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Second report on State Succession and its impact on the nationality of natural and legal persons, by Mr. Vaclav Mikulka, Special Rapporteur

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Second report on State succession and its impact on the nationality of natural and legal persons, by Mr. Václav Mikulka, Special Rapporteur

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* Incorporating document A/CN.4/474/Corr.1.

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Introduction

A. Previous work on the topic

1. At its forty-fifth session, in 1993, the International Law Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons".[1] The General Assembly endorsed this decision in paragraph 7 of its resolution 48/31 and, one year later, in paragraph 6 of its resolution 49/51, it endorsed the intention of the Commission to undertake work on the topic, on the understanding that the final form to be given to the work should be decided after a preliminary study had been presented to the Assembly. The Assembly also invited Governments to submit relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

1. Consideration of the topic at the forty-seventh session of the Commission

2. The first report of the Special Rapporteur[2] was considered by the Commission during its forty-seventh session. A summary of this debate is contained in chapter III of the report of the Commission on the work of its forty-seventh session.[3]

[1] *Yearbook ... 1993*, vol. II (Part Two), p. 97, para. 440.

[2] *Yearbook ... 1995*, vol. II (Part One), p. 157, document A/CN.4/467.

[3] Ibid., vol. II (Part Two), pp. 36–38, paras. 165–193.

3. Following this debate, the Commission decided to establish a Working Group on State succession and its impact on the nationality of natural and legal persons, with the mandate to undertake a detailed substantive study of the issues raised in the Special Rapporteur's first report. The Working Group's report[4] was also considered by the Commission,[5] after which the latter decided[6] to reconvene the Working Group at the forty-eighth session to enable it to complete its task, namely, "to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action".[7] This should enable the Commission to meet the request contained in paragraph 6 of General Assembly resolution 49/51.

2. Views expressed by States in the Sixth Committee during the fiftieth session of the General Assembly

4. During consideration of the report of the Commission by the Sixth Committee at the fiftieth session of the General Assembly, 26 delegations expressed their views on chapter III of the report, which concerned the topic of State succession and its impact on the nationality of natural and legal persons.[8] The progress achieved by the Commission on this topic was generally welcomed. It was further stressed that the Commission's work on this subject pertained both to codification and to progressive development of international law.[9] Comments made on specific issues will be referred to under the relevant sections below.

3. General Assembly resolution 50/45

5. In its resolution 50/45 entitled "Report of the International Law Commission on the work of its forty-seventh session", the General Assembly noted, among other things, the beginning of the work on State succession and its impact on the nationality of natural and legal persons and invited the Commission to continue its work on this topic along the lines indicated in the report (para. 4). The Assembly also requested the Secretary-General to again invite Governments to submit as soon as possible relevant materials, including treaties, national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to this topic (para. 6). By means of this resolution, the Commission received a clear instruction to complete the preliminary study on this subject during its forty-eighth session.

B. Consideration in other bodies of the problems of nationality arising in the context of State succession

6. In his first report, the Special Rapporteur had made reference to the work of several international bodies currently dealing with issues of nationality in relation to State succession.[10] The progress achieved by these bodies and organizations is worth noting and can be a source of inspiration and encouragement for the Commission. Thus, the Committee of experts on nationality of the Council of Europe is drafting a European Convention on Nationality, containing basic principles, including the right to a nationality, the obligation to avoid statelessness, the inadmissibility of arbitrary deprivation of nationality, non-discrimination, as well as specific provisions concerning the loss and acquisition of nationality in situations of State succession. Another organ of the Council of Europe, the European Commission for Democracy through Law, is currently preparing a draft set of principles for State practice in relation to the impact of State succession on nationality. As for the problem of statelessness, including statelessness resulting from State succession, it appears to be of growing interest to UNHCR.[11]

C. Work remaining in order to complete the preliminary study of the topic

7. While some members of the Commission were of the view that the first report of the Special Rapporteur and the summary of the Commission's discussion thereon had already satisfied the request for a "preliminary study",[12] others considered that the Commission should present the General Assembly with a number of options and possible solutions.[13] A similar divergency of views characterized the discussion of the report of the Working Group. While the majority of members were of the view that the results obtained were more positive than might have been expected so early in the study of a field that remains largely unexplored, the view was also expressed that the Working Group had not yet fulfilled its mandate and that its report did not contain the specific guidelines which the Commission needed in order to undertake practical work and to move finally beyond the stage of theory.[14] The Commission also regretted the Working Group's failure to provide a calendar of action for the Commission's future work on this topic.[15]

8. According to yet another view, instead of identifying the issues and then making recommendations on

[4] Ibid., annex, p. 113.

[5] Ibid., pp. 38–42, paras. 194–228, and vol. I, 2411th and 2413th meetings.

[6] Ibid., vol. II (Part Two), p. 42, para. 229.

[7] Ibid., p. 33, para. 147; see also *Yearbook ... 1996*, vol. II (Part Two), p. 74, paras. 67–68.

[8] See *Official Records of the General Assembly, Fiftieth Session, Sixth Committee* (A/C.6/50/SR.13, 15–16, 18 and 20–24 and A/C.6/50/SR.1–46/Corrigendum), as well as the topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fiftieth session of the General Assembly (A/CN.4/472/Add.1), paras. 1–29.

[9] A/CN.4/472/Add.1, paras. 1 and 3.

[10] Para. 31 of the report (see footnote 2 above).

[11] For a review of the recent activities of UNHCR in this field, see Batchelor, "UNHCR and issues related to nationality". See also the Addendum to the Report of the United Nations High Commissioner for Refugees (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A* (A/50/12/Add.1), para. 20), the Report of the Sub-Committee of the Whole on International Protection (A/AC.96/858), paras. 21–27), as well as General Assembly resolution 50/152 of 21 December 1995 entitled "Office of the United Nations High Commissioner for Refugees".

[12] See *Yearbook ... 1995*, vol. I, 2389th meeting, statement by Mr. Pellet, p. 66, para. 28.

[13] Ibid., 2387th meeting, statement by Mr. Tomuschat, p. 54, para. 16.

[14] Ibid., 2411th meeting, statement by Mr. Yankov, p. 217, paras. 39–40.

[15] Ibid., vol. II (Part Two), p. 39, para. 205.

how they should be addressed, the report of the Working Group listed a number of "obligations" whose sources and characteristics should have been more clearly explained. Concern was expressed that to speak of obligations at the present early stage, before State practice was clear, might cause confusion.[16]

9. The report of the Working Group, as the Special Rapporteur had already stated, was preliminary in character. In fact, the Working Group intended to complete its mandate during the forty-eighth session of the Commission and to work out a calendar of action after it had completed its consideration of all the issues at hand.[17] The short "excursion" into the field of substantive problems had been useful in order to shed more light on a subject generally considered to be very complex and sensitive as well as to assess realistically the prospects of different approaches in addressing specific problems. The five meetings of the Working Group resulting in an eight-page report certainly did not amount to a "detailed substantive study" of the subject, as was argued by one delegation in the Sixth Committee.[18] In formulating "principles" which were merely working hypotheses meriting further study,[19] the Working Group had in fact defined and organized the main substantive issues to be examined in the future by the Commission. In this respect, the latter had thus fulfilled that part of its mandate dealing with the nationality of natural persons.

10. The Working Group did not examine the second part of the topic, i.e. the nationality of legal persons, which was regretted by some members of the Commission.[20] The reasons for this are obvious: the lack of specific input from the first report and the time constraints under which the Working Group operated. At the forty-eighth session of the Commission, the Working Group should therefore devote some time to a similar "excursion" into the field of substantive issues concerning the problems of nationality of legal persons arising in the context of State succession.

11. The task of the Working Group at the forty-eighth session of the Commission should not consist in redrafting the above-mentioned "principles", but merely in considering the most appropriate form the work on this topic should take as well as the working methods and the timetable to be followed in order to achieve the final goal of offering a balanced legal framework for a just and equitable resolution of nationality problems arising from State succession. The prevailing view in the Commission was that the Working Group should complete its task during the forty-eighth session.

D. Major substantive issues to be examined by the Commission in the future

12. There are a number of specific substantive issues which crystallized during the discussions on the first report, both in the Working Group and in the Sixth Committee. Most of them had already been identified in the first report, but the debate has led to a more precise definition of such issues and to a determination of their degree of urgency as well as to the realization of the problems the Commission could encounter when addressing this subject in terms of codification and progressive development of the law. These substantive issues can be divided into two major groups, corresponding to the dual character of the topic, namely, the problems relating to the nationality of natural persons and the problems relating to the nationality of legal persons. This report has been organized accordingly.[21]

[16] Ibid., para. 204.

[17] Ibid., p. 41, para. 220.

[18] One representative was of the view that, by establishing a Working Group to consider the subject, the Commission seemed to be moving away from presenting the preliminary study requested by the General Assembly and to be embarking upon the preparation of a detailed substantive study, although the Special Rapporteur's first report had supplied all the elements necessary to complete the requested study in a short period of time (A/CN.4/472/Add.1, para. 4).

[19] *Yearbook ... 1995*, vol. II (Part Two), p. 42, para. 226.

[20] Ibid., vol. I, 2411th meeting, statements by Mr. Pellet and Mr. Vargas Carreño, p. 216.

[21] Ibid., vol. II (Part Two), p. 42, para. 228. Upon conclusion of the consideration of this topic at the forty-seventh session of the Commission, the Special Rapporteur indicated that he intended to divide his second report into three sections: the first would deal with issues considered by the Working Group, in particular the nationality of natural persons, the second would address the issue of legal persons, and the third would deal with future work, including the form which the outcome of the work could take.

CHAPTER I

Nationality of natural persons

A. General issues

13. There was broad support in the Commission for the Special Rapporteur's contention that, while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States.[22] It was generally agreed that it was precisely this limited role of international law in the specific context of State succession which was to be the focus of the Commission's work.[23]

1. PROTECTION OF HUMAN RIGHTS

14. Some members of the Commission pointed out that, in particular, it was the development of human rights

[22] Ibid., vol. II (Part One), first report of the Special Rapporteur (footnote 2 above), pp. 168–189, paras. 57–66 and p. 172, paras. 85–89. See also volume II (Part Two), pp. 34–35, paras. 157–160.

[23] Ibid., vol. II (Part Two), p. 37, para. 183.

laws which imposed new restrictions on the discretionary power of States with respect to nationality.[24] As the Special Rapporteur had nevertheless pointed out, it was not always possible in the event of a collective change of nationality to apply automatically all the principles set forth in the human rights instruments in order to resolve individual cases.[25] There was also a view that the role played by international law, including human rights law, should not be overemphasized, since both the literature and jurisprudence had recognized the exclusive character of the competence of the State in determining which individuals were its nationals.[26]

15. During the debate in the Sixth Committee, it was also generally recognized that, while nationality was essentially governed by internal law, certain restrictions on the freedom of action of States derived from international law, which therefore had a role to play in this area. The human rights aspect of the topic was particularly highlighted in this respect. It was strongly emphasized that the Commission's work on the topic should aim at the protection of the individual against any detrimental effects in the area of nationality resulting from State succession, especially statelessness.[27]

16. The debate both in the Commission and in the Sixth Committee indicates general acceptance of the fact that the predecessor or successor State, as the case may be, cannot invoke the argument that nationality is primarily a matter of internal law as a justification for non-compliance with its relevant obligations under international law. In its future work, the Commission could envisage the formulation of a general principle to this effect.

(a) *The right to a nationality*

17. The Special Rapporteur's comments, in his first report, on the individual's right to a nationality[28] gave rise to a debate within the Commission. Several members regarded the right to a nationality as central to the work. Special emphasis was placed on article 15 of the Universal Declaration of Human Rights; at the same time it was noted that the International Covenant on Civil and Political Rights reflected a reluctance to recognize that right as a general rule.[29] As to the conclusions which the Commission should draw from the existence of the right to a nationality within the context of State succession, it was noted *inter alia* that the right implied a concomitant obligation on States to negotiate so that the persons concerned could acquire a nationality—an obligation the Commission should stress.[30]

18. The Working Group based its discussion on the premise that, in situations resulting from State succession, every person whose nationality might be affected by the change in the international status of the territory had the right to a nationality and that States had the obligation to prevent statelessness.[31] It was subsequently noted in the Commission that the principle of the individual's right to a nationality would undoubtedly come to be incorporated in many national legislations.[32]

19. The right to a nationality is a central element of a conceptual approach to the topic, which, as emphasized in the Sixth Committee, should aim at the protection of the individual against any detrimental effects resulting from State succession.[33] While the concept of the right to a nationality and its usefulness in situations of State succession was generally accepted, it would nevertheless be unwise to draw any substantive conclusions therefrom, having in mind the very preliminary stage of the discussion on this issue. It would be even more unwise to presume the existence of a consensus on the question as to whether this concept or some of its elements belong to the realm of *lex lata*.[34] It would nonetheless be difficult to object to the view that the right to a nationality embodied in article 15 of the Universal Declaration of Human Rights "must be understood to provide at least a moral guidance" for the legislation on citizenship when new States are created or old ones resume their sovereignty.[35]

20. It is not the intention of the Special Rapporteur to engage the Commission, at this stage, in an in-depth study of this problem. No doubt, as in the case of any other aspect of the question of the nationality of natural persons, the first task of the Commission is to determine whether the application of the concept of the right to a nationality in the context of State succession presents certain specificities. But once the Commission begins, in the next stage of its work on the topic, the analysis of these specificities, it must ascertain whether a general right to a nationality exists. For only after it has clarified the existing rules of law and indicated where such law was found to be inadequate can the Commission pave the way for the progressive development of the law consistent with realistic expectations.[36] The point made in the Sixth Committee that the Commission should clearly distinguish between the *lex lata* and the *lex ferenda*[37] is indeed well taken.

21. In the context of State succession, the question of the right to a nationality is of a limited and "manageable" scope, clearly defined *ratione personae* as well as *ratione*

[24] Ibid., vol. I, statements by Messrs Crawford and Fomba (2388th meeting, pp. 60–61, paras. 36–48, and pp. 61–62, paras. 52–60, respectively), Al-Baharna (2389th meeting, p. 66, paras. 29–34), Kabatsi, Yamada and Kusuma-Atmadja (2390th meeting, p. 68, paras. 1–6, p.72, paras. 27–37, and p. 73, paras. 38–46 respectively).

[25] Ibid., vol. II (Part Two), p. 38, para. 193.

[26] Ibid., p. 37, para. 184.

[27] A/CN.4/472/Add.1, paras. 5–6.

[28] Para. 87 of the report (see footnote 2 above).

[29] Ibid., vol. I, 2387th and 2389th meetings, statements by Mr. Tomuschat and Mr. Al-Baharna respectively, p. 54, paras. 11–17, and p. 67, paras. 29–34.

[30] Ibid., 2387th meeting, statement by Mr. Bowett, p. 53, paras. 4–10.

[31] Ibid., vol. II (Part Two), annex, para. 4.

[32] Ibid., vol. I, 2411th meeting, statement by Mr. Lukashuk, p. 218, para. 52.

[33] A/CN.4/472/Add.1, para. 6.

[34] During the debate in the Commission on this question, it was also noted that article 24, paragraph 3, of the International Covenant on Civil and Political Rights guaranteed every child the right to acquire a nationality, which raises the question of whether there is not a distinction between the rights of adults and those of children in the matter. See the statement by Mr. Tomuschat (*Yearbook ... 1995*, vol. I, 2387th meeting, p. 54, para. 14).

[35] Eide, "Citizenship and international law: the challenge of ethnonationalism", p. 9.

[36] See the view expressed in the Commission during the discussion of the report of the Working Group, *Yearbook ... 1995*, vol. II (Part Two), p. 39, para. 204.

[37] See A/CN.4/472/Add.1, para. 3.

temporis,[38] as is also the case with the obligation not to create statelessness.

22. The right to a nationality, as a human right, is conceivable as a right of an individual vis-à-vis a certain State, deriving, under certain conditions, from international law. As the case may be, it is the right to be granted the nationality of the successor State or not to be deprived of the nationality of the predecessor State. The obligation of the State not to create statelessness, however, is a State-to-State *erga omnes* obligation, conceivable either as a corollary of the above right to a nationality or as an autonomous obligation existing in the sphere of inter-State relations only and having no direct legal consequences in the relationship between States and individuals. Accordingly, while on the one hand the determination of the existence of a positive rule establishing the right to a nationality in the case of State succession implies the existence of a positive rule prohibiting, at least to the same extent, the creation of statelessness, on the other hand the determination of the existence of a positive rule prohibiting, under conditions specific to State succession, the creation of statelessness does not inevitably imply the existence of a right to a nationality as a right of an individual vis-à-vis the State concerned.

