, during the consideration of the Commission's report in the Sixth Committee. Arrangements had already been made by the Secretariat and the colloquium would be held.

37. He was sure that, as servants of the peoples of the United Nations, all present would work together to advance the goals and objectives of the Charter of the United Nations and that the Commission and the United Nations as a whole would rise to the challenge.

38. The CHAIRMAN thanked the Secretary-General for his kind words, which were a source of inspiration and encouragement for the members. The Commission firmly hoped that the Secretary-General would honour it with his presence on the occasion of its fiftieth anniversary.

39. It was a time to look back on the past and to form new resolutions. The Commission's record was certainly nothing to be ashamed of. The achievements over the past 50 years covered a wide variety of fields and had laid the foundations of what might be termed the constitutional law of the international community, the finest products of which were the Vienna Convention on diplomatic relations and the Vienna Convention on the law of treaties. In addition, the draft articles on State responsibility adopted on first reading at the previous session were already exerting considerable influence and would assist in shedding light on the splendid enigma of international law, a law that forged links primarily, even if not exclusively, among sovereign States.

40. The Commission had proven its worth and continued to serve the international community by helping the United Nations to discharge its first purpose under the Charter of the United Nations: the maintenance of international peace and security in conformity with the principles of justice and international law. Those were sufficient grounds, he felt, to refrain from questioning the basic modalities of its functioning and, a fortiori, its existence. At the same time, they should not serve as an excuse to avoid seeking ways and means of improving the Commission's working methods and procedures and giving serious thought to its future work programme. A working group on the long-term programme of work had tackled

that difficult task at the forty-eighth session<sup>3</sup> and some of its recommendations were currently being implemented. But progress did not depend on the Commission alone.

41. One of the most valuable aspects of the Commission's work was the close collaboration with the General Assembly, through the Sixth Committee, and with States. Such collaboration between political bodies and independent experts ensured, or should ensure, that the drafts produced were technically sound and realist. In practice, however, the cooperation was often far from satisfactory and that was certainly not always the Commission's fault. In its report on the work of its forty-eighth session, the Commission had referred in "diplomatic" terms to the shortcomings of the existing dialogue and the share of responsibility borne by the Sixth Committee.<sup>4</sup> He would revert to the subject, in less diplomatic terms, when he came to represent the Commission at the fifty-second session of the General Assembly.

42. It was unnecessary in front of the Secretary-General to recall that the Commission, like all other United Nations bodies, was feeling the impact of the budgetary crisis. Unfortunately, with the shortening of its sessions, it had reached what threatened to become a point of no return.

43. It was an anomaly that no woman had yet been elected to the Commission. The reasons for that regrettable situation were complex and the remedy uncertain, depending as it did more on States than on the adoption of legal provisions. Consideration might nonetheless be given to certain measures, which should at least act as an incentive or possibly be binding. A second anomaly was the way in which the membership of the Commission was renewed. Unlike the judges of ICJ and the members of most expert bodies, the members of the Commission were all subject to re-election at the same time every five years. It was not a satisfactory procedure and led to disruptive changes in the membership of the Commission. Although the 18 new members at the current session—over half of the total—had settled in quite rapidly, renewal of one third or one half of members would certainly make for a smoother transition.

44. The members of the Commission greatly appreciated, in terms of both quantity and quality, the services provided by the Secretariat staff at all levels. However exorbitant the Commission's demands, they were always met with competence and dedication. The Secretary-General could be proud of his staff.

45. Expressing the hope that the Commission could look forward to additional and more extended visits, he presented the Secretary-General with a copy, signed by all members present, of the Commission's contribution to the United Nations Decade of International Law.<sup>5</sup>

*The meeting rose at 4.45 p.m.*

<sup>3</sup> See *Yearbook . . . 1996*, vol. II (Part Two), paras. 244-245 and annex II.

<sup>4</sup> *Ibid.*, paras. 173-184.

<sup>5</sup> *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* (United Nations publication, Sales No. E/F 97.V.4).

## 2507th MEETING

Tuesday, 8 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>2</sup> (*continued*)\*

#### PART II (*continued*)

##### SECTION 4 (Separation of part of the territory)

1. The CHAIRMAN invited the Commission to continue its consideration of 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).

2. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), introducing the articles in section 4, said that section as proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)<sup>3</sup> had begun with a scope article, which had been article 22. That article was currently inserted in the opening clause of article 24 (Attribution of the nationality of the successor State), for the same reasons as had led to the deletion of article 19, in section 3.

3. Article 24 thus consisted of articles 22 and 23 as proposed by the Special Rapporteur in his third report and the title was slightly amended. In the opening clause, separation of part of the territory was defined as an act whereby part or parts of the territory of a State separated from that

State and formed one or more successor States while the predecessor State continued to exist. That definition therefore drew a distinction between separation and transfer of territory where the separated part of the territory joined another existing State. Under article 24, each successor State, subject to article 26 (Granting of the right of option by the predecessor and the successor States) attributed its nationality to persons concerned who had their habitual residence in its territory. In addition, without prejudice to the provisions of article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), each successor State attributed its nationality to persons covered by subparagraphs (b) (i) and (ii). In view of the parallels between the texts of article 22 proposed by the Special Rapporteur and article 24, the changes in article 22 had to be reflected in article 24. That explained why the Drafting Committee had redrafted subparagraphs (a) and (b) and why changes had to be made in article 24 similar to those decided on in plenary for article 22 as proposed by the Special Rapporteur.

4. Article 25 (Withdrawal of the nationality of the predecessor State) corresponded to article 24 as proposed by the Special Rapporteur in his third report and kept the same title. It attempted to maintain a delicate balance between what a predecessor State, in a case of separation, should and should not do. Under paragraph 1, the predecessor State was obliged to withdraw its nationality from persons concerned who had chosen the nationality of one of the successor States. That category included persons concerned who were qualified to acquire the nationality of one or more of the successor States in accordance with article 24. Paragraph 1 was subject to two qualifications, the first concerning observance of article 26, on the right of options. Secondly, any withdrawal of nationality by the predecessor State could not take place before the persons concerned had acquired the nationality of the successor State, something which upheld one of the basic policies of the draft, namely avoiding statelessness, even if temporarily or for a short period of time. The paragraph sought to prevent situations in which a predecessor State, by continuing the validity of its nationality for a certain category of persons, might prevent them from becoming nationals of one of the successor States, or again the absurd situation in which, theoretically speaking, the successor State would be left with very few nationals on its territory. Article 25, paragraph 2, was aimed at preventing a predecessor State from using the pretext of the separation of part of its territory to deny its nationality to various categories of its population. In that regard, he would emphasize that, while the requirements of paragraph 2 applied to persons concerned, they applied with greater force to nationals of the predecessor State who were not affected by State succession at all. In view of the redrafting of article 24, revisions had also been necessary in original article 25.

5. Section 4 ended with article 26, which corresponded to article 25 as proposed by the Special Rapporteur and was intended to give effect to article 10 (Respect for the will of persons concerned) in a case of separation of a territory of a State. It recognized a right of option for all persons concerned who, by virtue of the application of articles 24 and 25, would be qualified to have the nationality of both the predecessor and the successor States or two or more successor States. The Drafting Committee

\* Resumed from the 2505th meeting.

<sup>1</sup> Reproduced in *Yearbook*... 1997, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles see 2504th meeting, para. 28.

<sup>3</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

had made only stylistic changes so that the article was consistent with the use of terms in the previous articles. The article did not contain a provision analogous to paragraph 2 of article 23 for cases of dissolution, since the continued existence of the predecessor State and its duty not to withdraw its nationality from persons concerned until they had acquired the nationality of the successor State was enough to remove any risk of statelessness.

ARTICLE 24 (Attribution of the nationality of the successor State)

6. Mr. GALICKI explained changes that should be made to article 24 further to those decided on by the Commission in connection with article 22 as proposed by the Special Rapporteur, changes which the Chairman of the Drafting Committee had mentioned only very briefly. First, in subparagraph (b) (i), the word "legal" should be inserted between "appropriate" and "connection", and in subparagraph (b) (ii), the words "of a similar character" should be deleted.

7. In response to a query by Mr. ECONOMIDES, the CHAIRMAN said the secretariat would make sure that the text of the introductory paragraph of article 24 would reproduce, word for word, that found in the 1978 and 1983 Vienna Conventions. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 24 as amended.

*Article 24, as amended, was adopted.*

ARTICLE 25 (Withdrawal of the nationality of the predecessor State)

8. Mr. ECONOMIDES said he had two comments to make on what he considered to be matters of substance. With reference, first, to paragraph 1, he thought the Commission could do without stating two successive operations, namely a positive act in the first sentence and a negative act in the second. Paragraph 1 should therefore be recast to read:

"1. Subject to the provisions of article 26, the predecessor State shall withdraw its nationality from persons concerned who acquire the nationality of the successor State in accordance with article 24."

The second point concerned paragraph 2, which the Special Rapporteur himself seemed to have considered deleting. He still failed to see its value, since it added nothing to the provisions of paragraph 1 and simply stated the obvious. If the paragraph was justified in article 25, one might ask why a similar provision had not been incorporated in article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State) for cases of transfer of part of the territory, in which there was also a part of the population that did not change nationality.

9. Mr. ROSENSTOCK, supported by Mr. BROWNLIE, said that, with regard to the proposal to change paragraph 1, whilst he was generally in favour of a certain economy of drafting, he considered in the current instance that the wording of paragraph 1 as submitted to the Commission served a didactic purpose for the casual reader,

and indeed for any non-specialist, and should therefore be retained.

10. Mr. ECONOMIDES withdrew his proposal to amend paragraph 1 of article 25.

11. Mr. MIKULKA (Special Rapporteur), responding to the comment by Mr. Economides about paragraph 2, first emphasized the complementarity between paragraph 2 of article 25, article 26, of which it was the *raison d'être*, and paragraph 1 of article 25, which was expressly subject to article 26. Under article 25, paragraph 1, the predecessor State withdrew its nationality from persons concerned provided they had not opted to keep its nationality. However, to exercise that option, persons concerned should be entitled to choose between the nationality of the successor State and that of the predecessor State, and that entitlement stemmed precisely from article 25, paragraph 2, which indicated the categories of persons who were covered both by the legislation of the successor State and by the legislation of the predecessor State.

12. As to the comparison with transfer of part of the territory, both the Commission and the Drafting Committee had accepted the idea that the persons concerned were in fact those who had their habitual residence in the transferred territory and that, as far as the others were concerned, there was no reason to question the nationality of the predecessor State. That was why he had not deemed it advisable to resort to provisions as complex as those set out in article 25 in the case of separation.

13. Further justification of the difference in treatment for articles 20 and 25 and, therefore, for keeping article 25, paragraph 2, lay in the fact that it was often difficult to distinguish between separation and dissolution. It meant laying down for those two situations rules that were as close as possible for cases in which the process of separation continued and led to complete dissolution. Accordingly, in the case of separation, it was necessary to protect persons born in the affected territory who had their habitual residence outside that territory and might well be deprived of a nationality if the separation led to dissolution. However, such a risk did not exist in the case of transfer in part of the territory, since everyone who did not acquire the nationality of the successor State remained a national of the predecessor State.

14. A further problem, sometimes, was the difficulty of persuading a State that it was the successor State when it insisted on regarding itself as the predecessor State. Hence the need to formulate the obligations of the predecessor State by drawing very closely on those of the successor State, so as to conclude that, on the legal level, the obligations imposed on both States were ultimately the same, but drafted in different terms. That was exactly the purpose of article 25, paragraph 2, which was warranted by the need to impose on the predecessor State at least the same conditions as those imposed on the successor State by article 24 in regard to keeping certain categories of persons as its own nationals.

15. Mr. BROWNLIE said that the apparent differences in the views of Mr. Economides and the Special Rapporteur lay in the deliberately didactic style of the draft declaration, which should be understandable to non-jurists.

Consequently, even if there were technical grounds for the criticisms, it was preferable to keep the text as it stood.

16. Mr. ECONOMIDES pointed out that, while article 25, paragraph 1, did relate to State succession, that was not true of paragraph 2, which simply described a factual situation, namely the predecessor State continued to exist and kept the population that stayed on the territory left to it. Such a remark had no place in the draft and, if its presence was to be justified for didactic reasons, such reasons also applied to all the other articles.

17. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said he wished to make three points. First, it was clear that the Drafting Committee had chosen certain stylistic options inherent in a draft declaration which had already been used in the draft articles proposed by the Special Rapporteur. Secondly, the Commission's point of departure was that the case of transfer of part of the territory envisaged in article 20 covered separation of a territory that was justified for various technical reasons and therefore affected only a very small population, of a different magnitude from that covered by article 25. For that reason, it had not been deemed advisable to reproduce in the first case the complex system devised in the context of section 4. Thirdly, paragraph 2 would apply more particularly in a situation in which, after a country was split and a new State was created on a religious basis, the former State would theoretically be tempted to exclude from its population anyone with the religion that acted as the foundation for the new State. The same process might be followed for ethnic or other reasons. The purpose of paragraph 2 was to protect such persons against the risk of being deprived of a nationality they wanted to keep.

18. Mr. SIMMA said that Mr. Economides' argument was not without merit. The question was whether to evoke the situation of the population of the predecessor State, other than to say that it should have a right of option. The Special Rapporteur's explanations concerning the reasons why transfer of a part of the territory was in that respect treated differently from separation of a part of the territory were not convincing, and paragraph 2 did simply state the obvious. As to the Special Rapporteur's second argument for maintaining the paragraph, namely the frequent shift from a situation of separation to one of dissolution, one might well answer that, from the standpoint of law, the shift in such a case was from a situation under article 25 to a situation under article 22 (Attribution of the nationality of the successor States).

19. Mr. KABATSI said it was true that, from one point of view, article 25, paragraph 2, did not deal with actual State succession, but the point was to avoid statelessness or to avoid people having a nationality they did not want. The Chairman of the Drafting Committee had given a relevant example in that regard. Furthermore, with the argument adduced by Mr. Rosenstock about the didactic purpose of paragraph 2, it seemed preferable to keep it.

20. Mr. BENNOUNA said that the problem was one of substance, since it was currently acknowledged that article 25, paragraph 2, did not relate to State succession. Furthermore, in accordance with the rule of useful effect, every provision should have legal consequences, something which was not true in the case of paragraph 2. The

Special Rapporteur's explanations for the difference in treatment of transfer of part of a territory and of separation of part of a territory were not convincing and there seemed to be some inconsistency.

21. Mr. ROSENSTOCK said that problems like the one cited by the Chairman of the Drafting Committee were far more likely to occur in cases of separation than of transfer of a part of territory, and more attention should therefore be paid to the issues of, for example, ethnic cleansing, in the case of a separation. It was also very useful to say in substance to a State, for instance the Federal Republic of Yugoslavia (Serbia and Montenegro), that regardless of whether it described the succession as separation or dissolution, the obligations stayed the same and it must not engage in ethnic cleansing. That was precisely what article 25, paragraph 2, stated.

22. Mr. GALICKI pointed out that article 25, paragraph 2, contained a "human rights protection" element which should not be overlooked. Paragraph 1 did set out an obligation but it also enunciated a right of the predecessor State to withdraw its nationality. The purpose of paragraph 2 was to protect certain categories of persons and to prevent their nationality being withdrawn from them, for example on the grounds of their religion or ethnic origin, pursuant to paragraph 1.

23. The CHAIRMAN, speaking as a member of the Commission, said that he had not understood the Special Rapporteur's explanations either and, from the standpoint of legal technique, he did not find it satisfactory to treat situations—transfer of a part of territory and separation of a part of a territory—that were close to one another. Moreover, if the provisions concerning separation of part of a territory were being aligned with those on dissolution, it should be done completely and, in that regard article 25, paragraph 2, should contain a clause saying "without prejudice to the provisions of article 7".

24. Nor was he persuaded by the human rights arguments advanced by Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Galicki and Mr. Kabatsi. To take the case of partition of the kind that had happened in India, should a State refuse its nationality to some of its nationals on religious grounds and want to expel them, he would point out that the State was forbidden to do so under article 13 (Status of habitual residents), and under article 14 (Non-discrimination). Such situations, which article 25, paragraph 2, would implicitly cover, were already dealt with in Part I of the draft, which were binding inasmuch as they fell under codification.

25. Mr. BROWNLIE said he had emphasized from the outset that the differences between transfer and separation of a part of territory were not fundamental in terms of the objective pursued in connection with the topic at hand, and he had also pointed out that a number of historical situations, for example, the break-up of the Austro-Hungarian Empire, were part of political processes which did not coincide with any of the categories used by the Commission for the purposes of the draft. Since he had received no support on that point at that time, it had been his understanding that the Commission had decided not to question the work already done during the previous quin-

quennium. It was therefore surprising that some members were reverting to the matter at so late a stage.

26. Mr. SIMMA said that the underlying basic human rights considerations warranted the existence of paragraph 2, even though the interests it sought to protect were already protected in Part I of the draft. The idea was, in fact, to prevent religion, ethnic origin or political belief, for example, from being taken into account in attributing nationality in relation to a succession of States.

27. Mr. ECONOMIDES said that, from a practical standpoint, it was difficult to see why a predecessor State that had already lost a part, possibly a large part, of its territory and its population would withdraw its nationality from persons who remained on the territory left to it. Such behaviour would be self-destructive.

28. Mr. BENNOUNA said that he endorsed the comments made by the Chairman, speaking as a member of the Commission. As it stood, the text of paragraph 2 was obscure and, if it was referring to the principles of protection of human rights set out in Part I, perhaps it should explicitly say so.

29. Mr. MIKULKA (Special Rapporteur) said that, in the draft article he had initially proposed, the paragraphs had been in the reverse order. The article had first indicated the categories of persons from which the predecessor State must not withdraw its nationality and then, in what had been paragraph 2 at that time, had indicated that it could nonetheless withdraw its nationality from persons in those categories if they acquired the nationality of the successor State. It was the Commission which had decided to reverse that order and it was currently lost in the labyrinth that it had itself created.

30. Mr. Economides had pointed out that paragraph 2 had nothing to do with State succession and that it simply stated the obvious, which was right in some situations, for instance in the case of separation of a part of territory under normal conditions and if the only rule that applied was the rule of habitual residence. But things grew complicated when article 25, paragraph 2, was read in the light of article 24, subparagraphs (b) (i) and (b) (ii). Thus, article 25, paragraph 2 (a), was no longer so obvious if one took into account article 24, subparagraph (b) (i), under the terms of which the successor State attributed its nationality to persons concerned who were not covered by subparagraph (a), in other words, who had their habitual residence either in another successor State or in the predecessor State, and who had an appropriate legal connection with a constituent unit of the predecessor State that had become part of that successor State. Accordingly, there was an obligation on the successor State to grant its nationality to certain categories of persons, although those persons had their habitual residence in the territory of the predecessor State. He asked if there were sufficiently strong reasons to adduce that the law of the successor State should prevail and that the predecessor State was obliged to withdraw its nationality from the category of persons in question even though they had their habitual residence in its own territory. Needless to say, the answer to that question was in the negative. The persons in question should be able to exercise their right of option, and that was exactly what was meant by the opening clause of

article 25, paragraph 2, "Subject to the provisions of article 26", namely, only if the persons concerned decided otherwise in exercise of their right of option. Naturally, not all residents of the predecessor State were entitled to exercise a right of option—only persons who had their habitual residence in the territory of that State and who, at the same time, came under article 24, subparagraph (b) (i). That showed that article 25, paragraph 2, did concern State succession and it acted as a counterbalance to the provisions of article 24, subparagraph (b). Without it, the predecessor State would be obliged to withdraw its nationality from certain categories of persons who should normally keep that nationality, at least if they wanted to. While the successor State had the right to attribute its nationality to certain categories of persons falling under article 25, paragraph 2, subparagraphs (a), (b) and (c), the predecessor State did not withdraw its nationality from those persons before they had expressed their wishes and had accepted such a consequence by exercising their right of option. As far as he was concerned, it was therefore preferable to keep article 25, paragraph 2.

31. Mr. THIAM said he was not opposed to keeping paragraph 2, but it was incomprehensible in the absence of a commentary.

32. Mr. AL-BAHARNA said that he did not have any objection either to keeping paragraph 2, more particularly to protect the categories of persons covered by subparagraphs (b) and (c). He nonetheless wondered whether, in view of the debate, it would not be better for the purposes of clarity to insert the words "and in exceptional cases where paragraph 1 does not apply" after "Subject to the provisions of article 26". In that way, the scope of the provision would be limited and would no longer appear to be inconsistent with paragraph 1.

33. Mr. SIMMA said he seemed to recall that the order of the paragraphs of article 25 as proposed by the Special Rapporteur had been reversed because some members had taken the view that it was strange for an article entitled "Withdrawal of the nationality of the predecessor State" to start with a paragraph stipulating that "The predecessor State shall not withdraw its nationality".

34. In view of the Special Rapporteur's explanations, perhaps it would be better to revert to the initial order, in which case Mr. Al-Baharna's proposal could not be adopted.

35. Mr. HAFNER said that, in any event, Mr. Al-Baharna's proposal could not be adopted, since article 25, paragraph 2, was an exception to paragraph 1 and it entered into play precisely when paragraph 1 was applicable.

36. The CHAIRMAN, recalling the decision taken earlier in connection with article 24, said that, in article 25, paragraph 2, subparagraph (b), the word "legal" should be inserted between "appropriate" and "connection" and, in subparagraph (c), the words "of a similar character" should be deleted.

37. Mr. MIKULKA (Special Rapporteur) proposed that the introductory phrase in paragraph 2 should be amended to specify the particular category of persons, namely the persons who were entitled to the nationality of the prede-

cessor State but who were also qualified to obtain the nationality of the successor State. The paragraph would thus begin: "Subject to the provisions of article 26, the predecessor State shall not withdraw its nationality from persons concerned entitled to acquire the nationality of the successor State . . .".

38. Mr. SIMMA said that he endorsed that proposed amendment, for it specified the persons covered by the paragraph and distinguished them clearly from the rest of the population concerned.

39. Mr. AL-BAHARNA said that the situation created by the opposition between paragraph 1 and paragraph 2 was confusing. Paragraph 1 said that "the predecessor State shall withdraw its nationality", whereas paragraph 2 said that "the predecessor State shall not withdraw its nationality". It was paragraph 2 that was the essence of a provision that was imbued, above all in subparagraphs (b) and (c), with the concern to respect the human rights of the persons concerned. Nevertheless, there was no disadvantage in keeping the text in its current form.

40. Mr. BENNOUNA said he too wondered about the results of the opposition between paragraph 1 and paragraph 2. Since paragraph 1 laid down that the predecessor State must refrain from withdrawing its nationality from persons concerned before they acquired the nationality of the successor State, it was difficult to understand why paragraph 2 should specify the exceptional cases in which precisely "the predecessor State shall not withdraw its nationality". Generally speaking, the article was confusing and badly drafted.

41. Mr. ROSENSTOCK said that it should be made clearer that the persons covered by paragraph 2 formed a subgroup of the population covered by paragraph 1. To make the link between the two paragraphs intelligible, the introductory phrase in paragraph 2 should say: ". . . the predecessor State shall not, however, withdraw its nationality . . .".

42. Mr. BENNOUNA said that article 25 might be construed as affording dual protection for certain persons, in other words, the nationality of the predecessor State, which could not be withdrawn from them, and the nationality of the successor State, to which they could lay claim. It was, therefore, a broad provision, and all the more so in that one of the requirements was simply to have an "appropriate connection"—an extremely vague criterion—with the predecessor State. He called for caution, since the situations created in that way could have major consequences.

43. Mr. MIKULKA (Special Rapporteur) said that the hypothesis of dual nationality was removed by the phrase "Subject to the provisions of article 26", at the beginning of paragraph 2, since article 26, by means of the right of option, settled the problem of duplication of nationalities.

44. Mr. GALICKI noted that paragraph 1 spoke of "persons concerned qualified to acquire the nationality", but under the Special Rapporteur's proposed amendment, they were persons "entitled to acquire the nationality". What was the reason for that change in formulation?

45. Mr. MIKULKA (Special Rapporteur) said that it was not absolutely necessary to base paragraph 2 slavishly on paragraph 1, inasmuch as the two provisions did not relate to the same persons. Paragraph 1 was much broader in that it covered those who could acquire the nationality of the successor State, but did not necessarily do so, whereas paragraph 2, which was much more specific, covered those who were actually entitled to the nationality of the predecessor State.

46. At the request of Mr. BENNOUNA, the CHAIRMAN had the text of paragraph 2, with the amendments proposed so far, circulated in English and French. It read:

"2. Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons concerned entitled to acquire the nationality of the successor State and:

"(a) Having their habitual residence in its territory;

"(b) Not covered by subparagraph (a) having an appropriate legal bond with a constituent unit of the predecessor State that has remained part of the territory of the predecessor State;

"(c) 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 with that State."

47. Mr. SIMMA, supported by Mr. HAFNER, noted that there was a difference in subparagraph (b) between the French version, which spoke of persons *qui avaient un lien juridique approprié*, and the English version, which used the present tense, "having an appropriate legal bond". He wondered whether such a difference in tense had substantive consequences.

48. Mr. MIKULKA (Special Rapporteur) pointed to the same anomaly as between the French and English versions of articles 22 and 24. The French version was the correct one, for the persons in question might no longer have "an appropriate link" after the succession of States.

49. The CHAIRMAN, supported by Mr. SIMMA, said that the English version should be brought into line with the French version and articles 22 and 24 should be corrected accordingly.

50. Mr. GALICKI said he wondered why the English spoke of "legal bond" in subparagraph (b) and "appropriate connection" in subparagraph (c), whereas the same term was used in French, namely "lien". In previous articles, the word "connection" had always been used.

51. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that he favoured the word "bond".

52. Mr. BROWNLIE supported by Mr. ROSENSTOCK, said that there was nuance between "bond" and "connection". The former was more rigorous than the latter. Since the Commission was seeking to draft as broad a text as possible, he proposed that the term "connection" should be retained.

53. Mr. MIKULKA (Special Rapporteur) proposed that the introductory phrase in paragraph 2 of the text that had just been distributed should read:

“Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons concerned who are covered by paragraph 1 and who:”.

54. Mr. AL-BAHARNA said the text that had just been circulated did not seem to mark any advance over the version proposed by the Drafting Committee, which was much clearer. In English, the repetition in paragraph 1 and in the introductory phrase of paragraph 2 of the word “however”, which was translated successively in French as *toutefois cependant*, could only lead the reader astray. If paragraph 2 introduced a further exception to the exception already set out at the end of paragraph 1, it would be better to say so expressly, by inserting at the beginning of the paragraph a formulation such as “in the following exceptional circumstances”.

55. The CHAIRMAN noted that no other member endorsed that proposed amendment, which was not therefore adopted. He invited the Commission to adopt the text that had been circulated, as amended by the Special Rapporteur and subject to replacing the word “bond” by “connection” in the English version.

56. Mr. BENNOUNA said that he wished to enter a general reservation in regard to article 25. If he rightly understood the meaning of the article, in cases of separation of part of a territory, not only were certain categories of persons entitled to acquire the nationality of the successor State established on that part of the territory, but the predecessor State must also keep its nationality for them, subject to the right of option set out in article 26, which by definition, would not necessarily be exercised.

57. Clearly, very considerable account had been taken of the rights of the persons concerned and an effort had been made to protect them from statelessness by every means. No effort had been made, however, with regard to the rights of States. The category of persons covered by paragraph 2 was very broad, and hence there was a risk of situations giving rise to conflict. The prohibition on the successor State’s withdrawing its nationality from persons who had taken the nationality of another State might place it in a very uncomfortable situation.

58. Mr. ECONOMIDES said that, in the version of article 25 proposed by the Drafting Committee, paragraph 2 already seemed superfluous. In the newly circulated text, it made for even greater confusion, as it enunciated an obligation of “non-withdrawal of nationality” that seemed to contradict the obligation of withdrawal formulated in paragraph 1. He shared Mr. Bennouna’s hesitation about the paragraph.

59. Mr. GOCO said that, as a better counterpart to the term “qualified” used in paragraph 1, the Commission could, as the Special Rapporteur himself had suggested, precede the series of conditions set out in subparagraphs (a), (b) and (c) of paragraph 2 with the relative pronoun “who”, which would obviously, in the continuation of the text, replace the present participles by verbs in the indicative.

60. Mr. SIMMA said he wondered whether a change along those lines would really make for a difference in substance. If the Commission did decide to make the change, it might also, for the sake of consistency, harmonize the wording of articles 22 and 24, which had already been adopted.

61. The CHAIRMAN said that such harmonization was not necessarily essential, although he had no firm opinion in that regard. If the Commission agreed to the amendment, paragraph 2 would read:

“2. Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons concerned who are covered by paragraph 1 and who

“(a) Have their habitual residence in its territory;

“(b) Are not covered by subparagraph (a) and have an appropriate legal bond with a constituent unit of the predecessor State that has remained part of the predecessor State;

“(c) Have 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 have any other appropriate connection with that State.”

62. Mr. ECONOMIDES said he would like further clarification. How could a person covered by paragraph 1, in other words, someone meeting the conditions laid down in article 24, which had “an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State” also come under paragraph 2 of article 24, which envisaged the existence of “an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State”?

63. Mr. MIKULKA (Special Rapporteur) said that the case of the former Yugoslavia provided yet again a very good example. Before the Arbitration Commission of the Conference on the Former Yugoslavia (the Badinter Commission)<sup>4</sup> had reached the conclusion that the case had been one of dissolution, it had generally been regarded as a case of the “separation” of Slovenia and Croatia. In the case in point, the “unlikely” person sought by Mr. Economides would be a Serb who had his habitual residence in Slovenia or in Croatia but had an appropriate legal bond with Serbia (in other words, with Yugoslavia, which had at that time been the predecessor State).

64. The CHAIRMAN asked whether, in the light of that clarification, the Commission agreed to adopt paragraph 2 as he had read out.

*It was so agreed.*

65. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 25, as amended.

*Article 25, as amended, was adopted.*

*The meeting rose at 1.15 p.m.*

<sup>4</sup> See 2494th meeting, footnote 10.

## 2508th MEETING

Wednesday, 9 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, 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. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>2</sup> (*continued*)

#### PART II (*concluded*)

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

#### ARTICLE 26 (Granting of the right of option by the predecessor and the successor States)

1. Mr. ECONOMIDES said that the draft articles in general, and article 26 in particular, were based on an internal law approach which was at variance with the international law approach that he espoused. Under international law, the right of option was invariably granted by the successor State and not by the predecessor State, which remained outside the process of State succession. He failed to see why a predecessor State which had already lost part of its territory and population should be further penalized by the obligation to grant a right of option. He had no specific proposal to make regarding article 26 and simply wished to place his view on record.

2. Mr. MIKULKA (Special Rapporteur) said he wondered how the right of option could be exercised without involving the predecessor State. Both States must be prepared to make concessions and the successor State was not in a position to allow certain persons to keep the nationality of the predecessor State without the latter's consent.

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles see 2504th meeting, para. 28.

3. The reference to an additional sacrifice on the part of the predecessor State was surprising, since Mr. Economides had consistently maintained that persons who originated in the territory affected by the succession and whose habitual residence was either in a third State or in the predecessor State should be given the option, in addition to persons having their habitual residence within the affected territory, of acquiring the nationality of the successor State. It was hard to see how that option could be exercised without reference to the nationality of the predecessor State.

4. In response to a request from Mr. BENNOUNA for practical examples, he mentioned the Treaty of Versailles, under which Czechoslovakia, Poland and other States had become successor States following their separation from the Austro-Hungarian Empire. The main rule had been that all persons acquired the nationality of the successor State on the territory of which they had their habitual residence. However, persons of German ethnic origin had been given the right to opt for retention of Austrian nationality, although they were resident in, for example, Czechoslovak territory. During the period of decolonization, States such as France, the United Kingdom of Great Britain and Northern Ireland and Italy that had formerly administered the colonies, noting that certain newly independent States were not granting their nationality to all habitual residents in their territory, had granted a right to opt for their nationality to persons who would otherwise have become stateless. Examples of such cases were to be found in de Burlet's work.<sup>3</sup>

5. Mr. GOCO inquired about the relationship between article 26 and article 10 (Respect for the will of persons concerned) which provided for the granting of a right of option by "States concerned", a term defined by the Commission as referring to both successor and predecessor States. He asked if article 26 was merely a reiteration of that provision.

6. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 26 reiterated the provision for a right of option in the specific case of separation of part of a territory.

7. Mr. ECONOMIDES said that he knew of no case in State practice, prior to the Second World War, in which a predecessor State had granted a right of option. After the First World War, on the other hand, successor States had offered certain sectors of the population who had come under their sovereignty the right to opt, within a reasonable period of time, for retention of the nationality of the predecessor State.

8. The Special Rapporteur had referred to his proposal to enlarge the category of persons who had an appropriate connection with the territory. His position from the outset regarding persons concerned, within the meaning of international law, was that they were in all cases specific persons: all nationals of the predecessor State in the case of dissolution of a State, and nationals of the predecessor State having their habitual residence in the transferred

<sup>3</sup> Bibliothèque de la Faculté de droit de l'Université catholique de Louvain, *Nationalité des personnes physiques et décolonisation: Essai de contribution à la théorie de la succession d'États*, by J. de Burlet, vol. X (Brussels, Bruylant, 1975).

territory in the cases of transfer and separation. Other categories, such as persons having an appropriate connection with the territory, might wish to change their nationality, but they would do so on the basis of internal rather than international law. The successor State could offer its nationality to such other categories of persons and the predecessor State would remain outside that process. Although he had accommodated himself to the Commission's approach, he had not departed from his original position, which was fully consistent with international law.

9. The CHAIRMAN asked Mr. Economides whether he foresaw any specific adverse consequences ensuing from the adoption of article 26.

10. Mr. ECONOMIDES said that he had insufficient experience to make a firm prediction. He was simply drawing attention to the fact that article 26 had nothing to do with State succession under international law. The right of option was always granted by the successor State in favour of the nationality of the predecessor State or another successor State. A predecessor State which was obliged to grant the right of option would inevitably face adverse consequences. The stability of States and inter-State relations would be undermined. He feared that the Commission was departing significantly from traditional international law without having examined the implications of its approach.

11. The CHAIRMAN asked whether the obligation for both the successor State and the predecessor State to grant the right of option might entail conflicts of law or problems of incompatibility between the positions of those States.

12. Mr. MIKULKA (Special Rapporteur) said that, when the Commission had discussed article 10, introducing the provisions regarding the right of option, it had agreed to interpret the word "option" in a broad sense as the possibility offered to a person concerned to choose between two nationalities if the person was entitled to acquire both or to keep one nationality while acquiring another. In the case of separation, three different nationalities might be involved. When Croatia and Slovenia had separated from the former Yugoslavia, a person with Yugoslav nationality might have had connections with both Slovenia and Croatia, for example an ethnic Croat—hence a "citizen" of the Republic of Croatia within the Federal Republic of Yugoslavia—who was habitually resident in Slovenia. Several of the criteria set forth in the draft articles would apply to the person concerned. Slovenia, a successor State, had the right to attribute its nationality to all persons having their habitual residence in its territory; Croatia, another successor State, could grant its nationality to any citizen of the former constituent republics of Yugoslavia; and Yugoslavia (Serbia and Montenegro) viewed the person concerned as still possessing Yugoslav nationality. In the case of all three States, the right of option included the obligation to allow the person concerned to renounce his or her nationality. The situation would, of course, be less complex for the bulk of the population who had their habitual residence and connections in the same State.

13. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that when the Drafting Committee had discussed the draft, grey areas had been found in almost every article, so that a nagging doubt had persisted as to the comprehensiveness of the provisions. Some of them had therefore been retained even where they seemed to be redundant. It was preferable to leave such matters pending until the second reading, by which time more information on practical situations might have come to light.

14. He wished to draw attention to the word "qualified" in article 26. Persons having their habitual residence in the predecessor State were already qualified to have the nationality of that State. But nationals of the predecessor State who were resident elsewhere could be divested of their nationality and their qualification to keep it must therefore be recognized.

