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Summary record of the 2514th meeting

Topic:
Other topics

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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-Statism, 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 In any event, the Commission was close to the limits of an outdated terminology.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. Candioti, 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 nationality *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 CEDEÑO 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 permitted 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.[1] 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.

[1] 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[2] 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,[3] 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

[2] See 2477th meeting, footnote 7.

[3] 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 nationality 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 évolution 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)