23. These questions, however, already relate to a substantive study of the problem and should therefore be left to a later stage of the work of the Commission on this topic.

(b) *The obligation to prevent statelessness*

24. The seriousness of the problem of statelessness in situations of State succession has generally been recognized by the Commission.[39] The solution of this problem should therefore have priority over the consideration of other problems of conflicts of nationality.[40] The obligation to prevent statelessness and the right to a nationality have therefore been accepted by the Working Group as fundamental premises for the formulation of guidelines to be taken into account by the States concerned in their negotiations to resolve questions of nationality by mutual agreement.[41]

25. In this respect, during the Commission's consideration of the report of the Working Group, it was said that if the basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succession was not at present a rule of international law, it should be the aim of the Commission to make it one.[42]

26. In the Sixth Committee, statelessness has been generally recognized as a serious problem deserving the primary attention of the Commission,[43] while the importance of the prevention or reduction of dual nationality was considered to be a real problem to a somewhat lesser extent.[44] No delegation challenged the Working Group's premise regarding the obligation not to create statelessness as a result of State succession.

2. The principle of effective nationality

27. While the main function of the rules of international law concerning the protection of human rights in the context of State succession is to prevent the detrimental effects of the unjustified withdrawal by the predecessor State of its nationality from certain categories of persons, or the unjustified refusal of the successor State to grant its nationality to certain individuals, the function of the principle of effective nationality is to control the abusive exercise of the discretionary power of the State to grant its nationality by depriving such nationality of its effects vis-à-vis third States.[45]

28. According to one view expressed during the Commission's debate on this question, outside the framework of diplomatic protection, the principle of effective nationality lost its pertinence and scope.[46] Reference was made, in this respect, to the arbitral award in the *Flegenheimer* case[47] and to the judgment of the Court of Justice of the European Communities in the *Micheletti* case.[48] However, several other members highlighted the importance of the principle of effective nationality and, in particular, the concept of a genuine link, which the Commission, in their view, should help pinpoint better than ICJ had done in the *Nottebohm* case.[49] They proposed that the criteria for establishing a genuine link for each different category of State succession should be studied. In that context, an individual's emotional attachment to a particular State was an element that should not be overlooked.[50]

29. In the Sixth Committee, the need to determine whether the application of the concept of genuine link presented certain specificities in the context of State succession was further highlighted.[51]

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[38] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 174–175, paras. 97–102 and 111.

[39] Ibid., vol. II (Part Two), p. 38, para. 189.

[40] The Special Rapporteur had highlighted in his first report the problems of positive conflict of nationalities (dual nationality, multiple nationality) and negative conflict of nationalities (statelessness) arising from State succession (ibid., vol. II (Part One), document A/CN.4/467, para. 106). See also volume II (Part Two), p. 40, para. 206.

[41] *Yearbook ... 1995*, vol. II (Part Two), annex, p. 113, para. 4.

[42] Ibid., vol. I, 2413th meeting, statement by Mr. Crawford, p. 230.

[43] A/CN.4/472/Add.1, para. 6.

[44] See *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 20–24th meetings, statements by Morocco (A/C.6/50/SR.20, para. 63), Brazil (A/C.6/50/SR.21, para. 79), China (A/C.6/50/SR.22, para. 28), Austria (A/C.6/50/SR.23, para. 32) and Guinea (A/C.6/50/SR.24, para. 79).

[45] For a discussion of the principle of effective nationality, see the first report of the Special Rapporteur (footnote 2 above), pp. 170–171, paras. 76–84.

[46] *Yearbook ... 1995*, vol. II (Part Two), p. 38, para. 187.

[47] Decision of 20 September 1958, UNRIAA, vol. XIV (Sales No. 65.V.4), pp. 327 et seq.

[48] *Reports of Cases before the Court of Justice and the Court of First Instance of the European Communities, 1992–7*, case C–369/90, judgment of 7 July 1992, *Mario Vicente Micheletti and Others*. v. *Delegación del Gobierno en Cantabria*.

[49] *Second Phase, Judgment, I.C.J. Reports 1955*, pp. 4 et seq., at p. 23.

[50] *Yearbook ... 1995*, vol. II (Part Two), pp. 37–38, para. 186.

[51] A/CN.4/472/Add.1, para. 8. Some authors have argued that a successor State in whose territory an individual habitually or permanently resides, depending on the adopted classification, would presumably have much less difficulty meeting the test of genuine link. See Pejic, "Citizenship and statelessness in the former Yugoslavia: the legal framework".

30. This concept also appeared to be behind the concern expressed by one representative regarding the adoption, by successor States, of nationality laws under which they artificially extended their nationality to nationals of another independent State and which could be misused for purposes of partial or complete absorption of the population of such other State.[52] However, as one author pointed out, the major problem arising to date from the dissolution of the former Yugoslavia was not that the successor states had been competing to confer their nationality on individuals residing outside their borders. On the contrary, it was that some of them had, "by means of various legal devices, attempted to exclude from their nationality … persons who have been residing in their territories for considerable lengths of time".[53] This observation in fact seems to apply also to cases of State succession other than that of the former Yugoslavia.

31. The view was also expressed in the Sixth Committee that the Commission should study the relationship between the requirement of genuine link and the principle of non-discrimination.[54]

32. Moreover, according to another view expressed in the Sixth Committee, the concept of genuine link should also be taken into consideration in the application of the right of option between the nationalities of the various successor States in the case of dissolution.[55]

33. The discussion both in the Commission and in the Sixth Committee leads to the conclusion that, even if the primary context for the application of the principle of effective nationality is the law of diplomatic protection, the underlying notion of genuine link also has some role to play in the determination of the principles applicable to the withdrawal or granting of nationality in situations of State succession. If a right to nationality was recognized there was still a need for a genuine link to be established between the person and the State of his nationality;[56] moreover, the concept of the individual's rights to a nationality could be better pinpointed within the context of State succession through a study of the effect of the application of the criterion of genuine link.

B. Specific issues

34. As the Special Rapporteur stated when presenting the report of the Working Group to the Commission, the "principles" listed in that report were in fact working hypotheses which in the future would require verification, specification or amendment in the light of an analysis of the practice and doctrine, rather than some sort of final conclusions. This technique was chosen in order to draw, as a first step, a very general outline of a conceptual approach which seems to have been favourably received by the majority in the Commission.[57] That outline was considered by the members of the Working Group to be helpful for the subsequent discussion on the possible outcome of the work as well as on the working methods and timetable.

1. The obligation to negotiate in order to resolve by agreement problems of nationality resulting from State succession

35. The first conclusion formulated by the Working Group in its preliminary report was that States concerned should have the obligation to consult in order to determine whether State succession had any undesirable consequences with respect to nationality; if so, they should have the obligation to negotiate in order to resolve such problems by agreement.[58] It is assumed that this "obligation" is among those of which the underlying sources, according to some members, should have been further clarified[59] in order for such obligation to be apprehended in a realistic manner. It must therefore be recalled that this obligation was considered to be a corollary of the right of every individual to a nationality or of the obligation of States concerned to prevent statelessness.[60] It has, moreover, been argued that such obligation could be based on the general principle of the law of State succession providing for the settlement of certain questions relating to succession by agreement between States concerned, and embodied in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[61]

36. During the debate in the Sixth Committee, satisfaction was especially expressed with the Working Group's position that negotiations should be aimed, in particular, at the prevention of statelessness.[62]

37. Doubts were, however, raised as to whether the simple obligation to negotiate was sufficient to ensure that the relevant problems would actually be resolved. It was observed in this regard that the obligation to negotiate did not entail the duty to reach an agreement or to pursue the process at length if it were evident that it could not bear fruit.[63]

38. But the main problem seems to be the source of said obligation and its legal nature. Thus, some delegations expressed the view that, however desirable this obligation might be, it did not appear to be incumbent upon States concerned under positive general international law. It was argued, in particular, that such obligation could not be deduced from the general duty to negotiate for the resolution of disputes.[64]

39. If the Commission arrives at the conclusion that, in situations of State succession, the right to a nationality, or

[52] A/CN.4/472/Add.1, para. 10.

[53] Pejic, loc. cit., p. 2.

[54] A/CN.4/472/Add.1, para. 8.

[55] Ibid., para. 23.

[56] See footnote 50 above.

[57] Those voicing criticisms suggesting that, although the report of the Working Group was a good starting point for further work on the topic, the Group should have first examined the applicable rules of positive international law and relevant State practice before proceeding to the formulation of recommendations (A/CN.4/472/Add.1, para. 4), are therefore missing the purpose that the Working Group pursued by this technique.

[58] *Yearbook ... 1995*, vol. II (Part Two), annex, p. 113, paras. 5–7.

[59] Ibid., p. 39, para. 204.

[60] Ibid., p. 38, paras. 190 and 193–194.

[61] Ibid., para. 193.

[62] A/CN.4/472/Add.1, para. 16.

[63] Ibid.

[64] Ibid.

at least some of its elements, belong to the realm of *lex lata*, it should examine the question whether the above-mentioned obligation to negotiate can indeed be considered to be a corollary of such right and whether it can be deduced from the general principles applicable to State succession. Finally, if the Commission finds that such obligation does not yet exist as a matter of positive law, it could consider appropriate means to establish such obligation for the States concerned, or to further the development of this principle under general international law.

40. The Working Group did not confine itself to highlighting the obligation of States concerned to negotiate; it also formulated a number of principles to be retained as *guidelines for the negotiation between States concerned.* They relate to questions of the withdrawal and granting of nationality, the right of option, and the criteria applicable to the withdrawal and granting of nationality in various types of State succession, and should not be interpreted outside the specific context of the succession of States. Although not all those principles are necessarily *lex lata*, they should not all be regarded as principles of a merely supplementary character from which the States concerned are free to derogate by mutual agreement.[65]

41. It is not without interest to note that the European Commission for Democracy through Law of the Council of Europe has also opted for the elaboration of guidelines which, contrary to those envisaged by the Working Group, are also meant to be followed directly by all States concerned when enacting legislation in the field of nationality.

42. The Working Group's suggestion to extend the scope of the negotiations that States concerned have the duty to undertake, to such questions as dual nationality, the separation of families, military obligations, pensions and other social security benefits, and the right of residence, has generally met with the approval of the members of the Commission. Moreover, concrete examples of arrangements regarding the resolution of such problems in past cases of State succession were provided.[66] Relevant agreements are also to be found in recent practice.[67] However, according to another view, the above-mentioned issues had no direct bearing on legal provisions regarding nationality and should not therefore be among the issues which States were supposed to negotiate between themselves.[68]

2. Granting of the nationality of the successor State

43. Bearing in mind, *inter alia*, article 15 of the Universal Declaration of Human Rights and articles 8 and 9 of the 1961 Convention on the Reduction of Statelessness, the Special Rapporteur suggested that the Commission could study the question of whether an obligation of the successor State to grant its nationality to the inhabitants of territories lost by the predecessor State could be deduced from the principles set out in the relevant conventions.[69]

44. The Working Group reached several preliminary conclusions on this point, which vary according to the type of State succession in question. Thus, in the case of secession and transfer of part of a territory, the Working Group considered that the obligation of the successor State to grant its nationality to certain categories of persons should be the corollary of the right of the predecessor State to withdraw its nationality from those persons.[70] In the case of unification, including absorption, in which the loss of the predecessor State's nationality was an inevitable result of the disappearance of that State, the Working Group concluded on a preliminary basis that the successor State should have the obligation to grant its nationality to former nationals of a predecessor State residing in the successor State and to those residing in a third State, unless they also had the nationality of a third State.[71] In the case of dissolution, where the loss of nationality of the predecessor State was also an automatic consequence of the disappearance of that State, the Working Group's preliminary conclusions were much more varied: the categories of persons to which the successor State had an obligation to grant its nationality were established in the light of various elements, including the question of the delimitation of powers between the successor States.[72]

45. The legal grounds for the conclusions of the Working Group differ not only in respect of each case of State succession but also in respect of the various categories of persons involved. There is, moreover, a need to balance the determination of the existence of an obligation of successor States to grant their nationality to certain categories of persons with the requirement to delimit their competence to do so. Obviously, there is a risk that statelessness or dual—or even multiple—nationality could occur. While the legal grounds for the obligation of the successor State to grant its nationality are presumably to be found among the rules concerning the protection of human rights, the rules regarding the delimitation of competences between the different successor States are of a rather different order. This is still an unexplored area which should be examined by the Commission in its future work on the topic.

46. The fundamental assumption that the successor State is under an obligation to grant its nationality to a core

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[65] *Yearbook ... 1995*, vol. II (Part Two), p. 41, para. 221. By way of example, the Special Rapporteur mentioned the obligation to prevent statelessness and, reflecting the views of the Working Group, said that it was unacceptable to impose on States an obligation to negotiate while allowing them to leave millions of persons stateless as a result of those negotiations.

[66] Ibid., vol. I, 2411th meeting, statement by Mr. Kusuma-Atmadja, p. 218, paras. 45–51.

[67] Thus, the Czech Republic and Slovakia, for example, concluded several agreements resolving these issues, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior and the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

[68] *Yearbook ... 1995*, vol. II (Part Two), p. 40, para. 208.

[69] Ibid., p. 35, para. 160.

[70] Ibid., annex, p. 114, para. 13.

[71] Ibid., p. 115, para. 17.

[72] Ibid., paras. 19–20.

body of its population has been supported both explicitly and implicitly by some representatives in the Sixth Committee.[73] This obligation was considered to be a logical consequence of the fact that every entity claiming statehood must have a population.[74]

47. It has not been easy for the Special Rapporteur to draw more specific conclusions from the preliminary comments of representatives in the Sixth Committee on this issue. The observation that the transfer of sovereignty to the successor State entailed an automatic and collective change in nationality for persons residing in its territory and possessing the nationality of the predecessor State[75] seems to address the issue of the legislative technique used by the State concerned. The remark that such automatic change in nationality could not occur in the absence of relevant domestic legislation is in consonance with the Special Rapporteur's thesis concerning the exclusively domestic character of the legal basis of nationality.[76] Nevertheless, the comments of delegations were inconclusive as to the existence of an international obligation binding upon the successor State regarding the granting of its nationality following State succession.

48. In the view of one representative, it would be desirable, for the purpose of preventing statelessness in situations of State succession, for the successor State to grant its nationality to permanent residents of what became the territory of the successor State who on the date of succession were or became stateless, and even to persons born in such territory who resided outside that territory and, on the date of State succession, were or became stateless. Another representative, nevertheless, wondered why a person who had been stateless under the regime of the predecessor State and who resided in the territory of the successor State should acquire the nationality of the latter merely as a consequence of State succession.[77]

49. The successor State certainly has a discretionary power to grant its nationality to such stateless persons. But the problem would be qualitatively different if it were envisaged that that State had an obligation to do so.

50. In State practice, one can find a number of examples of "collective naturalization", both past and recent, which should be analysed by the Commission in its future work on this topic.

51. Thus, article VIII of the 1848 Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America provided for the right of option of Mexican nationals established in territories which earlier belonged to Mexico and were transferred to the United States, as well as for their right to move to Mexico. Nevertheless, the said article provided that:

> ... those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.[78]

52. The acquisition of Italian nationality following the cession of Venetia and Mantua by Austria to the Kingdom of Italy was explained in a circular from the Austrian Minister for Foreign Affairs to the Italian consuls abroad in the following terms:

> The citizens of the Provinces ceded by Austria under the Treaty of 3 October [1866] cease *pleno jure* to be Austrian subjects and become Italian citizens. The Royal Consuls are therefore responsible for providing them with legal papers showing their new nationality ...[79]

53. Article V of the 1882 Treaty between Mexico and Guatemala for fixing the Boundaries between the respective States established a similar right of option for nationals "of either of the two Contracting Parties who, in virtue of the stipulations of this Treaty, in future remain in the territories of the other", stating, at the same time, that:

> ... those who remain in the said territories after the lapse of one year, without having declared their intention of retaining their former nationality, shall be considered as natives of the other Contracting Party.[80]

54. When in 1914 Cyprus became a British colony, according to the Cyprus (Annexation) Order in Council, 1914, all Ottoman citizens who were ordinarily resident in Cyprus on that date became British citizens. By virtue of other Orders of the Governor, Ottoman subjects of Cypriot origin who were on the date of annexation temporarily absent from Cyprus also acquired British nationality.[81]

55. The 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) contains a whole series of provisions on the acquisition of the nationality of the successor State and the consequent loss of German nationality in connection with the cession by Germany of numerous territories to neighbouring States. Thus, in relation to the renunciation by Germany

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[73] A/CN.4/472/Add.1, para. 17.