15. As to the question of whether a State which had lost territory should yield more of its population to the new territory by granting them a right of option, he would cite the example of Pakistan. Although Pakistan had been established on the basis of religion, not every Muslim in India had been accorded the right to emigrate to Pakistan. Only territories with a Muslim majority had been transferred to the new State. However, Muslims from other distant parts of India had begun to migrate to Pakistan. If the predecessor State had wished to stem the outflow by refusing to grant the right of option, considerable problems might have arisen.

16. Mr. ECONOMIDES said he would apply the rules of international law to the Special Rapporteur's example. When Slovenia became independent, all persons who had Yugoslav nationality and were resident in the territory of Slovenia, including Croats, Serbs and others, would automatically acquire Slovene nationality. Slovenia, as the successor State, must then grant persons concerned the right to opt for the nationality of the predecessor State or other successor States. International law made no provision, however, for Slovenes who were resident abroad. It was for internal law to regularize their situation on an individual basis by means of a naturalization procedure.

17. Mr. ADDO said he had no problem with article 26. Mr. Economides had expressed reservations for the record but was willing to go along with it. He therefore urged the Commission to take a decision and move on to the next point.

18. Mr. MIKULKA (Special Rapporteur) said he failed to see in what way the example given by Mr. Economides could be in conflict with article 26. He wished to point out, however, that the hypothetical Slovenes living abroad were still Yugoslavs, so that Yugoslavia was still involved inasmuch as it must allow them to renounce its nationality if they opted for that of Slovenia.

19. Mr. GOCO noted that the whole matter had been discussed at length under article 10, which was very similar to article 26. He therefore supported Mr. Addo's proposal to close the debate.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 26.

*Article 26 was adopted.*

NEW ARTICLE (Cases of succession of States covered by the present draft articles)

21. Mr. BROWNLIE proposed the following text for inclusion as a new article in the draft:

*“Cases of succession of States covered by the present draft articles*

“The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”

22. The point of the proposal was that the 1978 and 1983 Vienna Conventions contained similar articles and he believed that the matter should be treated differently in the current context. It was important to ensure absolute clarity with regard to the applicability of the scope of the future declaration. A mention in the commentary would not be sufficient, because most readers would concentrate their attention on the draft articles themselves. There was thus a good case for stating in the body of the draft itself that the articles applied only to the effects of a succession of States which had occurred in a lawful manner.

23. As to the placing of the proposed new article, he would be quite content if, for the time being, it appeared at the end of the draft. A decision to move it elsewhere in the text could be taken on second reading.

24. The CHAIRMAN appealed to members to refrain from discussing the question of the placement of the article.

25. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the question raised by Mr. Brownlie had not come up in the Drafting Committee in that form. There was, however, no doubt as to the clear intention that the draft articles would apply only in lawful cases of succession of States. As Chairman of the Drafting Committee he could not, of course, take up an independent position in the matter, but he was personally in agreement with the proposal and would have no objection to it being incorporated in the draft.

26. Mr. MIKULKA (Special Rapporteur), expressing complete agreement with the contents of the proposed new article, recalled that a similar proposal had been made by Mr. Economides at an early stage of the consideration of the topic (2477th meeting). He was under the impression it had then been agreed that the matter could be accommodated in the commentary. However, he could accept without any difficulty the idea of incorporating the proposed new article in the body of the draft.

27. Mr. SIMMA, also recalling the extensive discussion which had taken place on the same point at the outset of the debate, said he still took the view that it might be better not to insert a provision of the kind proposed by Mr. Brownlie either in the body of the draft or to discuss it in the commentary. In the first place, State succession rarely took place in so calm and orderly a way as in the case of the separation of Slovakia and the Czech Republic. More usually, as in the case of the dissolution of the former Yugoslavia, it was extremely difficult to determine

whether a succession of States had or had not occurred in conformity with international law. Secondly, the draft under consideration, unlike the 1978 and 1983 Vienna Conventions, dealt with the fate of individuals and thus included a strong human rights element. Surely, it would be in the interests of those individuals to omit the proposed article, leaving open the question of the applicability of the draft articles in cases where the lawfulness of a succession of States was in doubt. In his opinion, many of the articles were applicable irrespective of whether the succession was legal. To include the article proposed by Mr. Brownlie could diminish the practical importance of the declaration as a whole.

28. Recalling that Mr. Economides had, on earlier occasions, invoked the Venice Declaration,<sup>4</sup> he said that provision 1 of the Declaration defined State succession as comprising annexation as well as union, dissolution and separation. That showed the extent of confusion that could arise in attempting to define what was and what was not in conformity with international law and the Charter of the United Nations. He would not stand in the way of consensus, but wished his position to be placed on record.

29. Mr. DUGARD said he agreed with Mr. Simma. The proposed article could apply in cases such as that of the bantustans<sup>5</sup> or of the Republic of Cyprus where the Security Council had deplored the creation of a new State.<sup>6</sup> In many other cases, however, it was not clear whether or not State succession had occurred in conformity with international law. There was a risk that individuals might suffer if they were excluded from the scope of the declaration. If the new article was adopted, it should perhaps be accompanied by a savings clause to the effect that, where the rights of individuals were affected by an unlawful succession of States, those individuals would nonetheless benefit from the draft articles. Such a clause would, however, be difficult to draft, and he was therefore in favour of leaving the matter open, as recommended by Mr. Simma.

30. Mr. LUKASHUK said that he entirely agreed with Mr. Simma.

31. Mr. ADDO said he also agreed that the new article should not be included in the draft, but, like Mr. Simma, he would not stand in the way of a consensus.

32. Mr. GALICKI said he, too, supported Mr. Simma's position. A similar point relating to State succession had arisen in connection with the elaboration of the European Convention on Nationality,<sup>7</sup> and the drafters had eventually decided not to include a firm statement concerning applicability. Mr. Brownlie's point could be covered in the commentary without any risk of future controversy.

33. Mr. BENNOUNA said that the issue was a delicate one. On the one hand, it could not be admitted that a legal text such as the one under consideration, whatever form it might eventually take, would be applicable to an unlawful succession of States. On the other hand, he sympathized with the arguments advanced by Mr. Simma. It was,

<sup>4</sup> See 2475th meeting, footnote 22.

<sup>5</sup> See Security Council resolution 402 (1976) of 22 December 1976.

<sup>6</sup> See Security Council resolution 541 (1983) of 18 November 1983.

<sup>7</sup> See 2477th meeting, footnote 7.

unfortunately, a fact of life that new States were born in violence. Nations were not all as reasonable as the Czechs and Slovaks. When a succession of States occurred, it generally did so in a manner contrary to international law, or at least in a manner whose legality was open to doubt. He wondered whether the proposed article might not be redrafted in negative terms so as to say that the draft did not apply to the effects of a succession of States which had occurred in violation of international law. Alternatively, a reference to the principles of international law and to the Charter of the United Nations might perhaps be included in the preamble. The proposed article in its current form was not acceptable.

34. Mr. MELESCANU said that, since the draft articles were going to take the form not of an international convention but of a declaration designed merely to influence the decisions of States, the question of their precise applicability was perhaps without great practical significance.

35. Mr. HE said that he was entirely in agreement with Mr. Brownlie's proposal and with the first part of Mr. Bennouna's comments. Every State succession had to be in conformity with the principles of international law embodied in the Charter of the United Nations. That was a fundamental principle for keeping the world in good order. Anything else would open the way to intervention by other States or separatist groups from other States and give rise to disorder, which should be avoided in all cases.

36. Mr. ECONOMIDES said that it was precisely because the draft dealt with individuals that it could not be allowed to remain silent on the issue of the lawfulness of a succession of States. It would be completely unacceptable, for example, if an aggressor State were given the right to attribute its nationality to the population of a territory it had unlawfully occupied. The draft declaration should, if anything, be even stricter than the 1978 and 1983 Vienna Conventions. He entirely supported Mr. Brownlie's proposal and, with reference to the two cases cited by Mr. Dugard, said that the proposed new article as he understood it meant that the draft articles would not apply in cases of State succession determined as being unlawful by the Security Council, an arbitration tribunal or ICJ. As to Mr. Simma's point in connection with the Venice Declaration, the term "annexation" in provision 1, clearly meant a lawful transfer of territory. The question of unlawful use of force was explicitly covered in the report attached to the Declaration,<sup>8</sup> a copy of which he would be pleased to make available to members.

37. Mr. HAFNER said that, while sympathizing with Mr. Simma's position, he shared the legal concerns voiced by Mr. Economides and therefore was inclined to go along with Mr. Brownlie's proposal. In the event of strong opposition to that proposal, he would be prepared to accept a savings clause along the lines suggested by Mr. Dugard.

38. Mr. KATEKA said the fact that some cases of State succession were unlawful should not stop the Commission from stating what it believed to be the situation in law. Rejection of Mr. Brownlie's proposal could be inter-

preted as condoning unlawful cases of State succession. The proposal should be adopted, possibly with a savings clause to protect the situation of the individuals concerned.

39. Mr. RODRÍGUEZ CEDEÑO said he agreed that failure to include the proposed new article could be interpreted as a permissive attitude toward violations of international law as embodied in the Charter of the United Nations. Mr. Simma's point could perhaps be met by couching the article in negative terms, as suggested by Mr. Bennouna.

40. Mr. THIAM said he, too, supported Mr. Brownlie's proposal. The international community would be troubled by a deliberate decision on the part of the Commission to remain silent on the matter of unlawful State succession. As for protecting the rights of the individuals concerned, the principles of international law embodied in the Charter of the United Nations surely included principles governing human rights.

41. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), speaking as a member of the Commission, suggested that the opposing points of view which had been expressed, and with both of which he had sympathy, might be reconciled by adding to the text proposed by Mr. Brownlie a sentence such as: "However, a dispute about the legality of succession shall not adversely affect the legal nationality status of the persons concerned" or "However, the legal consequences of a succession of States recognized as unlawful shall be construed in a manner beneficial to the persons concerned".

42. Mr. CANDIOTI said he fully agreed with Mr. Brownlie, Mr. Economides and Mr. Hafner that a provision like the one proposed should be incorporated in the draft. He also shared the concerns expressed by Mr. Simma about the protection of human rights in the event of unlawful succession of States. Article 11 proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)<sup>9</sup> had referred specifically to the protection of the human rights of the persons concerned, but the Commission had decided to include that reference in the preamble. It was currently in the sixth paragraph of the preamble, which could perhaps be strengthened so that it clearly referred to all cases of succession of States, whether legal, illegal or in a grey area between the two.

43. Mr. GOCO said he had no objection to Mr. Brownlie's proposal and pointed out that the same wording was to be found in article 6 of the 1978 Vienna Convention. He was nonetheless somewhat concerned about the phrase "apply only to the effects", for that implied that other effects were not covered. Article 3 of the 1978 Vienna Convention was entitled "Cases not within the scope of the present Convention", and it might be useful to include a similar article in the draft.

44. Mr. ROSENSTOCK said the members of the Commission seemed generally to agree that the consequences of illegal annexation should not be recognized as legal and that the draft articles should not depart from the pattern

<sup>8</sup> Explanatory report on the Declaration on the consequences of State succession for the nationality of natural persons (see 2475th meeting, footnote 22), pp. 7-13.

<sup>9</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

set by the 1978 and 1983 Vienna Conventions, which did not address themselves to what had preceded or followed the succession of States. On the other hand, in a context not of treaties, debts or archives, but of human rights, it would be unfortunate if, in order for a person to claim the benefits of protection under the current draft articles, a succession of States must be recognized as legal. It should be possible to provide for those benefits, even in the event of totally illegal State succession. Those concerns might be met by incorporating a formulation like the one proposed by Mr. Sreenivasa Rao, but in an early part of the commentary, rather than in the draft articles. That part of the commentary would explain that the draft was intended to deal with succession of States occurring in conformity with international law, but that, in any event, the rights granted to the persons concerned must be deemed to be fundamental human rights not affected by any circumstances whatsoever.

45. Mr. AL-BAHARNA said it was a pity that such an important proposal had not been made earlier, during the work in the Drafting Committee. He was not in favour of adding a new article, but thought that, to take account of legitimate concerns about illegal cases of State succession, such cases could be covered elsewhere in the draft. It might suffice to include a reference to annexation, which was the only illegal case that came to mind. Alternatively, a reference to succession in conformity with international law could be included as the penultimate paragraph of the preamble. Finally, if there was to be an additional article, he thought it should read: "The present articles do not apply to effects of cases of succession arising from annexation of territory by force".

46. Mr. BAENA SOARES said it was essential for the Commission to incorporate in the draft wording like that proposed by Mr. Brownlie, and he endorsed the version suggested by Mr. Bennouna. Unlike Mr. Rosenstock, he did not think the issue of human rights should be addressed in the commentary.

47. Mr. LUKASHUK, speaking on a point of order, proposed that Mr. Hafner should be asked to prepare a text reflecting his ideas.

48. Mr. BROWNLIE, speaking on a point of order, said he insisted on being given the right to reply briefly to points raised so far during the discussion.

49. The CHAIRMAN said that neither of those comments had been points of order, the purpose of which was to mark disagreement with the manner in which the Chairman was conducting a meeting.

50. Speaking as a member of the Commission, he said he agreed with Mr. Kateka that omitting any reference to the issue under discussion would be difficult, indeed surprising. He was receptive to the arguments advanced by Mr. Simma and Mr. Dugard, but he had not been moved by the impassioned plea of Mr. Economides. As he saw it, the problem was whether to compound the disadvantages that illegal succession of States inflicted on the population by depriving it of the rights set out in the draft articles. Did the Commission wish to make people stateless? That would be deplorable.

51. Yet it was hard to find a way out. He shared Mr. Bennouna's intentions but his proposal did not seem an appropriate solution: couching the wording in negative rather than positive terms would only add a negative overtone and amount to telling the persons concerned that they could not enjoy certain rights. Perhaps the current positive wording could be retained, but with the deletion of the word "only". That would indicate that the draft articles applied to the effects of a legal succession of States, but did not preclude the possibility of them applying in other cases. There was a good reason for not using exactly the same language as in the 1978 and 1983 Vienna Conventions. Those texts contained the phrase "The present Convention", namely the whole of the Convention, whereas Mr. Brownlie's proposal referred to "The present draft articles", meaning each article individually, not the set of articles as a whole. If the word "only" was deleted, that would alert the attentive reader to a departure from the wording of the Vienna Conventions motivated by the problem currently under discussion.

52. The concerns of Mr. Simma and Mr. Dugard must be addressed, and that could be done in one of two ways: by adding one of Mr. Sreenivasa Rao's proposals, and personally he preferred the first one, because it seemed clearer; or making a strong statement in the commentary that the difference in wording from the 1978 and 1983 Vienna Conventions was not to be taken to mean that the draft did not apply to all situations in which the persons concerned enjoyed certain rights. Those rights must be safeguarded.

53. Mr. MIKULKA (Special Rapporteur) drew attention to article 40, paragraph 1, of the 1978 Vienna Convention, which contained the phrase "shall not prejudice". That wording might usefully be incorporated in Mr. Brownlie's proposal.

54. Mr. BROWNLIE said the corollary to that suggestion, from Mr. Simma's standpoint, was that the statement of principle would have to be removed even from the commentary. The Commission should consider very carefully whether that was a good idea. He had the impression that a clear majority of members supported his proposal. According to a recognized principle of interpretation to be found in the 1969 Vienna Convention, the text of a treaty was to be read as being compatible with general international law. Accordingly, the principle set out in his proposed article was inescapable and it applied, a fortiori, to a text not intended to be a treaty.

55. As to substance, Mr. Bennouna's point that all States were born in violence did not seem to be particularly relevant. The draft articles dealt, not with the birth of States, but with the role of external intervention, including the threat or use of force, in the formation of States. A historical example might be Manchukuo or any other situation in which fictional statehood was used to confer legitimacy on what would otherwise clearly be an unlawful annexation.

56. He agreed with Mr. Simma that the overriding objective was to protect human rights, but the problem was how to do that effectively. He was not convinced that that objective was well served by omitting a principle that was in fact borrowed from the 1978 and 1983 Vienna

Conventions. The entire draft actually created conditions of greater instability than those that would prevail under the operation of the normal principles of general international law. The right of option was, after all, administered by States, and that gave them a great deal of power. The possibility of a succession of States involving no illegality being combined with a grey area where there was an element of illegality might well undermine the objective of protecting individuals and creating conditions of stability after a territorial change. He therefore maintained his proposal as originally formulated, and thought that even minor modifications of the wording would send the wrong signals.

57. Mr. SIMMA, reporting on the results of consultations, said that both sides had good reasons for their viewpoints, but something must be done to accommodate the concerns already spelled out. One way to do so might be to retain Mr. Brownlie's proposal, adding at the beginning, the phrase: "Without prejudice to the right to a nationality of persons concerned". Mr. Rosenstock had supplied that wording. Another option would be to add at the beginning of Mr. Brownlie's proposal a formulation put forward by Mr. Sreenivasa Rao, namely, "However, the legal consequences of any State succession in respect of nationality shall be construed in a manner beneficial to the persons concerned." Personally, he could accept either alternative, but preferred the first one.

58. Mr. LUKASHUK said he supported the first alternative suggested by Mr. Simma.

59. Mr. MELESCANU asked whether Mr. Brownlie could accept a more neutral formulation than the text he had proposed, such as "The present draft articles relate to the effects of the succession of States . . .". He could accept the first alternative proposed by Mr. Simma, but would also like Mr. Brownlie's text to be formulated in weaker terms.

60. Mr. ECONOMIDES, referring to the alternatives just put forward by Mr. Simma, asked whether an aggressor State that used force illegally, in violation of the Charter of the United Nations, could be considered to be a State concerned for the purposes of the draft articles.

61. Mr. BROWNLIE, replying to Mr. Melescanu, said his problem with small changes of wording was that, as the saying went, a very small amount of water could spoil a good drink. Explanations would be demanded for the changes. He could accept the Simma/Rosenstock formula, because the draft consisted of a sequence of articles and it could be assumed that the right to nationality, whatever it meant in the earlier articles, was being maintained. What signals would the Commission be giving, however, if it did not retain the formula used in the Vienna Conventions? Mr. Simma had not adequately explained the difference between the 1978 and 1983 Vienna Conventions and the current draft articles. After all, the Commission was dealing with an instrument on the nationality of natural persons, and was not drafting a human rights instrument per se.

62. Mr. SIMMA, replying to Mr. Economides, said that, obviously, he did not consider an aggressor State as a "State concerned" in the sense of the draft articles, nor did he consider the Manchukuo situation the only one in

which the question could arise as to whether State succession was legal or illegal. Rather, he had been thinking more of the Yugoslav context, where the issue was whether cases of secession of States were legal or illegal. That was a question which, in the light of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>10</sup> was highly controversial. The majority view in a United Nations body would be that secession could not be legal under any circumstances, whereas, under the penultimate paragraph of the Declaration, the minority view would conclude the opposite. His proposal was to retain the whole of the proposed article by Mr. Brownlie, including the word "only", and to add his proposed new clause at the beginning.

63. Mr. ROSENSTOCK said that the question of "the State concerned" was effectively dealt with in his proposal, but he could accept either version. The proposal was intended only to permit individuals to assert their rights under the draft articles and to avoid having to answer the question as to whether the succession was legal, while at the same time retaining the protection afforded by Mr. Brownlie's proposal.

64. Mr. BENNOUNA said he agreed with Mr. Brownlie that, if the Commission included an article on the question of legality or of international law, it should use the same wording as in the 1978 and 1983 Vienna Conventions. To make any changes would indeed be to have a little water ruin the drink. Furthermore, the Commission would be asked why and it would be completely altering the meaning. The idea of continuity with the 1978 and 1983 Vienna Conventions was excellent, and legally and technically defensible. The problem—and he agreed with the formulation "without prejudice", while retaining Mr. Brownlie's wording—was that he was not convinced the "without prejudice" phrase should be included in the same article. It could form part of a subsequent provision, leaving the Brownlie formula intact. What was important was that the formula should remain, as an indication of the Commission's continuity and consistency in the work it was doing. The savings clause, since the rights in question could be customary rights, could perhaps be included in a separate article.

65. The CHAIRMAN, speaking as a member of the Commission, said he disagreed with Mr. Bennouna that the clauses of the 1978 and 1983 Vienna Conventions should be kept in their entirety. Nor did he agree with Mr. Brownlie that, since the subject matter was the nationality of natural persons, the logic was therefore the same as for the Conventions. On the contrary, all of the texts were on different matters. In the current instance, the emphasis was on nationality, and it was the rights of individuals that lay at the heart of the draft. A different situation was involved. He favoured the Simma/Rosenstock formula, but was greatly opposed to retaining the word "only", for the provision would lose all logic. The draft articles were not a reiteration of the earlier texts; they applied, but not if they had prejudicial effects on natural persons. The word "only" must be deleted, both for moral reasons—in order to protect individuals—and logical reasons, as "without prejudice" could mean that some of the articles

<sup>10</sup> General Assembly resolution 2625 (XXV), annex.

or provisions could apply to situations created even by an illegal State succession. Another problem altogether, although as it was purely a matter of legal logic it would call into question the Conventions, was whether there was such a thing as illegal State succession.

66. Mr. MELESCANU said that neither the logic nor the system was the same as those of the 1978 Vienna Convention, in which articles 39 and 40 dealt with State responsibility and the outbreak of hostilities and certain cases of military occupation. They were absent from the current draft. There was in the current instance a difference of mechanism and structure compared with the 1978 Vienna Convention. Thus, the proposal should be watered down.

67. Mr. ECONOMIDES said the only compromise proposal acceptable was that of Mr. Al-Baharna and Mr. Candioti. Mr. Brownlie's proposed text, with the words "Recognizing that" inserted at the beginning, could be moved to the preamble, before the paragraph on human rights, which would read: "Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected in all cases and to the greatest extent possible."

68. He disagreed with the assertion that, as the draft articles concerned nationality in relation to the succession of States, they were different from the 1978 and 1983 Vienna Conventions. The proposed solution would enable the provisions of the Conventions to be retained intact, while at the same time indicating the need to ensure respect for human rights as much as possible and in every instance. The results of such a provision would be apparent only in future practice.

69. Mr. GALICKI said he fully supported both the Rosenstock/Brownlie formula and the Chairman's suggestion to delete the word "only", for both substantive and logical reasons.

70. Mr. HE said that, logically, the preamble should precede the draft articles and therefore Mr. Brownlie's proposed article should appear in the body of the text rather than in the preamble.

71. Mr. BROWNLIE said he preferred Mr. Simma's proposal to Mr. Rosenstock's.

72. Mr. ROSENSTOCK said his original proposal had been "Without prejudice to the rights of persons concerned as set out in these articles", whereas Mr. Simma's proposal was "Without prejudice to the right to a nationality of persons concerned". He would, however, go along with the consensus.

*By a show of hands, the Commission voted to insert Mr. Simma's proposed text before Mr. Brownlie's formulation, to delete the word "only" and to adopt the new draft article.*

*The new article, as amended, was adopted.*

*Part II, as amended, was adopted.*

*The meeting rose at 1.10 p.m.*

## 2509th MEETING

*Thursday, 10 July 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*later: Mr. João Clemente BAENA SOARES*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, 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. Operti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.*

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>2</sup> (concluded)

1. The CHAIRMAN said that, before continuing its consideration of 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 and Corr.1 and Add.1), the Commission should decide where it wished to insert the new article adopted at the previous meeting. It might perhaps form the first article of a Part III.

2. Mr. GALICKI said that he endorsed the Chairman's suggestion, for the article could not logically be inserted anywhere in the two parts that had already been adopted. Furthermore, the Commission had only just completed the first reading of the draft and it might add further articles later on. They would naturally fall in a Part III.

3. Mr. ROSENSTOCK said it did not seem essential to open a Part III at that stage. A more simple solution would be to insert the new article after article 26 and to insert three dots between them. The commentary would make it clear that the article had been adopted after the event and that its final place in the draft had not yet been decided.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Rosenstock's proposal.

*It was so agreed.*

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles, see 2504th meeting, para. 28.

## TITLES OF PARTS I AND II

5. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the original title of Part I proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1),<sup>3</sup> namely "General principles concerning nationality in relation to the succession of States", had been deemed inappropriate by the Commission, which had taken the view that they were not in fact "principles". In the circumstances, the Drafting Committee had therefore suggested the title "General provisions".

6. The CHAIRMAN added that that title had the advantage of being based on the one in existing conventions, such as the 1983 Vienna Convention. He said that, if he heard no objection, he would take it that the Commission agreed to adopt the titles of the two parts of the draft to read: "Part I. General provisions" and "Part II. Provisions relating to specific categories of succession of States".

*The titles of Parts I and II were adopted.*

## PREAMBLE

7. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the purpose of the preamble was normally to set forth some of the more general principles underlying the provisions that followed, and that was what the Drafting Committee had endeavoured to do. In the first paragraph, which corresponded to the first paragraph of the preamble as proposed by the Special Rapporteur in his third report, the Committee had eliminated the temporal element to show clearly that the question of nationality arising from the succession of States was a subject of interest and concern at all times. To the extent that the draft articles were to apply to all cases of State succession in the future, it was not advisable to insist on the fact that the Commission had been inspired by recent events. However, the commentary to the preamble would place the problem not only in its historical perspective but also in the perspective of decolonization and in the context of recent events.

8. The second paragraph corresponded to the second paragraph of the preamble as proposed by the Special Rapporteur. It emphasized that, while nationality was essentially governed by internal law, international law limited the freedom of action of States in that field. The word "essentially" meant that nationality issues were largely the subject of internal law. In the second half of the paragraph, the Committee had replaced the formulation "international law imposes certain restrictions on the freedom of action", used by the Special Rapporteur, by "international law limits the freedom of action", as a better reflection of the idea that the "limitation" was not only passive but should also be exercised actively, since it placed certain obligations on States at the international plane in that respect.

9. The three paragraphs that followed dealt with the human rights aspect of the draft. The fourth paragraph, based on the last paragraph proposed by the Special Rap-

porteur, recalled that the Universal Declaration of Human Rights<sup>4</sup> proclaimed the right of every person to a nationality.

10. The fifth paragraph, which was new, referred to the International Covenant on Civil and Political Rights and to the Convention on the Rights of the Child, which recognized the right of every child to acquire a nationality. The Committee had thought it useful to mention those instruments, for children could become "persons concerned" by the State succession even if they were born after the event, a situation that was provided for in the draft.

11. The sixth paragraph corresponded to original article 11 as proposed by the Special Rapporteur. As already explained when he had introduced the articles proposed for Part I (2495th meeting), the Drafting Committee had taken the view that the idea expressed in that article, namely the need to fully respect the human rights and fundamental freedoms of persons whose nationality might be affected by a State succession, logically found a place in the preamble, after the two paragraphs referring to the relevant human rights instruments.

12. The seventh paragraph referred to the Convention on the Reduction of Statelessness and the 1978 and 1983 Vienna Conventions, as a way of indicating that the Commission had already addressed various aspects of the problem in different instruments at different times.

13. Lastly, the eighth paragraph corresponded to the third paragraph of the preamble as proposed by the Special Rapporteur. It indicated the need for the codification and progressive development of international law concerning nationality in order to ensure greater juridical security in international relations. It was patterned on a similar provision included in the preamble to the 1978 and 1983 Vienna Conventions.

*First paragraph*

*The first paragraph was adopted.*

*Second paragraph*

14. Mr. GOCO said that the expression "international law limits the freedom of action of States" did not seem very felicitous. The idea that they might find their "freedom" restricted could well antagonize States and it would be better to replace the word by another formulation.

15. Mr. LUKASHUK recalled that there had been some reticence about the formulation, for it was not quite true to say that international law limited the freedom of action—and hence the sovereignty—of States. Admittedly, sovereignty was not absolute and was indeed deemed to be exercised within the framework of the law, but it would perhaps have been better to emphasize not the limitation on the freedom of States but on the guarantee of the rights of the individual. He therefore proposed that the last phrase should be replaced by a formulation reading:

<sup>3</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

<sup>4</sup> See 2475th meeting, footnote 8.

“international law also issues certain rules in this field so as to guarantee the rights of the individual”.

16. Mr. ECONOMIDES said he had proposed another text for the paragraph reading: “*Emphasizing that nationality is essentially governed by internal law within the limits set by international law*”.

17. Mr. BENNOUNA said he seemed to remember that there was a formula similar to the one proposed by Mr. Economides in the advisory opinion of PCIJ in the *Nationality Decrees Issued in Tunis and Morocco* case.<sup>5</sup>

18. Mr. THIAM said he wondered whether the word “essentially” was really necessary and whether it did not simply water down the text.

19. Mr. MIKULKA (Special Rapporteur), supported by Mr. BROWNLIE, said that the formulation used was in fact the one used by ICJ and in legal writings. By deleting the word “essentially”, the Commission would imply that nationality was “absolutely” governed by internal law, which was not true.

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

*The second paragraph, as amended, was adopted.*

#### *Third paragraph*

21. Mr. GOCO suggested that, in the English version, the phrase “due account should be taken . . . of” should be replaced by “due regard should be given . . . to”, so as to emphasize the idea of respect for the interests of States and of individuals.

22. Mr. ECONOMIDES said it would perhaps be useful to specify more clearly the scope of the paragraph, which had a place apart in the preamble, by adding the words “involved in a succession of States” at the end.

23. The CHAIRMAN said that such an addition was not perhaps essential. If the Commission did want to change the third paragraph along those lines, it should, logically, also amend the two previous paragraphs, something which could well lead to endless drafting problems.

24. Mr. BENNOUNA said that it was regrettable that the paragraph should speak solely of the interests of States and of individuals and not of their rights. He suggested that the words “as well as their respective rights” should be inserted at the end.

25. Mr. THIAM said he endorsed that suggestion.

26. The CHAIRMAN noted that one might simply speak of “the rights and interests of States and those of individuals”.

27. Mr. MELESCANU pointed out that, if the Commission spoke of rights, it must also mention the corresponding obligations, and hence there was a risk of many complications.

28. Mr. SIMMA said he seemed to recall that the Drafting Committee had refrained from using the word “rights” precisely to avoid running up against that type of problem.

29. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) confirmed that what Mr. Simma had said was true. Obligations were effectively the counterpart of rights, yet the way in which rights and obligations were combined or were distinguished was very different, depending on whether the standpoint was one of inter-State relations or of relations between States and individuals. Accordingly the Drafting Committee had preferred to use the word “interests”, which had the advantage of covering all situations without any need to engage in a dangerous drafting exercise. Additional explanations could, however, be given in the commentary.

30. Mr. KABATSI and Mr. ROSENSTOCK said that, in view of the explanations given by the Chairman of the Drafting Committee, it would be preferable to keep the word “interests”.

31. Mr. OPERTTI BADAN said he nonetheless wondered whether the word “interests” was not too broad. In point of fact, they were not all kinds of interests, such as political interests, but the legitimate interests of States and those of individuals. He therefore suggested inserting the word “legitimate” before “interests”.

32. Mr. GALICKI said he had himself proposed that formulation in the Drafting Committee.

33. Mr. MIKULKA (Special Rapporteur) explained that the Drafting Committee, after discussing the matter at length, had finally rejected the proposal. However, needless to say it was for the Commission to take the final decision.

34. The CHAIRMAN noted that such a solution, apart from the fact that it got round the problem, did not seem to raise any objections from members of the Commission. He therefore suggested that the word “legitimate” should be inserted before “interests”.

*The third paragraph, as amended, was adopted.*

#### *Fourth to seventh paragraphs*

*The fourth to seventh paragraphs were adopted.*

#### *Eighth paragraph*

35. Mr. BENNOUNA noted that the text spoke of the codification and progressive development of the rules of international law, but the draft might ultimately take the form of a declaration. The Commission thereby implied that, even if the instrument was a declaration, it would codify, or contain, rules of international law.

36. Mr. MELESCANU said the wording of the eighth paragraph did not necessarily imply that the Commission regarded the declaration itself as constituting such codification and progressive development of the rules of international law. Rather, it signified the kind of objective the Commission had set for the continuation of the process.

<sup>5</sup> See 2475th meeting, footnote 16.

37. The CHAIRMAN pointed out that the Commission did not enter into it, since the text was one being proposed for adoption by the General Assembly.

38. Further to an exchange of views in which Mr. GOCO, Mr. BROWNLIE and Mr. OPERTTI BADAN took part, the CHAIRMAN confirmed that the expression "as a means for ensuring greater juridical security in international relations" was, in all language versions, taken from the preambles of the 1978 and 1983 Vienna Conventions.

39. Mr. LUKASHUK, emphasizing that the expression "international relations" referred to inter-State relations, said that a reference should be added to natural and legal persons. Furthermore, in the Russian version it would be better to speak of "international relationships".

40. Mr. ECONOMIDES proposed that, to take account of Mr. Lukashuk's comments and for the purposes of symmetry with the third paragraph, the last phrase should read: "as a means for ensuring States and individuals greater juridical security".

41. Mr. GALICKI said he endorsed Mr. Economides' proposal, which was in keeping with the 1978 and 1983 Vienna Conventions yet emphasized the particular features of the Commission's draft.

42. Mr. SIMMA and Mr. OPERTTI BADAN said they expressly supported the proposal by Mr. Economides.

*The eighth paragraph, as amended, was adopted.*

#### *Ninth paragraph*

43. The CHAIRMAN, speaking as a member of the Commission, asked why the word "declares" had not been preferred to "proclaims", which tended to emphasize the novelty of the text, whereas "declares" was a better reflection of the idea of codification and progressive development.

44. Mr. DUGARD, supported by Mr. ROSENSTOCK, explained that the Drafting Committee had adopted the term after considering other relevant declarations and had concluded that the word "proclaims" was the one most commonly employed.

45. Mr. THIAM, Mr. BROWNLIE and Mr. KATEKA said they preferred the word "declares", which was less solemn and more neutral than "proclaims".

46. Mr. OPERTTI BADAN said that, from a legal standpoint, the word "declares", was preferable to "proclaims" which was more rhetorical.

47. Mr. MIKULKA (Special Rapporteur) said that the use of the word "proclaims" in previous declarations could be explained by the fact that it was immediately followed by the title of the declaration in question, the General Assembly's purpose having been to avoid any unfortunate repetition. As long as the Commission omitted the title and replaced it with "the following", there was no reason not to employ "declares".

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to replace the word "Proclaims" by "Declares".

*The ninth paragraph, as amended, was adopted.*

49. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said he wished to point out a few drafting changes suggested by comments by the Special Rapporteur in establishing the commentaries. The first change consisted in replacing the word "laws" in the English version of article 5 by the word "legislation". The second change was to replace the expression "related issues" in article 17 by "connected issues". The third change was to recast the title of section 4 so as to read "Separation of part or parts of the territory".

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the drafting changes proposed by the Chairman of the Drafting Committee.

*It was so agreed.*

*The draft articles as a whole, as amended, were adopted.*

51. The CHAIRMAN emphasized the considerable work done by the Commission, which, for the first time, had at one single session adopted an entire set of draft articles on first reading. In keeping with tradition, the secretariat would note any proposals for changes of mere form that members of the Commission would like to make to the different language versions.

*Mr. Baena Soares took the Chair.*

#### **Reservations to treaties (continued)\* (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>6</sup> A/CN.4/479, sect. D, A/CN.4/L.540)**

[Agenda item 4]

#### **DRAFT PRELIMINARY CONCLUSIONS ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES PROPOSED BY THE DRAFTING COMMITTEE**

52. The CHAIRMAN invited the Commission to begin its consideration of the texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading (A/CN.4/L.540).

53. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had held two meetings, on 2 and 3 July, to consider both the draft resolution, contained at the end of the second report of the Special Rapporteur (A/CN.4/477 and Add.1 and A/CN.4/478), referred to it and the form that it might take. After settling substantive issues, the Drafting Committee had prepared two different drafts, one in the form of a resolution and the other in the form of conclusions. On the question of form, different views had been expressed in the Drafting Committee as in the Commission. One view had

\* Resumed from the 2503rd meeting.