[74] See the statement by Austria, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 23rd meeting (A/C.6/50/SR.23, para. 31).

[75] See the statement by Greece, ibid., 22nd meeting (A/C.6/50/SR.22, paras. 60–61).

[76] See the statements by Austria (A/C.6/50/SR.23, para. 31) and Finland (A/C.6/50/SR.24, para. 64), ibid., 23rd and 24th meetings, respectively.

[77] A/CN.4/472/Add.1, para. 18.

[78] *Treaties and Conventions concluded between the United States of America and Other Powers*, rev. ed. (Washington, D.C., United States Government Printing Office, 1873), p. 562. See also *The Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana Publications, 1969), vol. 102, p. 29.

[79] United Nations, *Materials on Succession of States in Respect of Matters Other than Treaties* (ST/LEG/SER.B/17) (Sales No. E/F.77.V.9), pp. 7–8. When a question arose as to whether article XIV of the Peace Treaty of 3 October 1866 with Austria, governing the nationality of the inhabitants of the provinces ceded to Italy, applied not only in the case of persons originating from these provinces, as was specifically provided, but also in cases where only the family as such originated therefrom, the Minister for Foreign Affairs, in a dispatch to the Italian Consul General at Trieste, stated that he did not consider the restrictive view taken by Austria unfounded and commented as follows:

> "Where there is cession of territory between two States, one of these States as a rule relinquishes to the other only what happens to be in that part of the territory which it renounces; nor has the new owner the right to lay claim to that which lies outside that same territory.
>
> "It therefore follows that the mere fact of giving persons originating from the ceded territory, who are living outside that territory, the right to keep the nationality of their country of origin in itself constitutes an actual concession."

[80] *British and Foreign State Papers, 1881–1882*, vol. LXXIII, p. 273.

[81] Ibid., *1914 (Part II)*, vol. CVIII (London, HM Stationery Office, 1918), pp. 165–166.

of rights and title over Moresnet, Eupen and Malmédy in favour of Belgium, article 36 of the Treaty provided:

> When the transfer of the sovereignty over the territories referred to above has become definitive, German nationals habitually resident in the territories will definitively acquire Belgian nationality *ipso facto*, and will lose their German nationality.
>
> Nevertheless, German nationals who became resident in the territories after August 1, 1914, shall not obtain Belgian nationality without a permit from the Belgian Government.

56. Regarding the restoration of Alsace-Lorraine to France, paragraph 1 of the annex relating to article 54 of the Treaty of Versailles provided that:

> As from November 11, 1918, the following persons are *ipso facto* reinstated in French nationality:
>
> (1) Persons who lost French nationality by the application of the Franco-German Treaty of May 10, 1871, and who have not since that date acquired any nationality other than German;
>
> (2) The legitimate or natural descendants of the persons referred to in the immediately preceding paragraph, with the exception of those whose ascendants in the paternal line include a German who migrated into Alsace-Lorraine after July 15, 1870;
>
> (3) All persons born in Alsace-Lorraine of unknown parents, or whose nationality is unknown.[82]

57. With respect to the recognition of the independence of the Czecho-Slovak State and its frontiers, article 84 of the Treaty of Versailles provided that:

> German nationals habitually resident in any of the territories recognised as forming part of the Czecho-Slovak State will obtain Czecho-Slovak nationality *ipso facto* and lose their German nationality.

58. In relation to the recognition of the independence of Poland and the cession of certain territories by Germany to Poland, article 91 of the Treaty of Versailles similarly provided that:

> German nationals habitually resident in territories recognised as forming part of Poland will acquire Polish nationality *ipso facto* and will lose their German nationality.
>
> German nationals, however, or their descendants who became resident in these territories after January 1, 1908, will not acquire Polish nationality without a special authorisation from the Polish State.

59. Article 112 of the Treaty of Versailles, concerning nationality issues arising in connection with the restoration of Schleswig to Denmark, was also drafted along these lines.[83]

60. Finally, with regard to the establishment of the Free City of Danzig, which constituted a *sui generis* type of territorial change, different from the territorial transfers mentioned above, article 105 of the Treaty of Versailles provided that:

> On the coming into force of the present Treaty German nationals ordinarily resident in the territory described in Article 100 will *ipso facto* lose their German nationality, in order to become nationals of the Free City of Danzig.

61. The effects of the dismemberment of the Austro-Hungarian Monarchy on nationality were regulated in a relatively uniform manner by the provisions of the 1919 Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). According to article 70 of the Peace Treaty:

> Every person possessing rights of citizenship (*pertinenza*) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory.[84]

62. The 1919 Treaty of Peace between the Allied and Associated Powers and Bulgaria (Treaty of Neuilly-sur-Seine) also contained provisions on the acquisition of the nationality of the successor State. They concerned the renunciation by Bulgaria of rights and title over certain territories in favour of the Serb-Croat-Slovene State[85] and Greece. Article 39 of section I provided that:

> Bulgarian nationals habitually resident in the territories assigned to the Serb-Croat-Slovene State will acquire Serb-Croat-Slovene nationality *ipso facto* and will lose their Bulgarian nationality. Bulgarian nationals, however, who became resident in these territories after

[82] Paragraph 2 of the annex enumerated categories of other persons who could claim French nationality on the basis of a procedure determined by the French Government, which nevertheless reserved to itself the right to reject the claim in individual cases, except in the cases of claims by the husband or wife of a person whose French nationality had been restored under relevant provisions of the Treaty. All remaining Germans born or domiciled in Alsace-Lorraine did not acquire French nationality by reason of the restoration of Alsace-Lorraine to France, even though they might have had the status of citizens of that territory. According to paragraph 3 of the annex, such persons could acquire French nationality only by naturalization, on condition of having been domiciled in Alsace-Lorraine from a date previous to 3 August 1914 and of submitting proof of unbroken residence within the restored territory for a period of three years from 11 November 1918.

[83] It read:

"All the inhabitants of the territory which is returned to Denmark will acquire Danish nationality *ipso facto*, and will lose their German nationality.

"Persons, however, who had become habitually resident in this territory after October 1, 1918, will not be able to acquire Danish nationality without permission from the Danish Government."

[84] Nevertheless, the situation differed in the case of territory transferred to Italy, where the *ipso facto* scenario did not apply vis-à-vis persons possessing rights of citizenship in such territory who were not born there and persons who acquired their rights of citizenship in such territory after 24 May 1915 or who acquired them only by reason of their official position (art. 71). Such persons, as well as those who formerly possessed rights of citizenship in the territories transferred to Italy, or whose father, or mother if the father was unknown, possessed rights of citizenship in such territories, or those who had served in the Italian Army during the war and their descendants, could claim Italian nationality subject to the conditions prescribed for the right of option (art. 72). Italian authorities were entitled to refuse such claims in individual cases (art. 73). In that event, or when no such claim was made, the persons concerned obtained *ipso facto* the nationality of the State exercising sovereignty over the territory in which they possessed rights of citizenship before acquiring such rights in the territory transferred to Italy (art. 74). Moreover, according to article 76, persons who acquired *pertinenza* in territories transferred to the Serb-Croat-Slovene State or to the Czecho-Slovak State could not acquire the nationality of those States without a permit. If the permit was refused, or not applied for, such persons obtained *ipso facto* the nationality of the State exercising sovereignty over the territory in which they previously possessed rights of citizenship (arts. 76–77).

[85] Formed after the First World War by Serbia, Montenegro and some territories of the former Austro-Hungarian Monarchy; named Yugoslavia in 1929.

1st January, 1913, will not acquire Serb-Croat-Slovene nationality without a permit from the Serb-Croat-Slovene State.

63. A similar provision was to be found in article 44 of section II, concerning territories ceded to Greece.[86]

64. Article 9 of the 1920 Treaty of Peace between Finland and the Soviet Government of Russia (Treaty of Tartu), by which Russia ceded to Finland the area of Petsamo (Petschenga), provided that "Russian citizens domiciled in the territory of Petschenga shall, without any further formality, become Finnish citizens". Nevertheless, the inhabitants of this area were given, on the basis of the same article, the right of option, as discussed below.

65. The 1923 Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State and Turkey (Treaty of Lausanne) contained two types of provisions concerning the acquisition of nationality. In accordance with article 21:

> Turkish nationals ordinarily resident in Cyprus on the 5th November, 1914, will acquire British nationality subject to the conditions laid down in the local law, and will thereupon lose their Turkish nationality.
>
> It is understood that the Government of Cyprus will be entitled to refuse British nationality to inhabitants of the island who, being Turkish nationals, had formerly acquired another nationality without the consent of the Turkish Government.

With regard to the other territories detached from Turkey under that Treaty, article 30 stipulates that:

> Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.

66. As regards cases of State succession after the Second World War, the 1947 Treaty of Peace with Italy contained provisions on acquisition of nationality in connection with the cession of certain territories by Italy to France, Yugoslavia and Greece. According to paragraph 1 of article 19 of the Treaty:

> Italian citizens who were domiciled on June 10, 1940, in territory transferred by Italy to another State under the present Treaty, and their children born after that date, shall, except as provided in the following paragraph [with respect to the right of option[87]], become citizens with full civil and political rights of the State to which the territory is transferred, in accordance with legislation to that effect to be introduced by that State within three months from the coming into force of the present Treaty. Upon becoming citizens of the State concerned they shall lose their Italian citizenship.

67. Other examples of provisions on acquisition of nationality can be found in two treaties on the cession to India of French territories and establishments in India. Article II of the 1951 Treaty of cession of the territory of the Free Town of Chandernagore between India and France,[88] provided that:

> French subjects and citizens of the French Union domiciled in the territory of the Free Town of Chandernagore on the day on which the present Treaty comes into force shall become, subject to the provisions [regarding the right of such persons to opt for the retention of their nationality] …, nationals and citizens of India.

The 1956 Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, contains similar provisions. According to article 4:

> French Nationals born in the territory of the Establishments and domiciled therein at the date of the entry into force of the Treaty of Cession shall become nationals and citizens of the Indian Union, with the exceptions enumerated under Article 5 hereafter.

Article 6 further stipulated that:

> French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union on the date of the entry into force of the Treaty of Cession shall become nationals and citizens of the Indian Union.[89]

68. Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that:

> Nationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect.[90]

69. State practice during the period of decolonization presents many common characteristics. Thus, according to the Constitution of Barbados,[91][91] two types of acquisition of citizenship were envisaged in relation to accession to independence. Section 2 enumerates the categories of persons who automatically became citizens of Barbados on the day of its independence, 30 November 1966. It reads:

> (1) Every person who, having been born in Barbados, is on 29th November 1966 a citizen of the United Kingdom and Colonies shall become a citizen of Barbados on 30th November 1966.
>
> (2) Every person who, having been born outside Barbados, is on 29th November 1966 a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death have become a citizen of Barbados in accordance with the provisions of subsection (1), become a citizen of Barbados on 30th November 1966.
>
> (3) Any person who on 29th November 1966 is a citizen of the United Kingdom and Colonies
>
> (*a*) having become such a citizen under the British Nationality Act 1948 by virtue of his having been naturalised in Barbados as a British subject before that Act came into force; or
>
> (*b*) having become such a citizen by virtue of his having been naturalised or registered in Barbados under that Act,
>
> shall become a citizen of Barbados on 30th November 1966.

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[86] It read:

"Bulgarian nationals resident in the territories assigned to Greece will obtain Greek nationality *ipso facto* and will lose their Bulgarian nationality.

"Bulgarian nationals, however, who became resident in these territories after the 1st January, 1913, will not acquire Greek nationality without a permit from Greece."

[87] See footnote 180 below.

[88] United Nations, *Treaty Series*, vol. 203, p. 155.

[89] United Nations, *Materials on Succession of States* … (see footnote 79 above), p. 87. Article 5 and the second part of article 6 provided for the right of opting out, i.e. retaining French nationality.

[90] Text reproduced in Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", p. 374; see also page 372.

[91] United Nations, *Materials on Succession of States* … (see footnote 79 above), p. 124.

Section 3 enumerates the categories of persons entitled to be registered as citizens upon making application.[92]

70. Similar provisions can be found in the constitutions of a number of other States which acceded to independence after the Second World War, such as Botswana,[93] Guyana,[94] Jamaica,[95] Kenya,[96] Lesotho,[97] Mauritius,[98] Sierra Leone,[99] Trinidad and Tobago[100] and Zambia.[101]

71. Section 1 of the Constitution of Malawi provided for automatic acquisition of citizenship following accession to independence as follows:

> Every person who, having been born in the former Nyasaland Protectorate, is on 5th July 1964 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Malawi on 6th July 1964:
>
> Provided that a person shall not become a citizen of Malawi by virtue of this subsection if neither of his parents was born in the former Nyasaland Protectorate.[102]

In section 2, subsections (1) and (2), the Constitution further provided for the acquisition of the citizenship of Malawi, upon application before 6 July 1965, by any person who was on 31 December 1963 a citizen of the former Federation of Rhodesia and Nyasaland and who had a substantial Malawi connection.[103] It contained also

[92] Ibid., pp. 124–125. It reads:

> "(1) Any woman who on 29th November 1966 is or has been married to a person
>
> "(a) who becomes a citizen of Barbados by virtue of section 2; or
>
> "(*b*) who, having died before 30th November 1966, would but for his death have become a citizen of Barbados by virtue of that section,
>
> shall be entitled, upon making application, and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Barbados.
>
> "(2) Any person who is a Commonwealth citizen (otherwise than by virtue of being a citizen of Barbados) and who
>
> "(*a*) has been ordinarily resident in Barbados continuously for a period of seven years or more at any time before 30th November 1966; and
>
> "(*b*) has not, since such period of residence in Barbados and before that date, been ordinarily resident outside Barbados continuously for a period of seven years or more,
>
> shall be entitled, upon making application, to be registered as a citizen of Barbados:
>
> …
>
> "(3) Any woman who on 29th November 1966 is or has been married to a person who subsequently becomes a citizen of Barbados by registration under subsection (2) shall be entitled, upon making application, and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Barbados."

The right to be registered as a citizen according to provisions of subsections (2) and (3) was, nevertheless, subject to such exceptions or qualifications as might "be prescribed in the interests of national security or public policy".

[93] Ibid., pp. 137–139. Section 20 of the Constitution of Botswana contains provisions essentially similar to those of section 2 (1) and (2) of the Constitution of Barbados concerning the automatic acquisition of citizenship. Section 23 contains provisions concerning the acquisition of the citizenship of Botswana by certain categories of persons who, upon making application, were entitled to be registered as citizens by virtue of connection with Bechuanaland. Section 25 provides for the acquisition, upon application, of the citizenship of Botswana by Commonwealth citizens and citizens of certain other African countries ordinarily resident in Botswana, including the former Protectorate of Bechuanaland, for a period of at least five years prior to the application.

[94] Ibid., pp. 203–204. Section 21 of the Constitution of Guyana contains provisions essentially similar to those of section 2 (1) and (2) of the Constitution of Barbados on automatic acquisition of citizenship. Section 22 (1), (2) and (3) provides that the following persons are entitled to be registered as citizens upon application: any woman married to a person who automatically became or would, but for his death, have become a citizen of Guyana; citizens of the United Kingdom and Colonies having become such citizens by naturalization or registration in the former Colony of British Guiana; or other Commonwealth citizens ordinarily resident in Guyana for at least five years prior to independence. Section 22 (3) is basically similar to section 3 (3) of the Constitution of Barbados.

[95] Ibid., p. 246. The provisions of sections 3 and 4 of the Constitution of Jamaica are basically similar to those of sections 2 (1) and (2) and 3 (1) and (3) of the Constitution of Barbados.

[96] Ibid., pp. 254–255. The provisions of section 1 of the Constitution of Kenya are basically similar to those of section 2 (1) and (2) of the Constitution of Barbados. In addition, section 2 of the Constitution of Kenya provides that persons who, as citizens of the United Kingdom and Colonies or of the Republic of Ireland were, on the date of independence, ordinarily and lawfully resident in Kenya were entitled to be registered as citizens, upon making application within a two-year period.

[97] Ibid., p. 282. The provisions of section 23 of the Constitution of Lesotho are basically similar to those of section 2 of the Constitution of Barbados.

[98] Ibid., p. 353. The provisions of section 20 (1), (2) and (3) of the Constitution of Mauritius are basically similar to those of section 2 (1), (2) and (3) of the Constitution of Barbados. In addition, section 21 provides for the acquisition of the citizenship of Mauritius, upon application, by any woman married to a person who automatically became or would, but for his death, have become a citizen of Mauritius upon independence.

[99] Ibid., pp. 389–390. The provisions of section 1 of the Constitution of Sierra Leone concerning automatic acquisition of citizenship are basically similar to those of section 2 of the Constitution of Barbados. Section 2 contains provisions on the acquisition of citizenship, upon application within a two-year period after the date of independence, by a woman who was, on that date, a citizen of the United Kingdom and Colonies or a British protected person, and married to a person who automatically became or would, but for his death, have become a citizen of Sierra Leone.

[100] Ibid., p. 429. The provisions of section 9 of the Constitution of Trinidad and Tobago are basically similar to those of section 2 of the Constitution of Barbados. Section 10 provides for the acquisition of the citizenship of Trinidad and Tobago, upon application, by any citizen of the United Kingdom and Colonies or a British protected person ordinarily resident in Trinidad and Tobago on the date of independence (subsect. (1)) and by any woman married to such a person, but whose marriage had been terminated by death or dissolution (subsect. (4)); subsections (2) and (3) of section 10 are basically similar to those of subsections (1) and (3) of section 3 of the Constitution of Barbados.

[101] Ibid., p. 472. Section 3 of the Constitution of Zambia is similar to section 2 (1) and (2) of the Constitution of Barbados with the only difference that the former applies to "a British protected person" instead of "a citizen of the United Kingdom and Colonies", as does the latter. In addition, section 8 provides for the acquisition of the citizenship of Zambia, upon application, by a Commonwealth citizen, a citizen of the Republic of Ireland or a citizen of any country in Africa who has been ordinarily resident in Zambia, including in the former Protectorate of Northern Rhodesia, for a period of four years prior to the application.

[102] Ibid., p. 307.

[103] Ibid., pp. 307–308. According to subsection 2, a person had a substantial Malawi connection if he or his father was born in the former Nyasaland Protectorate; if he or his father, at the time of that person's

detailed provisions on the acquisition of the citizenship of Malawi, upon application, by any woman married to, or a widow of, a person who became or would, but for his death, have become a citizen of Malawi (sects. 2 (4) and 3), and any person who on the date of Malawi's independence was a citizen of the United Kingdom and Colonies by virtue of naturalization or registration in the former Nyasaland Protectorate under the British Nationality Act, 1948 (sect. 3 (5)).

72. According to section 2 of annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960:

> 1. Any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any of the qualifications specified in paragraph 2 of this Section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty.
>
> 2. The qualifications referred to in paragraph 1 of this Section are that the person concerned is
>
> (*a*) a person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943; or
>
> (*b*) a person who was born in the Island of Cyprus on or after the 5th of November, 1914; or
>
> (*c*) a person descended in the male line from such a person as is referred to in subparagraph (*a*) or (*b*) of this paragraph.
>
> 3. Any citizen of the United Kingdom and Colonies born between the date of this Treaty and the agreed date [16 February 1961] shall become a citizen of the Republic of Cyprus at the date of his birth if his father becomes such a citizen under this Section or would but for his death have done so.[104]

73. Under article 3 of the Convention on Nationality between France and Viet Nam, signed in Saigon on 16 August 1955:

> The following shall have Vietnamese nationality wherever they were on 8 March 1949: former French subjects whose place of origin is South Viet Nam (Cochin China) or the former concessions of Hanoi, Haiphong or Tourane.[105]

74. The solution of nationality problems sometimes occurred in a rather complex framework of consecutive changes, as was the case with Singapore, which acceded to independence through a transient merger with the already independent Federation of Malaya. Thus, on 16 September 1963, the Federation of Malaysia was constituted, comprising the States of the former Federation, the Borneo States, namely Sabah and Sarawak, and the State of Singapore. There was a division of legislative power among the Federation and its component units. Under the Constitution of Malaysia, separate citizenship for these units was maintained and, in addition, a Federal citizenship was established. There were separate provisions in the Malaysian Constitution governing the acquisition of Federal citizenship by persons of the States of Malaya who were not Singapore citizens,[106] by persons of the Borneo States who were not Singapore citizens,[107] and by persons who were Singapore citizens or were residents of Singapore.[108] A person who was a citizen of Singapore acquired the additional status of citizen of the Federation by operation of the law, and Federal citizenship was not severable from Singapore citizenship. If any person who was both a Singapore citizen and a Federal citizen lost either status, he also lost the other.[109] When, on 9 August 1965, Singapore seceded from the Federation of Malaysia to become an independent State, Singapore citizens ceased to be citizens of the Federation of Malaysia and their Singapore citizenship became the only one of relevance. Its acquisition and loss were governed by the Singapore Constitution and the provisions of the Malaysian Constitution which continued to apply to Singapore by virtue of the Republic of Singapore Independence Act, 1965.[110]

75. In recent cases of State succession in Eastern and Central Europe, the nationality laws of successor States resulting from the dissolution of federal States, i.e. Yugoslavia and Czechoslovakia, provided that individuals who, on the date of State succession had, according to the laws of the predecessor State, "the secondary nationality" of the territorial unit which acceded to independence would automatically acquire the nationality of the latter. Thus, article 39 of the Law on the Republic of Slovenia Citizenship provides that "[a]ny person who held citizenship of the Republic of Slovenia and of the Socialist Federative Republic of Yugoslavia according to existing valid regulations is considered to be a citizen of the Republic of Slovenia".[111] In addition to automatic acquisition, other

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birth, were citizens of the United Kingdom and Colonies by virtue of registration or naturalization in the former Protectorate under the British Nationality Act, 1948; were registered or naturalized as citizens of the former Federation of Rhodesia and Nyasaland, having been ordinarily resident in the former Protectorate; were, as minor children, registered as citizens of the former Federation by the responsible parent; were adopted by a citizen of the former Federation who was resident in the former Protectorate; were registered as citizens of the former Federation by virtue of the possession of associations with the former Protectorate under the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957 and 1959; or were listed in the list of general voters registered in the former Protectorate by virtue of the Electoral Act, 1958.

[104] United Nations, *Treaty Series*, vol. 382, p. 119. In addition to the provisions on automatic acquisition of Cypriot citizenship, annex D provided for the acquisition of citizenship, upon application, by persons who, before the date of the Treaty, were citizens of the United Kingdom and Colonies and possessed any of the qualifications specified in paragraph 2 of section 2, but were not ordinarily resident in the Island of Cyprus; persons of Cypriot origin who were not citizens of the United Kingdom and Colonies; women who were married to persons entitled under different provisions to make an application for the citizenship of the Republic of Cyprus; and persons born between the date of the Treaty and the agreed date of 16 February 1961 (sect. 4). Annex D further provided for the acquisition of Cypriot citizenship, upon application, by citizens of the United Kingdom and Colonies ordinarily resident in the Island at any time in the period of five years immediately before the date of the Treaty who were either naturalized or registered as citizens of the United Kingdom and Colonies by the Governor of Cyprus or were descendants in the male line of such persons (sect. 5); and by women who were citizens of the United Kingdom and Colonies whose husbands became or would have become citizens of the Republic of Cyprus (sect. 6).

[105] Ibid., *Materials on Succession of States* ... (see footnote 79 above), p. 447.

[106] *Constitutions of Asian Countries* (Bombay, N. M. Tripathi Private Ltd., 1968), p. 622. See also articles 15, 16 and 19, pp. 628–633.

[107] Ibid., p. 630, art. 16A.

[108] Ibid., pp. 631–632, art. 19.

[109] Ibid., p. 628, art. 14 (3).

[110] Goh Phai Cheng, *Citizenship Laws of Singapore*, pp. 7–9.

[111] Citizenship Act of Slovenia of 5 June 1991, *Uradni list Republike Slovenije* (Official Gazette of the Republic of Slovenia), No. 1/1991 (English translation in *Central and Eastern European Legal Materials*, V. Pechota, ed. (Ardsley-on-Hudson, N.Y., Transnational Juris, 1997), binder 5A).

means of acquiring Slovenian citizenship were envisaged for certain categories of persons.[112]

76. The Law on Croatian Citizenship is also based on the concept of the continuity of Croat nationality which, in the Socialist Federal Republic of Yugoslavia, existed alongside Yugoslav federal nationality. With regard to citizens of the former Federation who did not at the same time hold Croat nationality, article 30, paragraph 2, of the Law provides that any member of the Croatian nation who did not hold Croat nationality on the day of the entry into force of the Law but who can prove that he/she had been legally resident in the Republic of Croatia for at least 10 years, shall be considered to be a Croat citizen if he/she supplies a written declaration that he/she regards himself/herself as a Croat citizen.[113]

77. Article 1, paragraph 1, of the Law on the acquisition and loss of citizenship of the Czech Republic provides that:

> Natural persons who were citizens of the Czech Republic as of December 31, 1992, and simultaneously citizens of the Czech and Slovak Federal Republic, shall be citizens of the Czech Republic as of January 1, 1993.[114]

In addition to the provisions on *ipso facto* acquisition of nationality, the Law contains provisions on the acquisition of nationality on the basis of a declaration. This possibility was open to individuals who, on 31 December 1992, were citizens of Czechoslovakia but not citizens of the Czech or the Slovak Republic, and, under certain conditions, to individuals who, after the dissolution of Czechoslovakia, acquired the nationality of Slovakia, provided that they had been permanent residents of the Czech Republic for at least two years or they were permanent residents in a third country but had their last permanent residence before leaving Czechoslovakia in the territory of the Czech Republic.[115]

78. Section 2 of the Law on State Citizenship in the Slovak Republic, of 19 January 1993, contains provisions on *ipso facto* acquisition of nationality similar to those of the relevant legislation of the Czech Republic:

> A person, who was up to 31st December 1992 a citizen of the Slovak Republic under the law of the Slovak National Council No. 206/1968 of the Code regarding the gain and loss of citizenship of the Slovak Socialist Republic according to the law No. 88/1990 of the collection of laws, is a citizen of the Slovak Republic under this law.[116]

The Law furthermore provides for the optional acquisition of Slovak nationality by other former Czechoslovak nationals, irrespective of their permanent residence.[117]

79. When Ukraine became independent, after the disintegration of the Union of Soviet Socialist Republics, the acquisition of its citizenship by persons affected by the succession was regulated by the Law on Ukrainian Citizenship of 8 October 1991, article 2 of which reads:

> The citizens of Ukraine are:
>
> (1) The persons who at the moment of enactment of this Law reside in Ukraine, irrespective of their origin, social and property status, racial and national belonging, sex, education, language, political views, religious confession, sort and nature of activities, if they are not citizens of other States and if they do not decline to acquire the citizenship of Ukraine;
>
> (2) The persons who are civil servants, who are conscripted to a military service, who study abroad or who lawfully left for abroad and are permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine ...[118]

80. In the case of the three Baltic republics, i.e. Estonia, Latvia and Lithuania, which regained their independence in 1991, the issue of citizenship was resolved on the basis of the retroactive application of the principles embodied in nationality laws in force prior to 1940. Thus, the Law on Citizenship of Estonia of 1938, and the Law on Citizenship of Latvia of 1919 have been re-enacted in order to determine the aggregate body of citizens of these republics.[119] Similarly, articles 17 and 18 of the Law on Citizenship of Lithuania of 5 December 1991 provide for the retention or restoration of the rights to citizenship of Lithuania with reference to the law in force before 15 June 1940.[120] Other persons permanently residing in these re-

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[112] Ibid. Thus article 40 of the Law on the Republic of Slovenia Citizenship Act provides that:

> "A citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite of the independence and autonomy of the Republic of Slovenia on the 23rd of December 1990 and is actually living here, can acquire citizenship of the Republic of Slovenia on condition that such a person files an application with the administrative organ competent for internal affairs of the community where they reside."

Article 41 of the same Law envisages that those persons who were previously deprived of the citizenship of the People's Republic of Slovenia and the Socialist Federal Republic of Yugoslavia, as well as officers of the ex-Yugoslav army who did not want to return to their homeland, emigrants who had lost their citizenship as a result of their stay abroad and some other categories of persons may acquire the citizenship of Slovenia on the basis of an application within a one-year period.

[113] Law on Croatian Citizenship of 26 June 1991, enacted in parallel to the proclamation of the independence of Croatia (see *Narodne Novine: Sluzbeni list Republike Hrvatske* (People's News: Official Gazette of the Republic of Croatia), No. 53/1991 (8 October 1991), p. 1466. See also *Central and Eastern European ...* (footnote 111 above), binder 5–5A.

[114] Law No. 40/1993 of 29 December 1992 on the acquisition and loss of citizenship of the Czech Republic, *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), document DIR/JUR (96) 4), appendix IV. Article 1, paragraph 2, provides that:

> "To determine whether a natural person is citizen of the Czech Republic, or was citizen of the Czech and Slovak Federal Republic as of December 31, 1992, regulations shall apply which were in force at the time when the person concerned gained or lost citizenship."

[115] Ibid., arts. 6 and 18. For other conditions regarding the optional acquisition of Czech nationality, see paragraph 123 below.

[116] *Sbierka zákonov Slovenskej republiky* (Collection of laws of the Slovak Republic), law No. 40/1993. See also *Report of the experts of the Council of Europe ...* (footnote 114 above), appendix V.

[117] *Sbierka zákonov …* (footnote 116 above), sect. 3. For more details see paragraph 122 below.

[118] Published in *Pravda Ukrainy*, 14 November 1991.

[119] See the Resolution of the Supreme Council of the Republic of Estonia of 26 February 1992, reintroducing, with retroactive effect, the 1938 Law on Citizenship; and the Resolution on the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization, of 15 October 1991, *Central and Eastern European ...* (footnote 111 above), binder 6.

[120] Ibid., binder 6A.

publics could acquire citizenship upon request, upon fulfilling other requirements spelled out in the law.[121]

81. The nationality of Eritrea, an independent State since 27 April 1993, has been regulated by the Eritrean Nationality Proclamation No. 21/1992.[122] The provisions on acquisition of Eritrean nationality on the date of independence make a distinction between persons who are of Eritrean origin, persons naturalized *ex lege* as a result of their residence in Eritrea between 1934 and 1951, persons naturalized upon request and persons born to such categories of individuals. According to article 2, paragraph 2, of the Proclamation: "A person who has 'Eritrean origin' is any person who was resident in Eritrea in 1933." Article 3, paragraph 1, provides for *ex lege* naturalization:

> Eritrean nationality is hereby granted to any person who is not of Eritrean origin and who entered, and resided in, Eritrea between the beginning of 1934 and the end of 1951, provided that he has not committed anti-people acts during the liberation struggle of the Eritrean people ...

Article 4, paragraph 1, envisages the acquisition of Eritrean nationality upon application: "Any person who is not of Eritrean origin and has entered, and resided in, Eritrea in 1952 or after shall apply for Eritrean nationality to the Secretary of Internal Affairs."[123] Finally, the Proclamation automatically confers Eritrean nationality on any person born to a father or a mother of Eritrean origin in Eritrea or abroad (art. 2, para. 1) and any person born to a person naturalized *ex lege* (art. 3, para. 2). It further confers Eritrean nationality on any person born to an Eritrean national naturalized upon application after such naturalization (art. 4, para. 6).

3. Withdrawal or loss of the nationality of the predecessor State

82. With regard to the general consideration of the limitations on the freedom of States in the area of nationality, in particular those resulting from some obligations in the field of human rights, the Special Rapporteur has suggested that the Commission should study the precise limits of the discretionary power of the predecessor State to deprive of its nationality the inhabitants of the territory it has lost[124] in cases of State succession in which

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[121] Article 6 of the Law on Citizenship of Estonia provides as follows:

"Foreigners wishing to acquire Estonian citizenship by naturalization must fulfil the following requirements:

"(1) He or she must have attained the age of 18 years, or have obtained the consent of his or her parents or guardians for acquiring Estonian citizenship;

"(2) He or she must have permanently resided in Estonia at least two years prior to and one year after the date of application for Estonian citizenship;

"(3) He or she must know the Estonian language."

According to paragraph 5 of the Supreme Council resolution on the Application of the Law on Citizenship of 26 February 1992, the duration of permanent residency in Estonia, as stipulated in article 6, paragraph 2, above, was considered to begin as of 30 March 1990.

Subsection 3/4/ of the Resolution of the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization of 15 October 1991 provides that persons who were permanent residents in Latvia on the date of adoption of the resolution can be granted the citizenship of Latvia if they:

"(1) have learned the Latvian language at a conversational level ...;

"(2) submit an application renouncing their previous citizenship and have received permission of expatriation from that country, if such is required by that country's law;

"(3) at the moment this resolution takes effect, have lived and have been permanently-registered residents of Latvia for no less than 16 years;

"(4) know the fundamental principles of the Republic of Latvia Constitution; and

"(5) Have sworn a citizens's oath to the Republic of Latvia."