<sup>6</sup> See *Yearbook* . . . 1996, vol. II (Part One).

supported the preparation of a resolution to be adopted by the Commission. According to another view, the Commission should adopt conclusions and incorporate them in its report to the General Assembly. Another solution proposed was to adopt a draft resolution enabling the Commission to enter into a dialogue on that very important issue without taking a final position until it received feedback from other relevant bodies. In the absence of an agreement, the Committee had decided to leave the matter for the Commission to decide.

54. Introducing the two drafts proposed by the Drafting Committee, he pointed out that the texts of the resolution and the conclusions were identical, the only difference being in style. Both sought to reflect the Commission's view, as was indicated in the respective introductory words.

55. The three paragraphs of the preamble of the resolution, corresponding to the opening paragraph of the conclusions, were of a general character and briefly stated the background and reasons for the proposed text. The express reference to the forty-ninth session, in the first paragraph of the preamble, was intended to emphasize the temporal element of the Commission's view, something which would allow a measure of flexibility pending progress on the topic and feedback by other organs. The second paragraph of the preamble referred specifically to "normative multilateral treaties", the expression employed by the Special Rapporteur in the draft resolution contained at the end of his second report and used during the discussion in the Commission. Although the Special Rapporteur had explained in detail in his second report what that formulation meant and there had been a general understanding in the Commission, no consensus had emerged on an exact definition of the expression. The Drafting Committee, considering that the matter could be taken up at a later stage in the Commission's work, had therefore deemed it prudent not to attempt to define such treaties.

56. Paragraph 1 used the wording which had been proposed by the Special Rapporteur in the draft resolution contained at the end of his second report, with some drafting changes. For example, in order not to minimize the role of other important criteria for determining the admissibility of reservations, the Drafting Committee had described the object and purpose of the treaty as "the most important of the criteria", an expression it had used instead of the original "fundamental criterion". Again, it had thought it advisable to change the word "permissibility" to "admissibility", as a more neutral legal term. Paragraphs 2 and 3 corresponded to paragraphs 2 and 3 as proposed by the Special Rapporteur, with a single minor drafting change at the end of paragraph 3, where the words "fully applicable to" had been replaced by "govern".

57. Paragraph 4 corresponded to paragraph 4 proposed by the Special Rapporteur, but was slightly amended to take account of the fact that in plenary many members had objected to the statement that the establishment of monitoring machinery by human rights treaties created special problems. The Drafting Committee had been of the view that it was not the monitoring bodies that gave rise to problems but that the establishment of those bodies gave

rise to legal questions that had not been envisaged at the time the treaties had been drafted. The Drafting Committee had also replaced the expression "determination of the permissibility of reservations" by "appreciation of the admissibility of reservations", to reflect the reality and the competence of the monitoring bodies, which, in the opinion of the Drafting Committee, did not actually "determine" or pronounce upon the admissibility of reservations but, because of the nature of their function, evaluated the reservation involved with a view to appreciating its true purport and effect. The word "appreciation" better captured the idea of that function and gave a more balanced perspective of the powers and functions of the monitoring bodies with respect to reservations.

58. Paragraphs 5 and 6, corresponded to paragraph 5 proposed by the Special Rapporteur, which the Committee had found too long and thought that the ideas it contained should be spelt out separately in two new paragraphs. Paragraph 5 was a factual statement and, in that regard, he would draw the Commission's attention to the words "these treaties", which were intended to indicate that the paragraph dealt only with existing human rights treaties referred to in paragraph 4. Paragraph 6 stressed that the competence of the monitoring bodies did not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with articles 19 to 23 of the 1969 and 1986 Vienna Conventions and, where appropriate, by the organs settling any dispute that might arise with regard to the implementation of the treaties. Those two points had been accepted in the discussion in plenary.

59. Paragraph 7 corresponded to paragraph 8 proposed by the Special Rapporteur. Unlike the two previous paragraphs, which concerned existing treaties, it suggested that consideration should be given to providing specific clauses in normative multilateral treaties including, in particular, human rights treaties, to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation.

60. Paragraph 8 was new, it was factual and was not contested. It stressed that the bodies in question could not assume competence that was not vested in them by the treaties at the time of their establishment.

61. Paragraph 9 corresponded to paragraph 7 proposed by the Special Rapporteur, with some drafting changes for the purposes of consistency. It called upon States to cooperate with monitoring bodies and give due consideration to any recommendations they might make or to comply with their determination if such bodies had been granted authority to that effect.

62. Paragraph 10 was a revised version of paragraph 6 proposed by the Special Rapporteur, which had provided that, in the event of incompatibility, only the reserving State had the responsibility for taking appropriate action. The Drafting Committee had found the wording too restrictive, taking the view that, while the reserving State was primarily responsible for taking the requisite action, it was not the only one and other contracting parties could do so. The second sentence of the paragraph enumerated some of the actions that a reserving State could and should take. Paragraph 11 corresponded to paragraph 9

proposed by the Special Rapporteur, with no changes. Paragraph 12 was new and was a savings clause that reflected the idea expressed in plenary that the text proposed by the Commission should not affect practices which had developed in the regional context.

63. Mr. BENNOUNA said he had reservations about the very idea of the Commission adopting conclusions or a resolution at the current stage. It was premature, for the Commission had not examined the topic sufficiently to come to a proper decision. Moreover, by adopting the resolution the Commission appeared to be telling States which legal policy they should follow, something it was not entitled to do. Lastly, the Commission should refrain from engaging in polemics with monitoring bodies established under human rights treaties.

64. Mr. THIAM said that he endorsed Mr. Bennouna's comments.

#### DRAFT RESOLUTION

##### PREAMBLE

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the preamble.

*The preamble was adopted.*

##### OPERATIVE PART

##### Paragraph 1

66. Mr. OPERTTI BADAN said he did not understand what exactly was meant by the expression "Reaffirms its commitment to the effective application of the reservations regime". The proper formulation would be "Reaffirms its attachment to the need effectively to apply the reservations regime".

67. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), supported by Mr. BROWNLIE, proposed that the phrase in question should be recast to read: "Reaffirms its attachment to the promotion of the reservations regime".

68. Mr. BENNOUNA said that the word "Reaffirms" was much too strong and conveyed the impression that the Commission was speaking as a political body. Since it was difficult to see, moreover, what was being reaffirmed, the paragraph should be deleted.

69. Mr. ECONOMIDES said he too thought that the word "Reaffirms" was out of place. It would be better to say "Recognizes the usefulness of the application of the reservations regime".

70. Mr. RODRÍGUEZ CEDEÑO and Mr. OPERTTI BADAN, referring to the Spanish version of the draft, proposed the use of the expressions *Reafirma su adhesión* or *Reafirma la conveniencia*, which would have the advantage of doing away with the political connotations mentioned by Mr. Bennouna.

71. Mr. ROSENSTOCK explained that the Commission would be "reaffirming" what it had already said in paragraph 105, subparagraph (d), of its report to the General

Assembly on the work of its forty-eighth session,<sup>7</sup> namely that it considered that there should be no change in the provisions of the 1969 and 1986 Vienna Conventions.

72. Mr. SIMMA said that he was persuaded by that explanation and thought that the word "Reaffirms" should be retained.

73. Mr. FERRARI BRAVO said that the Commission was not in a position to reaffirm anything. It could only take note of, and then discuss, the rules of general international law. He too wondered whether paragraph 1 was really necessary.

74. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Commission was in the process of reopening the debate on a very important matter of substance. The point was to emphasize that there was no question of changing the regime instituted in articles 19 to 23 of the 1969 and 1986 Vienna Conventions. In the light of Mr. Rosenstock's explanations, he proposed that the paragraph should read:

"1. *Recalls* the view that articles 19 to 23 of the Vienna Conventions [...] provide for effective application of the reservations regime and that the criterion of the object and purpose of the treaty is the most important for determining the admissibility of reservations."

75. Mr. HE said he thought paragraph 1 should be kept, inasmuch as it simply reproduced a conclusion the Commission had already reached at the previous session.

76. Mr. GOCO, supported by Mr. KABATSI, said that the discussion would be much more to the point if the Commission knew whether it had a draft resolution or draft conclusions before it.

77. The CHAIRMAN invited the Commission to decide on the form and the purpose of the text under consideration.

78. Mr. PELLET (Special Rapporteur) said that the choice between "resolution" and "conclusions" did not really make any great difference. In point of fact, the Commission had three solutions. It could adopt a resolution which would be transmitted to the General Assembly and in which it would give its view on the question of reservations to treaties, which was of a quite urgent character. It was the solution he had himself proposed in his second report. It could also, as a number of members had advocated, enter into a dialogue with the human rights treaty monitoring bodies and await their reaction and, to that end, adopt a draft resolution. Lastly, it could adopt draft conclusions, which were less formal in character but had also less authority than a resolution. Personally, he would emphasize that the Commission should not fear making innovations; he would prefer a draft resolution.

79. Mr. THIAM said that he tended to be in favour of "provisional conclusions".

80. Mr. BROWNLIE said that the alternative lay in two different objectives: either the Commission wanted to be useful in the short term and provide guidance for human rights monitoring bodies or it wished to continue orderly consideration of the subject that was before the Commission and take all opinions into account. That tension between the two objectives reflected in fact the attitude of

<sup>7</sup> See 2479th meeting, footnote 6.

the Special Rapporteur himself, who would have liked to do both things at the same time.

81. If the Commission opted for “preliminary conclusions”, it would be contradicting the peremptory nature of the first words of paragraph 1, namely “*Reaffirms its attachment*”. Furthermore, it was not yet in a position to draw any conclusion, within the legal meaning of the term, which meant that the Commission had completed consideration of the topic.

82. Mr. DUGARD said that, if it was a question of entering into contact with the human rights monitoring bodies, either option was valid.

83. Mr. ROSENSTOCK said he wished to point out that the term “draft resolution” did not in fact designate a text that would be submitted to the General Assembly for its endorsement. The Commission was simply trying to take stock of the situation. The reactions of the human rights monitoring bodies should not be a matter for great concern: those bodies knew that the Commission was working on the topic and the circles that were concerned with human rights had already reacted. Proof of that lay in the introduction written by Mrs. Higgins to a book,<sup>8</sup> a member of ICJ, and in general comment No. 24 (52) of the Human Rights Committee.<sup>9</sup> In any event, the Commission should adopt a text in which it explained the stage it had reached in its reflections.

84. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said he too thought that the Commission should adopt “preliminary conclusions”. However, at the purely formal level, it was not for the Commission to enter into direct contact with the human rights bodies: its mandate was from Member States and it was required to report to Member States.

85. Mr. HAFNER, referring to paragraphs 7, 9 and 11 of the text under consideration, noted that they envisaged various activities. Accordingly, it could be best described as “conclusions”.

86. Mr. BENNOUNA, Mr. SIMMA, Mr. OPERTTI BADAN, Mr. RODRÍGUEZ CEDEÑO, Mr. HE and Mr. KABATSI said that they were in favour of “preliminary conclusions”.

87. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished the text under consideration to take the form of “preliminary conclusions”.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

<sup>8</sup> Chinkin and others, *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*, J. P. Gardner, ed. (London, British Institute of International and Comparative Law, 1997).

<sup>9</sup> See 2487th meeting, footnote 17.

## 2510th MEETING

*Friday, 11 July 1997, at 10.10 a.m.*

*Chairman:* Mr. Alain PELLET

later: Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam.

### Appointment of special rapporteurs

1. The CHAIRMAN said that the Bureau was proposing the appointment of four special rapporteurs on topics under discussion or to be discussed by the Commission. All four persons concerned had already indicated their willingness to undertake the tasks. Mr. Crawford had agreed to serve as Special Rapporteur on State responsibility, Mr. Bennouna on diplomatic protection and Mr. Rodríguez Cedeño on unilateral acts of States. As to international liability for injurious consequences arising out of acts not prohibited by international law, Mr. Sreenivasa Rao had agreed to work initially only on prevention; subsequently, the Commission would decide whether he should also deal with liability or whether another special rapporteur should be appointed, or whether the topic should be abandoned.

2. The role of special rapporteurs was set forth in paragraphs 185 to 201 of the report of the Commission on the work of its forty-eighth session.<sup>1</sup> It included, among other things, the idea that future special rapporteurs should rely on input from a standing consultative group.

3. Mr. THIAM asked whether the Commission was competent to decide that a topic proposed for its consideration by the General Assembly should be split into two parts, as was evidently being proposed for international liability. The Assembly had not actually asked the Commission to deal with prevention.

4. The CHAIRMAN said that it was not the Commission's intention at the current time to appoint two special rapporteurs, but that, on the topic of international liability, it was certainly entitled to concentrate initially on prevention.

<sup>1</sup> See 2479th meeting, footnote 6.

*The Commission appointed the four Special Rapporteurs by acclamation.*

5. The CHAIRMAN said that with the exception of the two Special Rapporteurs appointed previously, namely, Mr. Mikulka and himself, there would be a standing consultative group for three of the newly appointed Special Rapporteurs. However, the Commission had adopted the report of the Working Group on State responsibility (A/CN.4/L.538),<sup>2</sup> which had proposed a slightly different procedure, consisting in establishing working groups to direct the activities of the Special Rapporteur on the more difficult subjects. That would apply to the concept of crime, countermeasures and the settlement of disputes.

6. Mr. ROSENSTOCK said that the new Special Rapporteurs should bear in mind that the rapid progress made by the Special Rapporteur, Mr. Mikulka, on nationality in relation to the succession of States had been greatly facilitated by his excellent and constructive use of a working group.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to form consultative groups for the topics, other than State responsibility, to be addressed by the new Special Rapporteurs, bearing in mind the guidelines on such groups contained in paragraphs 191 to 195 of the report of the Commission on the work of its forty-eighth session. The groups would work between sessions, should number between three and five members, and should strive for balanced composition.

*It was so agreed.*

*Mr. Kabatsi took the Chair.*

**Reservations to treaties (continued) (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>3</sup> A/CN.4/479, sect. D, A/CN.4/L.540)**

[Agenda item 4]

DRAFT PRELIMINARY CONCLUSIONS ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES PROPOSED BY THE DRAFTING COMMITTEE (continued)

8. The CHAIRMAN invited the Commission to continue its consideration of the texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading (A/CN.4/L.540).

DRAFT PRELIMINARY CONCLUSIONS

*Paragraph 1*

9. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that what the Commission was in fact reaffirming in paragraph 1 was the view expressed at its previous session, namely, that the regime set out in articles 19 to 23 of the 1969 and 1986 Vienna Conventions

was the one that was applicable as a treaty reservations system. The intention of the paragraph was only to note that that regime contained various criteria for determining the admissibility of reservations, the criterion of the object and purpose of the treaty being the most important. There was no disagreement among members about repeating the Commission's view and since there were no problems of substance the paragraph could be amended to say: "The Commission reiterates its views . . .". If such a form of language was included in the conclusions, it would be factual—an indication of the Commission's support for the stability of the Vienna regime.

10. Mr. AL-BAHARNA said that, since there was no disagreement over the substance of the paragraph, the Commission should not consider replacing the word "commitment". He was happy with the paragraph as it stood. However, since "commitment" had both legal and political connotations, he would agree to the wording "The Commission reaffirms its recognition of . . .".

11. Mr. ECONOMIDES said the Commission was faced with a contradiction. It was just starting its work on the topic of reservations to treaties, and did not know where that work would take it. The Special Rapporteur had said in his reports that the 1969 and 1986 Vienna Conventions contained lacunae and ambiguities and had certain shortcomings, yet had suggested that additional protocols might be proposed. He asked whether it was logical for the Commission to express its faith in that system at the current stage in its work. The first paragraph should read "The Commission reiterates its position . . .", and a footnote should explain that position, which should not be repeated in the body of the text. The Commission's opinion might change later.

12. Mr. PAMBOU-TCHIVOUNDA said that he found the word "reaffirms" inappropriate, since it implied that the Commission had "affirmed" something on a previous occasion. It was also questionable on policy grounds, as he doubted whether the Commission had any business affirming its commitment to the Vienna regime, which was exclusively the concern of States parties to the 1969 and 1986 Vienna Conventions.

13. The Special Rapporteur had made the important point in his second report (A/CN.4/477 and Add.1 and A/CN.4/478) that the Vienna regime was designed to be generally applicable, but that point had been omitted from the preliminary conclusions. He was also dissatisfied with the reference to the object and purpose of the treaty as a "criterion" for determining the admissibility of reservations. The word "condition" would be more appropriate in the context.

14. Mr. OPERTTI BADAN said he could go along with the wording proposed by the Chairman of the Drafting Committee, except for a minor detail. The opening phrase might be amended to read: "The Commission reiterates its favourable view of the reservations regime . . .". In addition to replacing the word "commitment" by "favourable view", he was in favour of deleting the words "effective application", in the light of Mr. Brownlie's argument that the underlying concept was difficult to substantiate in legal terms and had certain political connotations. The

<sup>2</sup> See 2504th meeting.

<sup>3</sup> See *Yearbook . . . 1996*, vol. II (Part One).

Commission must confine its comments to the normative framework.

15. Mr. ROSENSTOCK said that the wording proposed by the Chairman of the Drafting Committee and Mr. Operti Badan represented a centre of gravity and an acceptable compromise. Both versions reiterated the position adopted by the Commission at the forty-seventh session to the effect that the relevant provisions of the 1969 and 1986 Vienna Conventions should remain unchanged<sup>4</sup> and they also avoided some of the “theological” problems raised by other members.

16. Mr. LUKASHUK stressed the importance of paragraph 1 as a statement of the general concept that the Commission had adopted as its point of departure. Clearly, the Commission was not committed to the “application” of the reservations regime but rather to the regime itself. He supported the version of the paragraph proposed by the Chairman of the Drafting Committee and Mr. Operti Badan.

17. Mr. CANDIOTI said he supported the version of paragraph 1 proposed by the Chairman of the Drafting Committee. A reference should be made to paragraph 105 of the report of the Commission on the work of its forty-eighth session,<sup>5</sup> setting forth the view it proposed to reiterate.

18. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), responding to a request by the Chairman, read out his version of paragraph 1, seeking to incorporate Mr. Operti Badan’s suggestions:

“The Commission reiterates its view that articles 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations.”

19. Mr. OPERTTI BADAN noted that the Chairman of the Drafting Committee had omitted the word “favourable” in the phrase “reiterates its view”. What remained was little more than a statement of the fact, rather than the expression of a favourable view of the reservations regime.

20. Mr. KATEKA, supported by Mr. AL-BAHARNA, said the word “favourable” was inappropriate. The Commission had no business passing judgement on the Vienna regime.

21. Mr. ROSENSTOCK, supported by the Chairman of the Drafting Committee, suggested inserting the words “and should be retained” after “regime of reservations to treaties” in order to reflect Mr. Operti Badan’s point, which was a valid one.

22. Mr. MIKULKA said he agreed with Mr. Operti Badan and supported Mr. Rosenstock’s proposal as a

minimum guarantee that the message after two years of debate in the Commission, namely that certain established principles must be preserved, would not be lost.

23. Mr. GOCO said he was unhappy with the proposed new wording of the paragraph. The paragraph was a syllogism and, as Mr. Lukashuk had noted, the anchor point of the preliminary conclusions. The key idea was the importance attached by the Commission to the reservations regime and to the criterion of the object and purpose of the treaty for determining the admissibility of reservations. He saw no reason to state a “view” that was unelicited. The opening phrase should state the Commission’s position in positive terms: “The Commission attaches importance to the reservations regime . . .”.

24. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the phrase “reiterates its view” was a form of shorthand for the Commission’s recognition on previous occasions of the importance of the reservations regime.

25. Mr. KATEKA said that the Commission’s endorsement of the Vienna reservations regime was separate from the singling out of the criterion of object and purpose as being of special importance in determining the admissibility of reservations.

26. The CHAIRMAN said that note had been taken of Mr. Goco’s reservation.

27. Mr. AL-BAHARNA said that much of the substance of the original version of paragraph 1 had been lost in the reformulation process. Mr. Goco’s view might be accommodated by rewording the opening phrase of that version to read “The Commission reiterates its recognition of the effective application . . .” and replacing “particularly to” by “particularly of”.

28. Mr. BENNOUNA proposed that the Commission should reproduce the text of paragraph 105 (d) of the report of the Commission on the work of its forty-eighth session, with the necessary editing changes, as paragraph 1 of the preliminary conclusions. He requested an indicative vote on his proposal.

29. The CHAIRMAN, noting that the same idea was contained in the version of paragraph 1 read out by the Chairman of the Drafting Committee and amended by Mr. Rosenstock, put that version to the vote.

*Further to the indicative vote, paragraph 1, as amended, was adopted.*

*Paragraphs 2 and 3*

*Paragraphs 2 and 3 were adopted.*

*Paragraph 4*

30. Mr. ECONOMIDES said he doubted whether the establishment of monitoring bodies by human rights treaties invariably gave rise to legal questions and therefore suggested replacing the words “gave rise” to either “may give rise” or “sometimes give rise”.

<sup>4</sup> See 2501st meeting, footnote 11.

<sup>5</sup> See 2479th meeting, footnote 6.

31. Mr. PELLET (Special Rapporteur), supported by Mr. AL-BAHARNA, said he agreed with Mr. Economides, but would prefer the wording "gave rise to certain legal questions".

32. Mr. THIAM said that the paragraph should remain unchanged, since the idea of "certain legal questions" was implicit in the original wording.

*Paragraph 4 was adopted.*

*Paragraph 5*

33. Mr. OPERTTI BADAN said that the paragraph posed a serious difficulty. Some human rights monitoring bodies, such as, for example, the Inter-American Commission of Human Rights, included members from countries which had not ratified the treaty instituting the monitoring body in question. It was completely unacceptable for a body partly formed of States not parties to a treaty to have the right to comment upon and express recommendations with regard to the admissibility of reservations by States which were parties. The objection, as he saw it, was insurmountable, and unless the paragraph was thoroughly revised he would be compelled to oppose the adoption of the text as a whole. The point he was raising was a matter not of drafting but of substance and it should not be dealt with in a perfunctory manner with, as it were, an eye on the clock.

34. Mr. PELLET (Special Rapporteur) drew attention to paragraph 12, which made it very clear that the principles set forth were without prejudice to the practices and rules developed by monitoring bodies within regional contexts. As to the procedural aspect of the matter raised by Mr. Operti Badan, he continued to find it difficult to acquiesce to debates being reopened by members who had been absent on the numerous earlier occasions for discussing their points of concern. He did not, of course, challenge the right of any member to be absent from a meeting or to say that he would have opposed a decision had he been present; what he did challenge most forcefully was the right of members who had been absent to reopen the debate on which a decision had been taken.

35. Mr. ROSENSTOCK expressed the hope that careful consideration of paragraph 12 would resolve or mitigate any difficulty and permit agreement on paragraph 5.

36. Mr. PAMBOU-TCHIVOUNDA said that the wording of the paragraph was confusing. The words "in order to carry out the functions assigned to them" implied that commenting upon and expressing recommendations with regard to the admissibility of reservations was not included among those functions.

37. The CHAIRMAN said that he understood the thrust of the paragraph to be that, in order to discharge their functions, monitoring bodies were entitled to comment upon and express recommendations on matters which included the admissibility of reservations by States, the object of such recommendations being to advise States rather than to oppose them.

38. Mr. LUKASHUK said that, notwithstanding the Special Rapporteur's reference to paragraph 12, he shared Mr. Operti Badan's position. In the paragraph under con-

sideration, the Commission stated that it considered the monitoring bodies competent not only to comment but also to express recommendations on questions of the admissibility of reservations by States. That amounted to a presumption and he, for one, did not think that the level commensurate with such a presumption had yet been reached in positive international law. The right to express recommendations on the admissibility of reservations belonged to the States parties, not the monitoring bodies. The paragraph would be acceptable if the words "and express recommendations with regard . . . to" were deleted.

39. Mr. MIKULKA suggested replacing the words "are competent" by the less categorical expression "may be competent".

40. Mr. ROSENSTOCK said that he would be prepared to accept either of the amendments proposed by Mr. Lukashuk and Mr. Mikulka. If, however, they were rejected by the majority of members, he would also be prepared to accept the paragraph recommended by the Drafting Committee, which represented a compromise between two widely divergent views on the implied powers of human rights monitoring bodies. To speak of "commenting" and "expressing recommendations" was already very different from the idea, defended by some members, that human rights monitoring bodies were competent to "determine" the admissibility or otherwise of reservations by States.

41. Mr. OPERTTI BADAN, replying to the Special Rapporteur, said that he had no intention of reopening the debate, but was under the impression that the precise point he was raising had not been discussed previously. The paragraph could be made acceptable by a slight amendment replacing the concept of competence by that of a faculty. The middle part of the paragraph would then read: "the monitoring bodies established thereby may make comments upon, *inter alia*, the admissibility".

42. Mr. RODRÍGUEZ CEDEÑO supported that suggestion. It was not appropriate to speak of the competence of monitoring bodies to express recommendations on the admissibility of reservations.

43. Mr. BROWNLIE said that he was in favour of maintaining the paragraph as it stood. If the paragraph could be criticized at all, it was on the ground that it stated the obvious, but the integrity of the draft demanded that it should be maintained. If a monitoring body, say the European Court of Human Rights, which had as its only stated applicable law a multilateral standard-setting convention like the Convention for the Protection of Human Rights and Fundamental Freedoms, found in the normal course of its business that it had to address incidental issues of general international law—say, treaty law or State responsibility—then it was not acting *ultra vires* if it supplemented its expressed applicable law with the application of general principles of international law.

44. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the wording of the paragraph represented a compromise. The freedom of States to react to the monitoring bodies' recommendations in whatever way they wished remained unrestricted. Competence to comment upon and make recommendations on, *inter alia*,

the admissibility of reservations was a useful and important aspect of the monitoring bodies' work. Removing the reference to recommendations would destroy the balance of the compromise that had been reached. As Chairman of the Drafting Committee, having taken careful note of all the views expressed, including the specific point raised by Mr. Operti Badan, he recommended that paragraph 5 should be adopted in its current form, in the interests of the harmony of the text as a whole.

45. Mr. DUGARD also emphasized the compromise nature of the paragraph. The idea that monitoring bodies were competent to "determine" the admissibility of reservations had been dropped in deference to the school of thought which held that those bodies had no such powers. He appealed to members to adopt the paragraph as it stood.

46. Mr. AL-BAHARNA said he, too, supported the Drafting Committee's text, which had to be read in conjunction with paragraphs 6, 8 and 10.

47. Mr. RODRÍGUEZ CEDEÑO said that he would not oppose adoption of the paragraph, but wished to place on record his doubts as to whether the Commission was competent to determine the competence of monitoring bodies. He continued to believe that it would be preferable to avoid speaking of competence.

48. The CHAIRMAN said that, if he heard no objection, and taking note of the suggestions made by Mr. Operti Badan, Mr. Rodríguez Cedeño, Mr. Lukashuk and Mr. Mikulka, he would take it that the Commission agreed to adopt paragraph 5 without change.

49. Mr. CANDIOTI requested a vote on Mr. Mikulka's proposal to replace the words "are competent" by "may be competent".

50. Mr. PELLET (Special Rapporteur) said that, while he could not stand in the way of a vote being taken, he was very strongly opposed to the proposal. As Mr. Brownlie had put it, the paragraph merely stated the obvious. It had formed the subject of a very long discussion in the Drafting Committee, where the conclusion had been reached that competence to comment upon and express recommendations with regard to the admissibility of reservations was inherent in the functions assigned to human rights monitoring bodies.

51. Mr. LUKASHUK said that he supported the Special Rapporteur's position. Replacing the words "are competent" by "may be competent" would make the paragraph meaningless. It went without saying that States could confer any competence they wished upon the bodies they established.

52. Mr. ADDO said he agreed with the Special Rapporteur and Mr. Lukashuk.

53. Mr. BENNOUNA suggested that an indicative vote should be taken on the paragraph as a whole.

54. Mr. OPERTTI BADAN said that he would not insist on an indicative vote, on the understanding that his reservations were duly recorded.

*Paragraph 5 was adopted.*

55. Mr. PELLET (Special Rapporteur) assured members that an extensive summary of the debate on the draft conclusions, reflecting all views, would be incorporated in the report.

*Paragraph 6*

56. Mr. HE proposed that the word "exclude" should be replaced by "challenge", since the monitoring bodies merely had the competence to offer comments and make recommendations. The word "traditional", before "modalities", should be deleted.

57. Mr. LUKASHUK proposed that the words "between States" should be inserted after "any dispute"; otherwise the impression might be created that the reference was to disputes involving a monitoring body. Alternatively, it could be made clear in the commentary that the disputes in question were disputes between States.

58. Mr. BROWNLIE suggested that Mr. He's concerns might better be met by replacing the words "does not exclude" by "is compatible with", which was a slightly more elegant formulation.

59. Mr. PELLET (Special Rapporteur) said Mr. Lukashuk's proposal was a good one and accurately reflected the Drafting Committee's understanding. In French it would read *entre les États parties*. He had no objection to deleting the word "traditional", but could not accept amending "exclude" to "challenge", which would entirely change the meaning of the paragraph. He could, however, agree to the wording proposed by Mr. Brownlie.

60. Mr. ECONOMIDES said he endorsed Mr. Brownlie's proposal and pointed out that the phrase customarily used with reference to treaties, "interpretation or implementation", had been inadvertently truncated. He therefore proposed that the words "interpretation or" should be inserted before "implementation".

61. Mr. ROSENSTOCK pointed out that paragraph 6 provided a counterweight to paragraph 5. Adoption of Mr. Brownlie's amendment would destroy the balance, and that was something he could not accept. Implicit in paragraph 5 was the idea that the monitoring bodies could not take decisions, but that they could make recommendations, while paragraph 6 indicated that they could not circumvent what the 1969 and 1986 Vienna Conventions established with regard to the role of States and of other dispute settlement bodies. He would prefer to see the phrase "does not exclude" remain unchanged, but suggested that the words "or otherwise affect" could be inserted after it. He had no objection to deleting "traditional", but another solution might be to replace it with the word "established", which indicated the regime that already existed.

62. Mr. KATEKA said he endorsed the amendments proposed by Mr. Rosenstock, Mr. Lukashuk and Mr. Economides.

63. Mr. HAFNER said he could not agree to Mr. Lukashuk's proposal, concerning disputes "between States parties", because it would rule out a monitoring body which had decision-making power to which individuals were entitled to resort.

64. Mr. PAMBOU-TCHIVOUNDA said the logic behind the paragraph seemed to be defective, for it equated two incompatible elements, namely monitoring bodies and modalities. He would suggest that the phrase “does not preclude the traditional modalities” should be replaced by “is without prejudice to the normal control exercised”. He supported the proposal made by Mr. Economides.

65. Mr. PELLET (Special Rapporteur) said he liked the first part of Mr. Pambou-Tchivounda’s proposal, “is without prejudice to”, but not the second part, because the words “traditional modalities of control” implied competence. He could also accept the wording proposed by Mr. Rosenstock. Mr. Hafner’s comments were based on a misconception: the disputes referred to in paragraph 6 were indeed disputes between States. The monitoring bodies before which individuals could bring cases were covered in paragraphs 5 and 7. The Drafting Committee had been trying to indicate that international monitoring bodies had never had decision-making powers, but even so, they had had the right to make comments and recommendations, and that in future they might be given decision-making powers in cases brought before them by individuals.

66. Mr. ROSENSTOCK said he strongly preferred his own amendment to the clause suggested by Mr. Pambou-Tchivounda, which implied the existence of competing mechanisms. He agreed that the words “between States” would not adversely affect the right of individuals to bring cases before the monitoring bodies, but recalled that Mr. Lukashuk, in an earlier discussion, had also indicated he would be content with a written explanation that the disputes in question were between States. Perhaps that might be the safest way out, rather than amending the text.

67. Mr. BENNOUNA said he regretted that the Commission was working on the text in the guise of an extended Drafting Committee. The linguistic complications with which it was currently grappling reflected an underlying uncertainty about what the text should actually say. The Commission wanted it to say two apparently contradictory things: that the monitoring bodies had competence, but that that competence did not in any way affect the traditional modalities of control. Indeed, it might be best to use the formulation “does not affect”, an idea that was similar to the one behind Mr. Rosenstock’s proposal.

68. Mr. ECONOMIDES said all the proposals went in the same direction, but since Mr. Rosenstock had a definite position on the matter, perhaps the Commission could simply adopt his amendment. In the French version, the words *n’est pas exclusive* would be replaced by *n’affecte pas*.

69. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 6 as amended by Mr. Rosenstock.

*Paragraph 6, as amended, was adopted.*

#### *Paragraph 7*

70. Mr. OPERTTI BADAN said his concerns about paragraph 7 were the same as those he had expressed on paragraph 5. It was not appropriate to suggest that specific

clauses establishing the competence of monitoring bodies to determine the admissibility of a reservation should be incorporated in normative multilateral treaties, particularly in the field of human rights, when such bodies could comprise States that were not parties to the treaty to which a reservation had been entered.

71. Mr. LUKASHUK said he experienced difficulty with the phrase “elaborating protocols to existing treaties to confer competence on the monitoring body”. It seemed to imply that the Commission was pressing for such competence to be accorded, and he would prefer the words “confer competence on” to be replaced by “define the competence of”.

72. Mr. HAFNER said the words “to appreciate” were out of place and contradicted the wording of paragraph 5. Nevertheless, he could agree to the current formulation.

73. Mr. RODRÍGUEZ CEDEÑO said that, for greater clarity, the words “to be concluded in future” should be inserted after “normative multilateral treaties”.

74. Mr. ROSENSTOCK said the reference to treaties concluded in future was implicit in the current formulation but he would have no objection to the proposed change. He could not, however, accept amending “confer” to “define”, as that would change the aim and balance of the text and destroy the compromise that underlay it.

75. Mr. BENNOUNA said the wording of the paragraph was extremely convoluted and a simpler and clearer way must be found to express the idea. Moreover, the references to specific clauses and protocols were superfluous; the vehicle to be used was a matter of legal technique, to be decided on by the States signing the relevant instrument.

76. Mr. MIKULKA said he agreed with Mr. Lukashuk and Mr. Bennouna that the aim was precisely to encourage States to specify where certain competences lay, not to confer on monitoring bodies the competence to become involved in matters relating to the law of treaties. He asked, for example, why the monitoring bodies should be given competence instead of the depositaries.

77. Mr. HAFNER said he could not agree with Mr. Mikulka. The balance between paragraphs 5 and 7 was based on a difference of competence. The word “appreciate” in paragraph 7 confused the matter, and that was why he had raised the point. Paragraph 5 related to the competence of monitoring bodies merely to comment upon and make recommendations concerning the admissibility of reservations, while the subject of paragraph 6 was the determination of such admissibility, something that went beyond the competence outlined in paragraph 5. In paragraph 7, it was a question, not of defining or making more explicit the competence referred to in paragraph 5, but of adding another competence, and that was why the word “confer” was used. He believed the text must be kept as it stood.

78. Mr. PELLET (Special Rapporteur) said he agreed with Mr. Hafner: paragraph 7 was of no consequence unless it added something to the current situation and with a view to the future. In response to Mr. Bennouna’s comments, he explained that the Drafting Committee had

worked on the text in English and had had no hand in the versions in other languages. He, too, found the French version ponderous.

79. Mr. MIKULKA said he had understood paragraphs 5 and 7 in exactly the way Mr. Hafner had just described. That was precisely why he thought paragraph 7 should say to States that the Commission would like them to indicate explicitly whether or not they wanted the bodies responsible for monitoring the implementation of treaties on human rights to become involved, in addition, in determining the admissibility of reservations. But of course, the Commission must not encourage them to take one or another position on that matter.

80. Mr. OPERTTI BADAN said the discussion of paragraph 7 reflected on a smaller scale the debate on the entire draft preliminary conclusions, which would give the monitoring bodies competence approaching that which in the past had been the exclusive preserve of States, namely to determine the scope of reservations. He was entirely in agreement with Mr. Mikulka and proposed that paragraph 7 should simply be deleted. There was no reason for the Commission to suggest to States what they ought to do.