Subsection 3/5/ enumerates the categories of persons to whom citizenship would not be granted (ibid., binder 6A).

Article 12 of the Law on Citizenship of the Republic of Lithuania of 5 December 1991 sets out the conditions for granting citizenship:

"A person, upon his or her request, may be granted citizenship of the Republic of Lithuania provided he or she agrees to take the oath to the Republic and meets the following conditions of citizenship:

"(1) Has passed the examination in the Lithuanian language (can speak and read Lithuanian);

"(2) For the last ten years has had a permanent place of residence on the territory of the Republic of Lithuania;

"(3) Has a permanent place of employment or a constant legal source of support on the territory of the Republic of Lithuania;

"(4) Has passed the examination in the basic provisions of the Constitution of the Republic of Lithuania; and

"(5) Is a person without citizenship, or is a citizen of a State under the laws of which he or she loses citizenship of said State upon acquiring citizenship of the Republic of Lithuania, or if the person notifies in writing of his or her decision to refuse citizenship of another State upon being granted citizenship of the Republic of Lithuania.

"Persons meeting the conditions specified in this article shall be granted citizenship of the Republic of Lithuania taking into consideration the interests of the Republic of Lithuania."

Article 13 enumerates the reasons precluding the granting of citizenship of the Republic of Lithuania (ibid., binder 6A).

[122] *The United Nations and the Independence of Eritrea* (United Nations publication, Sales No. E.96.I.10), pp. 156–158.

[123] According to paragraph 2 of the same article:

"The Secretary of Internal Affairs shall grant Nationality by Naturalization to the person mentioned in sub-article 1 of this Article provided that the person:

"a. has entered Eritrea legally and has been domiciled in Eritrea for a period of ten (10) years before 1974 or has been domiciled in Eritrea for a period of twenty (20) years while making periodic visits abroad;

"b. possesses high integrity and has not been convicted of any crime;

"c. understands and speaks one of the languages of Eritrea;

"d. is free of any of the mental or physical handicaps mentioned in Article 339–340 of the Transitory Civil Code of Eritrea, will not become a burden to Eritrean society and can provide for his own and his family's needs;

"e. has renounced the nationality of another country, pursuant to the legislation of that country;

"f. has decided to be permanently domiciled in Eritrea upon the granting of his Eritrean nationality;

"g. has not committed anti-people acts during the liberation struggle of the Eritrean people."

[124] See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 175, para. 106, and vol. II (Part Two), p. 35, para. 160.

the predecessor State continues to exist after the territorial change, such as secession and transfer of part of a territory. Thus, the Working Group on State succession and its impact on the nationality of natural and legal persons concluded, on a preliminary basis, that the nationality of a number of the categories of individuals defined in its report should not be affected by State succession and that, in principle, the predecessor State should have the obligation not to withdraw its nationality from those categories of persons.[125]

83. This preliminary conclusion of the Working Group was also supported by some representatives in the Sixth Committee.[126]

84. At this preliminary stage, the Commission has not yet analysed the conditions for the application of this prohibition and the sources of international law from which it can be derived. It also remains to be determined whether such prohibition is only the counterpart of the obligation not to create statelessness, or whether it has a broader application—for instance, in terms of the prohibition of arbitrary deprivation of nationality. Only when it engages in a substantive study of the topic will the Commission also be able to address the question of the most appropriate way to strengthen and develop this obligation.

85. The Working Group also defined, on a preliminary basis, the categories of persons from whom the predecessor State should be entitled to withdraw its nationality, provided that such withdrawal of nationality does not result in statelessness.[127] This involves, in particular, cases in which the genuine link between the individual and the predecessor State has disappeared. However, the balance to be maintained between the consequences of the application of the principle of effective nationality, namely the right of the predecessor State to withdraw its nationality from persons who, following an instance of State succession, have lost their genuine link with that State, and the requirements deriving from the principle of the prohibition of statelessness, is a question which requires further study. In this respect, the Working Group formulated the hypothesis that the right of the predecessor State to withdraw its nationality from the categories of persons mentioned in paragraph 12 of its report could not be exercised until a person had acquired the nationality of the successor State. But is this "primacy" of the principle of the prohibition of statelessness absolute or merely temporary?

86. No comments were made, during the debate in the Sixth Committee, on the right of the predecessor State to withdraw its nationality from certain categories of persons and the conditions in which this withdrawal should be made. One can find, however, a number of instances in State practice where there was withdrawal or loss of the nationality of the predecessor State. These should be analysed by the Commission at a future stage.

87. Thus, in the case of the cession of Venetia and Mantua by Austria to the Kingdom of Italy, the automatic loss of Austrian nationality was considered to be a logical counterpart of the acquisition of Italian nationality.[128] The peace treaties after the First World War also provided for the automatic loss of the nationality of the predecessor State upon acquisition of the nationality of the successor State. The relevant provisions of the Treaty of Versailles concerning *ipso facto* loss of German nationality and the acquisition of the nationality of the successor State by persons habitually resident in territories ceded by Germany to Belgium, Denmark and the Free City of Danzig and in the territories forming part of the newly recognized Czecho-Slovak State and Poland, have already been quoted in paragraphs 55-60 above.[129] As regards Alsace-Lorraine, article 54 on *ipso facto* reinstatement of French nationality[130] is to be read in conjunction with article 53, according to which:

> ... Germany undertakes as from the present date to recognise and accept the regulations laid down in the Annex hereto regarding the nationality of the inhabitants or natives of the said territories, not to claim at any time or in any place whatsoever as German nationals those who shall have been declared on any ground to be French [and] to receive all others in her territory ...

88. The concept of *ipso facto* loss of the predecessor's nationality upon the acquisition of the nationality of the successor State was also embodied in article 70 of the Peace Treaty of Saint Germain-en-Laye[131] and articles 39 and 44 of the Treaty of Neuilly-sur-Seine.[132] It was applied explicitly in article 21 and implicitly in article 30 of the Treaty of Lausanne.[133] It is also to be found in paragraph 1 of article 19 of the 1947 Treaty of Peace with Italy.[134]

89. As a result of the 1944 Armistice Agreement and the 1947 Treaty of Peace with Finland, Finland ceded part of its territory to the Soviet Union. The loss of Finnish citizenship by the population concerned was at the time regulated by the internal law of that State, i.e. the Act of 9 May 1941 concerning the acquisition and loss of Finnish citizenship, which did not contain specific provisions regarding territorial changes. In other words, the loss of Finnish citizenship was essentially regulated by the standard provisions of the Act, which read:

> A Finnish citizen who becomes a citizen of another country otherwise than upon his application shall lose his Finnish citizenship if his actual residence and domicile are outside Finland; if he resides in Finland he shall lose his Finnish citizenship on removing his residence from Finland.[135]

90. According to article II of the Treaty of cession of the territory of the Free Town of Chandernagore, the automatic loss of French citizenship or of the citizenship of the French Union, as the case might be, upon *ipso facto* acquisition of the citizenship of India by French subjects and citizens of the French Union domiciled in that territory was subject to the right of those persons to opt for

[125] Ibid., vol. II (Part Two), annex, p. 114, para. 11.

[126] A/CN.4/472/Add.1, para. 21.

[127] *Yearbook ... 1995*, vol. II (Part Two), annex, p. 114, para. 12.

[128] See paragraph 52 above.

[129] Arts. 36, 112, 105, 84 and 91.

[130] See paragraph 56 above.

[131] See paragraph 61 above.

[132] See paragraphs 62–63 above.

[133] See paragraph 65 above.

[134] See paragraph 66 above.

[135] See United Nations, Legislative Series, *Laws concerning Nationality* (ST/LEG/SER.B/4) (United Nations publication, Sales No. 1954.V.1), art. 10, p. 151.

the retention of their nationality.[136] The automatic loss of French nationality resulting from the acquisition of Indian nationality by virtue of article 4 of the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France,[137] was also subject to the right of the persons concerned to opt for the retention of French nationality. Moreover, article 7 of the Treaty explicitly provided that:

> French nationals born in the territory of the Establishments and domiciled in a country other than the territory of the Indian Union or the territory of the said Establishments on the date of entry into force of the Treaty of Cession shall retain their French nationality, with the exceptions enumerated in Article 8 hereafter.[138]

91. There are a number of provisions in documents dating from the period of decolonization which define the conditions which have to be met in order to lose the nationality of the predecessor State, or to retain the nationality of the predecessor State despite the acquisition of the nationality of the successor State.

92. Paragraph 1 of the First Schedule to the Burma Independence Act, 1947, enumerates two categories of persons who, being British subjects immediately before independence day, ceased to be British subjects:

> (*a*) persons who were born in Burma or whose father or paternal grandfather was born in Burma, not being persons excepted by paragraph 2 of this Schedule from the operation of this sub-paragraph; and
>
> (*b*) women who were aliens at birth and became British subjects by reason only of their marriage to any such person as is specified in sub-paragraph (a) of this paragraph.

According to paragraph 2:

> (1) A person shall be deemed to be excepted from the operation of sub-paragraph (*a*) of paragraph 1 of this Schedule if he or his father or his paternal grandfather was born outside Burma in a place which, at the time of the birth, [was under British jurisdiction]
>
> (2) A person shall also be deemed to be excepted from the operation of the said sub-paragraph (*a*) if he or his father or his paternal grandfather became a British subject by naturalisation or by annexation of any territory which is outside Burma.[139]

93. The British Nationality (Cyprus) Order, 1960, contained detailed provisions on the loss of the citizenship of the United Kingdom and Colonies in connection with the accession of Cyprus to independence. It provided, in principle, that:

> ... any person who, immediately before the sixteenth day of February, 1961, is a citizen of the United Kingdom and Colonies shall cease to be such a citizen on that day if he possesses any of the qualifications specified in paragraph 2 of Section 2 of Annex D to the Treaty concerning the Establishment of the Republic of Cyprus ...[140]
>
> Provided that if any person would, on ceasing to be a citizen of the United Kingdom and Colonies under this paragraph, become stateless, he shall not cease to be such a citizen thereunder until the sixteenth day of August, 1961.[141]

According to article 2 of the Order:

> ... any citizen of the United Kingdom and Colonies who is granted citizenship of the Republic of Cyprus in pursuance of an application such as is referred to in Section 4, 5 or 6 of Annex D shall thereupon cease to be a citizen of the United Kingdom and Colonies.[142]

94. Section 2 (2) of the Fiji Independence Act 1970, read as follows:

> Except as provided by section 3 of this Act, any person who immediately before … [10 October 1970] is a citizen of the United Kingdom and Colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Fiji.[143]

Similar provisions can be found in the Botswana Independence Act 1966,[144] the Gambia Independence Act 1964,[145] the Jamaica Independence Act 1962,[146] the Kenya Independence Act 1963,[147] the Sierra Leone Independence Act 1961,[148] and the Swaziland Independence Act 1968.[149]

95. Certain acts did not provide for the loss of the citizenship of the predecessor State, but rather for the loss of the status of "protected person". Thus, for instance, the Ghana Independence Act, 1957 stipulated that:

> a person who, immediately before the appointed day, was for the purposes of the [British Nationality Act, 1948] … and Order in Council a British protected person by virtue of his connection with either of the territories mentioned in paragraph (*b*) of this section shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the foregoing provisions of this Act, but shall so cease upon his becoming a citizen of Ghana under any law of the Parliament of Ghana making provision for such citizenship.[150]

Similar provisions are contained in the Tanzania Act, 1969.[151]

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[136] United Nations, *Treaty Series* (see footnote 88 above), art. III of the Treaty.

[137] See paragraph 67 above.

[138] United Nations, *Materials on Succession of States* … (footnote 79 above), p. 87. Article 8 provided for the right to choose to acquire Indian nationality by means of a written declaration.

[139] Ibid., p. 148.

[140] Ibid., p. 171, art. 1, para. (1). For the qualifications for *ipso facto* acquisition of the citizenship of the Republic of Cyprus, see paragraph 72 above.

[141] Ibid., pp. 171–172. Article 1, para. (2), provided that persons possessing any of the qualifications specified in paragraph 2 of section 3 of annex D were exempted from the rule concerning the loss of the nationality of the United Kingdom and Colonies.

[142] Ibid., p. 172. See also footnote 104 above.

[143] Ibid., p. 179. Section 3 (1) stipulated that the above provisions on automatic loss of citizenship of the United Kingdom and Colonies did not apply to a person if he, his father or his father's father:

- "(*a*) was born in the United Kingdom or in a colony or an associated state; or
- "(*b*) is or was a person naturalised in the United Kingdom and Colonies; or
- "(*c*) was registered as a citizen of the United Kingdom and Colonies; or
- "(*d*) became a British subject by reason of the annexation of any territory included in a colony."

and section 3 (2) stipulated that a person did not cease to be a citizen of the United Kingdom and Colonies if:

- "(*a*) he was born in a protectorate or protected state, or
- "(*b*) his father or his father's father was so born and is or at any time was a British subject."

[144] Ibid., p. 129.

[145] Ibid., p. 189.

[146] Ibid., p. 239.

[147] Ibid., p. 248.

[148] Ibid., p. 386.

[149] Ibid., p. 404.

[150] Ibid., p. 194.

[151] Ibid., p. 523.

96. Former French subjects from South Viet Nam and the former concessions of Hanoi, Haiphong and Tourane who acquired Vietnamese nationality under article 3 of the Convention on Nationality between France and Viet Nam of 16 August 1955 simultaneously lost their French nationality. Article 2, however, provides that:

> The following shall retain French nationality: French citizens not of Viet Nam origin domiciled in South Viet Nam (Cochin China) and in the former concessions of Hanoi, Haiphong and Tourane at the date when these territories were attached to Viet Nam, even where they have not effectively established their domicile outside Viet Nam.[152]

97. The loss of the nationality of the predecessor State is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of the predecessor State. Among recent examples, reference can be made to the extinction of the German Democratic Republic by integration into the Federal Republic of Germany in 1990, and the dissolution of Czechoslovakia in 1993. However, in the case of the disintegration of a State which used to be organized on a federal basis, the loss of the nationality of the Federal State seems to be accepted, regardless of the fact that one of the States concerned claims that its international legal personality is identical to that of the former Federation.

4. The right of option

98. There was broad agreement regarding the Special Rapporteur's recommendation that the concept of the right of option under contemporary international law should be further clarified on the basis of State practice. While some members felt that the Commission should endeavour to strengthen that right, others drew attention to another aspect of the problem, stressing that there could be no unrestricted free choice of nationality and that the factors which would indicate that a choice was bona fide should be identified and the State must respect and give effect to them by granting its nationality.[153]

99. The Working Group, when it studied this problem, agreed that, at the current preliminary stage of study of the subject, the term "right of option" was used in a very broad sense, covering both the possibility of making a positive choice and that of renouncing a nationality acquired *ex lege*. In the view of the Working Group, since the expression of the will of the individual was a consideration which, with the development of human rights law, had become paramount, States should not be able, as in the past, to attribute their nationality, even by agreement inter se, against an individual's will.[154] Of course, these conclusions by the Working Group apply only to certain categories of persons whose nationality is affected by a succession of States, as defined in its report.[155] In theory, individuals for whom the right of option has been envisaged belong, on the one hand, to a "grey area" in which there is an overlap of the categories from whom, in the case of secession and transfer of part of a territory, the predecessor State has an obligation not to withdraw its nationality and the categories to whom the successor State has an obligation to grant its nationality and, on the other hand, the categories to whom, in cases of the dissolution of a State, no successor State in particular is required to grant its nationality.[156]

100. The Working Group also stressed that the right of option should be an effective right and that the States concerned should therefore have the obligation to provide individuals concerned with all relevant information on the consequences of the exercise of a particular option—including in areas relating to the right of residence and social security benefits—so that those persons would be able to make an informed choice.[157] Within the Commission, the view was expressed that a reasonable time limit should be envisaged for the exercise of the right of option.[158]

101. As to the legal basis of a right of option, some members of the Commission felt that, while the granting of such a right was desirable, the notion did not necessarily reflect *lex lata* and pertained to the progressive development of international law.[159]

102. The debate in the Sixth Committee revealed a considerable uncertainty about the existence, under general international law, of a right of option in the context of State succession. While in the view of some representatives, contemporary international law recognized such a right,[160] according to others, the concept pertained to the realm of progressive development of international law.[161] Support was, however, expressed for the Working Group's preliminary conclusions as to the categories of persons who should be granted a right of option.[162]

103. Several members of the Commission cautioned against an unduly broad approach to the right of option. Emphasis was also placed on the need not to reverse the roles: for, it was said, State succession was a matter for States and, notwithstanding legitimate human rights concerns, it was questionable whether the will of individuals could or should prevail in all cases over agreements between States as long as such agreements fulfilled a number of requirements.[163] Other members, however, took the view that the right of option was anchored in the structure of international law and should, in the context of State succession, be considered as a fundamental human right. It was also believed that the State should exercise its right to determine the nationality in the interest of nation-building judiciously, bearing in mind, for instance, the principle of the unity of the family.[164]

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[152] Ibid., p. 447.