81. Mr. ROSENSTOCK said he could accept deletion of paragraph 7, even though that would probably affect the overall balance. Alternatively, Mr. Mikulka's concerns might be met by adding the words “, if they seek to” after “existing treaties”.

82. Mr. PELLET (Special Rapporteur) said that, unlike Mr. Opertti Badan, he thought the Commission was doing its job when it made suggestions, which was exactly what it had done on reservations in 1951. It had adopted positions not in regard to human rights bodies but with regard to ICJ.<sup>6</sup> He was not entirely unmoved by Mr. Mikulka's position and thought that Mr. Lukashuk's proposal to replace “confer competence” by “define the competence of” had the merit of attenuating paragraph 7. Another possibility would be to ask States to specify the monitoring systems, including the competence of the monitoring bodies in general. He would not be opposed to any of those solutions, but thought it would be unfortunate to delete the entire paragraph. The Commission should not fail to adopt a position when it experienced some hesitations.

83. Mr. BENNOUNA, replying to a question from Mr. ROSENSTOCK, said further consideration of the paragraph should be deferred until the various amendments were placed before members of the Commission in writing.

*The meeting rose at 1.10 p.m.*

<sup>6</sup> See *Yearbook . . . 1951*, vol. II, document A/1858, pp. 125-131.

## 2511th MEETING

*Monday, 14 July 1997, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam.

### **Reservations to treaties (concluded) (A/CN.4/477 and Add.1 and A/CN.4/478,<sup>1</sup> A/CN.4/479, sect. D, A/CN.4/L.540)**

[Agenda item 4]

DRAFT PRELIMINARY CONCLUSIONS ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft conclusions contained in the texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading (A/CN.4/L.540).

DRAFT PRELIMINARY CONCLUSIONS (*concluded*)

*Paragraph 7 (concluded)*

2. The CHAIRMAN drew attention to a revised text of paragraph 7 proposed by Mr. Rosenstock (ILC(XLIX)/Plenary/WP.4) to replace the current wording of paragraph 7 which read:

“7. The Commission suggests that consideration be given to providing specific clauses in multilateral normative treaties, including in particular human rights treaties, or to elaborating protocols to existing treaties, if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;”

3. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the main change compared with paragraph 7 proposed by the Drafting Committee lay in the insertion of the formulation “if States seek”. It was intended to emphasize the fact that “providing specific clauses in multilateral normative treaties” was a new pro-

<sup>1</sup> See *Yearbook . . . 1996*, vol. II (Part One).

cedure and that States which sought to confer competence on the monitoring body were urged to use it instead of leaving the practice of the body concerned to develop by itself.

4. Mr. OPERTTI BADAN said he endorsed the new wording, subject to a few small changes needed in the Spanish version. Nevertheless, perhaps it would be better to replace the words "if States seek" by "if States decide".

5. Mr. RODRÍGUEZ CEDEÑO said he fully supported the revised version of paragraph 7 proposed by Mr. Rosenstock. However, there was an omission in the last phrase of the Spanish version, which, to be brought into line with the English and French versions, should include the words *apreciar o* between *para* and *determinar*.

6. Mr. LUKASHUK said that he was wholly satisfied with the new proposal and warmly thanked Mr. Rosenstock.

7. Mr. ROSENSTOCK explained that the main difference between the revised text just circulated and the text proposed by the Drafting Committee lay in the addition of the words "if States seek". They had been included in order to go easy on the sensibility of States and meet the concerns of members who had found that the Commission had adopted a tone that was too much of an "incitement" instead of confining itself to a neutral description.

8. The word "States" had seemed more appropriate than "States parties" because the paragraph related not only to "elaborating protocols to existing treaties" but also to "providing specific clauses in multilateral normative treaties".

9. Mr. THIAM, reverting to Mr. Bennouna's objections (2510th meeting), said that the formulation *suggère d'envisager la possibilité* (suggests that consideration be given), at the beginning of the paragraph, was not clear. It was far too complicated and was redundant.

10. Mr. PELLET (Special Rapporteur) recognized that it would be sufficient in French to say *suggère d'envisager d'inclure* and delete the words *la possibilité*.

11. Mr. BENNOUNA said that that cautious phrasing at the beginning of the paragraph was pointless because of the inclusion in the revised version of the words "if States seek", which already clearly indicated that States were acting as they wanted to. It would be more elegant and more direct to say "The Commission suggests providing...".

12. Mr. PELLET (Special Rapporteur) said he had no objection to that suggestion.

13. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that Mr. Bennouna's formulation would indeed be clearer and more elegant. However, if some members thought it necessary to keep the cautious phrasing, he was not against such a course.

14. Mr. HE said that he would prefer to keep to the more prudent formulation proposed by Mr. Rosenstock.

15. Mr. LUKASHUK said that he too would prefer to keep the text that had been circulated, because it had ini-

tially been proposed in English—which was an obstacle for members of the Commission whose mother tongue was not English—and the amendments being proposed unfortunately related largely to the French version—yet another handicap for members who had no written translation of the proposal in their own language.

16. Mr. GALICKI said that, as far as he was concerned, he preferred the shorter version proposed by Mr. Thiam and Mr. Bennouna. However, in the English version, adoption in the first part of the paragraph of the proposed phrase would mean having to replace the words "or to elaborating" by "or to elaborate" in the second part.

17. Mr. ROSENSTOCK said that the formulation "suggests providing . . . or elaborating" seemed better, as it was more elegant.

*Paragraph 7, as amended, was adopted.*

#### *Paragraph 8*

18. Mr. BENNOUNA said it was regrettable that the French version of the paragraph was drafted in such a way as to make the text so confusing and difficult to understand. As to the substance, he wondered what meaning was to be attached to the "legal force" of the findings of monitoring bodies. Such "force" stemmed from the reaction of States and the *opinio juris* of the bodies themselves. Since paragraph 8 as a whole added nothing to the conclusions and simply restated the obvious, he proposed that it should be deleted.

19. Mr. Sreenivasa RAO (President of the Drafting Committee) said the Drafting Committee had considered the paragraph very important and the advantage was that it was a reminder of something which needed to be said, namely, that treaty monitoring bodies had specific powers which they could not exercise over and above their mandate. In fact, that reminder was a response to the attitude of the Human Rights Committee in the case of general comment No. 24 (52).<sup>2</sup>

20. Mr. GOCO said that the expression "cannot exceed" was likely to produce strong reactions, notably in the Human Rights Committee.

21. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 8 should be retained if only to point out that treaty monitoring bodies had limited powers.

22. Mr. OPERTTI BADAN said that he was of the same opinion.

23. Mr. LUKASHUK said he too thought that the paragraph should be retained, but also wondered about the term "legal force". So far, the bodies in question were regarded as making recommendations, performing monitoring duties, providing guidance, and so on. The idea that their findings had "legal force" was new in that context and was difficult to grasp. For that reason, he suggested that the difficulty might be circumvented by speaking of

<sup>2</sup> See 2487th meeting, footnote 17.

“obligatory force”, which could be not only legal but also political.

24. Mr. ROSENSTOCK said that “obligatory force” and “legal force”, should not be confused. The latter did not mean that the findings Mr. Lukashuk spoke about would be imposed on States and would imply anything binding. As to what was to be done with the paragraph, he recognized that the provision had some meaning only in the context of general comment No. 24 (52) of the Human Rights Committee. However, an alert reader would immediately grasp its purpose.

25. Mr. RODRÍGUEZ CEDEÑO said that he preferred to keep the paragraph.

26. Mr. ECONOMIDES said that he endorsed Mr. Bennouna’s reservations regarding a paragraph that did no more than state the obvious. Moreover, there were certain drafting difficulties. The expression “cannot exceed” could usefully be replaced by “cannot be other than that” and the phrase “the powers given to them” would need to be revised, since the powers in question derived not only from their mandated powers but also their practice, as sanctioned by State more or less on a day-to-day basis. The latter expression could be replaced by “the powers at their disposal”.

27. Mr. DUGARD said that he too considered that the wording of the paragraph left something to be desired and would prefer a formulation such as: “the legal force of the findings of the monitoring bodies in respect of reservations is derived from and limited by the powers given to them for the performance of their general monitoring role”.

28. Mr. ADDO, Mr. AL-BAHARNA and Mr. HAFNER said they thought that paragraph 8 should be retained.

29. The CHAIRMAN said the Commission appeared to want to retain the current wording of paragraph 8. If he heard no objection, he would take it that, with a few changes of form in connection with the French version, the Commission agreed to adopt paragraph 8.

*Paragraph 8 was adopted.*

#### *Paragraph 9*

30. Mr. RODRÍGUEZ CEDEÑO said he wondered whether, in view of the particulars in paragraphs 7 and 8 concerning the competence of monitoring bodies, the Commission should not be more concise and delete the whole of the second part of the paragraph, from the words “that they may make . . .”.

31. Mr. OPERTTI BADAN said he shared that view, especially as the second part of the Spanish version spoke of *decisiones* (“determination” in the English version). It would be better for the Commission not to venture into the terrain of *decisiones* and simply speak of “recommendations” of the monitoring bodies.

32. Mr. BENNOUNA said that, as far as he was concerned, the paragraph should simply be deleted. He was particularly disturbed by the introductory formula “The Commission calls upon States to cooperate”. It was not

for the Commission to dictate their conduct to States. However, if the paragraph was maintained, he distinctly preferred the shorter version proposed by Mr. Rodríguez Cedeño.

33. Mr. HE said that he too favoured the shorter version.

34. The CHAIRMAN, speaking as a member of the Commission, said that he too was disturbed by the imperious tone of the formulation “The Commission calls on States to cooperate”. Moreover, he supported Mr. Rodríguez Cedeño’s proposal to delete the second part of the paragraph.

35. Mr. ROSENSTOCK said that, personally, he had no objection to deleting paragraph 9. However, if the Commission decided to keep it, it did not seem judicious to delete the last part: the word “determination” echoed paragraph 7, which already envisaged that monitoring bodies should be empowered to make a determination.

36. Mr. GALICKI said that, by deleting the second part of paragraph 9, the Commission would be concerned with the existing situation and not future possibilities. A logical solution would then be to change the order of the paragraphs and insert paragraph 7 after the shorter version of paragraph 9. In that way the Commission would meet Mr. Rosenstock’s concern for consistency, by mentioning first what existed and then what might be.

37. Mr. PELLET (Special Rapporteur) said he would not like to see the end of the paragraph lopped off. The current text was balanced and set out “in black and white” a reply to observations by the United States of America, France and the United Kingdom of Great Britain and Northern Ireland, which had clearly expressed their intention of doing what they felt like doing. It was not simply a question of the current situation but also the hypothesis that the monitoring bodies would, in the future, secure recognition of decision-making powers. Both parts were logically linked and they linked in with the previous paragraphs. However, if the Commission eliminated the second part of paragraph 9, it would then have to insert it before paragraph 7, as Mr. Galicki had suggested.

38. Mr. AL-BAHARNA said he too thought that, in its current form, the paragraph struck a certain balance that should be preserved.

39. Mr. RODRÍGUEZ CEDEÑO said that he was bothered precisely by the fact that the second part prejudged the future by speaking of a power of determination (*decisiones*) which had not yet even been envisaged. The important point in the paragraph seemed to be the call for cooperation with monitoring bodies. The text might perhaps be reformulated by laying greater emphasis on such cooperation and speaking neither of recommendations nor determinations.

40. Mr. THIAM said he was also of the opinion that the Commission could do without the paragraph. The last phrase, “if such bodies have been granted authority to that effect”, seemed in particular to state the obvious. It simply lengthened and pointlessly complicated the text and should be deleted.

41. Mr. CANDIOTI said that he associated himself with the comments by Mr. Thiam and with those by Mr. Operti Badan and Mr. Rodríguez Cedeño. If the paragraph was kept in its current form, he would at least suggest replacing the words "to any recommendations" by "to recommendations".

42. Mr. PELLET (Special Rapporteur) said that if the Commission followed Mr. Thiam's proposal to delete the last phrase after the word "determination", the reader would no longer understand that the hypothesis related to the future. There was some point to indicating that monitoring bodies would have no competence other than that which States wanted in future to confer on them. Nevertheless, the last part was not perhaps very elegant and could be replaced by something along the lines of: "if such bodies have been conferred with competence to that effect".

43. Mr. OPERTTI BADAN noted that there was an obvious confusion in the tenses used in the paragraph. The statement that the Commission "calls upon States to cooperate" was quite obviously in the present. However, States could not be asked to take account "in the present" of recommendations and still less of a determination that the monitoring bodies might have the power to make in the future. The Commission was not empowered to meddle in the relations that States might establish in the future with monitoring bodies.

44. Mr. ADDO said that, if paragraph 9 was maintained, it should be maintained *in toto*.

45. Mr. GOCO pointed out that, if the Commission invited States to cooperate with monitoring bodies, it was implicitly understood that such bodies had the competence to make recommendations. Moreover, the second part of the sentence followed on logically from paragraph 7. However, it would be better to replace the word "if" by the word "whenever" in order to indicate that the phrase related to the future.

46. Mr. ECONOMIDES said that paragraph 9 was very useful and was consistent with the terms of paragraph 7. Nevertheless, to bring out more clearly the fact that the last phrase related to the future, it should be recast to read: "if such bodies are granted authority to that effect in the future".

47. Mr. THIAM said that he could agree to maintaining the whole of the paragraph, provided Mr. Goco's proposal to replace "if" by "whenever" was adopted.

48. Mr. RODRÍGUEZ CEDEÑO proposed that, in order to highlight the appeal for State cooperation, the entire paragraph should be recast to read:

"9. The Commission calls upon States to cooperate with monitoring bodies so as to give appropriate consideration to matters relating to the formulation and admissibility of a reservation."

49. Mr. PELLET (Special Rapporteur) said that he failed to see anything new in that proposal. However, he agreed with the proposal by Mr. Goco and, even more, with that by Mr. Economides. The latter proposal removed any ambiguity yet respected the logic of the text

and was in keeping with the wishes of a number of members. The text of paragraph 9 would thus read:

"9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future."

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 9 with the wording read out by the Special Rapporteur.

*Paragraph 9, as amended, was adopted.*

#### *Paragraph 10*

51. Mr. ECONOMIDES said he had three comments in connection with the second sentence. First, the word "may" should be replaced by "shall", for in the case of a reservation incompatible with the object and purposes of the treaty the shift was from the optional to the mandatory. He even wondered whether the expression "for example" should be retained. Secondly, the various solutions offered to the State should be enumerated more logically: first, to modify the reservation so as to keep the part that was acceptable; if that was not possible, to withdraw the reservation; lastly, if such a course proved impossible, to forego becoming a party. The latter course should, moreover, be supplemented—and that was the object of his third comment—for instances in which the State was already a party to the treaty, in which case it should "cease to be a party". The text, recast in the light of those comments would read: "This action should consist in the State either modifying the reservation so as to eliminate the incompatibility, or withdrawing it, or foregoing becoming a party or ceasing to be a party."

52. Mr. HAFNER said that, since the Commission had stated in paragraph 1 of the draft conclusions that compatibility with the object and purpose of the treaty was only one of the criteria for determining the admissibility of reservations, it was not justifiable for paragraph 10 to cover only the case of incompatibility. It might imply the Commission had tried to institute for such a case a regime that was different from the other cases of inadmissibility set out in article 19 of the 1969 Vienna Convention. He therefore proposed that the first sentence of paragraph 10 should be recast to read: "The Commission notes also that, in the event of the inadmissibility of a reservation, it is primarily the reserving State that has the responsibility for taking action."

53. With reference to Mr. Economides' proposal, he would point out that the second sentence was far-reaching and already tended to prejudge the outcome of the Commission's discussions at the next session. The Drafting Committee had cited four examples and had used the verb "may" and not "shall" so as not to exclude other possibilities of reactions to an allegation of inadmissibility.

54. Mr. GOCO said he endorsed Mr. Economides' idea of reversing the order of the solutions set out in the second sentence. As to the substance, he agreed with Mr. Hafner's proposal to replace the notion of incompatibility

by that of inadmissibility. On the other hand, he wondered why the word “primarily” was used in the first sentence.

55. Mr. LUKASHUK said that he supported both of Mr. Hafner’s proposals, namely referring to inadmissibility and maintaining the verb “may”. However, since the sequence of paragraphs could convey the impression that inadmissibility would be determined by monitoring bodies, it should be emphasized that inadmissibility would be determined in a due and proper manner.

56. Mr. ROSENSTOCK said that he completely agreed with Mr. Hafner. The word “primarily” had been inserted in the first sentence in order to lead into the second sentence, while taking into account the fact that, apart from the reserving State and the State or organization having objected to the reservation, other States might want to move in and secure withdrawal of the reservations. However, the word was not essential and it could be omitted. The thrust of the paragraph was that it was not for monitoring bodies to determine admissibility and, if they did pronounce on admissibility, it certainly was not their task to take part in any discussion about severability. The idea would be properly expressed, even if the Commission decided to do away with the word “primarily”. However, he would prefer to keep the word “may”, rather than use “shall”, for a State was not under a duty to do anything. Furthermore, replacing the idea of incompatibility with that of inadmissibility largely removed the need to reverse the order of the possibilities set out in the second sentence, since modifying a reservation was of value only in cases of incompatibility with the object and purpose of the treaty.

57. Mr. OPERTTI BADAN said that there was a difference between the Spanish and French versions of the end of the first sentence. In his opinion, the Spanish text wrongly implied that the reserving State had the responsibility for adopting measures. It would be better to speak of “competence”.

58. Mr. ROSENSTOCK suggested that, if the Spanish and French versions spoke of “competence”, the English text should do the same.

59. The CHAIRMAN confirmed that the secretariat would make the requisite changes. He said that, if he heard no objection, he would take it that the Commission agreed to adopt the first sentence, reading: “The Commission notes also that, in the event of the inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action.

*It was so agreed.*

60. Mr. HAFNER pointed out that the word “incompatibility” in the second sentence should also be replaced by “inadmissibility”.

61. Mr. GALICKI said that, in that case, the reference to “modifying” the reservation posed a problem. The 1969 Vienna Convention itself did not allow for such modification and the Commission had agreed to that possibility solely in connection with incompatibility with the object and purpose of the treaty. As Mr. Rosenstock had pointed out, it was inconceivable for a State to be able to modify a reservation in the case of inadmissibility for reasons

other than that of incompatibility with the object and purpose of the treaty. Accordingly, he was not in favour of changing the order of the possibilities set out in the second sentence. The Commission first spoke of the general rules deriving directly from the Convention and then introduced a possibility based on State practice, namely modification of the reservation, which was confined solely to the case of incompatibility with the object and purpose of the treaty.

62. Mr. PELLET (Special Rapporteur) said that he did not agree with Mr. Galicki. In his view, the possibilities in paragraph 10 could be applied in cases other than incompatibility with the object and purpose of the treaty. He therefore thought, like Mr. Hafner, that if inadmissibility could be substituted for “incompatibility” in the first sentence, the same should be done in the second sentence.

63. Mr. HAFNER said that he endorsed the comment by the Special Rapporteur. The 1969 Vienna Convention did not expressly provide for the possibility of modifying a reservation. Therefore the logical thing was either to admit such a possibility for all the cases covered by article 19 of the Convention or to refuse it for all cases. Actually, practice had shown that it was possible to interpret a modification of a reservation as partial withdrawal, something that was not prohibited by any provision of the Convention.

64. Mr. LUKASHUK said he agreed with the comments by the Special Rapporteur, and Mr. Hafner had pointed out that, inasmuch as States were entitled under the relevant terms of the 1969 and 1986 Vienna Conventions to make and to withdraw reservations, they were also entitled to modify them.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 10, which would read:

“10. The Commission notes also that, in the event of the inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or foregoing becoming a party to the treaty.”

*Paragraph 10, as amended, was adopted.*

*Paragraph 11*

66. Mr. KATEKA said that the word “principles” was too strong and should be replaced by another term.

67. Mr. ROSENSTOCK, supported by Mr. DUGARD, Mr. Sreenivasa RAO and Mr. OPERTTI BADAN, proposed that the words “principles enunciated above” should be replaced by “above conclusions”.

*Paragraph 11, as amended, was adopted.*

*Paragraph 12*

68. Mr. HAFNER said that he could accept paragraph 12 on three conditions. First, it should be understood that the paragraph could not be interpreted as

authorizing States to establish a reservations regime different from the one in the 1969 Vienna Convention. The application of the Convention in the different regional contexts could, admittedly, produce different results, but the basics of the regime must be the same. States could naturally adopt particular provisions within a regional context, but failing such provisions, it was the Convention that applied.

69. Secondly, paragraph 12 should not be construed as permitting States to develop in a regional context reservations regimes that departed from the 1969 Vienna Convention in regard to treaties of a universal character and, in particular, human rights treaties. That would simply open the door to different interpretations of the object and purpose of such treaties and defeat their universality.

70. Thirdly, he did not believe that a regime already developed by monitoring bodies in a regional context could be separated from universal developments. General comment No. 24 (52) of the Human Rights Committee and the practice of the Committee on the Elimination of Discrimination against Women followed the decisions in the *Belilos*<sup>3</sup> and *Loizidou*<sup>4</sup> cases, which meant there was, at the universal level, a development that was parallel to and in conformity with practice at the regional level.

71. Mr. OPERTTI BADAN said the wording of paragraph 12 conveyed the idea that rules were being established in a hierarchy in which those developed at the regional level were of higher value than those set out by the Commission in the document under consideration. To say that the practices and rules developed within regional contexts should be maintained even if they were inconsistent with the Commission's conclusions, the object of which was to improve the reservations regime on a world basis, seemed somewhat inconsistent. It would therefore be preferable to delete paragraph 12.

72. Mr. ROSENSTOCK said he shared Mr. Hafner's view and thought, as did Mr. Opertti Badan, that paragraph 12 should be deleted. To take proper account of its underlying concerns, it would be enough for the Chairman of the Drafting Committee to explain in general terms that, in its conclusions the Commission was in no way criticizing the activities of regional bodies on which competence had been expressly conferred.

73. Mr. PELLET (Special Rapporteur) said that deletion of paragraph 12, which would be all the more disturbing in that it was a safeguard clause, would make the presence of the conclusions in paragraphs 4, 5 and 6 incomprehensible. For that reason, he was opposed to deleting it.

74. Mr. ECONOMIDES, supported by Mr. Sreenivasa RAO, said that paragraph 12 was essential and was a prerequisite for the consensus which seemed to have emerged in the Commission. It meant quite simply that the Commission's conclusions in no way affected the practices and rules instituted by the decisions of human rights treaty monitoring bodies.

75. Mr. LUKASHUK said the differences of views concerning paragraph 12 did not seem fundamental and the

Commission could very well keep the paragraph. Perhaps, to meet Mr. Hafner's concerns, which were not without some merit, it might be possible to indicate that the practices and rules developed by monitoring bodies at the regional level could depart from the regime established by the 1969 and 1986 Vienna Conventions only on minor points.

76. Mr. ROSENSTOCK said that nothing in the first 11 paragraphs of the draft conclusions could be construed as a criticism of the practices and rules of any regional monitoring body, and for that reason paragraph 12 was pointless. Even if some decisions by regional bodies could be criticized at the universal level, they could be justified at the regional level, as far as the provisions of the treaties in question and the practice of the monitoring bodies were concerned, by consent between States that did not necessarily exist at the universal level. Nevertheless, if some members wanted to keep paragraph 12 as a kind of guarantee, he would not press for it to be deleted, on the understanding that the Commission was not encouraging the fragmentation of international law or the introduction of practices that were not in keeping with the 1969 and 1986 Vienna Conventions.

77. Mr. BENNOUNA pointed out that the provisions on reservations in the 1969 Vienna Convention were not binding, whereas human rights instruments were. Obviously, States could waive the technical provisions of the Convention on reservations and, in that regard, he was in agreement with the Special Rapporteur and Mr. Economides: regional practices and rules should be maintained, particularly when they went further than did the provisions of the Convention. In any event, paragraph 12 was a savings clause and, as such, had no normative effect.

78. Mr. PELLET (Special Rapporteur) said he too thought that the provisions of the 1969 Vienna Convention on reservations did not have the character of *jus cogens* and that *lex specialis* could derogate from *lex generalis*. Even though he had some hesitations about the grounds for the jurisprudence of some European monitoring bodies, in his view paragraph 12 had the merit of not prejudging decisions the Commission might take in the future and enabling everyone, by its "constructive ambiguity" to keep his opinion. Moreover, in the French version, he would like the word *élaborées* to be replaced by *mises en oeuvre*.

79. Mr. OPERTTI BADAN said that he endorsed Mr. Rosenstock's comments and would not press for paragraph 12 to be deleted, on the understanding that the practice and rules developed by monitoring bodies within regional contexts respected the rules on reservations set forth in the 1969 and 1986 Vienna Conventions.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 12, with the proposed change to the French version and with the replacement of the words "principles enunciated above" by "above conclusions".

*Paragraph 12, as amended, was adopted.*

81. Mr. PELLET (Special Rapporteur), supported by Mr. BENNOUNA, said that the word *inadmissibilité*, used in a number of provisions in the French version, posed a problem and should be replaced by a word such as *illicéité*.

<sup>3</sup> See 2500th meeting, footnote 16.

<sup>4</sup> *Ibid.*, footnote 17.

82. The CHAIRMAN said that the Special Rapporteur and Francophone members of the Commission would agree with the secretariat on making the requisite change.

*The text of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, as a whole, as amended, was adopted.*

*The meeting rose at 1.10 p.m.*

## 2512th MEETING

*Monday, 14 July 1997, at 3.10 p.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

### Unilateral acts of States (A/CN.4/L.543)

[Agenda item 7]

#### REPORT OF THE WORKING GROUP

1. Mr. CANDIOTTI (Chairman of the Working Group on unilateral acts of States), introducing the report of the Working Group (A/CN.4/L.543), said that it had held three meetings from 22 May to 26 June 1997, at which it had considered the report of the Commission on the work of its forty-eighth session,<sup>1</sup> particularly the general outline set out in annex II, addendum 3. It had also taken into account the written comments by the Chairman, submitted in that capacity and also as a member of the Commission. The Working Group had received other useful contributions, one of which had been on the use of terms to designate unilateral acts, prepared by one of the members of the Working Group itself, as well as preliminary bibliographies and lists of judicial decisions and arbitral awards compiled by the secretariat.

2. The Working Group's discussions had been aimed at responding to the request in General Assembly resolution 51/160, paragraph 13, that the Commission should indi-

cate the scope and content of the topic, and account had been taken of the views expressed by Governments during the discussion in the Sixth Committee (A/CN.4/479, sect. E.6). A number of conclusions and recommendations had emerged from the Working Group's deliberations.

3. As the Commission had suggested in annex II of the report on the work of its forty-eighth session, it was indeed proper and timely to conduct a study of unilateral acts of States with a view to the codification and progressive development of the relevant rules. That conclusion was based on the growing importance of such acts in international relations and the existence of important doctrinal works and judgments of ICJ and other courts that shed light on the matter. A clear statement of the rules of international law applicable to unilateral acts would help bring certainty, predictability and stability to international relations and thus help to strengthen the rule of law in the international community.

4. As for the scope of the study, the Working Group had considered that the unilateral acts to be covered were those that States carried out with the intention of producing legal effects, and creating, recognizing, safeguarding or modifying rights, obligations or legal situations. Emphasis was placed on the importance of the element of intent, the content and the legal effect of such acts, which were essential for them to be characterized as lawful and to be clearly differentiated from other acts and actions, particularly internationally wrongful acts, that were part of the study of international responsibility. The scope of the topic was defined in terms of the unilateral nature of the acts by a single or several subjects of international law acting as a single party, without the participation of other counterpart(s) in the form of acceptance or consent. It was that elementary characteristic that differentiated such acts from bilateral or pluri-lateral legal acts, in other words, treaties.

5. It had been recognized that within the framework of the law of treaties, as in the context of international justice, States carried out many acts which were, *prima facie*, unilateral, but which, because they were based on a treaty, were not strictly unilateral. It had also been borne in mind that the 1969 Vienna Convention was a highly important precedent for the harmonization and formulation, *mutatis mutandis*, of the rules applicable to unilateral legal acts. It was also agreed that the study should at the current stage focus on unilateral legal acts of States, although later on the Commission could decide to extend the topic to cover rules applicable to the unilateral legal acts of international organizations.

6. With reference to the content of the study, the Working Group had considered the outline in annex II, addendum 3, to the report of the Commission on the work of its forty-eighth session as a useful basis. That outline was redrafted, as shown in section III of the Working Group's report, to include the following chapters: chapter I, Definition of unilateral legal acts of States, and determination of their basic elements and characteristics; chapter II, Criteria for classifying unilateral legal acts of States; chapter III, Analysis of the process of creation, the characteristics and the effects of the most frequent unilateral acts in State practice; chapter IV, General rules applicable

<sup>1</sup> See 2479th meeting, footnote 6.

to unilateral legal acts; and chapter V, Rules applicable to specific categories of unilateral legal acts of States.

7. That description of the topic's scope and content must be understood to be preliminary in nature, because the study's definitive structure could be determined only after detailed analysis of all the aspects of the topic. For those reasons, the Working Group had refrained from considering as yet the form that the Commission's work could take: a doctrinal study, draft articles with commentaries, a set of recommendations or guidelines or a combination of those options.

8. As to the method of proceeding with the topic, the Working Group had considered it desirable for the Commission to appoint a special rapporteur to prepare an initial report setting out a general introduction to the topic, the practice of States and the opinions of legal writers and jurisprudence, as well as a detailed plan for progress with the study. That objective had at the current time been achieved with the appointment of a Special Rapporteur. The Commission should also appoint a small consultative group to work with the Special Rapporteur on the preparation of the initial report and possibly on other tasks; request Governments, both in the Sixth Committee in the General Assembly at its fifty-second session and separately in writing, to submit information and opinions accompanied by any documentation they deemed relevant; consider the initial report at its fiftieth session and decide on how to continue with the study, recommending, with the necessary guidance and directives, that the Special Rapporteur produce subsequent reports developing the various chapters of the topic; and formulate a calendar of work in such a way as to make it possible to complete consideration of the topic as a whole on first reading by the end of the current quinquennium, in other words, by the fifty-third session, in 2001.

9. He was grateful to the members of the Working Group for their active participation and valuable contributions and, as a new member of the Commission, had found the experience extremely instructive. On behalf of the Working Group, he thanked the secretariat for its efficient assistance during the Working Group's meetings and in the preparation of the report of the Working Group.

10. The CHAIRMAN said the Commission was grateful to the Chairman of the Working Group for his endeavours, which were all the more impressive in that he had selflessly handed over the continuation of the task to Mr. Rodríguez Cedeño, the newly appointed Special Rapporteur.

11. Mr. LUKASHUK congratulated the Chairman of the Working Group and said it had been a pleasure to be a member of the Group. Regarding paragraphs 14 and 15 of the report of the Working Group, he agreed that it was important to look carefully at internal acts of States, laws, and the like, and to analyse the interaction between unilateral acts of States and custom. One minor criticism was that the report emphasized the unilateral nature of acts of States, but the legal consequences of such acts usually arose when other States reacted to them. The effect of reactions by States must therefore be duly taken into account. It would be premature at the current, early stage, to request Governments to provide their opinions and out-

line their practice in that area. Governments generally had great difficulty responding to the Commission's requests for general information and it would be preferable to await the elaboration of a precise plan of work and, possibly, of a detailed questionnaire, to which the replies by Governments would most likely be more informative.

12. He drew attention to a phrase in the Russian version of the report of the Working Group that did not appear in the English version and was not juridically accurate.

13. The CHAIRMAN said the secretariat would look into the matter.

14. Mr. BAENA SOARES commended the Chairman of the Working Group on the report of the Working Group, which skilfully responded to the issues raised in the Sixth Committee of the General Assembly and established as objectives for the work on the topic. With regard to paragraph 25 of the report, it would not be premature to ask Governments to make known their opinions and provide information they considered relevant for the study of the topic. With all due respect to those who held the opposite view, he did not think that such an initiative should be delayed. Indeed, Governments should be encouraged to contribute to the work on the topic from the very outset. Accordingly, the plan of work set out in section IV of the report should be retained as it stood.

15. Mr. SIMMA pointed out that chapter III of the outline for the study, in section III of the report, was entitled "Analysis of the process of creation . . . of the most frequent unilateral acts in State practice". Unilateral acts were not really created, and the term "creation" was inappropriate. He would also like clarification of the relationship between "material possible content", chapter IV (d) (iv), and "substantive content", in chapter II (i). If there was no difference in meaning, he would suggest that the words "material possible content" be replaced by "possible substantive content".

16. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said it was true that "process of creation" was not a legal term and was inappropriate. He suggested that it should be replaced by "forms". The phrase "material possible content" was either a typographical error or a mistranslation. It should read "materially possible content", meaning that the substantive content of the act must be materially possible. If an act had no materially possible content, then it was not valid. He nonetheless agreed that the phrase should be replaced by "possible substantive content".

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to replace the words "process of creation" by "forms" in chapter III of the outline for the study, in section III of the report of the Working Group.

*It was so agreed.*

18. The CHAIRMAN, speaking as a member of the Commission, said the phrase "lawfulness under international law", chapter IV (d) (iii) of the outline, subsumed the phrase "materially possible content" in chapter IV (d) (iv). "Lawfulness under international law" meant the conformity of an act with international law and, if transposed

*mutatis mutandis* to the law of treaties, related to all the causes for considering a treaty invalid set out in the 1969 Vienna Convention. Such causes included error and coercion, which rendered treaties, and by extension unilateral acts, null and void. Also, one of those causes was the possible conflict of the treaty with *jus cogens*, and the phrase “materially possible content”, as he understood it, referred to precisely the question of conformity with peremptory norms. Perhaps it should be made clear that the category of “lawfulness under international law” had a subcategory comprising causes of invalidity other than conflicts with *jus cogens*.

19. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said the reference was indeed to the material fact that the act was possible as one of the conditions for lawfulness of an act. The act must be both in conformity with international law and possible. But the list in chapter IV of the outline was by no means exhaustive. It was simply a series of examples. He would have no objection to deleting chapter IV (d) (iv), “Materially possible content”.

20. Mr. SIMMA said he thought “possible substantive content” meant something quite different. For example, when a State renounced territorial sovereignty over the non-existent island of Atlantis, it made a promise of renunciation, but without any substantive content.

21. Mr. ROSENSTOCK said he agreed entirely with Mr. Simma. It might be like a promise by the United States of America to bring back large quantities of blue cheese from Mars. Such a promise could not be thought to obligate the United States to pay damages when it turned out that Mars was not made of blue cheese, since the supply of blue cheese was not a possible material consequence of a mission to Mars. The category in question covered commitments whose performance could not be considered feasible, or which proved to be impossible to perform, in the way that a contract or a treaty could be impossible to perform.

22. The CHAIRMAN said it was true that, in the absence of an object, a commitment could not be made. However, he was not sure the United States would not incur responsibility if it had made a promise.

23. Mr. ECONOMIDES said that he commended the Working Group on its excellent work. The report set out an outline for future work on the topic which was obviously not exhaustive. The question of possible conflicts with *jus cogens* should certainly be considered under chapter IV (d) (iii), because one category within “Lawfulness under international law” was lawfulness in relation to peremptory norms. Perhaps the phrase “including in relation to the rules of *jus cogens*” could be appended to “Lawfulness under *jus cogens*”.

24. The CHAIRMAN, speaking as a member of the Commission, suggested that “materially possible content” might be replaced by “existence of object”. The idea was that a State should not issue rules on whimsical matters.

25. Mr. SIMMA said the important issue was not that an object was present, but that the substantive content of a promise was invalid. He therefore preferred the phrase

“possible substantive content”, which was broader and covered all cases.

26. The CHAIRMAN, speaking as a member of the Commission, said that he did not agree with Mr. Simma and was convinced that any State that made a promise involving an object and failed to carry out that promise would be liable under international law. Speaking as Chairman, he asked whether there was any opposition to the amendment proposed by Mr. Economides.

27. Mr. ROSENSTOCK said it would be inappropriate to add a reference to peremptory norms within the category of lawfulness under international law, because a fortiori that category covered peremptory norms.

28. The CHAIRMAN said that, if he heard no objection, and subject to the comments made during the discussion, he would take it that the Commission agreed to adopt the outline for the study of unilateral acts of States set out in section III of the report of the Working Group.

*It was so agreed.*

29. Mr. BENNOUNA congratulated the Working Group and its Chairman on an excellent report which would undoubtedly serve as the prelude to a most useful and interesting codification exercise. The definition of unilateral legal acts in paragraph 10 seemed somewhat confusing or, at any rate, incomplete. What exactly was the difference between “pluri-lateral” international legal acts, which were to be left outside the scope of the study, and the so-called “collective” or “joint” acts referred to in the last sentence of the paragraph? A clearer distinction should perhaps be drawn and greater emphasis placed on the element of will. It was the will of a single State, rather than the legal effects produced, that was the principal distinguishing feature of a unilateral act. In that connection, he referred to the definition of the term “treaty” in article 2, paragraph 1 (a), of the 1969 Vienna Convention.

30. As to paragraph 15, it would perhaps be more appropriate to speak of the contribution of unilateral acts of States to custom than of the interaction between them. It was undoubtedly the case that customary international law was often shaped by unilateral acts. Lastly, he wondered whether the final words of paragraph 14, “and are permitted by international law”, were entirely appropriate. Such wording was too restrictive. The study should not exclude acts which were neither permitted nor prohibited by international law but belonged, as it were, to an as yet unregulated grey area. That was, surely, particularly true of maritime jurisdiction, the example adduced in the paragraph.

31. Mr. SIMMA said that the idea of interaction was more comprehensive than that of a “contribution” and should be retained. A unilateral act could be negative; it could be contrary to existing customary law and could erode it. Such acts should not be excluded from the scope of the study.

32. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) explained that the term “interaction” had been chosen in order to indicate that custom could influence unilateral acts as well as vice versa, and also to express the point just made by Mr. Simma, namely,

that the effects of unilateral acts could be negative as well as positive.

33. Mr. BENNOUNA said that, in view of those explanations, he would not insist on his suggestion regarding paragraph 15.

34. Mr. HAFNER, said that, as a member of the Working Group, he agreed with the point raised by Mr. Bennouna in connection with paragraph 14 and suggested that the words "and are permitted by international law" should be replaced by "and are explicitly provided with such effect by international law".

35. After an exchange of views in which Mr. BENNOUNA, Mr. HAFNER and the CHAIRMAN took part, Mr. BENNOUNA proposed that the last part of paragraph 14 should read: "which are opposable to other States, in conformity with international law".

*It was so agreed.*

36. Mr. SIMMA said that he had two problems with the substance of paragraph 10. First, he shared Mr. Bennouna's view that the definition of unilateral legal acts was not entirely satisfactory and wondered, in particular, whether the Working Group had considered including such unilateral acts as, for example, the acceptance or rejection of a reservation to a treaty. However, he had no strong feelings on the subject and was prepared to accept the definition as it stood.

37. His second and more important difficulty was with the last sentence of the paragraph, which spoke of so-called "collective" or "joint" acts performed by a plurality of States which did not intend to regulate their mutual relations by that means. The sentence was apparently designed to distinguish unilateral acts from treaties. If so, the concept underlying the distinction did not seem altogether pertinent or correct. There were many agreements between States, such as human rights treaties, which could hardly be defined as regulating their mutual relations. Further clarification of the precise purport of the sentence would be welcome.

38. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said it had been decided from the outset that acts resulting from the combined will of a number of States—in other words, acts such as treaties—should be excluded from the scope of the study. The distinction between unilateral and pluri-lateral acts was sometimes extremely difficult to draw. That was true, for example, of the act of withdrawal of a reservation to a treaty. The Working Group had decided to choose the participation, or "will", of another party as the decisive criterion. The last sentence of paragraph 10 referred to cases in which several States agreed to perform an act which expressed the will of each of those States but was not designed to regulate their mutual relations. The decision of the Allied Powers to declare the end of the Second World War was an example of a collective unilateral act of that nature.

39. The CHAIRMAN said that, in his view, members should refrain from going too deeply into the substance of what was, after all, only a preliminary report.

40. Mr. LUKASHUK, responding to one of the points raised by Mr. Simma, said that rules of international law could regulate relations only between subjects capable of exercising the rights and bearing the obligations resulting therefrom, in other words, between States. Mr. Simma had expressed the familiar view that human rights agreements regulated relations not between States but between the State and the individual. In that case, when States concluded agreements between themselves on, say, the protection of seals or fish, did such agreements regulate the relationship between the State and seals or fish? Or did they regulate relations between States? The Charter of the United Nations was perfectly clear on the subject of relations between States in connection with human rights. A human rights treaty placed certain obligations upon States, and States bore the responsibility for the realization of those rights.

41. Mr. THIAM said that discussing such matters at the current stage was, in his opinion, premature.

42. Mr. SIMMA said that States could agree to use a treaty to regulate whatever matter they chose. It was, of course, true that the majority of treaties regulated relations between States, but it was meaningless to assert that, for instance, the Convention for the Protection of Human Rights and Fundamental Freedoms did so.

43. Mr. OPERTTI BADAN suggested that the Working Group might consider expanding the scope of the study to include acts by intergovernmental organizations, particularly in the economic sphere, which belonged to yet another "grey area", an area between unilateral acts of States *stricto sensu* and acts which stemmed from the collective will of States without being acts of a supranational character.

44. The CHAIRMAN said that the suggestion would be noted, and speaking as a member of the Commission, adding that he personally doubted whether acts of that kind should be covered by the study.

45. Mr. ECONOMIDES said that it would be premature at the current time to try to spell out every aspect of the problem. He suggested that the words "do not intend to regulate their mutual relations by this means" in the last sentence of paragraph 10 should be replaced by the words "do not intend to create treaty relations between them".

46. The CHAIRMAN, speaking as a member of the Commission, said that a preliminary report should be as uncomplicated and uncontroversial as possible, since it might otherwise prejudice future developments. He therefore proposed removing all controversial points from paragraph 10 so that, as from the second sentence, the middle section would read:

"They emanate from one single side (from the Latin *latus*). But the Commission does not exclude so-called 'collective' or 'joint' acts, inasmuch as they are performed by a plurality of States which wish to express, simultaneously or in parallel fashion,".

*It was so agreed.*

47. Mr. BENNOUNA, taking up Mr. Operti Badan's point concerning international organizations, said it was

regrettable that such bodies had been excluded from the purview of the study. In particular, he wondered about the status of acts by small regional organizations. It seemed anomalous that an act which appeared questionable when performed by an individual State became acceptable when undertaken by a small supranational organization. Regional organizations frequently took direct action against third parties, for example in the form of sanctions or reprisals. There was no difference, in his view, between “collective” acts of States and acts undertaken by small-scale regional organizations. He could live with the proposed restriction, but he had doubts about the underlying logic.

48. The CHAIRMAN said that Mr. Bennouna’s point was valid in situations where an organization acted in place of its members. But the Special Rapporteur would be faced with a boundless task if his task was extended to include international organizations. At the same time, there was nothing to prevent him from making comparisons to illustrate a point.

49. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said that the Working Group had discussed the matter in detail and a future study of unilateral acts by international organizations had not been ruled out. However, it had been decided, in accordance with the guidelines established by the Commission at the previous session and by the General Assembly in resolution 51/160, to focus in the current quinquennium on States rather than other subjects of international law. He drew attention to the General scheme contained in annex II to the report of the Commission on the work of its forty-eighth session which, under section 3 (b), Law of unilateral acts listed, *inter alia*, “Unilateral acts of States”, “Law applicable to resolutions of international organizations” and “Control of validity of the resolutions of international organizations”. As the Commission was embarking on the first attempt ever to codify the law of unilateral acts, it was sensible to begin with unilateral acts of States, which had been addressed most frequently in doctrinal works and on which a certain amount of jurisprudence had been developed. The Working Group did not intend to exclude acts carried out by other subjects of international law, as was noted in the last sentence of paragraph 11.

50. Mr. OPERTTI BADAN said that, in view of the possibility that such acts might be discussed at a later stage, he intended to submit a document on the subject at the next session.

51. The CHAIRMAN said that his successor as Chairman would rule on the matter at the next session. In his view, paragraph 11 clearly ruled out any such discussion.

52. Speaking as a member of the Commission, he proposed that the words “the first report that the Commission could request”, at the end of paragraph 19, should be replaced by “the first report to be prepared by the Special Rapporteur”. He further proposed that the words “as appropriate” should be deleted from the first sentence of paragraph 26.

*It was so agreed.*

53. 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 unilateral acts of States, as amended.

*The report of the Working Group on unilateral acts of States, as amended, was adopted.*

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

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

54. The CHAIRMAN, drawing the Commission’s attention to document A/CN.4/L.539 and Add.1-7, said that he intended to proceed section by section or article by article rather than paragraph by paragraph as was the customary procedure.

55. Mr. GALICKI (Rapporteur) said that document A/CN.4/L.539 had been prepared before the end of the debate on the draft articles. Paragraph 6, for example, referred to 26 draft articles instead of 27, the additional article having been drafted at a plenary meeting rather than in the Drafting Committee. Moreover, as document A/CN.4/L.539/Add.1 concerning the preamble had not yet been issued, he suggested that the Commission should proceed directly to a discussion of the documents dealing with the commentaries to the draft articles.

56. The CHAIRMAN said that the secretariat’s workload was already extremely heavy and it would be unable to cope with requests for additional corrigenda. The Commission could rely on the secretariat to make the necessary amendments to paragraphs 6 and 7 in due course.

#### **A. Introduction (A/CN.4/L.539)**

*Section A was adopted.*

#### **B. Consideration of the topic at the present session**

57. The CHAIRMAN said that note had been taken of the Rapporteur’s comments and inquired about the choice of 1 January 1999, placed in square brackets in paragraph 7, as the deadline for the submission of comments and observations to the Secretary-General.

58. Mr. MIKULKA (Special Rapporteur) said that States normally had at least one year to submit comments, but the Sixth Committee might decide otherwise.

59. The CHAIRMAN, speaking as a member of the Commission, proposed that the following new paragraph 6 *bis* should be inserted between paragraphs 6 and 7:

“6 *bis*. At its 2512th meeting, on 14 July 1997, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Václav Mikulka, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion in a short period of time its first

reading of the draft articles on nationality of natural persons in relation to the succession of States.”

He further proposed that a footnote to paragraph 6 *bis*, similar to footnote 291 in the report of the Commission on the work of its forty-eighth session, should refer to a request by the Commission to Mr. Mikulka to attend the fifty-second session of the General Assembly on its behalf in order to follow the debate in the Sixth Committee on the report of the Commission.

*It was so agreed.*

*Section B, as amended, was adopted.*

**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 (A/CN.4/L.539/Add.1-7)**

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

*Commentary to article 1 (Right to a nationality) (A/CN.4/L.539/Add.2)*

60. The CHAIRMAN suggested that the word *stipulé* in the French version at the beginning of paragraph (6) of the commentary should be amended to read *mentionné* or *prévu*.

*It was so agreed.*

*The commentary to article 1, as amended, was adopted.*

*Commentary to article 2 (Use of terms)*

61. Mr. MIKULKA (Special Rapporteur) proposed that paragraph (3) of the commentary to article 2 and the footnote thereto should be deleted, because the same point was adequately covered in the commentary to new draft article 27.

*It was so agreed.*

62. Mr. HAFNER pointed out that the statement at the beginning of paragraph (8) to the effect that the term “person concerned” did not include nationals of third States was incorrect, since a person with dual nationality might be a national both of the predecessor State and of a third State. He proposed replacing the words “nationals of third States” by “persons possessing only the nationality of a third State”.

63. Mr. MIKULKA (Special Rapporteur) agreed that the sentence should be reworded along those lines.

64. The CHAIRMAN noted that nationals of third States were also mentioned in paragraphs (6) and (7) and asked why the word “third” in paragraph (7) had been placed in square brackets in a quotation from O’Connell.

65. Mr. MIKULKA (Special Rapporteur) said that paragraph (7) referred to cases of annexation. The word “third” had been inserted to enhance the relevance of the example to the topic under discussion.

66. Mr. ROSENSTOCK said the word “third” had been put in brackets only because the text between quotation

marks was based on a quote from O’Connell, who had not used that word. It had been added later, presumably to make the text more comprehensible. Paragraphs (6) to (8), especially with the small change suggested by Mr. Hafner, were fully consistent.

67. The CHAIRMAN said he had a problem with the translation in paragraph (7) of “inchoate” as *rudimentaire* in French. With the Commission’s permission, he would discuss it with the secretariat.

68. Mr. ECONOMIDES asked that his minority opinion, referred to in paragraph (13), should be further explained by adding the following:

“One member of the Commission expressed reservations on 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 other cases (transfer or separation), only those who have their habitual residence in the territory affected by the transfer. 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.”

69. Mr. ROSENSTOCK said Mr. Economides’ proposed text sounded more like a summary of the debate than an addition to the comments. He believed the point was covered by the existing formulation.

70. Mr. ECONOMIDES said he had made his point on several occasions during the debate and had the right to express his personal opinion.

71. The CHAIRMAN said that that right was not being denied, but the opinion was that of only one member of the Commission and should therefore be expressed more briefly. It was legitimate to include such an opinion in the report on the first reading of a draft, but not the second. Too much detail should nonetheless be avoided in the commentary, which should simply indicate that there might have been a problem. The report was, after all, not a summary record.

72. Mr. KATEKA said the phrase “One member” should be replaced by “A member”, as it was not a matter of counting the number of members expressing reservations.

73. The CHAIRMAN agreed, noting that no change would be required in the French or Spanish versions. He asked whether Commission members agreed to the inclusion of Mr. Economides’ proposed addition, as long as it did not constitute a precedent.

74. Mr. SIMMA asked whether there was a guiding principle for deciding on so comprehensive an addition as that proposed by Mr. Economides or whether it was for the Commission to decide on each such case.

75. The CHAIRMAN said members asking for their opposing views to be reflected in the report should be moderate. The Commission should take the decision on a case-by-case basis if a proposal was challenged.

*At the suggestion of Mr. Bennouna, the Commission decided to discuss Mr. Economides' proposal at a subsequent meeting.*

76. Mr. MIKULKA (Special Rapporteur) said he would have no problem accepting Mr. Economides' proposal, but wondered whether the last part was necessary, as it went beyond the debate on definition of terms to address matters of substance. It also referred to persons having their habitual residence in the transferred territory, but was obviously not just about transfer but also about separation; reference would have to be made to territories subject to State succession. Several other elements should perhaps be included for the sake of uniformity.

77. Mr. THIAM said it was a general rule in the Commission that members had the right for their personal opinions to be reflected in the report.

78. The CHAIRMAN said he agreed, but no member's views should occupy as much space as the commentaries of the Commission itself. Personally he had some doubts about paragraph (10), which was trying too hard to accommodate every possible case of unification or absorption; he wondered whether a predecessor State could disappear.

*Commentary to article 3 (Prevention of statelessness)*

79. The CHAIRMAN, speaking as a member of the Commission, asked why in the French version of the last sentence of paragraph (2), the phrase *en offrant des solutions qui peuvent être reprises mutatis mutandis par le législateur*, used a verb where choice was implied, whereas an imperative was needed. The word *peuvent* should be replaced by *doivent*.

80. Mr. ROSENSTOCK said he suspected the problem was one of translation, as the English phrasing, "which can . . . be used by", was perfectly acceptable.

81. The CHAIRMAN said that "shall" or "must" would be more appropriate, and that the problem was therefore not one of translation but of substance.

82. Mr. MIKULKA (Special Rapporteur) suggested there was a misunderstanding, as the reference was to multilateral conventions on nationality in general, especially from the standpoint of naturalization. He thought the Commission wished to distinguish between naturalization and the solution of problems of nationality in the context of succession of States. States could, of course, be guided by concepts contained in more general conventions, but it would be completely erroneous to say that they "must" be so guided, as in that case the Commission would be contradicting itself. The English text faithfully expressed the intention.

83. The CHAIRMAN said the French phrase *le législateur national à la recherche des solutions*, however, was completely unacceptable in French and should be redrafted by the secretariat.

84. Mr. DUGARD said that the comment on "dual or multiple nationality" in the last sentence of paragraph (6) seemed to imply some criticism of that concept, whereas the Commission had been careful to avoid any judgement

on the subject. In the current instance, the concept was being linked with the creation of legal bonds of nationality without appropriate connection, of which the Commission had been critical. It might be better to say, "on an acceptably large scale", so as to differentiate dual or multiple nationality from nationality without appropriate connection.

85. The CHAIRMAN said the Commission had been divided on the issue, with some members feeling that it was not a serious matter to let dual or multiple nationality develop and others, like himself, very hostile to the idea. He was not sure that the proposal had the effect Mr. Dugard was seeking to achieve.

86. Mr. GALICKI (Rapporteur) said he supported the Chairman's position on multiple nationality.

87. Mr. MIKULKA (Special Rapporteur) said the sentence must be read in conjunction with the previous two sentences. It was a statement of fact that could not be changed. If the intention was to say that two given States had the obligation to attribute their nationality, then dual nationality would be inevitable. The Commission was not saying whether it did or did not like dual nationality, but rather that the obligation to attribute nationality could not be interpreted in such a way as to mean that every State was under that obligation. Otherwise, the person concerned would end up with the nationality of all the States concerned.

88. The CHAIRMAN, speaking as a member of the Commission, said that the sentence seemed to suggest condemnation, because of the clause beginning with "otherwise".

89. Mr. MIKULKA (Special Rapporteur) asked whether that connotation would be introduced by Mr. Dugard's proposed amendment. As drafted, however, the text was neutral. It simply stated that multiple nationality would occur frequently and there would be numerous cases of statelessness.

90. Mr. DUGARD withdrew his proposal.

*The commentary to article 3 was adopted.*

*Commentary to article 4 (Presumption of nationality)*

*The commentary to article 4 was adopted.*

*Commentary to article 5 (Legislation concerning nationality and other connected issues)*

91. Mr. HAFNER said that paragraph (6) rightly stated that there had been a different view concerning the use of the word "should" or "shall". It might also be useful to add the reason for emphasizing the use of the word "shall". The last sentence could be reworded to begin, "In light of the obligation incumbent on the State to take the necessary legislative or administrative measures to implement the rules of international law, some members considered . . .".

92. Mr. ROSENSTOCK said he agreed with Mr. Hafner's proposal, but it should be slightly redrafted so as

to begin the sentence with the words "Some members, however,".

93. The CHAIRMAN said that the word "was", in the same sentence, should be replaced by "would have been". Paragraph (3) gave the impression that it applied to the draft articles as a whole. In view of article 19, however, and the distinction drawn between Parts I and II, the explanation was too rigid. It would be better to indicate that, in regard to the obligations—in the strict legal sense—of States under Part I, but not under Part II, reference should be made to article 19.

94. Mr. MIKULKA (Special Rapporteur) asked what would then become of the article on unification. Was it not an obligation, despite the fact that it appeared in Part II?

95. The CHAIRMAN said greater precision was needed. The commentary should spell out that respect for the principles set out in the draft articles was called for when such principles were binding. Often the principles in Part II however, were not binding.

96. Mr. ECONOMIDES said that none of the provisions, either in Part I or in Part II, had binding force.

97. The CHAIRMAN, speaking as a member of the Commission, said he disagreed. What was at issue was the legal value of principles, not of provisions.

98. Mr. ROSENSTOCK said that the English version was quite careful in its use of the word "should". The current discussion was, in fact, either a non-issue or a confusion based on what had originally been concepts of the distinction between Parts I and II but which could not be accurately so described at the current time.

99. The CHAIRMAN, speaking as a member of the Commission, said he would not insist on his objection, but he found the end of paragraph (1) was not clear.

100. Mr. MIKULKA (Special Rapporteur) said the French text did not convey exactly the same meaning as the English. The matter could perhaps be resolved by slightly recasting the French version.

101. Mr. BENNOUNA said he agreed that there was a problem of translation which the secretariat could resolve.

*The commentary to article 5, as amended, was adopted.*

*Commentary to article 6 (Effective date)*

102. The CHAIRMAN said that the distinction drawn in the French version of paragraph (1) between *principes généraux de droit* and *principes généraux du droit international* caused a problem. What was intended was the general principles of law, referred to in article 38, paragraph 1 (c), of the Statute of ICJ.

*The commentary to article 6, as amended in the French version, was adopted.*

*The meeting rose at 6.05 p.m.*

## 2513th MEETING

*Tuesday, 15 July 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

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

### Diplomatic protection (A/CN.4/L.537)

[Agenda item 6]

#### REPORT OF THE WORKING GROUP

1. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection), introducing the report of the Working Group (A/CN.4/L.537), said that diplomatic protection was a traditional topic in international law and also one of the oldest institutions, since it was tied in with the very existence of the State and one of those which had made it possible to take individuals and non-State entities into consideration in international life. The Working Group had therefore kept the subject's title, which was the one it had had for centuries. It had sought to distinguish diplomatic protection from certain forms of intervention by diplomatic or consular agents provided for in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, so as to clearly mark the difference between diplomatic protection and diplomatic and consular relations. It had noted that the institution had evolved and had adapted with time, in order to take account of the fact that individuals had more and more access to international bodies and could even be parties in international courts. The Working Group had considered that, in view of the increased cross-border exchanges in persons and in trade, claims submitted by States on behalf of their nationals would remain an area of significant interest.

2. For the purposes of its work, the Working Group had borne in mind the general outline contained in the report of the Commission to the General Assembly on the work of its forty-eighth session,<sup>1</sup> the topical summary of the discussion held by the Sixth Committee at the fifty-first session of the General Assembly (A/CN.4/479, sect. E.6) and written comments submitted by Governments. It had decided to retain from the general outline only material dealing with diplomatic protection *stricto sensu*, taking

<sup>1</sup> *Yearbook* . . . 1996, vol. II (Part Two), annex II, addendum 1.

the view that the topic should not extend to claims deriving from direct harm caused by one State to another. It would address only indirect harm caused to natural or legal persons whose case was taken up by a State.

3. As to the scope of the topic, the Working Group had considered that the study of diplomatic protection would be confined to codifying secondary rules and had distinguished the topic from that of the status of aliens and the minimum rules that every State should respect in that regard. As far as the nature and the definition of diplomatic protection were concerned, the Commission had adopted a pragmatic approach and for that reason the Working Group had not thought it necessary to take sides in the various doctrinal debates on the subject. Its point of departure was the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case<sup>2</sup> and it had pointed out that it was link of nationality which provided the basis for the State's right to take up a case for its nationals. The Working Group had, in that regard, discussed certain questions which the Special Rapporteur should study in his preliminary report, such as the question of whether there was a right to diplomatic protection for the benefit of nationals or whether their agreement was needed in order for the State to be able to exercise its protection.

4. In the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,<sup>3</sup> ICJ had recognized that international organizations had the right to protect their agents—one spoke in such cases of functional protection—on the basis not of nationality but of status as an agent of the organization. In view of the links between diplomatic protection and functional protection, the Working Group had decided for the time being that the latter formed part of the topic and that it was for the Commission to decide on that matter once the Special Rapporteur had submitted his preliminary report. The two types of protection were analogous in many ways, but there were also some differences and they were not mutually exclusive.

5. The Working Group had recalled that diplomatic protection related solely to indirect harm, since the State intervened to ensure respect for international law in the person of its nationals, because they did not have access to the international sphere. Some questions arose with regard to legal persons (theory of control, rights of shareholders, for example) that the Special Rapporteur would have to take up in his preliminary report. He would draw members' attention to section II (Content of the topic) of the report of the Working Group, and particularly the outline it contained. The Planning Group would have to decide how the study of the topic was to be devised.

6. Some mistakes had crept into the report and should be corrected. In paragraph 13 of the French version, the word *ou* should be preceded by *et*. On pages 3 and 4 of the English version, the word "Reparations" should be placed in the singular and, on page 5, in section C, the words "aircrafts" and "spacecrafts" obviously did not need the final "s". The words "in special cases" in section B.3 should be deleted. Lastly, he suggested that the heading of section A

of chapter IV should be replaced by: "Final settlement between the parties".

7. Mr. LUKASHUK said that tribute should be paid to the Chairman of the Working Group for the way in which he had conducted its work, in which unanimity had prevailed. The Special Rapporteur would have to consider the very notion of diplomatic protection, which was increasingly geared in modern law more and more to the rights of the individual, who currently had greater access to the international sphere. As the Working Group indicated in paragraph 11, the study should focus on the consequences of an internationally wrongful act which caused indirect injury to the State usually because of injury to its nationals. Diplomatic protection had become one of the principal means of protecting human rights and the Special Rapporteur would also have to take up that issue.

8. He would also have to envisage his study from the standpoint of modern constitutional law, since diplomatic protection was based on nationality, and nationality, which was essentially a matter for internal law, was currently regarded as a bilateral link between the State and individual that entailed rights and obligations for both of them. Accordingly, it could be said that, as far as modern international law was concerned, a right to diplomatic protection did indeed exist and, for that reason, he did not believe—to mention an issue raised in paragraph 16 of the report of the Working Group—that diplomatic protection was based on jurisdiction *ratione personae* over the individual.

9. Again, the Special Rapporteur's preliminary report should start with an introduction which, following a brief background to the topic, would set out the state of international law at the current time. It would also have to be pointed out that protection of the rights of nationals was one of the State's principal functions and that diplomatic protection was one of the oldest forms of protection of human rights.

10. Mr. CANDIOTI said he fully shared Mr. Lukashuk's views concerning the rights of individuals, which should be studied along with the rights of States exercising diplomatic protection. A proper balance meant that both of them should be discussed, and the situation of the State against which protection was exercised would also need to be considered.

11. Latin America had made a major contribution to the historical development of the law on diplomatic protection, particularly in the last century, when such protection had given rise to abuses. Lastly, the really fundamental issue that would have to be examined was that of exhaustion of local remedies.

12. Mr. Sreenivasa RAO said that the report of the Working Group was excellent and shed light on important issues. The topic, however, had not seemed convincing in the beginning, especially as it had had an unfortunate history at a time when diplomatic protection could be seen as an extension of colonial power. In the modern world, it was still a delicate issue and of great concern above all to small States and to developing countries. But those doubts disappeared on reading the report, which clearly showed that the subject could be scrutinized in a professional

<sup>2</sup> Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.

<sup>3</sup> I.C.J. Reports 1949, p. 174.

manner. Furthermore, the time had arrived to re-evaluate the long-standing principles on which diplomatic protection was based.

13. Paragraph 17 referred to the case of agents of international organizations, for which the organizations provided "functional" protection. According to the paragraph, diplomatic protection properly speaking was to be clearly distinguished from such "functional" protection, the idea being supported by a quotation from the advisory opinion of ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*. He nonetheless doubted whether the Court had actually adopted the position attributed to it. In any event, as Mr. Lukashuk had said, if a State was to exercise its diplomatic protection, in addition to and independent of the "functional" protection of an international organization, the basis should be clearly identified and it must be for a different violation, for a different cause or for a different purpose; otherwise, it might lead to twofold protection, a situation that it would be better to avoid. But if the act causing the exercise of protection could not be covered by functional protection alone and was liable to bring diplomatic protection into play, the State should preserve the right to protect its nationals. He wished to keep an open mind on such complex issues and he awaited with interest the development of the Commission's views.

14. In his professional activities he had found in the modern world a tendency towards excessive broadening of diplomatic protection. It occurred chiefly in the context of negotiation of foreign investment agreements, particularly in the case of some exporting Western States. That matter would have to be borne in mind and it related to issues of the exhaustion of local remedies such as when could such remedies be said to be exhausted; to the nationals of which States were they offered; and for what purpose.

15. Other aspects of diplomatic protection would doubtless be taken up in the course of the work, such as equity in the protection afforded to individuals, the needs of the economy and the requirements of inter-State cooperation, the effective provision of local remedies, and so on. Diplomatic protection should be neither the reason nor the pretext for promoting excessive "internationalization" of what was nothing more than a State's economic policy.

16. Mr. ROSENSTOCK said he endorsed the comments by Mr. Lukashuk and would emphasize the importance of the Working Group's decision to focus on secondary rules. In his opinion, it would not be profitable to discuss primary rules as well, and still less foreign investment law.

17. Mr. Sreenivasa RAO said he agreed with Mr. Rosenstock that there could be no question of studying primary rules, and certainly not foreign investment law. He had simply wished to draw the Commission's attention to certain issues which would not fail to arise in terms of primary rules in connection with consideration of certain points in the proposed outline: right of espousal, the role of the State in diplomatic protection, or exhaustion of local remedies, for example.

18. Mr. PAMBOU-TCHIVOUNDA said that it would be useful to include in paragraph 21, so that it also fea-

tured in the report of the Commission to the General Assembly, the Commission's plan to consider the topic of diplomatic protection. It would also give an idea of the Commission's overall strategy.

19. The first phrase in paragraph 11, "Just like the topic of State responsibility", was awkward and should be deleted. Nor did the remainder of the paragraph seem very clear: if an obligation was breached, the breach was in the context of inter-State relations, in other words a matter of direct international responsibility of the classic type. The paragraph spoke, however, of an internationally wrongful act which caused indirect injury to the State, something which was rather difficult to grasp in conceptual terms.

20. Limiting the work to codification of the secondary rules on the subject, as stated at the beginning of paragraph 12, should not hide the fact that, as the Commission moved ahead, that exclusive focus on the secondary rules would make the work more delicate and more difficult. The Commission would in any event have to study the conditions under which diplomatic protection was exercised, which would form the subject of chapter III, the "clean hands" rule and exhaustion of local remedies, all of them complex questions which would necessarily mean venturing into the field of the primary rules.

21. Mr. SIMMA thanked Mr. Sreenivasa Rao and Mr. Pambou-Tchivounda for drawing the Commission's attention to a number of important aspects of the topic it intended to take up. He endorsed more particularly what Mr. Pambou-Tchivounda had said about how close some of the issues to be studied were to the primary rules. That was certainly the case with the "clean hands" rule which was really on the borderline between primary and secondary rules. The Commission could not dogmatically avoid studying problems pertaining to the primary rules. Moreover, the principle inferred from the *Mavrommatis Palestine Concessions* case and the decision to discuss only the secondary rules were in fact simply points of departure. Furthermore, the decision to leave out the primary rules from the consideration of the topic of State responsibility<sup>4</sup> was an old decision and should be reviewed in the light of the current situation.

22. Mr. ECONOMIDES said that the proposed outline was very satisfying. Paragraph 12, he noted, spoke of international obligations whether under customary or treaty law. He hoped that the study would not rule out the case of a person who suffered harm because the right conferred on him by an international organization had been violated and he appealed for diplomatic protection from his State of origin. In his opinion, therefore, the paragraph should end with the phrase: "whether under customary or treaty or institutional law".

23. Mr. BENNOUNA (Chairman of the Working Group) said that the Working Group had based itself on the classic sources of law as enumerated in Article 38 of the Statute of ICJ, namely international conventions, international custom and the general principles of law. Mr. Economides probably had in mind what was termed derived international law, since he spoke of the law cre-

<sup>4</sup> See *Yearbook* . . . 1962, vol. II, p. 191, doc. A/5209, para. 68 and *Yearbook* . . . 1963, vol. II, p. 224, doc. A/5509, paras. 52-54.

ated by a decision of an institution based itself on treaty law. Nevertheless, not all readers would understand what the Commission meant by “institutional law”.

24. The CHAIRMAN, speaking as a member of the Commission, said it would be useful to arrive at a still better definition of the topic and to use a more precise vocabulary, more particularly in paragraph 12. In his opinion, international protection was one element in the law of State responsibility and it was regrettable that the Special Rapporteurs on the latter topic had not dealt with an institution which was one of the modalities for the implementation of responsibility. Accordingly, the terminology in paragraph 12 should be changed to speak of “an internationally wrongful act” rather than “a violation of an international obligation” of the State. Moreover, that would meet the concern expressed by Mr. Economides in connection with the sources of the obligation in question and would provide a *renvoi* to the definition of an internationally wrongful act given in article 3 of the draft articles on State responsibility.<sup>5</sup>

25. Mr. Simma and Mr. Pambou-Tchivounda seemed to anticipate a slide towards examination of the primary rules. Actually, it was in the Commission’s interest to keep strictly to the secondary rules and take up again the approach originally followed by a former Special Rapporteur on State responsibility, Mr. Ago, who had had a brilliant idea in approaching that topic from the standpoint of the secondary rules.

26. It had to be acknowledged that diplomatic protection was a topic fraught with misgivings and political difficulties. It was an institution which had historically been imposed by the developed and powerful States on the weaker countries, more particularly in Latin America. Indeed, it was for that reason that the jurists from that continent had played such a role in the juridical crystallization of diplomatic protection and also for that reason that it had materialized as a defence against what had come to be known, after a term used by Jessup, as “dollar diplomacy”. A most striking thing was the complete lack of symmetry in diplomatic protection. A State whose national had been injured could exercise its diplomatic protection against the State causing the harm, but the reverse was not true: a State which had suffered harm as a result of an individual could not complain to the State of which that person was a national. Clearly, positions of political and economic strength explained why it was a one-way institution, so to speak.

27. Again, even though the concept of diplomatic protection was unquestionably a concept in positive law, one might well ask whether it was not to a large extent a fiction and whether it was not entirely outmoded on the eve of the twenty-first century. It had emerged at a time when the individual was not yet regarded as a subject of international law and when the State had had to replace him in order to assert his rights and so avoid a denial of justice. The quotation in paragraph 17 from the *Mavrommatis Palestine Concessions* case clearly showed that originally it was its own right—and not that of its national—that the State was deemed to claim. However, that postulate was contradicted by the way in which the problem of repara-

tion was settled: such reparation should in all logic be granted on the basis of the injury suffered by the State since it was its own right that it was exercising, yet it was calculated in terms of the harm suffered by the individual. The fact that individuals were nowadays increasingly recognized as subjects of international law was a dimension that would necessarily have to be taken into account in the Special Rapporteur’s first report on the topic.

28. He was bothered by the title and the content of chapter IV of the outline, concerning the “Consequences of diplomatic protection”. In his opinion, the title was not clear and was not in keeping with the Working Group’s general approach to the topic. As to Mr. Bennouna’s suggestion that the title of section A of that chapter should be replaced by “Final settlement between the parties”, he wondered who the parties were. Apparently, the Chairman of the Working Group meant the State on the one hand and the individual on the other. However, in diplomatic protection, the parties were in reality the protector State on the one hand, and on the other, the State that was the author of the internationally wrongful act. Nor was he convinced by the enumeration in sections B, C, D and E, which seemed to lack consistency. In the final analysis, he wondered whether the true consequence of diplomatic protection was not quite simply reparation.

29. Mr. MIKULKA said that Mr. Pellet’s remarks added still further to the feeling of confusion he experienced in connection with paragraphs 11, 12 and 13. Initially, he had fully subscribed to the idea set out in paragraph 13 that the State had the right to act for the benefit of natural or legal persons that were victims of injury or a denial of justice in another State. From a perusal of paragraph 11, that basic idea seemed to be contradicted by the fact that the Commission in its study of diplomatic protection should focus on the consequences of an internationally wrongful act, an approach which presupposed that consideration would be given exclusively to failures to meet international obligations. Yet natural or legal persons might easily have suffered injury under internal law, even if it was at the international level that their cause was then taken up by the State representing them. That aspect seemed to have been totally overlooked. Paragraph 12, which used phrases such as “the topic will be limited only to codification of secondary rules on the subject”, or again “violation of an international obligation of the State”, gave the impression, taken in isolation, that State responsibility was at issue. If, as the Working Group seemed to affirm, diplomatic protection genuinely derived from secondary rules, he wondered why the Commission, when it had completed the first reading of the articles on State responsibility, had failed to mention the question as one of the consequences of internationally wrongful acts.