[153] See *Yearbook ... 1995*, vol. II (Part Two), p. 38, para. 192.

[154] Ibid., p. 115, annex, para. 23.

[155] Ibid., p. 42, para. 224.

[156] Ibid., pp. 114–115, annex, paras. 14 and 21, for the definitions of the categories of individuals to which the States concerned have an obligation to grant a right of option.

[157] Ibid., p. 115, annex, para. 24.

[158] Ibid., p. 40, para. 212.

[159] Ibid., pp. 40–41, para. 213.

[160] See the statement by the Republic of Korea, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 24th meeting (A/C.6/50/SR.24, para. 90).

[161] See the statement by the Islamic Republic of Iran, ibid., 23rd meeting (A/C.6/50/SR.23, para. 51).

[162] A/CN.4/472/Add.1, para. 23.

[163] *Yearbook ... 1995*, vol. II (Part Two), p. 41, para. 214.

[164] Ibid., para. 215.

104. Within the scope of the issue of the right of option, one must also address the question raised by one representative in the Sixth Committee: whether persons who had been granted the nationality of the successor State had the right to refuse or renounce such nationality and what the consequences of such refusal entailed.[165] As the Working Group indicated in its report, it was using the term "option" in a broad sense, including the possibility of "opting out", i.e. renouncing a nationality acquired *ex lege*.[166] Thus, the problem has already been included in the scope of the study.

105. There are a number of examples from State practice where the right of option was granted in situations of State succession. The precedent of the Evian Declaration[167] has already been referred to in the first report.[168] But many other examples can be provided. Indeed, numerous treaties regulating questions of nationality in connection with State succession as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

106. The acquisition of Belgian nationality *ipso facto* and the subsequent loss of German nationality by persons habitually resident in the ceded territories provided for under article 36 of the Treaty of Versailles[169] could have been reversed by the exercise of the right of option. According to article 37 of the Treaty:

> Within the two years following the definitive transfer of the sovereignty over the territories assigned to Belgium under the present Treaty, German nationals over 18 years of age habitually resident in those territories will be entitled to opt for German nationality.
>
> Option by a husband will cover his wife, and option by parents will cover their children under 18 years of age.
>
> Persons who have exercised the above right to opt must, within the ensuing twelve months, transfer their place of residence to Germany. ...

107. In relation to Alsace-Lorraine, paragraph 2 of the annex relating to article 79 of the Treaty of Versailles enumerated several categories of persons entitled to claim French nationality, in particular, persons not restored to French nationality under other provisions of the annex whose ascendants included a Frenchman or Frenchwoman, persons born or domiciled in Alsace-Lorraine, including Germans, or foreigners who acquired the status of citizens of Alsace-Lorraine. It reserved, at the same time, the right for French authorities, in individual cases, to reject the claim to French nationality. Accordingly, the procedure did not exactly correspond to the traditional notion of the right of option.

108. Article 85 of the Treaty of Versailles provided for the right of option for a wider range of persons than only German nationals habitually resident in the ceded territories[170] or in any other territories forming part of the Czecho-Slovak State.[171] It read:

> Within a period of two years from the coming into force of the present Treaty, German nationals over eighteen years of age habitually resident in any of the territories recognised as forming part of the Czecho-Slovak State will be entitled to opt for German nationality. Czecho-Slovaks who are German nationals and are habitually resident in Germany will have a similar right to opt for Czecho-Slovak nationality.
>
> …
>
> Persons who have exercised the above right to opt must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.
>
> …
>
> Within the same period Czecho-Slovaks who are German nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Czecho-Slovak nationality and lose their German nationality by complying with the requirements laid down by the Czecho-Slovak State.

109. Article 91 of the Treaty of Versailles contains essentially similar provisions concerning the right of option for German nationals habitually resident in territories recognized as forming part of Poland who acquired Polish nationality *ipso facto* and for Poles who were German nationals habitually resident in Germany or in a third country.[172]

110. Yet another scenario of option was provided for in article 113 of the Treaty of Versailles:

> Within two years from the date on which the sovereignty over the whole or part of the territory of Schleswig subjected to the plebiscite is restored to Denmark:
>
> Any person over 18 years of age, born in the territory restored to Denmark, not habitually resident in this region, and possessing German nationality, will be entitled to opt for Denmark;
>
> Any person over 18 years of age habitually resident in the territory restored to Denmark will be entitled to opt for Germany.
>
> Option by a husband will cover his wife and option by parents will cover their children less than 18 years of age.
>
> Persons who have exercised the above right to opt must within the ensuing twelve months transfer their place of residence to the State in favour of which they have opted. ...

111. Moreover, according to article 106 of the Treaty of Versailles, relating to the Free City of Danzig, German nationals over 18 years of age ordinarily resident in the territory concerned, to whom the provisions of article 105 on automatic loss of German nationality and acquisition of the nationality of the Free City of Danzig applied,[173] had the right to opt, within a period of two years, for German nationality. After having exercised such right, they

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[165] See the statement by Japan, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 22nd meeting (A/C.6/50/SR.22, para. 36).

[166] *Yearbook ... 1995*, vol. II (Part Two), p. 115, annex, para. 23.

[167] See the Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria (Paris and Rocher Noir, 3 July 1962), United Nations, *Treaty Series*, vol. 507, pp. 25 et seq., at pp. 35 and 37.

[168] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 175, para. 107.

[169] See paragraph 55 above.

[170] A portion of Silesian territory; see article 83 of the Treaty.

[171] Such persons automatically acquired Czecho-Slovak nationality; see article 84 of the Treaty, para. 57 above.

[172] See also paragraph 58 above.

[173] See paragraph 60 above.

were obliged, during the ensuing 12 months, to transfer their place of residence to Germany.

112. The Peace Treaty of Saint-Germain-en-Laye also contained several provisions on the right of option. Article 78 provided that:

> Persons over 18 years of age losing their Austrian nationality and obtaining *ipso facto* a new nationality under Article 70 shall be entitled within a period of one year from the coming into force of the present Treaty to opt for the nationality of the State in which they possessed rights of citizenship before acquiring such rights in the territory transferred.[174]

According to article 79 of the Treaty:

> Persons entitled to vote in plebiscites provided for in the present Treaty shall within a period of six months after the definitive attribution of the area in which the plebiscite has taken place be entitled to opt for the nationality of the State to which the area is not assigned. The provisions of Article 78 relating to the right of option shall apply equally to the exercise of the right under this Article.

Finally, article 80 stipulated that:

> Persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory, shall within six months from the coming into force of the present Treaty severally be entitled to opt for Austria, Italy, Poland, Roumania, the Serb-Croat-Slovene State, or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right to opt. The provisions of Article 78 as to the exercise of the right of option shall apply to the right of option given by this Article.

113. The Treaty of Neuilly-sur-Seine, the provisions of which on *ipso facto* acquisition and loss of nationality have already been mentioned above,[175] provided for the right of option in articles 40 and 45,[176] drafted along the same lines as articles 37 and 85 of the Treaty of Versailles.

114. When the Soviet Government of Russia ceded to Finland the area of Petsamo (Petschenga), by the Treaty of Tartu of 14 October 1920, the inhabitants of that territory were granted the right of option. Article 9 of the Treaty, which stipulated that Russian citizens domiciled in the ceded territory would automatically become Finnish citizens,[177] also provided that:

> ... Nevertheless, those who have attained the age of 18 years may, during the year following the entry into force of the present Treaty, opt for Russian nationality. A husband shall opt on behalf of his wife unless otherwise decided by agreement between them, and parents shall opt on behalf of those of their children who have not attained 18 years of age.
>
> All persons who opt in favour of Russia shall be free, within a time limit of one year reckoned from the date of option, to leave the territory, taking with them their movable property, free of customs and export duties. Such persons shall retain full rights over immovable property left by them in the territory of Petschenga.

115. The 1923 Treaty of Lausanne guaranteed the right of option for a period of two years from its entry into force to Turkish nationals habitually resident in the island of Cyprus; Turkey had declared that it recognized the annexation of Cyprus by the British Government. Individuals who opted for Turkish nationality were to leave Cyprus within 12 months of exercising the right of option (art. 21). The Treaty also included provisions on the right of option of Turkish subjects habitually resident in the territories detached from Turkey under that Treaty or natives of those territories who were habitually resident abroad.[178]

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[174] For the text of article 70, see paragraph 61 above.

[175] Arts. 39 and 44 of the Treaty; see paragraphs 62–63 above.

[176] Article 40 read:

> "Within a period of two years from the coming into force of the present Treaty, Bulgarian nationals over 18 years of age and habitually resident in the territories which are assigned to the Serb-Croat-Slovene State in accordance with the present Treaty will be entitled to opt for their former nationality. Serb-Croat-Slovenes over 18 years of age who are Bulgarian nationals and habitually resident in Bulgaria will have a similar right to opt for Serb-Croat-Slovene nationality.
>
> ...
>
> "Persons who have exercised the above right to opt must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.
>
> ...
>
> "Within the same period Serb-Croat-Slovenes who are Bulgarian nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Serb-Croat-Slovene nationality and lose their Bulgarian nationality by complying with the requirements laid down by the Serb-Croat-Slovene State."
>
> Article 45 stipulated that:
>
> "Within a period of two years from the coming into force of the present Treaty, Bulgarian nationals over 18 years of age and habitually resident in the territories assigned to Greece in accordance with the present Treaty will be entitled to opt for Bulgarian nationality.
>
> ...
>
> "Persons who have exercised the above right to opt must within the succeeding twelve months transfer their place of residence to the State for which they have opted. ..."

[177] See paragraph 64 above.

[178] Articles 31 to 34 read as follows:

> "*Article 31*.
>
> "Persons over eighteen years of age, losing their Turkish nationality and obtaining *ipso facto* a new nationality under Article 30, shall be entitled within a period of two years from the coming into force of the present Treaty to opt for Turkish nationality.
>
> "*Article 32*.
>
> "Persons over eighteen years of age, habitually resident in territory detached from Turkey in accordance with the present Treaty, and differing in race from the majority of the population of such territory shall, within two years from the coming into force of the present Treaty, be entitled to opt for the nationality of one of the States in which the majority of the population is of the same race as the person exercising the right to opt, subject to the consent of that State.
>
> "*Article 33*.
>
> "Persons who have exercised the right to opt in accordance with the provisions of Articles 31 and 32 must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.
>
> "They will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt.
>
> "They may carry with them their movable property of every description. No export or import duties may be imposed upon them in connection with the removal of such property.
>
> "*Article 34*.
>
> "Subject to any agreements which it may be necessary to conclude between the Governments exercising authority in the coun-

116. The 1947 Treaty of Peace with Italy envisaged, in addition to the above-mentioned provisions on *ipso facto* acquisition and loss of nationality,[179] that persons domiciled in territory transferred by Italy to other States and whose customary language was Italian would have a right of option.[180]

117. Articles III and IV of the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France provide yet another example of the "opting out" concept. Thus, French subjects and citizens of the French Union who were domiciled in the transferred territory and acquired *ipso facto* Indian nationality under the Treaty[181] could, according to article III, by a written declaration made within six months following the coming into force of the Treaty, opt for the retention of their nationality.[182] Article 4 of the Agreement between India and France for the settlement of the question of the future of the French Establishments in India, provided that: "Questions pertaining to citizenship shall be determined before *de jure* transfer takes place. Both the Governments agree that free choice of nationality shall be allowed."[183] The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, also contained provisions on the right of option for French nationals who were otherwise to acquire Indian nationality automatically by virtue of articles 4 and 6 of the Treaty as well as for French nationals who were otherwise, under article 7, to retain their French nationality.[184]

118. While some of the documents concerning nationality issues in relation to decolonization contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after having envisaged that the categories of persons specified in the First Schedule to that Act[185] automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject. In that case, the provisions regarding loss of British nationality would be deemed never to have applied to or in relation to such person or, except so far as the declaration otherwise provided, any child of his who was under the age of 18 years at the date of the declaration.[186] The Act also provided for a right of option for the purpose of avoiding statelessness. Indeed, any person, other than a person mentioned in section 2, subsection (2), who ceased to be a British subject under the Act and upon independence neither became, nor became qualified to become, a citizen of the independent country of Burma had the like right of election as provided for by subsection (2) of section 2.[187]

119. Several articles of the Convention on Nationality between France and Viet Nam establish the right of option.[188] Among these provisions, only some relate to the situation of State succession. Thus, in accordance with article 4:

> Persons of Viet Nam origin aged more than eighteen at the date of coming into operation of the present Convention, and who have acquired French nationality prior to 8 March 1949 either by individual or collective administrative measure or by judicial decision shall retain

tries detached from Turkey and the Governments of the countries where the persons concerned are resident, Turkish nationals of over eighteen years of age who are natives of a territory detached from Turkey under the present Treaty, and who on its coming into force are habitually resident abroad, may opt for the nationality of the territory of which they are natives, if they belong by race to the majority of the population of that territory, and subject to the consent of the Government exercising authority therein. This right of option must be exercised within two years from the coming into force of the present Treaty."

[179] See paragraph 66 above.

[180] Article 19 read as follows:

"…

"2. The Government of the State to which the territory is transferred shall, by appropriate legislation within three months from the coming into force of the present Treaty, provide that all [Italian citizens domiciled on 10 June 1949 in territory transferred by Italy to another State, and their children born after that date,] … over the age of eighteen years (or [such married citizens] … whether under or over that age) whose customary language is Italian, shall be entitled to opt for Italian citizenship within a period of one year from the coming into force of the present Treaty. Any person so opting shall retain Italian citizenship and shall not be considered to have acquired the citizenship of the State to which the territory is transferred. The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or, if the father is not alive, on the part of the mother, shall, however, automatically include all unmarried children under the age of eighteen years.

"3. The State to which the territory is transferred may require those who take advantage of the option to move to Italy within a year from the date when the option was exercised."

At the same time, article 20 provided that Italian citizens whose customary language was one of the Yugoslav languages and who were domiciled in Italy could acquire Yugoslav nationality upon request. This provision covered a category of persons whose nationality was not affected by State succession and is therefore outside the scope of the Commission's study.

[181] See article II of the Treaty, paragraph 67 above.

[182] See footnote 88 above. Article IV of the Treaty read:

"Persons who will have opted for the retention of their nationality in accordance with the provisions of article III of this Treaty and who desire to permanently reside or establish themselves in any French territory outside the Free Town of Chandernagore shall, on application to the Government of the Republic of India, be permitted to transfer or remove such or all of their assets and property as they may desire and as may be standing in their names on the date of the coming into force of this Treaty."

[183] United Nations, *Materials on State Succession* … (footnote 79 above), p. 80.

[184] Ibid., p. 87. Article 5 of the Treaty provided that French nationals born in the territory of the Establishments and domiciled therein could, "by means of a written declaration drawn up within six months of the entry into force of the Treaty of Cession, choose to retain their nationality. Persons availing themselves of this right shall be deemed never to have acquired Indian nationality".

Article 6 further provided that French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union "and their children shall be entitled to choose as indicated in Article 5 above. They shall make this choice under the conditions and in the manner prescribed in the aforesaid Article".

Finally, article 8 provided that French nationals born in the territory of the Establishments and domiciled in a country other than the territory of the Indian Union that were otherwise to retain French nationality could, "by means of a written declaration signed in the presence of the competent Indian authorities within six months of the entry into force of the Treaty of Cession, choose to acquire Indian nationality. Persons availing themselves of this right shall be deemed to have lost French nationality as from the date of the entry into force of the Treaty of Cession".

[185] See paragraph 92 above.

[186] United Nations, *Materials on State Succession* … (footnote 79 above), pp. 145–146.

[187] Ibid., p. 146, sect. 2, subsect. (3). For the remaining provisions of section 2 on the right of option and its consequences, see subsections (4) and (6).

[188] Ibid., pp. 446–450.

French nationality with the right to opt for Viet Nam nationality under the provisions laid down by the present Convention.