30. Lastly, he was puzzled by the remark by the Chairman, for whom the consequence of diplomatic protection would in fact be reparation. In his opinion, such reparation—which could incidentally be of a number of kinds—was made precisely through diplomatic protection, which meant ending up in a vicious circle.

31. Mr. THIAM said he too thought that the topic of diplomatic protection was basically one of the secondary rules on State responsibility. It was in the matter of the subjects of law that he disagreed with the outline pro-

<sup>5</sup> *Yearbook* . . . 1996, vol. II (Part Two), chap. III, sect. D.

posed in the report of the Working Group. It was quite normal for natural persons to benefit from diplomatic protection, but the same was not necessarily true in the case of legal persons. Among the categories of legal persons enumerated, the Working Group appeared to have forgotten multinational corporations, which were often more powerful than States, to which it seemed quite paradoxical that States should grant diplomatic protection.

32. Mr. BENNOUNA (Chairman of the Working Group), responding to comments, said that, while it was increasingly common for individuals to be recognized as subjects of international law, they were recognized as such only to the extent that States agreed.

33. The Working Group had taken the view that legal persons should be included in the topic for the time being, because of the nationality link which still formed the basis for diplomatic protection. Even if, a priori, Mr. Thiam's comment about transnational corporations was relevant—and it should not be forgotten that it had never been possible to secure the adoption within the United Nations of a code of conduct for such corporations—it was impossible to ignore the nationality criterion.

34. The specific issues concerning that category of persons, whether they related to different nationalities among the shareholders, the case of legal persons which had both the nationality of the host State and that of the State deemed to ensure their protection, or again new direct remedies afforded to foreign investors, they would have to be examined as the Commission moved ahead with the topic.

35. Mr. LUKASHUK said that, unlike the Chairman, for whom modern international law was simply an expression of the balance of power, he thought that it was intended to respond to the needs of the international community. In his opinion, the problems of the survival of mankind could not be settled by power relationships.

36. The issues raised by Mr. Mikulka were both very important and highly relevant. They were, quite obviously, complex matters and he was not sure the members of the Commission were in a position to respond to them at the current time. However, they would deserve to be considered in future work on the topic.

37. Mr. FERRARI BRAVO recalled that PCIJ had said that "By taking up the case of one of its subjects . . . a State is in reality asserting its own rights".<sup>6</sup> It had been an old concept in which diplomatic protection had been identified with protection of the individual. The State had then been regarded as the "master" of its citizens, a theory broadly supported by the doctrine of the time. However, it was currently an outdated theory, not only because of the breakthrough of the individual as a subject of international law but also because of the increasingly complex problems of the nationality of legal persons tied in with the development of transnational corporations. As shown by the *Barcelona Traction* case,<sup>7</sup> for example, a company might be of a particular nationality and have shareholders

who were nationals of different countries. In that case, the problem arose of the interest in taking action of the State whose nationality the company possessed.

38. They were points the Special Rapporteur would have to take up when he came to set out in his first report his view of the work to be done on the topic. However, for his own part, he hoped that the Special Rapporteur would not dwell on the matter too much, for contrary to what had been said by the Chairman, he believed that the Commission had done well, on the initiative of the former Special Rapporteur on State responsibility, Mr. Ago, to leave diplomatic protection out of the theory of responsibility.

39. The CHAIRMAN said a perusal of the first and second reports of the former Special Rapporteur, Mr. Ago<sup>8</sup> showed that he had been far from setting that issue aside and had probably thought in the beginning of including it in the topic that had been assigned to him.

40. Mr. DUGARD said it would perhaps be useful to indicate in the report of the Working Group that the Commission had already done preliminary work on the subject and mention more particularly the reports of the former Special Rapporteur on the topic of State responsibility, Mr. García Amador.<sup>9</sup> That might be of interest to the Sixth Committee.

41. The CHAIRMAN said that he feared that would be materially impossible at the current advanced stage in the work.

42. Mr. BENNOUNA (Chairman of the Working Group) said that all members of the Commission remembered the reports by the former Special Rapporteur, Mr. García Amador. However, the way in which the former Special Rapporteur had approached the topic, from the standpoint of the status of aliens, in other words, from the primary rules, had ultimately led to an impasse, and he would point out that the Commission had decided not to adopt that approach. It had currently decided to discuss the secondary rules, on the basis of harm suffered by the individual. Accordingly, it would have to clear a path between the ever-present reality of inter-State relations and the "recognition" of the rights of the individual, which could not yet, however, be regarded as forming part of positive law. The major developments in recent years also meant that the topic had to be viewed from a new and "fresher" angle. However, as a reminder of the background, paragraph 11 could easily refer to a footnote which would explain that the topic had already been taken up in the Commission by the former Special Rapporteur from a different standpoint.

43. Mr. SIMMA said the Chairman had rightly thought that the topic of diplomatic protection formed part of State responsibility as a specific aspect of the implementation

<sup>8</sup> First report: *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1; and second report: *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233.

<sup>9</sup> First report: *Yearbook . . . 1956*, vol. II, p. 173, document A/CN.4/96; second report: *Yearbook . . . 1957*, vol. II, p. 104, document A/CN.4/106; third report: *Yearbook . . . 1958*, vol. II, p. 47, document A/CN.4/111; fourth report: *Yearbook . . . 1959*, vol. II, p. 1, document A/CN.4/119; fifth report: *Yearbook . . . 1960*, vol. II, p. 41, document A/CN.4/125; and sixth report: *Yearbook . . . 1961*, vol. II, p. 1, document A/CN.4/134 and Add.1.

<sup>6</sup> *Mavrommatis Palestine Concessions* case (see footnote 2 above), p. 12.

<sup>7</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

of international responsibility. However, the reason why that issue had been excluded from the study on State responsibility was in fact quite simple: in all doctrinal works, the topic was dealt with as a corollary to the question of the treatment of aliens, which was governed by a specific set of primary rules. That clearly showed that the distinction between primary and secondary rules would be very difficult, indeed impossible, to make and that the Commission would sooner or later be obliged to take up the primary rules.

44. Mr. Sreenivasa RAO noted that in the outline, “insurers” were included among legal persons, but in a separate category. While the relevance of such a classification could be challenged, it was nonetheless acceptable for the purposes of identification. Again, with reference to chapter I, section B.3, concerning the right of espousal, and section D, on transferability of claims, he wondered about the categories of persons who would be covered by those provisions in a study on diplomatic protection. Furthermore, for the non-specialist reader, the formula *lis alibi pendens*, in chapter III, section A.5, could be replaced by the equivalent in each of the Commission’s working languages and then be placed after it in brackets.

45. Mr. BENNOUNA (Chairman of the Working Group) said he agreed with the latter proposal. As to the first comment, he confirmed that insurers formed part of the category of legal persons, but, in the case of harm suffered by a person, the protection of the insurer could raise a special legal problem, which warranted separate treatment. Lastly, and with reference to the transferability of claims, the Commission would have to consider certain problems relating, for instance, to a person’s death or disappearance, such as the problem of the successors to the claims, or transfers.

46. The CHAIRMAN, speaking as a member of the Commission, said it was surprising that insurers figured under the heading of legal persons, when the problem also arose for natural persons.

47. Mr. OPERTTI BADAN said that he had some doubts about chapter I, section B, which defined the categories of legal persons. More particularly, he wondered why, when item 1 (a) was very broad in scope, item 1 (b) was confined to “partnerships”, which could take on various forms, depending on the State’s internal law. Secondly, section B.3, concerning the right of espousal, should be updated and should take account more particularly of the special case of transnational corporations and of the jurisprudence in the *Barcelona Traction* case.

48. The CHAIRMAN recalled, in connection with chapter I, section B.3, that the Chairman of the Working Group had proposed that the phrase “in special cases” should be deleted. The concrete proposals that had been made to the main body of the text all related to paragraph 12, which, after being recast, would read:

“12. Thus the topic would be limited only to codification of secondary rules: while addressing the requirement of an internationally wrongful act of the State as a prerequisite, it will not address the specific content of the obligations breached.”

The footnote to which reference would be made after the expression “secondary rules” would indicate that that approach contrasted with the one which had been adopted at the beginning of the Commission’s work on responsibility, as conducted by the former Special Rapporteur on the topic of State responsibility, Mr. Garcia Amador.

49. In the outline, the Latin expression *lis alibi pendens*, in chapter III, section A.5, would be translated into the Commission’s working languages and, a priori, the suggestion for the French version would be the term *litispendance*. The Chairman of the Working Group had agreed to word the title of chapter IV, section A, “Final satisfaction”. Lastly, he would propose, as a member of the Commission, that the title of chapter IV, section B, should read “Submission of the question to a jurisdiction to determine and liquidate claims”.

50. In response to a question by Mr. MIKULKA concerning the title preceding paragraph 11, which spoke of “secondary rules”, he explained that the intention was to say that the Commission was not concerned with the nature of the rule violated, for it was a lesser consideration. That position was fully in keeping with article 17 of the draft on State responsibility, concerning the irrelevance of the origin of the international obligation breached.<sup>10</sup>

51. Mr. BENNOUNA (Chairman of the Working Group) confirmed that the secondary rules were defined *a contrario*, so to speak, and were therefore a “hold-all” category. The Commission did not intend to define the rule of international law guaranteeing the treatment of aliens or that of investment in a particular country, or to codify the primary rule concerned. It would confine itself to saying that there were rules of international law which protected aliens, and it would limit the study to the possibility, for example, of a denial of justice, as it was usual under the rule of territorial jurisdiction for the State itself to remedy the harm. In the event of serious discrimination towards aliens, or a violation of the rights that they were guaranteed under basic rules of international law, diplomatic protection was the mechanism that raised the case to the international level. It was the existing mechanism that the Commission would endeavour to clarify.

52. The disappearance of diplomatic protection would, admittedly, mark a great advance in international law, for it would mean that individuals had become subjects of international law. That, however, was not the case, since the individual possessed only a limited degree of personality recognized by States when he acceded directly to a jurisdictional or other international body in order to claim his rights. As for the Calvo clause,<sup>11</sup> to which some members had alluded, it was, like others, an institution certainly conceived to the detriment of the weak, and hence the need to look precisely at what developments had taken place.

53. Furthermore, when the World Bank had created the International Centre for Settlement of Investment Disputes (ICSID) in 1965, thereby giving investors direct access to an international arbitration tribunal, some coun-

<sup>10</sup> See footnote 5 above.

<sup>11</sup> See *Yearbook* . . . 1956, vol. II, document A/CN.4/96, pp. 206-208.

tries had viewed it as a violation of their sovereignty. In the early days, the Latin American countries had not joined ICSID.

54. Accordingly, the topic was such that the Commission stood on the borderline between the rules of internal law and of international law, as well as the rules on human rights, assuring some degree of personality for non-State bodies, and of inter-State, yet still in the overall field of responsibility. The former Special Rapporteur on State responsibility, Mr. Ago had made a very judicious choice in opting for the "secondary" approach and confining himself to wrongful acts, thus leaving aside activities not prohibited by international law. The study of diplomatic protection had not been at the heart of the codification exercise, and he therefore thought that it could currently be undertaken in order to supplement the major work of codifying State responsibility.

55. Mr. GALICKI, emphasizing that the Commission was simply starting on the topic, wondered whether, as a precaution, it might not delete the word "only" from the English version of paragraph 12.

56. The CHAIRMAN pointed out that the change related perhaps to other language versions in addition to the English, but it did not apply to the French.

57. Mr. BENNOUNA (Chairman of the Working Group) said that, in his opinion, the recast version of paragraph 12 as read out by the Chairman was an improvement, subject to the insertion of the word "international" before "obligations". He also endorsed the Chairman's suggestions to amend the outline.

58. Mr. SIMMA said that it was not enough to delete the word "only". It should be replaced by "essentially", the ambiguity of which would be satisfactory to all points of view. In any event, the Commission was close to the limits of an outdated terminology.

59. Mr. ROSENSTOCK said that, unlike the proposal made by Mr. Simma, the suggestion to delete the word "only" was acceptable.

60. The CHAIRMAN emphasized that the ambiguity that would be introduced by Mr. Simma's amendment would be far from constructive. If the Commission implied that it might take up things other than secondary rules, it would meet with protest from a number of States that it would be reasonable to reassure. He said that, if he heard no objection, he would take it that the Commission agreed to that view and to adopt the report of the Working Group, as amended, and to make it a chapter of the report of the Commission on the work of its forty-ninth session.

*It was so agreed.*

#### **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 7 (Attribution of nationality to persons concerned having their habitual residence in another State)* (A/CN.4/L.539/Add.3)

61. Further to an exchange of views in which Mr. ECONOMIDES, Mr. MIKULKA (Special Rapporteur), Mr. ROSENSTOCK and Mr. KATEKA took part, the CHAIRMAN said that the question of the advisability of including in the commentaries proposals that the Commission had not adopted had been discussed for a number of years. Only by proceeding empirically and in a concrete fashion could the Commission expect to settle the problem, by endeavouring to display tolerance. It should nonetheless be acknowledged that the point of view of the Commission prevailed and that the commentary should be as concise as possible. For the continuation of the work, he therefore suggested that members who wished to add a paragraph to the commentary should draft it and communicate it in advance to the secretariat, which would ensure that it was circulated.

*The meeting rose at 1.05 p.m.*

---

## **2514th MEETING**

*Wednesday, 16 July 1997, at 10.10 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. 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 7* (Attribution of nationality to persons concerned having their habitual residence in another State) (*concluded*) (A/CN.4/L.539/Add.3)

1. The CHAIRMAN recalled that Mr. Economides had made a proposal (2513rd meeting) concerning the commentary relating to paragraph 1 of the article. The proposal, distributed as an informal working paper (ILC(XLIX)/Plenary/WP.6), was to insert a paragraph (3 *bis*) reading:

“(3) *bis*. According to the view of one member, paragraph 1 should be drafted in more stringent terms and provide for clear obligations not to attribute nationality automatically in the case referred to in this provision.”

2. Mr. MIKULKA (Special Rapporteur) said that he was strongly opposed to the proposal. The point Mr. Economides wanted to make was covered by paragraph 2 of the article and was explained in the part of the commentary relating to that paragraph.

3. Mr. ROSENSTOCK said that, while deprecating moves to incorporate in the commentary such matters as properly belonged in the summary records, he had no serious difficulty with Mr. Economides' text except so far as the drafting was concerned.

4. Mr. SIMMA said that he generally agreed with Mr. Rosenstock, but wondered whether the phrase “be drafted in more stringent terms” was appropriate. Surely, what Mr. Economides wanted was not to have the paragraph couched in stricter terms but to provide an obligation where currently there was none.

5. Mr. ECONOMIDES, responding to the objection by the Special Rapporteur, gave the example of a person from Czechoslovakia habitually resident in Greece and having Greek nationality. In such a case it was clear that the successor State, namely, the Czech Republic, would not compulsorily attribute its nationality to the person concerned, although that person could opt to obtain that nationality. But if, at the time of the succession of States, that person had the nationality of Czechoslovakia rather than of Greece, paragraph 1 as it stood implied that the successor State—the Czech Republic—could, if it so wished, attribute its nationality to the person concerned. That was the aspect of paragraph 1 he wanted to change.

6. Mr. MIKULKA (Special Rapporteur) said he still thought the point was sufficiently covered by paragraph 2 of the article. A successor State could not attribute its nationality to persons concerned against their will.

7. The CHAIRMAN said he agreed that the commentary did not have to reflect every view expressed during the debate, especially if that view had remained unsupported. However, if Mr. Economides attached great importance to the matter, he suggested that the proposal should be incorporated in the commentary as a new paragraph (3) *bis*, reading:

“(3) *bis*. According to the view of one member, the paragraph should be drafted in such a manner as to exclude any possibility that a State attribute its nation-

ality *ex lege*. The majority of the Commission considered that this hypothesis was covered by paragraph 2.”

*It was so agreed.*

8. Mr. BENNOUNA, referring to paragraph (4) wondered whether it was correct to speak of a “presumption of consent” in the penultimate sentence.

9. Mr. MIKULKA (Special Rapporteur) said that he had no strong feelings on the subject. It might be better to speak of “implicit consent”.

10. Mr. ROSENSTOCK said that he marginally preferred the text as it stood. In the second of the two examples cited by Mr. Economides, the person concerned, when offered the nationality of the successor State, might not say whether he or she accepted the offer for a fairly long time, say, two months. In such a case a presumption of consent would recommend itself on practical grounds.

11. After a brief exchange of views in which Mr. MIKULKA (Special Rapporteur), Mr. BENNOUNA and the CHAIRMAN took part, the CHAIRMAN suggested that paragraph (4) should remain unchanged.

*It was so agreed.*

12. The CHAIRMAN, referring to paragraph (2), said that the extensive doctrinal debate referred to in the first sentence was unsupported by any examples of practice.

13. Mr. MIKULKA (Special Rapporteur) drew attention to the footnote, containing a reference to O'Connell.

14. The CHAIRMAN suggested that the footnote should be slightly amended to indicate that O'Connell cited practice.

*It was so agreed.*

15. Mr. RODRÍGUEZ CEDENO proposed that the first sentence of paragraph (4) in the English and Spanish versions should be brought into line with the French version by replacing the word “extend” in the first sentence by the word “attribute”.

*It was so agreed.*

16. The CHAIRMAN, noting that the term “appropriate connection” appeared in paragraph (3) for the first time, suggested the addition of a footnote reading: “As to the expression ‘appropriate connection’, see paragraphs (9) and (10) of the commentary to article 10.”

*It was so agreed.*

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the commentary to article 7 as amended.

*It was so agreed.*

*The commentary to article 7, as amended, was adopted.*

*Commentary to article 8* (Renunciation of the nationality of another State as a condition for attribution of nationality)

*The commentary to article 8 was adopted.*

*Commentary to article 9* (Loss of nationality upon the acquisition of the nationality of another State)

*The commentary to article 9 was adopted.*

*Commentary to article 10* (Respect for the will of persons concerned)

18. Mr. ECONOMIDES, recalling that article 10, paragraph 2, had given rise to a particularly lively discussion in the course of which he had raised several objections to the Drafting Committee's text, proposed the addition of a new paragraph to follow paragraph (11), which would read:

"According to one member, paragraph 2 does not reflect two essential aspects of international practice regarding the succession of States: first, that, in some cases, the granting of a right of option is mandatory for the successor State and, secondly, that this right always entails a choice between two nationalities."

Many members had disagreed with his view during the discussion, without, however, giving any reasons. A sentence to that effect could be added to the text he was proposing.

19. Mr. MIKULKA (Special Rapporteur) said that he had no objection to including Mr. Economides' text in the commentary, but continued to think that the view expressed was completely incorrect and even absurd. The commentary provided a sufficient number of examples of international practice with regard to the right of option.

20. Mr. ECONOMIDES said the problem was that paragraph 2 of the article failed to reflect all aspects of the examples listed in paragraph (2) of the commentary.

21. The CHAIRMAN suggested that consideration of Mr. Economides' proposal should be deferred until the text was circulated in writing in English and French.

*It was so agreed.*

22. The CHAIRMAN, referring to paragraph (4), said that the phrase appearing in brackets in the first sentence of the French version *pour autant que le droit interne l'autorise* was unclear and unsatisfactory. He suggested that it should be replaced by *dans la mesure permise par le droit interne* (to the extent permitted by internal law).

23. Mr. ROSENSTOCK said that the reference to internal law should be understood, not as a limitation on the right, but as an explanation of its legal origin. He would therefore suggest that the words "to the extent permitted by internal law" should be replaced by "established under internal law".

24. The CHAIRMAN suggested that the words *pour autant que le droit interne l'autorise* in the French version should be deleted, and the words *en vertu de lois nationales* inserted at the end of the sentence. He asked if there was any objection to that amendment.

25. Mr. MIKULKA (Special Rapporteur) said he failed to see how that would improve the text.

26. The CHAIRMAN said that another alternative would be simply to delete the words "to the extent permit-

ted by internal law" and the equivalents in all the language versions.

27. Mr. MIKULKA (Special Rapporteur) said that would be preferable.

28. The CHAIRMAN said that, if he heard no objection, he would take it that that suggestion was adopted.

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

29. The CHAIRMAN queried whether the reference in paragraph (13) to the Free Town of Chandernagore was historically accurate.

30. Mr. MIKULKA (Special Rapporteur) and Mr. Sreenivasa RAO confirmed that it was.

31. Mr. BENNOUNA pointed out that the reference to the territory of Ifni should read: "Sidi Ifni".

*Paragraph (13), as amended, was adopted.*

*The commentary to article 10, as amended, was adopted, subject to consideration of the proposal by Mr. Economides.*

*Commentary to article 11* (Unity of a family)

*The commentary to article 11 was adopted.*

*Commentary to article 12* (Child born after the succession of States)

*The commentary to article 12 was adopted.*

*Commentary to article 13* (Status of habitual residents) (A/CN.4/L.539/Add.4)

32. Mr. LUKASHUK commented on the excellent professional quality of both the draft articles and the commentaries thereto. He had one very serious objection, however, to the commentary to article 13. Article 13 had replaced article 10 (Right of residence) as proposed by the Special Rapporteur.<sup>1</sup> Largely because of the effect of the commentary, article 13 virtually negated that right. The general principle set out in article 13, paragraph 1, was currently formulated so summarily that the commentary took on special importance. Even an experienced jurist would have difficulty understanding paragraph 1 without turning to the commentary. Yet the commentary was entirely unacceptable. It distorted both the international law currently in force and the Commission's position.

33. Article 10 as proposed by the Special Rapporteur had indicated that persons who had opted for the nationality of the predecessor State could not be expelled. The Commission had supported that provision. But the commentary referred neither to that provision, nor to the Commission's position on it. Instead, emphasis was laid on the provisions in article 10 that had been the most controversial, and which had indirectly legalized the expulsion of individuals who had opted for the nationality of the predecessor State.

<sup>1</sup> For the text, see 2475th meeting, para. 14.

34. The commentary showcased the opinion of those members of the Commission who believed that international law, at the current time, allowed a State to require that persons who had voluntarily opted for the nationality of another State transfer their habitual residence outside of its territory. To justify that viewpoint, the Special Rapporteur cited the Treaty of Versailles after the First World War, yet that was hardly a useful model for modern international law. On the other hand, the position of the majority of members of the Commission was described as moving into the realm of *lex ferenda*. Such an assertion was refuted, however, by the very examples set out in the commentary, which showed that State practice after the Second World War and as incorporated in the European Convention on Nationality<sup>2</sup> did not condone the expulsion of persons who were habitually resident in a country and had opted for the nationality of another State. He asked why the Special Rapporteur preferred to rely on outdated practice, ignoring contemporary experience. The Commission's task was the codification and progressive development of international law.

35. Even more unacceptable was the statement made in paragraph (5) of the commentary. Nevertheless, other articles dealt with the treatment of aliens. The statement implied that the Commission had no position on the expulsion of nationals of a predecessor State, that that issue related solely to the treatment of aliens and could be resolved by States entirely at their own discretion.

36. To his regret he could not accept the commentary to article 13. He had no drafting proposals to make, since the text would have to be entirely rewritten in order to reflect accurately the Commission's discussion on the issue.

37. Mr. HAFNER said he could agree with much of what Mr. Lukashuk had said and would propose an amendment to modify the order in which the arguments were presented and perhaps make the text of the commentary more balanced. The third sentence in paragraph (3) would begin with a reference to the view that international law at the current time did not indicate that States had any right to oblige persons to leave a country if they had opted for a different nationality, although "Some members believed that international law allowed a State to require that the latter category of persons transfer . . .".

38. Mr. ROSENSTOCK said he endorsed the text as it stood, but could go along with any fair way of presenting the fact that two sides had emerged in the discussion. He did not, however, consider that one or the other side should be presented as holding a majority or dominant viewpoint. His own view was that, where the right of option was entirely free, States were likewise free to consider that the exercise of that right entailed certain consequences for individuals.

39. Mr. GALICKI (Rapporteur) said he endorsed the opinion expressed by Mr. Lukashuk and supported by Mr. Hafner. The order in which the commentary presented the arguments could indeed create a false impression, and he therefore favoured the amendment proposed by Mr. Hafner.

40. The CHAIRMAN, speaking as a member of the Commission, pointed out that paragraph (5) indicated that the Commission had not taken a position on the issue. However, article 13 did adopt a position by stipulating that in no circumstances must the State succession have an adverse effect on the residence of individuals. He therefore did not agree with Mr. Rosenstock's interpretation.

41. Mr. MIKULKA (Special Rapporteur) noted that paragraph 1 had been drafted by Mr. Brownlie and, as he understood it, was intended to indicate that the status of habitual resident was not affected by a succession of States as such. What happened after the succession of States, including the status of aliens, was not what the Commission should be concerned with. As to the remarks about the presentation of one viewpoint as being dominant, he had carefully checked the summary records and had, he thought, conveyed an accurate picture in the commentary.

42. It had been argued that the practice cited in the commentary was derived mainly from the Treaty of Versailles, which dated back to the First World War and was no longer relevant. Yet the practice of States after the Second World War had followed exactly the same lines. He referred members to the Treaty of Peace with Italy and to the Treaty between the Union of Soviet Socialist Republics and Czechoslovakia,<sup>3</sup> under which Czechoslovakia had ceded part of its territory to the Soviet Union. If members could cite examples of State practice in which the right of option had been accorded without envisaging the possibility of requiring an individual who exercised that right to leave a State's territory, he would be very grateful. However, he had assumed it had been the Commission's wish not to take a position on that issue. His exposition of the two viewpoints was, in his opinion, perfectly well balanced and he could understand neither the objections to it nor the need to reverse the order of presentation.

43. Mr. Lukashuk's use of emotionally charged expressions like "expulsion" was somewhat provocative. He was far from being an advocate of driving people out of countries and wished, instead, to protect the rights of individuals to acquire the nationality of the successor State. In the light of contemporary international law, it was unacceptable that a successor State might not give individuals the right to acquire its nationality.

44. Article 13 was, in fact, much less comprehensive than his original proposal in article 10, which had set out a guarantee that the right of residence of persons habitually resident in a territory would be preserved, even if such persons did not acquire the nationality of the successor State. It was the Commission, not he, that had decided to delete that provision.

45. The CHAIRMAN called on members of the Commission to address themselves solely to the accuracy of the commentary, and in no circumstances to reopen the substantive debate on the issue.

46. Mr. ROSENSTOCK said that any proposed amendments should be submitted in writing. He thought the text

<sup>2</sup> See 2477th meeting, footnote 7.

<sup>3</sup> Treaty (with Protocol) concerning the Trans-Carpathian Ukraine (United Nations, *Treaty Series*, vol. 504, p. 299).

gave a balanced picture of the discussion, but was willing to look at alternative formulas.

47. Mr. Sreenivasa RAO said that, when introducing the text proposed by the Drafting Committee (2498th meeting), he had explained that the Special Rapporteur's proposal had been modified by the deletion of any reference to the point at issue. With that decision regarding the article, perhaps the commentary too should be drafted so as not to refer to the substantive issue. The summary records set out the views of members, and that should suffice.

48. He would therefore suggest that only the first sentence be retained in paragraph (3); that paragraph (4) be deleted; that in paragraph (5), the words "above discussion" be replaced by "this question"; and that the remainder of the sentence, after the words "an issue", be replaced by a new sentence, taken from his introduction to the draft article, to read: "Given this situation, the Drafting Committee decided not to include any provision on the matter in the draft articles, and it opted for a solution affecting neither position, allowing scope for some forward movement through future State practice and development of law."

49. Mr. HAFNER proposed that paragraph (3) should be split in two, the new paragraph to begin with the words "Some members believed . . .". That would more clearly delineate the two opinions expressed. He could agree only to Mr. Sreenivasa Rao's first proposal concerning paragraph (5), namely, to end the sentence after the words "an issue". He was not in favour of the proposed insertion.

50. Mr. PAMBOU-TCHIVOUNDA pointed out that the substantive concerns raised by Mr. Lukashuk deserved to be taken into account, but the Commission was currently working under heavy time constraints. Since the commentary, like the articles, would be revisited on second reading, perhaps Mr. Lukashuk could incorporate his comments in a working document, to be taken up when the commentary was being considered on second reading.

51. Mr. LUKASHUK said he supported the radical, yet simple, proposal made by Mr. Sreenivasa Rao. There was really no need for the history of the Commission's consideration of the issue to be recounted, especially when the version given was inaccurate.

52. The CHAIRMAN, speaking as a member of the Commission, said he was not in favour of Mr. Sreenivasa Rao's proposal, because he was firmly convinced that the underlying problems would not go away simply by deleting the bulk of the commentary to the article that had most divided the Commission. He would therefore suggest an alternative solution. Mr. Hafner's proposal that paragraph (3) should be divided into two paragraphs should be retained. Residence was very important, but the word "indeed", in paragraph (1), failed to provide an explanation where it was needed. He therefore suggested a new version of the second sentence, which in French would read: *La [majorité de la] Commission a en effet estimé qu'il ne serait pas convenable que le choix ou l'attribution d'une nationalité en liaison avec une succession d'Etats puisse en tant que tel entraîner des conséquences négatives pour les personnes concernées* (The [majority of the] Commission indeed considered that it would not be appropriate that the choice or attribution of a national-

ity in relation to a succession of States could as such entail negative consequences for the persons concerned). The first footnote to paragraph (3) could be shortened, with a simple reference to article 3 of the Treaty between the Principal Allied and Associated Powers and Poland and to Arbitrator Kaeckenbeeck on the acquisition of nationality.

53. For paragraph (5), he suggested using the language suggested by Mr. Sreenivasa Rao, but adding at the end: *sauf dans la mesure où le phénomène de la succession d'Etats lui-même serait à l'origine d'un changement de la situation* (except to the extent that the phenomenon of the succession of States itself is at the origin of a change of situation). He was not ready to agree that the Commission had taken no position at all. It had been guided by the idea that the succession of States as such could not give rise to an obligation to change residence. Otherwise, the option would not be a genuine option. If, on the other hand, for other reasons a State decided to expel someone, the Commission would then be ready to accept it.

54. He disagreed with the proposal implicit in Mr. Lukashuk's statement that the Commission should revert to article 10 as proposed by the Special Rapporteur.

55. Mr. LUKASHUK said that suggestion was fully acceptable to him.

56. Mr. ROSENSTOCK said that the report of the Drafting Committee accurately reflected the Commission's decision to limit the matter to the fact that the status of persons as habitual residents must not be affected by succession of States in and of itself. As to the other issue, on which there had been disagreement, the Chairman's suggestion amounted to putting an entirely different gloss on what had been done. He was also somewhat concerned about the suggestion concerning the footnote. The fact that there were not many citations in support of the contrary view was not a good enough reason for shortening the footnote by removing citations for the view that did not happen to be popular with the person in the Chair.

57. The CHAIRMAN said that, as the footnote was the only one to contain so many citations, it was not balanced. Moreover, criticism could not be levelled at members who were opposed to such a presentation on the grounds that they failed to provide precedents. The matter at hand was progressive development of the law. He did not believe the substance of his suggestion differed greatly from what Mr. Rosenstock was saying. Both emphasized that the succession of States as such could not give rise to negative consequences for the persons concerned.

58. Mr. PAMBOU-TCHIVOUNDA said he would support the Chairman's suggested wording, provided that, if it was inserted between the two sentences of paragraph (1), the words "as such", in the first sentence, were deleted; they did not have the same meaning in that context as in the Chairman's suggestion. In addition, what did the Chairman mean by the word "appropriate"?

59. The CHAIRMAN suggested the word "acceptable" in its place.

60. Mr. GOCO said that nothing should be added to the commentary that did not actually reflect the Commission's debate on the matter. The points raised at the cur-

rent time could perhaps be discussed on the second reading.

61. The CHAIRMAN replied that the only permissible topic of discussion at the current time was interpretations of the Commission's past debates.

62. Mr. ROSENSTOCK asked what could be clearer than the phrase, "in other words, that persons concerned who are habitual residents of a territory on the date of the succession retain such status", in the first sentence. Surely, that was all that needed to be said. Even if the last sentence of the paragraph was slightly obscure, it was very clear from the first sentence that a particular circumstance was being addressed.

63. The CHAIRMAN, speaking as a member of the Commission, said he thought his own formulation was markedly clearer than Mr. Rosenstock's first sentence. However, there had been a serious error in the French translation, which might explain the strong division of opinion. The English wording "a succession of States as such" was very different from the French, which said "the status of habitual residents as such".

64. Mr. ROSENSTOCK, speaking on a point of order, said the reason that United Nations documents indicated the language of the original was to avoid just such problems. In the current instance, English was the original and governing language. The French phrase *en tant que tel* was misplaced, and should be corrected to conform with the English. It was not a question of which language came first on any rational basis, but a question of which language the text was first drafted in.

65. The CHAIRMAN said that Mr. Rosenstock's statement did not concern a point of order and he would not accept it. He had been in the process of explaining a lack of understanding among members. He read out the text of his suggested amendments to paragraphs (1) and (5), in French, with an English translation by the secretariat, noting that the French text was the original and that the secretariat would redraft the footnote. The second sentence of paragraph (1) would be replaced by:

*"La [majorité de la] Commission a en effet estimé qu'il ne serait pas acceptable que le choix ou l'attribution d'une nationalité puissent, en tant qu'ils sont liés à la succession d'États, entraîner des conséquences négatives pour les personnes concernées."*

The secretariat's translation into English was:

"The [majority of the] Commission considers indeed that it would not be acceptable that the choice or the attribution of a nationality could inasmuch as they were related to the succession of States entail negative consequences for persons concerned."

66. The proposed new text to replace paragraph (5) was taken from the presentation made by the Chairman of the Drafting Committee, to which a sentence had been added referring to paragraph (1). It read:

*"(5) Etant donné cette situation, la Commission a décidé de ne pas inclure de disposition sur la question dans le projet d'articles, optant ainsi pour une solution neutre et qui laisse ouverte la possibilité d'une évolu-*

*tion à travers la pratique ultérieure des États et le développement du droit. Comme cela est expliqué au paragraphe (1), la [majorité de la] Commission était cependant fermement d'avis que la succession d'États en tant que telle ne pouvait, à la fin du vingtième siècle, affecter le statut de résidents habituels des personnes concernées."*

The secretariat's English translation was:

"(5) Given the situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution leaving the possibility open for an evolution through subsequent State practice and development of the law. As explained in paragraph (1), the [majority of the] Commission was, however, firmly of the view that a succession of States as such could not at the end of the twentieth century affect the status of the persons concerned as habitual residents."

67. Mr. ROSENSTOCK said the problem with the proposed text was that it referred to a "majority", which was something the Commission virtually never did. Again, there was simply a division in the Commission and it was not profitable to argue about a majority or a minority. The formulation for paragraph (1) totally biased the issue and it was only because an existing formulation in the English of paragraph (1) was being removed that language similar to the proposed paragraph (5) would be needed. As he disagreed with the change to paragraph (1), he did not see the need to change paragraph (5). In paragraph (5), the phrase "for an evolution through subsequent State practice and development of the law" also biased the issue. It was not a question of "until a better day comes"; that was not the Commission's view. If paragraph (5) was retained, however, it might be acceptable to delete "for an evolution through subsequent State practice and development of the law," so as not to take the position that the Commission could not wait until a new and bright day dawned.

68. The CHAIRMAN said that the bracketed words, "majority of the", had been included for the sake of prudence, but could certainly be removed. The proposed text of the first sentence of paragraph (5) was the language that had been used by Mr. Sreenivasa Rao, and he did not recall Mr. Rosenstock's having been opposed to it at the time.

69. Mr. PAMBOU-TCHIVOUNDA said the words "as such", referring to the status of habitual resident, made no sense, but simply reinforced the contradiction referred to earlier by the Chairman. They should be deleted and the words "for that status" should be added after "negative consequences".

70. Mr. DUGARD said that the English version of the proposed new second sentence was almost incomprehensible. It should be amended to read:

"The [majority of the] Commission considers that it would not be acceptable that the choice or attribution of a nationality could entail negative consequences for persons concerned inasmuch as they were related to the succession of States."

71. Mr. THIAM advocated the deletion of the words "majority of the". Reference to a majority view within the Commission would set a precedent and he was against any innovation in such a sensitive area.

72. Mr. MIKULKA (Special Rapporteur) said he thought Mr. Pambou-Tchivounda's problem had already been solved by the decision to place *en tant que tel* (as such) after *succession d'États* (succession of States), as in the English version.

73. The Chairman's version of the second sentence of paragraph (1) utterly failed to explain the text of article 13. It was not possible to see how a provision concerning the effect or absence of effect of State succession on habitual residence could be explained by a reference to the consequences of the choice or attribution of a nationality. They were two quite different issues and the latter was one that the Commission actually wished to avoid. He proposed rewording the sentence to read: "The Commission considered that it would not be acceptable that the succession of States should entail negative consequences for persons concerned." On the other hand, he could accept the proposed new version of paragraph (5).

74. Mr. PAMBOU-TCHIVOUNDA said that he could accept the amendment proposed by the Special Rapporteur. However, he proposed moving the words "as such" from the first to the second sentence which would then read: "The Commission considered that it would not be acceptable that the succession of States as such should entail negative consequences for persons concerned."

75. Mr. LUKASHUK said that he found the Chairman's suggested amendments acceptable. As to paragraph (4), the phrase "even if this entailed moving into the realm of *lex ferenda*" should be deleted.

76. Mr. MIKULKA (Special Rapporteur) said that the reference to *lex ferenda* had been inserted in response to suggestions by Mr. Crawford and Mr. Brownlie. If Mr. Lukashuk agreed, the phrase could be turned into a new sentence to the effect that "Still others felt that this entailed moving into the realm of *lex ferenda*."

77. Mr. ECONOMIDES said that, while he fully endorsed the Chairman's suggestions in terms of substance, he felt that the Special Rapporteur was correct in pointing out that article 1, paragraph 1, concerned only the status of habitual residents and had nothing to do with nationality issues. The Chairman's suggested new version of paragraph (1) of the commentary should therefore be reworded. An attempt could be made at the end of paragraph (5) to reach a compromise on what was a truly vital issue. Unless the Commission took at least tentative steps in that direction, it could give the impression that it was unaware of contemporary developments, particularly in human rights law.

78. The CHAIRMAN suggested the following new version of the second sentence of paragraph (1) in an effort to reconcile the various views that had been expressed: "The Commission considered that it would not be acceptable that the succession of States should as such entail negative consequences for the status of persons concerned as habitual residents."

79. Mr. ROSENSTOCK, supported by Mr. BENNOUNA, said it would be absurd to imply that the succession of States should have no negative consequences. Such consequences were inevitable. The point was that the status of habitual residents should not be affected by the succession of States as such, and that should be made clear in the commentary.

80. Mr. Sreenivasa RAO proposed the following version: "The Commission considered that the status of habitual residents was not affected in any manner by State succession." A positive assertion was, in his view, more appropriate than stating that certain developments were unacceptable.

81. The CHAIRMAN suggested a new version on that basis: "The Commission considers that a succession of States, as such, should not entail negative consequences for the status of persons concerned as habitual residents." He said that, if he heard no objection, he would take it that the Commission agreed to adopt that version.

*It was so agreed.*

82. The CHAIRMAN noted that paragraph (3) was to be divided in two at the end of the second sentence. The last two sentences would form a new paragraph.

*It was so agreed.*

83. The CHAIRMAN asked whether the Commission agreed to divide the final sentence of paragraph (4) in two. It would then read: "They considered that the draft articles should prohibit the imposition by States of such a requirement. For some members, this entailed moving into the realm of *lex ferenda*."

*It was so agreed.*

84. The CHAIRMAN asked whether the proposal to replace paragraph (5), without the words "the majority of", was acceptable.

85. Mr. ROSENSTOCK, supported by Mr. Sreenivasa RAO, proposed that the phrase "leaving the possibility open for the evolution through subsequent State practice and development of the law", in the first sentence, should be deleted.

*It was so agreed.*

86. Mr. GOCO proposed the deletion of the words "at the end of the twentieth century".

87. The CHAIRMAN, speaking as a member of the Commission, said that he was opposed to such a deletion because the reference to the end of the twentieth century was part and parcel of the underlying argument and followed a review of the historical background. The members who had defended that approach conceded that a contrary situation had obtained even in the recent past.

88. Mr. GOCO said that the reference to paragraph (1) covered that aspect. However, he would defer to the judgement of the other members.

89. Mr. HAFNER said he agreed with the Chairman. He suggested that Mr. Goco's concerns might be met if the reference to paragraph (1) was deleted.

90. Mr. ROSENSTOCK said that it would create confusion to delete the phrase "As explained in paragraph (1)". The last sentence merely repeated in somewhat flamboyant terms what had been said in paragraph (1). He was prepared to accept it if the reference was maintained.

91. Mr. GALICKI (Rapporteur) said he supported the points made by the Chairman and Mr. Rosenstock. Paragraph (5) brought the analysis begun in paragraph (1) to a logical conclusion. The new attitude to habitual residence had only recently developed and the reference to the twentieth century, though it might be considered "flamboyant", was in his view quite appropriate.

92. The CHAIRMAN asked whether the Commission agreed to accept the following version of paragraph (5):

"(5) Given this situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution. As explained in paragraph (1), the Commission was, however, firmly of the view that a succession of States as such could not, at the end of the twentieth century, affect the status of persons concerned as habitual residents."

*It was so agreed.*

*The commentary to article 13, as amended, was adopted.*

*Commentary to article 14 (Non-discrimination)*

93. Mr. DUGARD said that paragraph (2) rightly mentioned a number of conventions, but omitted a reference to the very pertinent International Convention on the Elimination of All Forms of Racial Discrimination. In particular, article 5, subparagraph (d) (iii), of that Convention required States parties to guarantee the right of everyone without distinction to enjoy the right to nationality as a civil right.

94. Mr. MIKULKA (Special Rapporteur) said he could not recall why he had omitted the reference and agreed on reflection that it was highly relevant.

95. The CHAIRMAN noted that a reference to the International Convention on the Elimination of All Forms of Racial Discrimination would be inserted in paragraph (2). He added that the commentary to article 14 had demanded a major effort of objectivity on the part of the Special Rapporteur and faithfully reflected the views of certain members of the Commission.

96. Mr. BENNOUNA said that he was unhappy with the reference in the third sentence of paragraph (4) to the jurisprudence of the Inter-American Court of Human Rights, according to which it was within the sovereignty of a State to give preferential treatment to aliens who would assimilate more easily. That was a highly controversial opinion and he disagreed with the last sentence of the paragraph, which stated that the principle applied by the Court appeared to be valid in the context of State succession. He viewed the Court's decision as a form of discrimination against aliens and proposed that the paragraph should end with the second sentence.

97. The CHAIRMAN, speaking as a member of the Commission, said that he, too, was in favour of deleting the last two sentences.

98. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) agreed with Mr. Bennouna that the Commission should not be seen as trying to promote discrimination through preferential treatment. The Drafting Committee had accepted the example in the light of the Special Rapporteur's explanation. Where a State's attitude was that everyone was welcome to its nationality but some were more welcome than others, there could be no objection.

99. The CHAIRMAN said it was precisely that attitude which seemed unacceptable.

100. Mr. MIKULKA (Special Rapporteur) said that, if the last two sentences were deleted, the preceding sentence would be left without any form of illustration or interpretation. He was surprised that the Commission experienced no difficulty with that sentence, which raised the question of whether a State could use the criteria referred to in article 14 to enlarge the circle of individuals entitled to acquire its nationality. It had even formed the basis of a proposal by Mr. Economides in another context. If members were happy with the truncated paragraph, the issue could be discussed later in the light of an amendment proposed by Mr. Economides.

*The meeting rose at 1.05 p.m.*

---

## 2515th MEETING

*Wednesday, 16 July 1997, at 3.15 p.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Lukashuk, Mr. Mikulka, 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 (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 14 (Non-discrimination) (concluded) (A/CN.4/L.539/Add.4)*

1. The CHAIRMAN informed members that the Special Rapporteur had agreed to keep only the first two sentences of paragraph (4).

2. Mr. DUGARD asked whether the reference to the jurisprudence cited in the deleted passage could not be placed in a footnote. It was important for the Commission to indicate that it was aware of the case even if it did not approve of the jurisprudence.

3. The CHAIRMAN said that it could indeed be placed in a footnote which would read: "See Inter-American Court of Human Rights, advisory opinion OC-4/84 of 19 January 1984, *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (ILR, vol. 79, p. 282)."

4. Mr. ECONOMIDES proposed that a new sentence should be inserted after the first sentence in paragraph (5) to read: "They [some members] mentioned, *inter alia*, the Venice Declaration, which expressly deals with this case." Moreover, a footnote, would explain: "This provision provides that: 'Those persons to whom this nationality has been granted shall enjoy perfect equality of treatment with the other nationals of the successor State.'"

5. Mr. ROSENSTOCK said that, if he recalled rightly, only one member had mentioned the Venice Declaration. Moreover, article 1, the most important of the entire draft, already contained a very strong clause stipulating: "irrespective of the mode of acquisition of that nationality".

6. The CHAIRMAN suggested a middle course that would consist in reproducing the whole of the proposal in a footnote reading: "One member drew attention to provision 8 (c) of the Venice Declaration, which expressly deals with this case.", to be followed by an actual quotation of provision 8 (c).

7. Mr. MIKULKA (Special Rapporteur) proposed that the Commission should keep to the usual method for citing references that was employed in all other paragraphs.

8. The CHAIRMAN said he endorsed that view and, if he heard no objection, he would take it that the Commission agreed to insert a footnote reading:

"See in this respect provision 8 (c) of the Venice Declaration which addresses this point expressly and provides that '[t]hose persons to whom [the nationality of the successor State] has been granted shall enjoy perfect equality of treatment with the other nationals of the successor State'."

*It was so agreed.*

*The commentary to article 14, as amended, was adopted.*

*Commentary to article 15 (Prohibition of arbitrary decisions concerning nationality issues)*

*The commentary to article 15 was adopted.*

*Commentary to article 16 (Procedures relating to nationality issues)*

9. The CHAIRMAN, speaking as a member of the Commission, said that the word "(unpublished)" should be inserted at the end of the first footnote to paragraph (2). Moreover, at the end of paragraph (2) of the French version, the phrase *n'est pas censée indiquer deux types de procédure qui s'excluent mutuellement* should be replaced by *ne signifie pas que les deux types de procédure s'excluent mutuellement*.

*It was so agreed.*

10. Mr. SIMMA, referring to the footnote to paragraph (1), proposed that the introductory phrase "It is interesting to note that", which seemed somewhat superficial in view of the gravity of the question, should be deleted.

*It was so agreed.*

11. Mr. BENNOUNA pointed out that the legal system in a number of countries comprised two categories of jurisdiction—administrative, and judicial within the strict meaning of the term. He proposed that, to give a better explanation of the meaning of "administrative review", the third sentence of paragraph (2) should be reworded to read: "The existence of a judicial review process did not exclude the possibility of a discretionary review by the administration".

12. Mr. THIAM said he endorsed that suggestion.

13. The CHAIRMAN pointed out that the question had not been taken up during the consideration of article 16. Moreover, in that connection he would point to the value of the adjective "prior", in the phrase "prior recourse to an administrative review process".

14. Mr. MIKULKA (Special Rapporteur) said that, needless to say, he had not reflected in the commentary discussions which had not taken place in the Commission.

15. Mr. GOCO said that the purpose of paragraph (2) was to enunciate the principle of exhaustion of administrative remedies before a matter was referred to a court. However, in the English version, the expression "two mutually exclusive processes" was redundant and the last part of the sentence should be reworded to read: "is not intended to suggest exclusive processes", since the basic idea was that the two types of processes could not be initiated simultaneously, but that one did not preclude the other.

16. Mr. SIMMA said the Special Rapporteur had certainly not wanted to enter into the subtleties of the French legal system and, in his opinion, had simply confined himself to stipulating, in article 16 and in the commentary, that there should be an effective administrative or judicial review process, irrespective of the system of municipal law. For his own part, he endorsed the Chairman's suggestion to recast the last sentence of paragraph (2) and pro-

posed that the English version might read “that the two possibilities exclude each other”, so as to avoid the word “mutual”.

17. The CHAIRMAN, taking up the proposal made by Mr. Simma, suggested that the French version should read: *ne signifie pas que ces deux procédures s'excluent l'une l'autre*.

18. Mr. PAMBOU-TCHIVOUNDA said he supported that suggestion. In addition, a footnote indicating that the Commission's comment was made regardless of the particular features of systems of municipal law, might meet Mr. Bennouna's concern.

19. Mr. LUKASHUK said that the Russian version of the commentary was perfectly accurate and, moreover, tied in very well with the last footnote to paragraph (2). He was not opposed to the Chairman's suggestion, but would point out that the definition of administrative procedure was a matter of the internal competence of States. Over and above the language problem, it was French law that was interfering with the work of the Commission, which should not continue along that path.

20. Mr. BENNOUNA pointed out that more than half of the countries in the world had two kinds of jurisdiction. Accordingly, the word “judicial” should be replaced by “jurisdictional”, particularly in the second sentence of paragraph (2), which would read “In some cases this encompassed jurisdictional review; in others it did not”. Moreover, the word “effective” in article 16, was superfluous. He would also emphasize the relevance of Mr. Goco's remark, which was in keeping with a general principle of law, namely, the administration should be allowed the opportunity to redress the consequences of its act before the matter was brought to court.

21. The CHAIRMAN said there could be no question of reconsidering the article itself, which had been adopted and which included the words “judicial” and “effective”.

22. Mr. ADDO said that, as far as he was concerned, the expression “administrative or judicial review” was very clear and meant that the adoption of one kind of process did not preclude the adoption of the other. He was opposed to replacing “judicial” by “jurisdictional”, which could well be a source of confusion, especially as there was nothing comparable in common law to a “jurisdictional review” in the context of article 16.

23. Mr. LUKASHUK said that he wholeheartedly supported the comments by Mr. Addo. In Russian law, jurisdiction meant the State's recognized authority to adopt rules and to ensure that they were respected, not necessarily through the courts. The use of the term “jurisdictional” in the commentary to article 16 would be meaningless.

24. Mr. THIAM said that, in the absence of administrative jurisdictions, the notion of “judicial review” might be clear in common law. However, from the standpoint of legal systems based on the French system, it was preferable to use the adjective “jurisdictional”, which related to contentious proceedings, regardless of the court or tribunal concerned. That should be made clear in the commentary.

25. Mr. RODRÍGUEZ CEDEÑO said that, in Spanish, the text was perfectly clear and did not call for any change.

26. Mr. ROSENSTOCK, supported by Mr. ADDO, pointed out that the expression “administrative or judicial review” appeared in the quotation from article 12 of the European Convention on Nationality contained in the last footnote to paragraph (2). It was difficult to see why the same expression could not be used in the commentary to article 16.

27. The CHAIRMAN said that it was not simply a problem of language but, for Francophones, genuinely a conceptual problem.

28. Mr. PAMBOU-TCHIVOUNDA suggested that a formulation should be inserted at the end of the last footnote to paragraph (2) to indicate that the word “judicial” signified the judge competent to conduct the review, whether administrative or judicial.

29. Mr. ECONOMIDES proposed that, in order to settle the problem, the wording of paragraph (2) should be changed by deleting the second sentence and replacing the third sentence by a new one reading: “This review, depending on the legislation of each country, may be conducted by the administration itself or by jurisdictions of an administrative or judicial character”.

30. Mr. DUGARD said it appeared that Mr. Economides' proposal was satisfactory to Francophones and acceptable to Anglophones. It might therefore be a suitable compromise.

31. The CHAIRMAN asked Mr. Economides to prepare, together with Mr. Pambou-Tchivounda, a written proposal for the Commission to examine later.

*It was so agreed.*

*Commentary to article 17 (Exchange of information, consultation and negotiation)*

*The commentary to article 17 was adopted.*

*Commentary to article 18 (Other States) (A/CN.4/L.539/Add.5)*

32. The CHAIRMAN, supported by Mr. MIKULKA (Special Rapporteur) and Mr. Sreenivasa RAO (Chairman of the Drafting Committee) proposed that the meaning of the phrase “the right of other States”, in the first line of paragraph (1), should be made clear by saying “the right of States other than the State which attributed nationality”.

*It was so agreed.*

33. Mr. BENNOUNA observed that paragraph (3) started with the words “A number of writers”, when only ICJ was quoted in the relevant footnotes. In his opinion, both of those footnotes should be expanded by citing other sources and other writers.

34. Mr. MIKULKA (Special Rapporteur) explained that, for the purposes of brevity, he had not wished to cite the very many authors, in European bodies alone, who

referred to the *Nottebohm* case. If the Commission thought it worthwhile he would give other bibliographical references in the footnotes.

*It was so agreed.*

35. Mr. ECONOMIDES proposed the insertion of a new sentence between the first and second sentences of paragraph (9), reading: "It was stated, in particular, that it would be difficult to apply the article in practice and that this disposition would allow States to take the law into their own hands".

*It was so agreed.*

*The commentary to article 18, as amended, was adopted.*

*Commentary to article 19 (Application of Part II)*

36. The CHAIRMAN, speaking as a member of the Commission, said there appeared to be two lacunae in paragraph (1). First, it did not explain what was meant by the fact that States "shall take into account" the provisions of Part II. Secondly, it did not draw a clear distinction between the articles in Part I, which set out principles which were obligatory for all States, and those in Part II, which simply provided States with general guidelines. Perhaps it would be possible to add a sentence stating that "The purpose of articles 20 to 26 is essentially to guide States".

37. Mr. ECONOMIDES said that he had experienced the same concern. It should be made plain that the essential difference between Parts I and II of the draft articles was that Part II did not contain recommendations properly speaking, but guiding principles on which States could draw in a case of State succession.

38. Mr. ROSENSTOCK said that the confusion to which the Commission's attention had just been drawn lay in the fact that the original distinction between Parts I and II had changed in the course of the deliberations. In the beginning, it had been a distinction in the normative value: Part I had included compulsory provisions, and Part II optional provisions. That distinction had then given way to a difference between general situations and particular situations. At the current stage in the work, it would be difficult to revert to the initial normative distinction.

39. Mr. MIKULKA (Special Rapporteur) said that the distinction between the two parts was not so clear. First, Part I in the English version often contained the "should" form of the verb, which clearly showed that recommendations were sometimes involved. Secondly, some provisions in Part II were plainly a reflection of rules of law that were in force. In the introduction to his third report (A/CN.4/480 and Add.1)<sup>1</sup> he had shown the very marked difference between Parts I and II at the normative level. However, he had been convinced by the subsequent deliberations and currently considered that there was a kind of continuum between Parts I and II.

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

40. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) added that the interpenetration of the two parts lay in the confusion regarding the use of the words "shall" and "should" in the English version. Some mystery should be allowed to remain, in his opinion. States would thus enjoy full latitude in defining their position in a real case of State succession.

41. The CHAIRMAN, speaking as a member of the Commission, said it was his understanding that the English-speaking members had agreed on a strict use of "shall" and "should". It was regrettable to learn that there was some artistic confusion in that regard.

42. He said that, if he heard no objection, he would take it that the Commission agreed to adopt the commentary to article 19.

*The commentary to article 19 was adopted.*

*Commentary to article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State)*

43. Mr. ECONOMIDES said that the first sentence of paragraph (5) should be corrected, for it stated that there were "instances" where the right to opt for the retention of the nationality of the predecessor State was granted only to some categories of persons residing in the transferred territory. Actually, history showed that, in the overwhelming majority of cases, the right of option was limited.

44. He proposed that the second sentence should be replaced by the following:

"Some members, however, considered that this approach was too great a departure from existing practice and that the right of option should be granted only to those persons concerned who have incontestable effective connections with the predecessor State which imply a will to retain the nationality of that State. On the other hand, it would not be appropriate to grant the right of option to persons who have the same links with the successor State."

That addition was intended to explain why the right of option should be limited.

45. Further to a brief exchange of views in which Mr. SIMMA, Mr. ROSENSTOCK, Mr. ECONOMIDES and Mr. MIKULKA (Special Rapporteur) took part, it was proposed that the beginning of the first sentence, "Although there have been instances", should be replaced by "Although there have been a number of instances".

*It was so agreed.*

46. Further to a brief exchange of views in which Mr. ROSENSTOCK, the CHAIRMAN, Mr. Sreenivasa RAO (Chairman of the Drafting Committee) and Mr. GALICKI (Rapporteur) took part, it was proposed that, in Mr. Economides' proposal, the phrase "Some members, however, considered that . . ." should be replaced by "According to one view . . .".

*It was so agreed.*

47. Mr. MIKULKA (Special Rapporteur) said that, in Mr. Economides' amendment, the two really new

elements that could pose a problem were, first, the “incontestable effective connections”, terms which the Commission had never used in the draft, and above all, the expression “which imply a will to retain the nationality”, which added yet another level of presumption to an already complex situation.

48. The CHAIRMAN said it was his understanding that the Commission was ready to approve paragraph (5) with the addition proposed by Mr. Economides, as orally amended.

*It was so agreed.*

49. Mr. ECONOMIDES said he wondered why the commentary included current paragraph (6), for the expression “should be deemed” introduced a presumption that had nothing to do with the text of the article. Article 20 said, in substance, that the successor State attributed its nationality to persons who had their habitual residence in the transferred territory, unless they otherwise indicated in exercising their right of option. The mere mention of a right of option implied that a change of nationality had already taken place, since the rule was that attribution of the nationality of the successor State was automatic; the right of option was exercised a posteriori. He did not see which “magic presumption” made it possible to consider that the persons concerned had not changed nationality at the time of the transfer of the territory and therefore retained the nationality of the predecessor State. In his view, paragraph (6) should be deleted or entirely recast in accordance with the letter of article 20.

50. Mr. MIKULKA (Special Rapporteur) said he failed to see why Mr. Economides considered that paragraph (6) contradicted article 20. According to the article,

“... 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 meant that if the persons in question otherwise indicated by exercising their right of option, the provisions of article 20 did not apply to them, in other words, the successor State did not attribute them its nationality and the predecessor State did not withdraw its own.

51. The use of the expression “should be deemed to have retained such nationality” in paragraph (6) of the commentary had been thought necessary in order to link it with article 4 of Part I, which, on the initiative of Mr. Brownlie, was currently entitled “Presumption of nationality”. The general presumption of nationality in article 4 was taken to be “subject to the provisions of the present draft articles”, in other words, subject to the case envisaged in the second part of article 20.

52. Mr. HAFNER said he was in favour of deleting paragraph (6). The question of the link with article 4, mentioned by the Special Rapporteur, could be left aside for the time being, on the understanding that the Commission would revert to it on second reading.

53. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that it was to reflect the debate in the Drafting Committee that it had been thought necessary to establish some continuity with article 4 and the Special Rapporteur had therefore drafted paragraph (6) in those terms. He saw no reason to delete it.

54. The CHAIRMAN suggested it could be made clear that the question was an exception to the presumption set out in article 4.

55. Mr. ROSENSTOCK suggested that it might be possible to insert a formulation after “article 20” stating “thereby cancelling the presumption in article 4”.

56. Mr. CANDIOTI said that, like Mr. Hafner, he would prefer the whole of the paragraph to be deleted. However, if the Commission decided to keep it, he hoped it would be made more explicit by adding a formulation of the type proposed by Mr. Rosenstock.

57. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) proposed another explanatory formula which might also be inserted after “article 20”, reading “and thus placing themselves outside the purview of article 4”.

58. Mr. MIKULKA (Special Rapporteur) said that he preferred the formulation proposed by Mr. Rosenstock, which seemed more precise and had the advantage of echoing paragraph (2) of the commentary to article 4, under the terms of which the general presumption of nationality contained in that article was a rebuttable presumption involving some exceptions.

59. Mr. ECONOMIDES said that such an explanation, however useful, did not solve the problem of the “reasonable time limit” provided for in article 10, paragraph 5, for the exercise of the right of option. The existence of that time limit, and hence of a gap between the date of the succession and the time at which the persons concerned were called upon to opt for a particular nationality, seemed to have been totally overlooked.

60. The CHAIRMAN noted that it was a question in paragraph (6) of an exception not to article 10 but to article 4. Consequently, the provisions of article 10 concerning a reasonable time limit still applied.

61. Mr. MIKULKA (Special Rapporteur) said he wished to confirm the Chairman’s statement. Actually, the question of a time limit did not arise in article 20 and hence there was no need to discuss the matter in the commentary to the article. In view of the discussion, he was in favour of retaining paragraph (6), with the addition of the proposal by Mr. Rosenstock, which made things much clearer.

62. The CHAIRMAN, speaking as a member of the Commission, said that he shared the Special Rapporteur’s view, something which also seemed to be true of most members of the Commission.

*It was so agreed.*

*The commentary to article 20, as amended, was adopted.*

*The meeting rose at 6.10 p.m.*

## 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.

2. Mr. MIKULKA (Special Rapporteur) said that, unfortunately, in his proposal Mr. Economides started by expressing “reservations” about the definition of persons concerned, as understood by the Commission. However, if his definition of persons concerned was compared with that set out in the last sentence of paragraph (8) of the commentary, they seemed to coincide entirely. Instead of expressing a divergent view in paragraph (13), it might therefore be enough to supplement the definition of persons concerned appearing in paragraph (8) by adding some elements from Mr. Economides’ proposal. It should prove possible to find some common ground.

3. Mr. ECONOMIDES said that his criticism of the Commission’s definition of “persons concerned” lay in the fact that it did not draw a distinction between categories of persons who changed nationality under international law and those who might, under certain conditions, change their nationality under internal law. He therefore wished to maintain his proposal, but would be ready to change the beginning and replace the words “One member of Commission expressed reservations” by “One member of the Commission considered that the definition contained in subparagraph (f) should be made clearer”.

4. Mr. PAMBOU-TCHIVOUNDA said that he tended to favour the solution proposed by the Special Rapporteur. Paragraph (13) of the commentary could be deleted and a sentence could be added at the end of paragraph (8) reading: “One member of the Commission considered that this definition was not sufficiently accurate”. It would be accompanied by a footnote which could reproduce the whole of the text of the proposal made by Mr. Economides.

5. Mr. THIAM said he supported that suggestion. However, instead of the formulation “One member of the Commission considered”, proposed by Mr. Economides, he would prefer the more neutral “It was suggested that”.

6. The CHAIRMAN said that the comments by Mr. Pambou-Tchivounda and Mr. Thiam would be duly reflected in the summary record. He noted, however, that Mr. Economides’ proposal did not meet with opposition from members of the Commission and, in particular, that the Special Rapporteur agreed to it. He said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph (13) as orally amended by Mr. Economides.

*It was so agreed.*

*The commentary to article 2, as amended, was adopted.*

*Commentary to article 16 (Procedures relating to nationality issues) (concluded) (A/CN.4/L.539/Add.4)\**

7. The CHAIRMAN said that the proposed amendment to paragraph (2), which, at the current time, had been circulated in a working paper, consisted in replacing the last three sentences by the following:

“Such a review, depending on the country, may be exercised either by the administration itself or by a competent jurisdiction of an administrative or judicial character. Moreover, the phrase ‘administrative or judicial review’ used in this article does not mean that the two types of process are mutually exclusive.”

8. Mr. ROSENSTOCK, supported by Mr. GOCO and Mr. DUGARD, said it might be better to delete the words “either by the administration itself”, for the notion of “administrative review” could mean different things from one legal system to another, which would inevitably cause difficulties.

9. Mr. SIMMA said that he was of a different opinion. The proposal was entirely satisfactory and he did not think that any legal system could take offence.

10. Mr. MIKULKA (Special Rapporteur) said that the problem was apparently more difficult in the English version, where the word “administration” was made still stronger by the word “itself”.

11. Mr. OPERTTI BADAN said that, to take account of the diversity of legal systems, it might be useful to refer in the first sentence to the internal law of States. After the words “administrative or judicial character”, one could add a formulation such as “in accordance with the internal law of each State”.

12. Mr. GALICKI said he endorsed that suggestion. Such a formulation would also have the advantage of being in keeping with the one found in the European Convention on Nationality.<sup>2</sup>

13. Mr. PAMBOU-TCHIVOUNDA said he too agreed with that solution. It would then be possible to delete the words “depending on the country” from the beginning of the sentence.

14. Mr. LUKASHUK said he too supported the proposal by Mr. Operti Badan. It was not for the Commission to provide for a review procedure. It was for States to do so, under their own internal law.

15. Mr. ROSENSTOCK said that that suggestion did not settle the problem posed by including the words “or by the administration itself”, which implied that “the administration” designated an entity different from “the competent jurisdiction of an administrative character”.

16. Mr. BENNOUNA and Mr. ADDO said that they endorsed Mr. Rosenstock’s view. In the context, it was jurisdictional reviews that were important.

17. The CHAIRMAN, summing up the discussion, first asked members whether they were ready to accept the proposal by Mr. Operti Badan to add the words “in accordance with the internal law of each State” after the words “administrative or judicial character”, an addition which logically involved deleting the phrase “depending on the country” at the beginning of the sentence. He noted that most members seemed to agree with that proposal.

18. After consulting members on Mr. Rosenstock’s suggestion to delete the words “either by the administration

\* Resumed from the 2515th meeting.

<sup>2</sup> See 2477th meeting, footnote 7.

itself" in the first sentence, he noted that the majority also seemed to be in favour of that proposal. He said that, if he heard no objection, he would take it that the Commission wish to adopt paragraph (2), as amended.

*It was so agreed.*

*The commentary to article 16, as amended, was adopted.*

*Commentary to article 10 (Respect for the will of persons concerned) (concluded) (A/CN.4/L.539/Add.3)*

19. Mr. MIKULKA (Special Rapporteur) pointed out that the Commission had not yet decided on the proposal by Mr. Economides to add a paragraph after paragraph (11). The proposal had been circulated, at the current time, in a working paper (ILC(XLIX)/Plenary/WP.7).<sup>3</sup>

20. He would emphasize that the first of the two elements in the proposal was unacceptable in that it meant disregarding the opinion of the Commission as expressed in paragraph (11) of the commentary.

21. Mr. ROSENSTOCK, Mr. BROWNLIE and Mr. SIMMA said that they supported the Special Rapporteur's position on that point.

22. The CHAIRMAN, after the Commission had proceeded to an informal vote, observed that the majority of members rejected the proposal by Mr. Economides.

*Section C.2, as amended, was adopted.*

1. TEXT OF THE DRAFT ARTICLES (A/CN.4/L.539/ADD.1)

23. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text of the draft articles.

*It was so agreed.*

*Section C.1 was adopted.*

*Chapter IV, as a whole, as amended, was adopted.*

*Mr. Baena Soares took the Chair.*

**CHAPTER V. Reservations to treaties (A/CN.4/L.544 and Add.1 and 2 and Add.2/Corr.1)**

24. Mr. PELLET (Special Rapporteur) said that he wished to make a comment which related to the whole of the document and concerned the use of the imperfect tense in the French version. In that regard he expressed his complete and unreserved disapproval of the methods that the United Nations bureaucracy imposed on a group of experts which was not subordinate to it. He cited, as an example, a footnote where the use of the imperfect was in no way justified. He therefore made a formal protest, which he intended to reiterate in the Sixth Committee, at the way in which the report was presented.

25. Mr. KATEKA said he recognized the Special Rapporteur's right to protest, but the virulence of his remarks was surprising and regrettable.

26. Mr. LUKASHUK said he did not think that the problem, regardless of the Special Rapporteur's opinion, warranted such attention. After all, no one would challenge the Commission's right to use the terminology and expressions it deemed appropriate.

**A. Introduction (A/CN.4/L.544)**

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.544 and Add.1)**

Paragraph 7

*Paragraph 7 was adopted.*

Paragraph 8

27. Mr. FERRARI BRAVO pointed out that the elections to the Commission had been held on 11 November 1996, not 18 November 1996.

*Paragraph 8, as amended, was adopted.*

Paragraph 9

*Paragraph 9 was adopted.*

Paragraph 10

28. Mr. PELLET (Special Rapporteur) said that the beginning of the second sentence should read:

"In that connection, he referred to the 1951 study by Mr. James Brierly, in which he took a view which ran counter . . .".

*Paragraph 10, as amended, was adopted.*

Paragraphs 11 to 42

*Paragraphs 11 to 42 were adopted.*

Paragraph 43

29. Mr. PELLET (Special Rapporteur) said that a subparagraph (d) should be inserted reading: "The State could renounce being party to the treaty".

*It was so agreed.*

30. Mr. SIMMA asked the Special Rapporteur whether he might consider changing subparagraph (a) somewhat so as to modify the statement that the State could do nothing. Perhaps it would be preferable to say that the State

<sup>3</sup> For the text, see 2514th meeting, para. 18.

could, after having examined the findings in good faith, maintain its reservation.

31. Mr. ROSENSTOCK pointed out, in connection with subparagraph (a), that the findings of monitoring bodies did not create legal obligations for States.

32. Mr. BENNOUNA said he feared subparagraph (a) did imply that the State, in order to respect the law, should have done something. However, he would not press for a change.

*Paragraph 43, as amended, was adopted.*

Paragraphs 44 to 52

*Paragraphs 44 to 52 were adopted.*

Paragraph 53

33. Mr. HAFNER, supported by Mr. PELLET (Special Rapporteur), said that there was a mistake in the first sentence of the paragraph. The Western position had not been "more flexible" than the Soviet position: it had been "less flexible". A correction was therefore necessary.

*It was so agreed.*

34. Mr. ROSENSTOCK proposed that, as a better reflection of the debate, the words "or package deal" should be inserted at the end of the paragraph, followed by a new sentence reading: "They moreover argued that the changes in the reservations regime from the draft by the Commission were not fundamental."

*It was so agreed.*

*Paragraph 53, as amended, was adopted.*

Paragraphs 54 to 60

*Paragraphs 54 to 60 were adopted.*

Paragraph 61

35. Mr. PELLET (Special Rapporteur) said that the words "as a source", in the first sentence, should be replaced by "in the formation".

*It was so agreed.*

36. Mr. BENNOUNA said that the phrase "alternatives to the rules created by treaties" at the end of the first sentence was truly incomprehensible.

37. Mr. PELLET (Special Rapporteur) said the purpose had been to reflect the view of a member who, unfortunately, was not present in order to provide any explanations. He therefore proposed that the formulation should quite simply be deleted and the sentence would end with the words "customary rules".

*It was so agreed.*

*Paragraph 61, as amended, was adopted.*

Paragraph 62

*Paragraph 62 was adopted.*

Paragraph 63

38. Mr. ROSENSTOCK said that the third sentence should be amended by deleting the parentheses and the words "of customary law and", and by inserting a sentence after the third sentence reading: "It was stated that the situation of the objecting State might be more nuanced in the case of customary rules". Lastly, in the fifth sentence, the words "According to another point of view," should be deleted.

*It was so agreed.*

*Paragraph 63, as amended, was adopted.*

Paragraph 64

39. Mr. SIMMA said that the fifth sentence, which was supposed to reflect an opinion he had voiced, was not clear. He therefore proposed that it should be changed to read: "In the second case, the result was that multilateral treaties were reduced to different bilateral legal relationships, a solution which did not work for certain categories of treaties, including human rights treaties".

*It was so agreed.*

*Paragraph 64, as amended, was adopted.*

Paragraph 65

*Paragraph 65 was adopted.*

Paragraph 66

40. Mr. HAFNER said that reference had been made not to the "possibility" that States might declare that a reservation had no legal effect, but to the practice of certain States, including Austria. The first sentence of the paragraph should therefore be changed to read: "Reference was made to the practice of certain States which consisted of declaring that a reservation had no legal effect and did not affect the obligations of the reserving State under the treaty". The second sentence would be modified accordingly, in other words, the phrase "a State might declare" would be replaced by "certain States declared" and the tense of the verb "request" would be changed to "requested".