The same provisions shall be applicable to persons of Viet Nam origin who, prior to the coming into operation of the present Convention have acquired French nationality in France under the rules of common law applicable to aliens.

Persons of Viet Nam origin above the age of eighteen at the date of coming into operation of the present Convention who have acquired French citizenship after 8 March 1949 by individual or collective administrative measure or by judicial decision shall acquire Viet Nam nationality with the right to opt for French nationality under the provisions laid down by the present Convention.

Other articles have established a right of option for other categories of persons. This right had to be exercised, in general, within six months after the date of the coming into operation of the Convention, except in the case of minor children, where the time limit began to run from the date on which the infant child attained the age of 18.[189]

120. Article 3 of the Treaty between Spain and Morocco regarding Spain's retrocession to Morocco of the Territory of Sidi Ifni read as follows:

With the exception of those who have acquired Spanish nationality by one of the means of acquisition laid down in the Spanish Civil Code, who shall retain it in any case, all persons born in the territory who have had Spanish nationality up to the date of the cession may opt for that nationality by making a declaration of option to the competent Spanish authorities within three months from that date.[190]

121. In recent cases of State succession in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through the national legislation of the States concerned, the possibility of choice, to the extent permitted by internal law, has been in fact "established" simultaneously in the legal orders of at least two States. The prospect of acquiring nationality by optional declaration on the basis of the legislation of one of the States concerned can be realistically evaluated only in conjunction with the laws of the other relating to renunciation of nationality, release from the nationality bond or loss of nationality. The real impact of the legislation of a successor State regarding optional acquisition of its nationality may also largely depend upon the legislation of the States concerned regarding dual nationality.

122. The Law on State Citizenship in the Slovak Republic contains liberal provisions on the optional acquisition of nationality. According to section 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia *ipso facto*, had the right to opt for the citizenship of Slovakia. Paragraphs (2) and (3) of section 3 further stipulated that:

(2) An application for citizenship under section (1) can be lodged until 31st December 1993 by way of written statement to the district office on the territory of the Slovak Republic, abroad to the Diplomatic Mission or to the Consulate of the Slovak Republic, according to the place of residence. Husband and wife can lodge a common statement.

(3) In the statement referred to in paragraph (2) the following must be clearly stated:

(*a*) identity of the person lodging the statement;

(*b*) the fact that the person lodging the statement was up to 31st December 1992 a citizen of the Czech and Slovak Republic;

(*c*) place of birth and the residence as at 31st December 1992.

No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.[191]

123. The Law on the acquisition and loss of citizenship of the Czech Republic envisages, in addition to provisions on *ex lege* acquisition of Czech nationality, that such nationality may be acquired on the basis of a declaration. According to article 6:

(1) Natural persons who were citizens of the Czech and Slovak Federal Republic as of December 31, 1992, but had neither citizenship of the Czech Republic nor citizenship of the Slovak Republic, can choose citizenship of the Czech Republic by declaration.

(2) Such declaration can be made … [before a competent authority], according to the place of permanent residence of the natural person making the declaration. Abroad, such declarations shall be made at diplomatic or consular offices of the Czech Republic.

(3) The appropriate office shall issue a certificate of declaration.[192]

While article 6 was addressed to a relatively small number of individuals—there were very few Czechoslovak nationals who did not have at the same time either Czech or Slovak "secondary" nationality—article 18 was addressed to a much larger group and provided that:

(1) Citizens of the Slovak Republic may choose citizenship of the Czech Republic by declaration made by December 31, 1993, at the latest provided that they:

(*a*) have been residing continuously on the territory of the Czech Republic for at least two years;

(*b*) present document of release from state citizenship of the Slovak Republic, with the exception of cases when they prove that they have applied for release from citizenship of the Slovak Republic and that their application has not been granted within three months, and simultaneously declare at the district office that they relinquish citizenship of the Slovak Republic: this document is not required in the case that by choosing citizenship of the Czech Republic, citizenship of the Slovak Republic is lost;

(*c*) have not been sentenced in the past five years for a wilful punishable offence.

The possibility of option was also open to the citizens of Slovakia permanently residing in a third country, provided that their last permanent residence before leaving for

[189] Ibid., p. 449, art. 15.

[190] 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, Aranzadi, 1969), pp. 1008–1011 and 1041.

[191] *Sbierka zákonov* … and *Report of the experts of the Council of Europe* … (see footnote 116 above), appendix V. Although the Slovak Law did not subject the optional acquisition of the Slovak nationality to the requirement of the loss of the other nationality of the individual concerned, according to article 17 of Law No. 40/1993 on the acquisition and loss of citizenship of the Czech Republic (see footnote 114 above), Czech nationals who made an optional declaration pursuant to section 3 of the Slovak Law were deemed to have automatically lost their Czech nationality when they acquired Slovak nationality. (This may not be obvious from the wording of article 17 alone which attaches the loss of Czech nationality to the acquisition of the nationality of another State upon the individual's own request. Nevertheless, the Czech Constitutional Court in its decision of 8 November 1995 (Collection of Laws of the Czech Republic, No. 6/1996) interpreted the notion of "request" as covering also optional declarations.)

[192] Ibid., appendix IV, p. 68.

abroad was on the territory of the Czech Republic or that at least one of their parents was a citizen of the Czech Republic. In such case, the condition under (*b*) above also applied, but not the condition under (*c*).

124. Another recent case of State succession in relation to which the question of the free choice of nationality has been raised is the disintegration of the Socialist Federal Republic of Yugoslavia. In its opinion No. 2 of 11 January 1992, the Arbitration Commission of the International Conference on the Former Yugoslavia stated, among other things, that, by virtue of the right of self-determination:

> [E]very individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Commission's view, one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Hercegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned.[193]

Although the Arbitration Commission might not necessarily have had in mind exactly the same issue as that of the "right of option" discussed in the first report of the Special Rapporteur and in the report of the Working Group, its opinion undoubtedly has some relevance for the question of nationality discussed by the International Law Commission.[194]

5. Criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option

125. The examples from State practice extensively quoted above suggest that there is a broad spectrum of criteria used for determining the categories of persons to whom nationality is granted, those from whom nationality is withdrawn and those who are entitled to exercise the right of option. These criteria are often combined.

126. The mosaic of different criteria used by the Working Group for the purpose of determining the categories of persons whose nationality may be affected as a result of State succession and of formulating certain guidelines for negotiations concerning the acquisition of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option, gave rise to a number of comments both in the Commission and in the Sixth Committee. One representative in the Sixth Committee observed in this respect that too much attention had been given to categorization.[195]

127. Some members of the Commission expressed concern that, in their view, the Working Group seemed to confer on *jus soli* the status of a kind of peremptory norm of general international law, whereas the principle of *jus sanguinis* was much more convoluted. The Commission was therefore invited to start from the premise that individuals had the nationality of the predecessor State and to avoid drawing firm distinctions about the way nationality was acquired. With regard to the criticism relating to an alleged overemphasis on *jus soli*, the Special Rapporteur has already pointed out that the fact of birth had systematically been considered in the Working Group in conjunction with the criterion of the place of habitual residence. Furthermore, the Working Group's conclusions gave a more prominent place to the fact of national residence than to the fact of birth.[196]

128. The concept of "secondary nationality" was queried by several members. In particular, the notion that there could be different degrees of nationality under international law and that nationality could refer to different concepts was viewed as questionable.[197] On the other hand, the view was expressed in the Sixth Committee that, in the case of a federal predecessor State composed of entities which attributed a secondary nationality, the application of the criterion of such secondary nationality could provide an option that recommended itself on account of its simplicity, convenience and reliability.[198]

129. As to the other criteria considered by the Working Group, some representatives in the Sixth Committee, when commenting on the alleged obligation of the successor State to grant its nationality, underlined the importance of the criterion of habitual residence in the territory of the successor State. One representative, presumably supporting the criterion of habitual residence, expressed the view that the mode of acquisition of the nationality of the predecessor State—as long as it was recognized by international law—and the place of birth were questionable criteria for determining the categories of individuals to which the successor State had an obligation to grant its nationality.[199]

130. The remark was further made that the criteria for determining which categories of persons acquired the nationality of the successor State both *ex lege* and through the exercise of the right of option should be established on the basis of existing legal instruments.[200] Another representative, commenting on the scope of the right of option as envisaged in a preliminary manner by the Working Group, and making reference to the practice of his own country, expressed the view that the successor State had the duty to grant the right of option for the nationality of the predecessor State—he presumably envisaged the

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[193] ILM, vol. 31, No. 6 (1992), p. 1498. For comments on this aspect of opinion No. 2, see Pellet, "Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", pp. 340–341.

[194] For different interpretations of opinion No. 2, see Mikulka, "Legal problems arising from the dissolution of States in relation to the refugee phenomenon", pp. 47–48, and Pellet, "Commentaires sur les problèmes découlant de la création et de la dissolution des États et les flux de réfugiés", pp. 56–57.

[195] See the statement by Brazil, *Official Records of the General Assembly, Fiftieth Session, Sixth Committe*e, 21st meeting (A/C.6/50/SR.21, para. 78).

[196] *Yearbook ... 1995*, vol. II (Part Two), pp. 40–42, paras. 210, 213 and 223.

[197] Ibid., p. 40, para. 211. The objection was raised in particular that the criterion of secondary nationality should be given such importance as is the case in paragraph 11 (*d*) of the Working Group's report, dealing with the obligation of the predecessor State not to withdraw its nationality from persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence. It was observed that there was no reason to prohibit the predecessor State from withdrawing its nationality from such persons, after a given period, if the latter resided in the successor State. The criterion of secondary nationality was also questioned in the context of the obligation to grant a right of option to certain categories of persons (para. 212).

[198] A/CN.4/472/Add.1, para. 29.

[199] Ibid., paras. 17–18.

[200] Ibid., para. 18.

"opting out" model—only to persons having ethnic, linguistic or religious ties to the latter.[201]

131. In the next stage of its work, the Commission should analyse State practice also from the point of view of the criteria used by States to determine the relevant categories of persons for the purpose of granting or withdrawing nationality or for allowing the option. The use of different criteria by individual States concerned may lead to dual nationality or statelessness. Certain criteria may also be discriminatory. In formulating the principles to be observed by States in this regard, the Commission should resort to criteria and techniques which have been successfully used in practice.

6. Non-discrimination

132. During the debate in the Commission, emphasis was placed on the obligation of non-discrimination which international law imposed on all States and which is also applicable to nationality.[202] The Working Group, for its part, agreed that, while withdrawal of, or refusal to grant a specific nationality in hypotheses of State succession should not rest on ethnic, linguistic, religious, cultural or other criteria, a successor State should be allowed to take such criteria into consideration, in addition to criteria envisaged by the Working Group in paragraphs 12 to 21 of its report, for enlarging the circle of individuals entitled to acquire its nationality.[203] This position, however, was opposed by a member of the Commission who observed that allowing a successor State to take into consideration ethnic, linguistic, religious or other similar criteria for the purpose of allowing more categories of individuals to acquire its nationality might lead to improper use of those criteria and open the way to discrimination.[204]

133. The risk that the Working Group's conclusions on the possibility of enlarging the circle of individuals entitled to acquire the nationality of the successor State based on certain additional criteria might eventually open the way to discrimination merited further study. In support of the Working Group's conclusions, however, reference may be made to the jurisprudence of the Inter-American Court of Human Rights which, in the case concerning *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*,[205] concluded that it was basically within the sovereignty of a State to give preferential treatment to aliens who, viewed objectively, would more easily and more rapidly assimilate within the national community and identify more readily with the traditional beliefs, values and institutions of that country, and accordingly held that preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favoured Central Americans, Ibero-Americans and Spaniards over other aliens, did not constitute discrimination contrary to the American Convention on Human Rights.[206]

134. The representatives in the Sixth Committee who touched upon this problem expressed their agreement with the Working Group's preliminary conclusion that States had the duty to refrain from applying discriminatory criteria, such as ethnicity, religion or language, in the granting or revoking of nationality in the context of State succession.[207]

7. Consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality

135. The problem of the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality was not dealt with in the Special Rapporteur's first report. It was addressed by the Working Group as a consequence of the approach adopted, that is to say, the elaboration of guiding principles for negotiations between the States concerned. The Working Group formulated, on a preliminary basis, a number of hypotheses which merit further study,[208] one being 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 violation of the principles formulated by the Working Group. Thus, a third State would be entitled to accord to an individual the rights or status which he/she would enjoy in the territory of the third State by virtue of being a national of a predecessor or successor State, as the case may be. The question was also asked during the debate in the Commission whether, in cases of extreme gravity, it should not be possible under international law to claim that acts carried out at the national level were null and void, where the decision to divest certain natural persons of their nationality was an element in the persecution of an ethnic minority.[209]

136. Several members were of the view that the Working Group's conclusions on the consequences of non-compliance by States with the principles applicable to the withdrawal or the grant of nationality called for further reflection, in particular with regard to the proposal to accord third States the right to judge actions of predecessor or successor States which had failed to comply with the principles applicable in this area. No principle of international law, it was stated, enabled a third State to interfere in problems which a priori concerned the predecessor and successor States alone.[210]

137. Starting from the premise that at least some of the principles governing questions of the withdrawal or grant

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[201] Ibid., para. 23.

[202] See the statement by Mr. Crawford (*Yearbook ... 1995*, vol. I, 2388th meeting, pp. 60–61). Similarly, it has recently been stressed by one author that, in cases of State succession, "the habitual or permanent residents of the territory constitute an undifferentiated body in terms of legal link, as a result of which there are no 'permissible' grounds for distinguishing among them. A state must, simply, be held to the highest standards of international human rights regulation, both treaty based, where applicable, and of a customary law nature. Among them the principle of non-discrimination figures most prominently" (Pejic, loc. cit., pp. 4–5).

[203] *Yearbook ... 1995*, vol. II (Part Two), p. 39, para. 197.

[204] Ibid., p. 41, para. 219.

[205] Advisory Opinion OC–4/84 of 19 January 1984, ILR (Cambridge), vol. 79 (1989), p. 283.

[206] See also Chan, "The right to a nationality as a human right: the current trend towards recognition", p. 6.

[207] A/CN.4/472/Add.1, para. 24.

[208] *Yearbook ... 1995*, vol. II (Part Two), annex, p. 116, para. 29.

[209] Ibid., vol. I, 2387th meeting, statement by Mr. Tomuschat, p. 53.

[210] Ibid., vol. II (Part Two), p. 41, para. 216.

of nationality in the context of State succession came under *lex lata*, particularly when such principles were incorporated in an international agreement concluded between the States concerned, the Working Group agreed that further study was necessary in order to clarify the question of the international responsibility of a predecessor or a successor State for its failure to comply with the above principles.[211] In this regard, certain members of the Commission questioned whether the principles governing international responsibility would suffice, since they governed only inter-State relations. It was also observed that dispute settlement arrangements, including arbitration or, possibly, recourse to the Human Rights Committee, should be envisaged with a view to reaching a decision within a reasonable period of time.[212]

138. According also to a view expressed in the Sixth Committee, this issue merited further consideration, in particular in order to determine whether any relevant principles could be invoked by individuals or whether the debate should concentrate solely on the question of State responsibility.[213]

139. The consequences of non-compliance cannot be discussed in general and *in abstracto*. They depend mainly on whether a particular principle which has been violated includes at least some elements of *lex lata*. But even for principles reflecting considerations *de lege ferenda*, the consequences are different when such principles are incorporated into a legally binding instrument, such as a bilateral treaty, or when they remain merely at the level of recommendations.

[211] Ibid., annex, p. 116, para. 30.

[212] Ibid., p. 41, paras. 217 and 219.

[213] A/CN.4/472/Add.1, para. 25.

Chapter II

Nationality of legal persons

A. Scope of the problem of the nationality of legal persons and its characteristics

140. The first report addressed the question of the nationality of legal persons in a very preliminary manner.[214] Despite the analogy between the nationality of physical persons and that of legal persons, the latter has also many specificities which must always be borne in mind. The limits to such analogy have already been generally mentioned in the first report.[215] Some were also recalled during the debate in the Commission and in the Sixth Committee, while additional differences were put forward as well.