*Paragraph 66, as amended, was adopted.*

Paragraphs 67 and 68

*Paragraphs 67 and 68 were adopted.*

Paragraph 69

41. Mr. ROSENSTOCK said the word "nevertheless", in the fourth sentence, gave the idea that what was to follow contradicted what had preceded that sentence. Obvi-

ously that was not the case. He therefore proposed that the word should be replaced by “moreover”.

*It was so agreed.*

*Paragraph 69, as amended, was adopted.*

Paragraphs 70 to 82

*Paragraphs 70 to 82 were adopted.*

Paragraph 83

42. Mr. HAFNER proposed that the last sentence should be split in two, the first part ending with the words “recent problem”. The second part would then be introduced by the word “Furthermore”. Such a construction would bring out the logical link between the two parts of the sentence.

*Paragraph 83, as amended, was adopted.*

Paragraph 84

43. Mr. HAFNER proposed that the word “even” should be inserted in the first sentence before the words “in the case of”.

*Paragraph 84, as amended, was adopted.*

Paragraph 85

44. Mr. SIMMA, referring to the first sentence, proposed that the words “limited treaties”, should be replaced by “restricted multilateral treaties”, the term which, he seemed to recollect, was used in the 1969 Vienna Convention.

45. Mr. HAFNER said he too thought that the paragraph should speak of “restricted multilateral treaties”.

46. Mr. HE said that, if the word “limited” was replaced by “restricted”, the whole of the chapter would have to be reviewed to make sure that the same term was used throughout.

47. Mr. PELLET (Special Rapporteur) said that, whatever term was used in the English, it must be in keeping with the translation of the corresponding passage from the conclusion of chapter II, section B, of his second report (A/CN.4/477 and Add.1),<sup>4</sup> which spoke of treaties concluded among a limited number of parties.

48. Mr. ROSENSTOCK proposed that the adjective used should be explained in a footnote that would also mention the relevant article of the 1969 Vienna Convention, namely, article 20.

*It was so agreed.*

*Paragraph 85, as amended, was adopted.*

Paragraph 86

49. Mr. ROSENSTOCK proposed that at the beginning of the second sentence, after the words, “It was nevertheless pointed out”, the words “by several members” should be inserted, so as to give a better reflection of the debate.

*Paragraph 86, as amended, was adopted.*

Paragraphs 87 to 89

*Paragraphs 87 to 89 were adopted.*

Paragraph 90

50. Mr. SIMMA proposed that the word “probably”, in the first sentence, should be deleted. Members whose observations were reported in that sentence had thought that the bodies in question had indeed broadened their functions.

*Paragraph 90, as amended, was adopted.*

Paragraph 91

51. Mr. OPERTTI BADAN, referring to the last sentence in the Spanish version, proposed that the words *poder de decisión* should be replaced by the proper word, which was *competencia*. In addition, the second sentence was not accurate. It should be indicated that the practice of the bodies concerned had developed in the field of the *consideración* (consideration) and not the *determinación* (determination) of the permissibility of reservations.

52. Mr. PELLET (Special Rapporteur) said that the second sentence, in his opinion, clearly reflected what had been said on that point in the course of the debate. As indicated in the first sentence, it was the opinion of “Some members”.

53. Mr. RODRÍGUEZ CEDEÑO said that the Special Rapporteur’s recollections were correct. It was regrettable, however, that the paragraph did not mention the fact that other members had considered that the mandate of monitoring bodies allowed them to adopt conclusions or observations, but not to make “determinations”.

54. Mr. PELLET (Special Rapporteur) said that that view would be reflected in the paragraphs of the report on the discussion of the draft resolution and preliminary draft conclusions the Commission had considered.

55. Mr. RODRÍGUEZ CEDEÑO said he was sorry that no mention was also made of it in paragraph 91, for he himself had voiced some thoughts on that particular point in the course of the general debate.

*Paragraph 91, as amended in the Spanish version, was adopted.*

Paragraph 92

56. Mr. OPERTTI BADAN asked for clarification concerning the second part of the fourth sentence, namely “the bodies monitoring universal human rights conven-

<sup>4</sup> See *Yearbook* . . . 1996, vol. II (Part One).

tions did not have such competence . . .”. Was it to be inferred that the monitoring bodies of regional conventions did have such competence?

57. Mr. ROSENSTOCK said that he shared the uncertainty expressed by Mr. Operti Badan. To remove any ambiguity, he proposed that the words “whatever might be the case at the regional level,” should be inserted before the words “the bodies monitoring”.

*Paragraph 92, as amended, was adopted.*

Paragraph 93

58. Mr. SIMMA proposed that the word “machinery”, at the beginning of the second sentence, should be replaced by “regime”.

*Paragraph 93, as amended, was adopted.*

Paragraphs 94 to 104

*Paragraphs 94 to 104 were adopted.*

Paragraph 105

59. Mr. FERRARI BRAVO said the paragraph did not give an accurate account of the Commission’s debate, for the Commission had had before it not only a draft resolution but also preliminary draft conclusions. Contrary to what was said in the second sentence, the Commission had decided not to adopt a draft resolution. Moreover, that could be seen from paragraph 105 *bis*.

60. The CHAIRMAN suggested that the second sentence of paragraph 105 should be deleted.

*It was so agreed.*

61. Mr. ROSENSTOCK said that it was a draft resolution that had first been submitted to the Commission. As clearly stated in the first sentence of paragraph 105, the Commission had decided to transmit it to the Drafting Committee without having taken a final decision as to the form of the text. It was the Drafting Committee itself that had submitted preliminary draft conclusions to the Commission, without the Drafting Committee itself having indicated what final form the Commission should give to the text.

62. Mr. PELLET (Special Rapporteur) and Mr. GALICKI (Rapporteur), confirmed that recollection of events. In their opinion, the first sentence of paragraph 105 should be kept as it stood.

*Paragraph 105, as amended, was adopted.*

Paragraphs 105 *bis* and 106

*Paragraphs 105 bis and 106 were adopted.*

Paragraph 107

63. Mr. RODRÍGUEZ CEDEÑO proposed that it should be explained in the first sentence that it was not the

“principle stated in paragraph 5” but the “principle expressed in paragraph 5 of the preliminary conclusions”, as the wording ultimately adopted for the paragraph was different from that which had been proposed by the Special Rapporteur.

*It was so agreed.*

64. Mr. RODRÍGUEZ CEDEÑO, reverting to the first sentence, said he thought it incorrect to say that the monitoring bodies established by treaties were competent to make comments and express recommendations. The proper formula would be “are competent to adopt decisions”.

65. Mr. PELLET (Special Rapporteur) pointed out that the sentence started with the words “Some members”, who had actually expressed that opinion.

66. Mr. SIMMA said that paragraph 107 seemed to contradict the preceding paragraph. The positions of members reflected in the two paragraphs were confused.

67. The CHAIRMAN suggested that consideration of paragraph 107 should be taken up at the next meeting.

*It was so agreed.*

*The meeting rose at 6.20 p.m.*

## 2518th MEETING

*Friday, 18 July 1997, at 10 a.m.*

*Chairman:* Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, 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 (concluded)

CHAPTER V. *Reservations to treaties (concluded)* (A/CN.4/L.544 and Add.1 and 2 and Add.2/Corr.1)

**B. Consideration of the topic at the present session (concluded)**  
(A/CN.4/L.544 and Add.1)

Paragraph 107 (concluded)

I. Mr. RODRÍGUEZ CEDEÑO, following a conversation with the secretariat, withdrew his proposed amendment to paragraph 107.

*Paragraph 107 was adopted.*

Paragraphs 108 to 113

*Paragraphs 108 to 113 were adopted.*

*Section B, as amended, was adopted.*

**C. Texts of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission**  
(A/CN.4/L.544/Add.2 and Add.2/Corr.1)

*Section C was adopted.*

*Chapter V, as a whole, as amended, was adopted.*

*Mr. Pellet took the Chair.*

**CHAPTER X. Other decisions and conclusions of the Commission**  
(A/CN.4/L.550)

2. Mr. BAENA SOARES (Chairman of the Planning Group) introduced the report of the Planning Group (A/CN.4/L.551), which also appeared in chapter X, section A, of the draft report of the Commission. The most-discussed topic had been the proposal for a split session in 1998, on an experimental basis. The Planning Group had also discussed the idea of returning to 12-week sessions and had considered criteria for the selection of topics for the long-term programme of work. The first week of the next session would be given over almost entirely to working groups, with a two-day seminar to celebrate the Commission's fiftieth anniversary. The report of the Planning Group also included a schedule for the consideration of topics for the period 1998-2001.

**A. Programme, procedures and working methods of the Commission, and its documentation**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

**1. PLANNING OF THE WORK OF THE CURRENT SESSION**

Paragraph 3

*Paragraph 3 was adopted.*

**2. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL**

Paragraph 4

*Paragraph 4 was adopted.*

**3. METHODS OF WORK**

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

3. Mr. BENNOUNA said that the Commission had always practised rotation of the chairmanship by geographical region. What was meant by the proposal in paragraph 6 to adjust that practice?

4. Mr. BAENA SOARES (Chairman of the Planning Group) said current practice was to rotate the chairmanship every five years in the same order, which meant that the same region held the chairmanship in the first year of each quinquennium. The idea of changing that practice was being advanced, but no decision had been taken. The evident difficulties in adapting the practice would require much more analysis and consideration.

5. Mr. ROSENSTOCK said it had been suggested that the rotation should itself be rotated, so that each region would get a chance in due course to chair the first and the last sessions of the quinquennium, which were critical in mapping out and in completing the Commission's work.

6. Mr. PAMBOU-TCHIVOUNDA asked what was accomplished by chairing the first or the last session. No problem had arisen with the rotation system so far and one should not be created by including paragraphs 6 and 7 in the report.

7. Mr. GALICKI (Rapporteur) suggested that the end of the first sentence of paragraph 6 should be changed from "the quinquennia" to "each quinquennium".

8. Mr. BENNOUNA said it was not appropriate in paragraph 6 to speak of "general support".

9. Mr. LUKASHUK proposed that the last sentence of that paragraph should read "This suggestion was supported and deserves further discussion".

10. Mr. THIAM said he was opposed to the proposal contained in paragraph 6. The current system of rotation of the chairmanship had never created any difficulties.

11. Mr. GOCO said no attempt was being made to modify existing practice, and yet the wording suggested that there should be an adjustment. The word "flexibility" was wrong. Instead of saying that the currently fixed sequence should be "adjusted", it should be "followed". The phrase "a way should . . . be found" should be deleted. As to paragraph 7, the idea had been to decide on the chairmanship at the end of each session, so as to allow the new Chairman adequate time to prepare for the next session.

12. The CHAIRMAN said a proposal had been made in the Planning Group to put an end to the fixed sequence of rotation and had not met with any strong objections.

13. Mr. ROSENSTOCK said he agreed with the Chairman that there had been no objections to the proposal. The last part of the last sentence of paragraph 6 should simply

state that there was an intention to consider the matter further.

14. The CHAIRMAN, speaking as a member of the Commission, said that, he was opposed to anything that would make for greater regionalization of the Commission. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 6, on the understanding that in the first sentence, “the quinquennia” would be replaced by “each quinquennium”, and in the second sentence the phrase “a way . . . practice” would be replaced by a statement consistent with the formulation proposed by Mr. Lukashuk.

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

Paragraph 7

15. Mr. BENNOUNA said he had strongly supported the idea contained in paragraph 7. A 10- or 12-week session demanded a great deal of preparation for the Chairman. The Commission should proceed to adopt it and state that it enlisted unanimous support.

16. The CHAIRMAN said that there had not been unanimous support in that regard in the Planning Group.

17. Mr. SIMMA said he agreed with Mr. Bennouna. The Commission should adopt the principle embodied in paragraph 7. Being more explicit on the matter would help Commission and Bureau members to prepare for the tasks ahead, such as chairing the Drafting Committee.

18. Mr. CANDIOTI said he agreed with the principle, as long as such a phrase as “where possible” was added, because, while it would be easy to observe in the second, third, fourth and fifth years of each quinquennium, it would be difficult the first year, as the General Assembly’s decision on the composition of the Commission’s membership could not be anticipated.

19. Mr. PAMBOU-TCHIVOUNDA said Mr. Candiotti’s point was very clear, but was the matter not a regional one? Each region’s designation of who would hold the chairmanship required coordination among all members from that region. The Commission should keep its feet on the ground.

20. Mr. THIAM asked how the Commission could be sure that the person designated as Chairman would still be available at the next session. He did not agree that a Chairman needed 12 months to prepare for office. As the existing system had never raised any problems, he saw no reason to change it.

21. Mr. LUKASHUK said he fully supported the proposal in paragraph 7. Its opponents should view it as an experiment which could be reversed if it failed to work. The change, however, would be unfair to the current Chairman. No sooner was one Chairman elected than the Commission started looking around for another. However, he trusted that Mr. Pellet would accept the situation with his usual composure.

22. Mr. SIMMA drew attention to the practical advantages to be gained from adopting the principle embodied in paragraph 7. The admirable way in which the current Chairman of the Drafting Committee had discharged his duties had led him (Mr. Simma) to consider standing for that office at the next session. As it was to be a split session, he would be able to organize his other commitments in such a way as to allow him to serve. He would be unable to do so, however, in the event of a return to unitary sessions.

23. Mr. GOCO said a sentence could be added similar to that inserted in paragraph 6 about the need for further consideration of the suggestion. It would obviously be impracticable to introduce such an innovation on the last day of the current session. It should also be borne in mind that the serving Chairman normally participated in the proceedings of the Sixth Committee of the General Assembly and that the change of Chairman hinged on the rotation system provided for in paragraph 6.

24. The CHAIRMAN said that Mr. Bennouna’s idea was not, as he saw it, to designate a new Chairman right away but rather to give the suggestion in paragraph 7 the status of a decision.

25. Mr. THIAM said that if the African Group was asked to designate a Chairman at that stage in the proceedings, it would be unable to do so. The office of Chairman was not so exacting as to require a long period of preparation. At all events, more time was needed for reflection and it would be unwise to take a hasty decision.

26. The CHAIRMAN said that he had personally found the chairmanship quite a demanding office. The incumbent must be prepared to devote himself single-mindedly to the task for the entire session.

27. Speaking as a member of the Commission, he said he was opposed to the proposal in paragraph 7. The existing system seemed to work quite well. The members knew in advance who was likely to be the next Chairman. There was scope for flexibility, since an alternative candidate could be found if the designated Chairman found he had other commitments. The proposed new system was, in his view, unduly rigid. For example, he would have been unable to offer his services as Chairman a year ago, since he was never sure of his schedule at ICJ until the last minute. The existing system struck a fairly satisfactory balance between predictability and flexibility. Mr. Pambou-Tchivounda had been right, moreover, to draw attention to the difficulty that would arise in the first year of the quinquennium.

28. It was far more important, in his opinion, to change the mode of election from the existing system of total renewal every five years to partial renewal, say every three years, in order to preserve continuity. He would suggest such a reform at the next session. It was also the only way that Mr. Pambou-Tchivounda’s objection might be addressed.

29. On the other hand, Mr. Simma was right to draw attention to the important role played by the Chairman of the Drafting Committee. Mr. Sreenivasa Rao, moreover, had been extremely reluctant to accept the office. For his own part, he was inclined to support the idea of holding

informal consultations at the end of a session on an appropriate and willing candidate. It had always been a personal appointment without provision for geographical rotation. In that connection, he paid tribute to Mr. Calero Rodrigues who had in the past been something of a "life Chairman" of the Drafting Committee.

30. He suggested deleting the word *notamment* in the French version and "generally" in the English version of paragraph 7 and adding the words "and the Chairman of the Drafting Committee" after the word "Chairman".

31. Mr. BENNOUNA said that he disagreed with the Chairman and continued to view the proposal in paragraph 7 as a good idea. The designation of officers need not be official, but the coordinators of the regional groups should reach some kind of understanding through informal consultations on the distribution of work. It was untrue to say that elections had never been contested in the Commission. The atmosphere had not always been harmonious.

32. Mr. THIAM said he agreed with the wording suggested by the Chairman, but insisted that no decision should be taken for the time being on the membership of the Bureau. Consultations were fine, however, and could be undertaken at any time.

33. The CHAIRMAN assured Mr. Thiam that there was no question of taking any decision.

34. Mr. PAMBOU-TCHIVOUNDA asked whether Mr. Goco's proposed reference to further consideration of the matter was to be inserted.

35. Mr. GOCO proposed the insertion of the following second sentence: "This suggestion will be subject to further consideration by the Commission at the next session." The implication was that the suggestion was considered valid but impracticable for the time being. Final approval of the matter was being deferred until the next session.

36. Mr. THIAM said he did not agree that the suggestion had been considered valid.

37. The CHAIRMAN noted that the proposed wording of the new sentence was non-committal. He said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 7, as amended, including the proposed new sentence by Mr. Goco.

*It was so agreed.*

*Paragraph 7, as amended, was adopted.*

#### 4. SPLIT SESSION FOR 1998

##### Paragraph 8

*Paragraph 8 was adopted.*

##### Paragraph 9

38. Mr. HAFNER proposed replacing "suggested" by "noted" in the last sentence of paragraph 9.

*It was so agreed.*

*Paragraph 9, as amended, was adopted.*

##### Paragraph 10

39. Mr. BENNOUNA said he failed to understand the second half of paragraph 10. What were the "appropriate arrangements" to be made by the Secretariat so as not to prejudge the outcome of the split-session experiment?

40. Mr. BAENA SOARES (Chairman of the Planning Group) said the problem was related to the organization of conference services within the United Nations. The idea that had been discussed at length was that the situation with respect to conference services should not influence the outcome of the split-session experiment. As budgets were adopted on a biennial basis, provision should be made at the beginning of the biennium for planned meetings.

41. Mr. BENNOUNA said he interpreted paragraph 10 as meaning that the Secretariat was to make appropriate arrangements to ensure that the problems and difficulties which the Commission expected to encounter in 1998 were not repeated.

42. Mr. LEE (Secretary to the Commission) said that the Secretariat's understanding of paragraph 10, in the light of paragraph 11 concerning the Commission's sessions in 1998 and 1999, was that the Secretariat would contact the competent body in the United Nations and request that contingency plans should be made so that the Secretariat had maximum flexibility after the split-session experiment and was able to provide the Commission with the requisite conference services, whatever decision it took.

43. Mr. GALICKI (Rapporteur) said that it was obviously in the Commission's interest to have paragraph 10 included in the report and interpreted by the Secretariat in the way suggested by the Secretary.

44. Mr. PAMBOU-TCHIVOUNDA asked whether the Secretariat had any choice in the matter. Was it likely to do anything that might run counter to the Commission's interests or cause an obstruction? He wondered whether paragraph 10 served any purpose in that case. The Secretariat only did what it had to do.

45. The CHAIRMAN said Mr. Pambou-Tchivounda might think differently if he had been involved in the practicalities of arranging for the allocation of conference services.

46. Mr. ROSENSTOCK said that the secretariat's response corresponded precisely to the thinking behind paragraph 10. The Commission would be free after the split-session experiment to make its choice on the merits and would not be constrained by decisions such as that regarding the dates of the Diplomatic Conference on the Establishment of an International Criminal Court, in 1998, which had in a certain sense been taken without consideration of the Commission's interests.

47. Mr. BENNOUNA thanked the Secretary to the Commission for his explanation and regretted that paragraph 10 was not equally clear. He could, however, support it in substance.

48. Mr. BAENA SOARES (Chairman of the Planning Group) said that paragraph 10 was a preventive measure to allow the Commission as much latitude as possible in taking its decision on the split-session experiment and to ensure that it was not hampered by prior administrative decisions.

49. Mr. BENNOUNA said that the Commission should review the position next year in the light of the results of the split-session experiment.

50. The CHAIRMAN, speaking as a member of the Commission, said that he disagreed with the position adopted by the Planning Group and thought that the principle of a 12-week session should not be regarded as sacrosanct. However, he realized that he had been a minority in the Planning Group.

*Paragraph 10 was adopted.*

#### 5. DURATION OF THE COMMISSION'S FUTURE SESSIONS

##### Paragraph 11

*Paragraph 11 was adopted.*

#### 6. CELEBRATION OF THE FIFTIETH ANNIVERSARY OF THE COMMISSION IN 1998

##### Paragraph 12

51. Mr. BENNOUNA asked whether the seminar to celebrate the fiftieth anniversary of the Commission, referred to in the second sentence of paragraph 12, ought not to have some specific title.

52. The CHAIRMAN explained that it had been considered prudent not to specify the precise orientation of the projected seminar. He suggested that the words "to collaborate with the Commission in organizing", in the third sentence, should be replaced by "to organize jointly with the Commission".

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

##### Paragraph 13

*Paragraph 13 was adopted.*

#### 7. COOPERATION WITH OTHER BODIES

##### Paragraphs 14 and 15

*Paragraphs 14 and 15 were adopted.*

#### 8. ORGANIZATION OF THE FIFTIETH SESSION

##### Paragraph 16

53. The CHAIRMAN said that the word "suggested" in the first sentence should be replaced by "arranged".

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

#### WORK PROGRAMME (1998-2001)

54. Mr. BENNOUNA suggested that, in the interests of harmonization, the second sentence of the 1998 entry under "Unilateral acts of States" should be deleted. Keeping it could be viewed as signifying that the Special Rapporteurs on other topics would not be assisted by small consultative groups of members of the Commission. As to the 2001 entry under "Diplomatic protection", the words "Fourth report of the Special Rapporteur and" should be inserted before "Possible completion of the first reading of the topic". He would not insist on the second report being described as preliminary, provided it was understood that its precise contents would depend on future developments.

*It was so agreed.*

55. Mr. HAFNER said that the reference under the 1998 entry for Unilateral acts of States to a small consultative group should be included for all the new topics. Again, the sentence in square brackets in the 1999 entry under "International liability" should be inserted in the corresponding entries for the years 2000 and 2001.

*It was so agreed.*

56. The CHAIRMAN said that the 1998 entry under "Reservations to treaties" should begin with the words "To the extent possible,". As to the 2001 entry under the same topic, he suggested that the word "completion" should be preceded by the word "Possible".

*It was so agreed.*

57. Mr. SIMMA congratulated the secretariat on preparing the work programme for the rest of the quinquennium, a welcome innovation which offered a better overview of the Commission's future activities. Any failure to carry out the programme in time would, of course, be more transparent than in the past, but that too was perhaps to be welcomed.

*Section A, as amended, was adopted.*

#### B. Appointment of special rapporteurs

##### Paragraphs 17 to 19

*Paragraphs 17 to 19 were adopted.*

##### Paragraph 20

58. The CHAIRMAN invited the Special Rapporteurs to indicate the membership of the respective consultative groups they had formed in accordance with paragraph 20.

59. Mr. MIKULKA said that the consultative group on nationality in relation to State succession would consist of Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Economides, Mr. Galicki, Mr. Hafner and Mr. Rosenstock. He had taken the liberty of exceeding the maximum membership of five members indicated by the Chairman because he had thought it desirable that, in addition to members who had already worked on the topic in the past, the group should also include representatives of different legal systems and of the main currents of opinion.

60. The CHAIRMAN said it was desirable to remain within the limits of three to five members. The regional aspect was, perhaps, not so important in the context.

61. Mr. BENNOUNA said that the consultative group on diplomatic protection would be composed of Mr. Dugard, Mr. Galicki, Mr. Sepúlveda and Mr. Simma.

62. Mr. RODRÍGUEZ CEDEÑO said that the consultative group on unilateral acts of States would be composed of Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Hafner, Mr. Lukashuk, Mr. Pambou-Tchivounda and Mr. Rosenstock.

63. Mr. Sreenivasa RAO said that the consultative group on international liability for injurious consequences arising out of acts not prohibited by international law would be composed of Mr. Galicki, Mr. Hafner, Mr. Kateka and Mr. Operti Badan. In addition, he had already received a great deal of cooperation from other members of the Commission.

64. The CHAIRMAN said that the working group on State responsibility would be formed afresh every year to deal with the separate subjects of crimes, countermeasures and settlement of disputes. The working group for the next session, which would be somewhat larger than those for other topics, would be set up at the beginning of the session. Mr. Dugard and Mr. Ferrari Bravo had already expressed an interest in joining it.

65. Mr. FERRARI BRAVO, noting that he had been listed among the members of the consultative group on unilateral acts of States, wished to place on record that he had not volunteered to join that consultative group, which in his opinion was already too large and which included another western European representative in the person of Mr. Economides. On the other hand, he was definitely interested in joining the working group on State responsibility.

66. Mr. DUGARD, agreeing that the consultative group on unilateral acts of States was rather large, said that he would prefer to withdraw from its membership, as he was already a member of the consultative group on diplomatic protection.

67. Mr. BENNOUNA said that, since the establishment of consultative groups constituted an innovation, a good deal of flexibility was called for. Members who did not formally belong to a consultative group but felt that they could make a valuable contribution would be welcome to do so at all times.

68. Mr. HAFNER said he agreed with Mr. Bennouna. Although not formally a member of the consultative group on unilateral acts of States, he would be interested in participating in its work from time to time.

69. Mr. ECONOMIDES proposed that a sentence expressing the view put forward by Mr. Bennouna should be added at the end of paragraph 20.

70. The CHAIRMAN suggested that paragraph 20 should read as follows:

“20. The Special Rapporteurs were invited to form, as the case may be, their respective consultative groups. The membership of these consultative groups was announced at the 2518th meeting on 18 July.

Nevertheless, it was stressed that all members of the Commission were invited to cooperate with the Special Rapporteurs.”

*It was so agreed.*

*Paragraph 20, as amended, was adopted.*

*Section B, as amended, was adopted.*

#### C. Long-term programme of work

Paragraph 21

*Paragraph 21 was adopted.*

*Section C was adopted.*

#### D. Cooperation with other bodies

Paragraphs 22 to 26

71. Mr. GALICKI (Rapporteur) indicated that some of the dates in paragraphs 22, 23 and 24 were wrong and would be corrected later.

72. The CHAIRMAN proposed that the last sentence of paragraph 25 should, in the interests of greater courtesy towards ICJ, begin with the words “The Commission found it useful”. In paragraph 26, the words “the representative” should be replaced by “a member of the legal service”.

*Paragraphs 22 to 26, as amended, were adopted.*

*Section D, as amended, was adopted.*

#### E. Date and place of the fiftieth session

Paragraph 27

73. Mr. GALICKI (Rapporteur) said that at the beginning of paragraph 27 the words “On the basis of those external factors mentioned above” should read: “In view of the external factors mentioned in paragraph 9”.

*It was so agreed.*

*Paragraph 27, as amended, was adopted.*

*Section E, as amended, was adopted.*

#### F. Representation at the fifty-second session of the General Assembly

Paragraph 28

74. Mr. GALICKI (Rapporteur) drew attention to a minor editing change in footnote 4.

*Paragraph 28 was adopted.*

*Section F was adopted.*

#### G. Contribution to the Decade of International Law

Paragraph 29

*Paragraph 29 was adopted.*

*Section G was adopted.*

#### H. International Law Seminar

Paragraphs 30 to 32

*Paragraphs 30 to 32 were adopted.*

Paragraph 33

75. The CHAIRMAN and Mr. GOCO drew attention to editing changes required in paragraph 33 in connection with the titles of the lectures they had given in the Seminar.

*It was so agreed.*

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 to 41

76. Mr. GALICKI (Rapporteur) suggested that the word “comprehensive”, in paragraph 41, should be replaced by “full”.

*Paragraphs 34 to 41 were adopted.*

*Section H, as amended, was adopted.*

*Chapter X, as a whole, as amended, was adopted.*

77. Mr. HAFNER said that the report of the Secretary-General entitled “Renewing the United Nations: a programme for reform”<sup>1</sup> covered a very wide field of activities, yet conspicuously absent was a reference to United Nations activities in the codification and progressive development of international law. International law was an important device for guaranteeing and securing peace and stability in international relations. He deeply regretted that it had been omitted from the report. The omission was all the more surprising since the second half of the United Nations Decade of International Law,<sup>2</sup> was currently under way, and preparations were to be made for the fiftieth anniversary of the Commission. He therefore suggested that the Chairman draw that omission to the attention of Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

78. The CHAIRMAN said that he, too, had found the omission disturbing. He undertook to raise the matter with the Legal Counsel and, if he had the opportunity, with the Secretary-General.

#### CHAPTER VI. *State responsibility* (A/CN.4/L.541)

*Chapter VI was adopted.*

#### CHAPTER VII. *International liability for injurious consequences arising out of acts not prohibited by international law* (A/CN.4/L.542)

*Chapter VII was adopted.*

#### CHAPTER VIII. *Diplomatic protection* (A/CN.4/L.548)

*Chapter VIII was adopted.*

#### CHAPTER IX. *Unilateral acts of States* (A/CN.4/L.549)

*Chapter IX was adopted.*

#### CHAPTER I. *Organization of the session* (A/CN.4/L.545 and Corr.1)

##### A. Membership

##### B. Officers and the Enlarged Bureau

##### C. Drafting Committee

##### D. Working groups

##### E. Secretariat

Paragraphs 1 to 12

*Paragraphs 1 to 12 were adopted.*

*Sections A to E were adopted.*

##### F. Agenda

Paragraph 13

79. The CHAIRMAN suggested that, after item 5, two new items should be inserted to read:

“6. Diplomatic protection

“7. Unilateral acts of States.”

*It was so agreed.*

*Paragraph 13, as amended, was adopted.*

*Section F, as amended, was adopted.*

*Chapter I, as a whole, as amended, was adopted.*

#### CHAPTER II. *Summary of the work of the Commission at its forty-ninth session* (A/CN.4/L.546)

*Chapter II was adopted.*

#### CHAPTER III. *Specific issues on which comments would be of particular interest to the Commission* (A/CN.4/L.547)

80. The CHAIRMAN noted that the chapter was an innovation introduced in response to one of the recommendations made in the report of the Commission on the work of its forty-eighth session.<sup>3</sup> It was intended to draw attention to the issues on which the Commission would like to hear the reactions of the General Assembly through the Sixth Committee.

81. Mr. GALICKI (Rapporteur) added that a section on specific issues had been included in chapter I of the report of the Commission on the work of its forty-eighth session, but it had currently been decided to place such material in a separate chapter, to make it more conspicuous. The

<sup>1</sup> A/51/950.

<sup>2</sup> See 2491st meeting, footnote 6.

<sup>3</sup> *Yearbook . . . 1996*, vol. II (Part Two), para. 148 (c).

issues were drawn from reports received from working groups and from consultations with the Chairmen of the working groups and the Special Rapporteurs.

82. Mr. BENNOUNA proposed that, in section (e) on diplomatic protection, subsection (b) should be deleted.

*It was so agreed.*

83. Mr. ROSENSTOCK proposed that, as a consequence of that amendment, the word "claimed", in section (e), subsection (c), should be deleted, as it might otherwise be ambiguous and suggest that the Commission did not think international organizations provided diplomatic protection for their agents.

*It was so agreed.*

84. Mr. RODRÍGUEZ CEDEÑO proposed that, at the end of the last paragraph, the words "and the Consultative Group" should be deleted.

*It was so agreed.*

*Chapter III, as a whole, as amended, was adopted.*

*The draft report of the Commission on the work of its forty-ninth session, as a whole, as amended, was adopted.*

### Closure of the session

85. The CHAIRMAN said he wished to share some of his thoughts on the session that was at that time coming to an end. He could not honestly state that it saddened him: being Chairman had been a harder job than he had ever expected it to be. Yet he was sure that nostalgia would set in at some point in the future, for the Commission, by entrusting him with its chairmanship, had offered him a unique and enriching experience for which he was truly grateful.

86. He had said at the start of his tenure as Chairman that he found the members of the Commission intrepid, and he was even more convinced of that now. To begin with, they had put up with him—something that was not always easy—and he was grateful to them for accepting him, defects and all. It was that very acceptance that had enabled him to act on his sincere devotion to the institution they all served. He truly believed in international law and that the Commission could help to promote it. By performing the duties assigned to him by the Commission, he felt he had been able to contribute to that effort. If, at times, he had acted impatiently or tactlessly he sincerely begged forgiveness.

87. He had initially feared that the session would be mainly about the Commission's getting into its stride after the replacement of over half of its membership, nor had the agenda, which had not seemed very ambitious, encouraged optimism. Yet he had been pleasantly surprised to see that those predictions had proved false, and that the session had truly been a fruitful one.

88. Those results could not have been accomplished without the remarkable efforts of those who worked behind the scenes. Mr. Lee, the Secretary to the Commission, had been an outstanding adviser and was one of the

main artisans of the session's success. All the other members of the secretariat had likewise won his admiration for their excellence and perseverance in performing their tasks and, on behalf of the Commission, he wished to thank all of them.

89. The new members of the Commission had adapted rapidly to the Commission's working methods and offered a fresh outlook on them. The long-standing members, too, had made their contribution by countenancing a number of innovations. Those attitudes had enabled the Commission to move forward. The Chairmen of the working groups had put perennial topics back on track towards completion and given a good start to the work on new topics. The members of the Enlarged Bureau, the Rapporteur and the Chairman of the Drafting Committee had won his gratitude and admiration. He also wished to pay special tribute to the Special Rapporteur on nationality in relation to the succession of States, whose topic had formed the bulk of the Commission's work at the current session. His enthusiasm for the topic and his energy had illuminated what was in essence a fairly austere subject. The results were, he believed, without precedent in the work of the Commission: the adoption, in the course of a single session, of an entire set of draft articles, with commentaries. The session had also yielded preliminary conclusions on reservations, fresh impetus had been given to the work on two long-standing topics, and the work on two new topics had been planned. The results of the session were certainly nothing to be ashamed of.

90. A few words should be said about traditions, which came in both the good and the bad varieties. He remained adamant that points of order had to be used parsimoniously and only to further the proceedings, not to interrupt them. He also remained convinced that independent experts like the members of the Commission should not have to hew to the line set by international civil servants who insisted on the rigorous observance of precedent, for example, in the presentation of the report. Members of the Commission not able to attend all of its meetings should exercise restraint by not speaking in ignorance of past discussion and thereby obliging the Commission to go back over terrain it had already covered. They could indicate briefly what their position would have been had they been present, they could express reservations, but they should not reopen the discussion.

91. It was gratifying, on the other hand, to see that the debates had taken a less formalistic turn, that they had been more relaxed and more direct, and he hoped that that new approach would be followed at the next session. He also hoped members would still continue to say what was truly on their minds concerning international law and its codification and progressive development, without unduly concerning themselves with the reactions of the Governments of their own countries or with the possible electoral consequences of their positions. A dialogue between the Commission and the community of States within the General Assembly was indispensable. The Commission was at the service of the international community, and it was by striving to develop the best possible rules of international law that it could best serve that community. However, the members of the Commission must remain modest. They were experts, but not legislators, and it was Governments that would decide in the end on the

fate of the rules they developed. On the whole, he thought an excellent balance prevailed.

92. He had had the honour of serving on the Commission during two other mandates previously, and the membership had been remarkable in both instances, notwithstanding the doctrinal disputes, cultural differences and ideological oppositions within it. The current membership was fully in keeping with that honourable tradition.

93. Mr. MIKULKA, speaking on behalf of the Commission, thanked the Chairman for his brilliant conduct of the Commission's proceedings. He had instituted a revolution

in its working methods which constituted a splendid contribution to the Commission's work.

94. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) thanked the Chairman for the excellent guidance given for the work of the Drafting Committee and paid tribute to the members of the Drafting Committee, and to the entire Commission, for having advanced so far on so many important fronts. He was happy to have been part of that endeavour.

95. After the usual exchange of courtesies, the CHAIRMAN declared the forty-ninth session of the International Law Commission closed.

*The meeting rose at 1.05 p.m.*

---

### كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم. استلم عنها من المكتبة التي تتعامل معها أو اكتب إلى: الأمم المتحدة، قسم البيع في نيويورك أو في جنيف.

#### 如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

#### HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

#### COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

#### КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

#### COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

---