141. The study of this problem is further complicated by the fact that, contrary to natural persons, legal persons can assume various forms. For example, there are two types of commercial corporations: those which have been incorporated *intuitu personae* and which are deemed to be primarily associations of individuals (*sociétés de personnes*), and those which have been established *intuitu pecuniae* and for which capital is a significant consideration (*sociétés de capitaux*); the latter have a more distinct legal personality than the former.[216] From another perspective, a distinction can be drawn between private corporations and State-owned corporations. Transnational corporations constitute yet another category.[217] Lastly, the problem of the nationality of legal persons is further complicated by the fact that, unlike physical persons, legal persons do not necessarily have the same nationality in all their legal relations.[218]

142. At the outset, it can be useful to summarize briefly the purposes for which the determination of the nationality of legal persons may be needed. Generally speaking, the problem of the nationality of legal persons arises mainly:

(*a*) In the area of conflicts of laws;

(*b*) In the context of the law on aliens;

(*c*) In the context of diplomatic protection;

(*d*) In relation to State responsibility.

This issue therefore concerns both private international law and public international law.

1. The nationality of legal persons in the area of conflicts of laws

143. Under private international law, when the activities of a legal person extend beyond the borders of any one State, the question arises of how to determine which rules regulate its legal status, or how to decide whether a given entity comes under the legal order of one State rather than another. There are a number of rules under private international law to connect such an entity to one legal order rather than another.[219] The nationality of the legal person is one such point of attachment. In the view of one author:

[214] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 166–167, paras. 46–50.

[215] Ibid., para. 48, quoting *Oppenheim's International Law*, Jennings and Watts, eds.

[216] Caflisch, "La nationalité des sociétés commerciales en droit international privé", p. 119, footnote 1. According to this author, the term "commercial corporations" means groups of persons incorporated in accordance with the law who have a profit-making goal and aim to carry out commercial or industrial activity under private law.

[217] See Seidl-Hohenveldern, *Corporations in and under International Law*.

[218] *Yearbook ... 1995*, vol. I, 2387th meeting, statement by Mr. Tomuschat, p. 53.

[219] Apart from the provisions regarding conflict of laws, whose function is simply to indicate to which legal order one should refer in order to settle the problem in question, private international law also contains rules which provide a practical solution to the legal question which arises with regard to a foreign physical or legal person, for example, the rules governing *cautio judicatum solvi*.

... each State legal order is free to choose the point or points of attachment (domicile, nationality, etc.) it deems appropriate; however, once nationality has been chosen as a point of attachment, there is an obligation to determine the nationality of each individual on the basis of the criteria established by *lex causae*, that is to say by the *law of the State whose nationality is involved*.[220]

144. The nationality of legal persons is normally established by reference to one or more elements such as actual place of management, incorporation or formation, centre of operations and, sometimes, control or dominant interest. While in some legislations of the European continent reference is made to incorporation—formation—and the actual place of management as alternative criteria for determining the nationality of a legal person, under Anglo-American law, the norms relating to the legal status of commercial corporations do not include nationality as a point of attachment, but go directly to incorporation or formation.[221]

2. The nationality of legal persons in the international conventions containing rules of international private law

145. International conventions frequently refer to the nationality of commercial corporations without regulating how that nationality is to be determined. The criteria used most frequently, however, are those of incorporation—or formation—and actual place of management. These criteria are sometimes combined, particularly in many treaties on establishment and trade.[222]

3. The nationality of legal persons in the sphere of the law on aliens

146. In the sphere of the law of aliens, the concept of the nationality of legal persons seems to be generally accepted.[223] Under English law and American law, the nationality of legal persons is dependent on the criterion of incorporation or formation. French law determines it by reference to relevant criteria in the area of conflicts of laws—the actual place of management or sometimes incorporation or formation—while under German law it is generally determined on the basis of the registered office.[224] Despite their common characteristics, the various legislations are far from uniform.

147. Meanwhile, other criteria, such as that of control, have been used to categorize as "nationals" of enemy States corporations which are controlled by enemy nationals.[225] In this case, the concept of nationality has a broader significance, in other words, it is a question not so much of determining nationality as of establishing the "enemy nature" of the corporation.[226]

4. The nationality of legal persons in the sphere of diplomatic protection

148. Nationality is a prerequisite for the exercise, by a State, of diplomatic protection of an individual or of a legal person. As Seidl-Hohenveldern points out:

As corporations have rights and duties of their own, the corporation as such and not its members are in need of diplomatic protection. As international law grants to each State the right to proffer diplomatic protection to its nationals, a corporation, in order to obtain diplomatic protection would have to prove that it possessed the nationality of the State concerned.[227]

But once again the differences between natural and legal persons are to be kept in mind. As the same author adds:

Nationality is sometimes seen as a mutual bond of loyalty existing between a State and its citizens, and diplomatic protection as a product of this bond.

On this basis corporations seem unlikely contenders for diplomatic protection. However, a more modern view bases a State's right to grant diplomatic protection on the fact that even when a State appears to be merely espousing the claim of one of its nationals, nonetheless it is also protecting its own rights and interests. …[228]

Since a corporation is, by definition, the owner of its assets, it is difficult to see why a right to diplomatic protection based on this concept of property should not extend to property held by corporations.[229]

149. Consequently, according to one school of thought, the criterion of substantial interest or control, as a criterion for determining the nationality of a legal person, becomes much more relevant in the context of diplomatic protection than in private international law. Some authors, however, warn against the "lifting of the corporate veil" to which acceptance of the "control test" would lead and

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[220] Caflisch, loc. cit., pp. 123–124.

[221] Ibid., pp. 130 and 142.

[222] See, for example, the Treaty of Commerce and Navigation between Norway and Japan (Tokyo, 28 February 1957), United Nations, *Treaty Series*, vol. 280, p. 88; the Agreement on commercial and economic co-operation between the United Kingdom of Great Britain and Northern Ireland and Cameroon (London, 29 July 1963), ibid., vol. 478, p. 150; the Treaty of Trade and Navigation between Czechoslovakia and Bulgaria (Sofia, 8 March 1963), ibid., vol. 495, p. 232; the German-Malagasy treaty concerning the encouragement of investments (21 September 1962), *Investment Promotion and Protection Treaties 1962*, vol. II (Dobbs Ferry, N.Y., Oceana Publications, 1992), p. 1; and the Agreement concerning economic co-operation and trade between Spain and Gabon (Libreville, 6 February 1976), United Nations, *Treaty Series*, vol. 1010, p. 98.

[223] See, for example, Cauvy, "Sociétés en droit international", pp. 465–467; Bastid and Luchaire, "La condition juridique internationale des sociétés constituées par les étrangers", pp. 159–167; Loussouarn, *Les conflits de lois en matière de sociétés*, pp. 90–92; and Coulombel, *Le particularisme de la condition juridique des personnes morales de droit privé*, pp. 352 et seq.

[224] Caflisch, loc. cit., pp. 130, 133, 137 and 142.

[225] See United States Executive Order No. 8389 of 10 April 1940, which provided:

"The term 'national' of Norway or Denmark shall include ... any partnership, association, or other organization, including any corporation organized under the laws of, or which on April 8, 1940, had its principal place of business in Norway or Denmark or which on or after such date has been controlled by, or a substantial part of the stock, shares, bonds, debentures, or other securities of which has been owned or controlled by, directly or indirectly, one or more persons, who have been, or who there is reasonable cause to believe have been, domiciled in, or the subjects, citizens or residents of Norway or Denmark at any time on or since April 8, 1940, and all persons acting or purporting to act directly or indirectly for the benefit or on behalf of the foregoing" (*1940 Federal Register*, vol. 5 (Government Printing Office), p. 1400).

[226] See Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre*, pp. 55, 66–68, 83 and 98.

[227] Seidl-Hohenveldern, *Corporations …*, p. 7.

[228] Seidl-Hohenveldern refers, in this respect, to the view expressed by several judges in the *Barcelona Traction* case. See the Separate Opinions of Judges Gros and Jessup and the Dissenting Opinion by Judge Riphagen, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, respectively, at pp. 269, 196 and 336.

[229] Seidl-Hohenveldern, *Corporations …*, p. 8.

consider it quite inappropriate even in the area of diplomatic protection, recalling that:

> In the *Barcelona Traction* case the International Court of Justice, while admitting that the corporate veil may be lifted under certain circumstances,[230] refused to do so in the case before it. The Court would have accepted the *jus standi* of the shareholders' home State had the corporation ceased to exist. On the demise of a corporation its shareholders become the owners of its assets on a *pro rata* basis.[231]

5. The nationality of legal persons in the sphere of State responsibility

150. The criterion of control of the corporation or the notion of "*intérêt substantiel*"[232] can be of some significance in the field of the responsibility of States under international law for certain acts or activities of their nationals. The question arises, however, as to whether the determination of the "nationality" of a corporation is not superfluous or even useless for the resolution of the problem of responsibility.

6. The impact of State succession on the nationality of legal persons

151. The impact of State succession on these criteria for attachment is prima facie obvious. The criterion of actual place of management can give rise to attachment to the successor State in the case of unification, to one of the successor States in the case of dissolution, or, in the case of partial succession, to either the successor State or the predecessor State.[233] The criterion of incorporation, on the other hand, can produce much more varied results: in cases in which the predecessor State ceases to exist, such as cases of unification through absorption, the legal order of the predecessor State may simply disappear. In cases of dissolution, the regime may be taken over—maintained-by all the successor States. In cases of separation of part of a territory, the legal order of the predecessor State continues to exist in that State and may at the same time be taken over—maintained—by the successor State.

152. It is therefore obvious that as regards the nationality of legal persons, State succession can give rise to conflicts that are negative (statelessness) or positive (dual nationality or multiple nationality), and these problems are not merely academic.[234]

153. In order to resolve this type of problem, peace treaties concluded after the First World War contained special provisions in this respect. In accordance with article 54, paragraph 3, of the Treaty of Versailles:

> Such juridical persons will also have the status of Alsace-Lorrainers as shall have been recognised as possessing this quality, whether by the French administrative authorities or by a judicial decision.[235]

154. As for article 75 of the Peace Treaty of Saint-Germain-en-Laye, it read:

> Juridical persons established in the territories transferred to Italy shall be considered Italian if they are recognised as such either by the Italian administrative authorities or by an Italian judicial decision.

155. The article additional to article 11 of the Treaty of Peace between Russia and Estonia (Tartu, 2 February 1920), read as follows:

> The Russian Government will hand over to the Estonian Government *inter alia* the shares of those joint-stock companies which had undertakings in Estonian territory, in so far as such shares may be at the disposal of the Russian Government as a result of the decree of the Central Executive Committee regarding the nationalization of the banks of December 14th, 1917 ... Similarly, the Russian Government agrees that the registered offices of the joint-stock companies above mentioned shall be regarded as transferred to Reval and that the Estonian authorities shall be entitled to amend the statutes of such companies in accordance with the rules to be laid down by those authorities. ... [T]he above-mentioned shares shall only confer on Estonia rights in respect of those undertakings of the joint-stock companies which may be situated in Estonian territory and in no case shall the rights of Estonia extend to undertakings of the same companies outside the confines of Estonia.[236]

156. Among other conventions which have regulated the question of the nationality of corporations during changes of territorial sovereignty, mention may also be made of the Convention relating to Manufacture and Transport Undertakings, forming Annex C to the Commercial Convention between Austria and Poland (25 September 1922),[237] which granted Austrian companies which had undertakings in the territories ceded to Poland the right to transfer their seat of business and register their statutes in Poland; and the Agreement regarding Companies, namely Legal Persons, incorporated Commercial and other Associations, other than Banks and Insurance Companies concluded between Austria and Italy (16 July 1923),[238] which granted Italy the right to request that companies engaged in production or transport in territory ceded to Italy should transfer their headquarters to the territory of Italy, register in Italy, and remove their names from the Austrian commercial registers.

157. Article 9, paragraph 2, of the Agreement between India and France for the settlement of the question of the

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[230] *I.C.J. Reports 1970* (footnote 228 above), pp. 38–39, paras. 56–58.

[231] Seidl-Hohenveldern, *Corporations* …, p. 9.

[232] See Caflisch, loc. cit., p. 125, footnote 22.

[233] In the Sixth Committee, one delegation, commenting on what could be considered a substantive issue, expressed the view that those legal persons which had their headquarters in what became the territory of the successor State should automatically acquire that State's nationality on the date of succession. See the statement by Greece, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 22nd meeting (A/C.6/50/SR.22, para. 63).

[234] See Caflisch, loc. cit., pp. 150–151. This author notes, on the one hand, that while cases of statelessness may arise, they are actually rare, and that, indeed, the examples of statelessness most frequently cited by authors derive from premises which seem to be erroneous. On the other hand, he concludes that the theory of international private law generally allows that a company can have two or more nationalities, and that in order to resolve positive conflicts of nationality, State courts will give preference, as in the case of individuals, to the nationality which is the most effective.

[235] Moreover, article 75, paragraph 1, of the Treaty read:

> "Notwithstanding the stipulations of Section V of Part X (Economic Clauses) of the present Treaty, all contracts made before the date of the promulgation in Alsace-Lorraine of the French decree of November 30, 1918, between Alsace-Lorrainers (whether individuals or juridical persons) or others resident in Alsace-Lorraine on the one part, and the German Empire or German States and their nationals resident in Germany on the other part, the execution of which has been suspended by the armistice or by subsequent French legislation, shall be maintained."

[236] *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, pp. 11–12. This provision gave rise to the dispute between Estonia and Lithuania regarding the Railway.

[237] League of Nations, *Treaty Series*, vol. LIX, p. 307.

[238] Ibid., vol. XXVII, p. 383.

future of the French Establishments in India (21 October 1954), stipulated:

> The Government of India agree to recognise as legal corporate bodies, with all due rights attached to such a qualification, the 'Conseils de fabrique' and the administration boards of the Missions.[239]

158. Since the determination of the nationality of legal persons for the purposes of diplomatic protection or of State responsibility may be governed by rules that are different from those applicable in private international law, the problem of the consequences of State succession for the nationality of a legal person is a separate issue. The nationality of the legal person, if determined on the basis of the criterion of control, may, in principle, change if there is a change in the nationality of the shareholders as a result of State succession. The solution therefore depends largely on the question of the nationality of physical persons. In the case of State-owned corporations, the solution is linked to the problem of the division of property between the predecessor State and the successor State or States, or among the successor States, as the case may be.

B. Consideration of the problem of the nationality of legal persons in the Commission and in the Sixth Committee

159. Two different positions emerged from the debate in the Commission: according to some members, this subject was important in practical terms and interesting from the legal standpoint and in much greater need of codification than was that of natural persons.[240] The point was also made that, because the practice of States with regard to the nationality of legal persons presented many common elements, this issue offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons. Other members, however, took the view that the question of legal persons was a separate and highly specific one, which should only be considered at a later stage. It was also believed that this question did not need to be dealt with by the Commission inasmuch as multinational corporations had the means to take care of their own interests.[241]

160. Nevertheless, all members seemed to agree that the two parts of the topic should be separated since each had its specificities and required a different method of work. Views were divided as far as the urgency of the question of the nationality of legal persons was concerned. Those who considered that the question deserved prompt consideration by the Commission stressed that rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization, in contrast to the striking absence of specific provisions on the nationality of natural persons in the context of State succession in the legislation of the majority of States.

161. The reasons for which the Working Group did not examine the question of the nationality of legal persons are explained in paragraph 10 above. The lack of progress on this part of the topic should not be interpreted as reflecting unawareness of the importance of the question on the part of the Working Group.[242]

C. Questions to be examined by the Working Group during the forty-eighth session of the Commission

162. As indicated above, in order to provide some guidance for the future work of the Commission on this part of the topic, the Working Group, during the forty-eighth session of the Commission, might devote some time to the consideration of the problems mentioned in section A above.

163. It should nevertheless be borne in mind that the Commission has not set itself the task of considering the problem of the nationality of legal persons in its entirety. Its duty is to concentrate on one aspect of the problem, namely the automatic change in the nationality of legal persons resulting from State succession. Such succession causes a change in the elements of fact which are used as criteria for determining the nationality of a legal person. Consequently, the Working Group could initially consider the kind of practical problems which State succession raises when applying the normal criteria to different ends and the possible interest that States may have in receiving guidance in this field.

164. However, as in the case of individuals, the main question which arises is whether the problem of the nationality of legal persons falls entirely within the scope of internal law and treaty law, as the case may be, or whether general international law has also some role to play in this respect. According to one point of view:

> As with natural persons, international law imposes certain limits on the right of a State to bestow its nationality on a corporation. It may do so only if the corporation is either established under its law, or has its seat, centre of management or exploitation there, or is controlled by shareholders who are nationals of the State concerned.[243]

165. The Commission also noted during the debate at its forty-seventh session that although certain legal systems do not regulate the nationality of corporations, international law attributes a nationality to those legal persons for its own purposes, and that nationality can be affected by State succession.[244]

166. As the Working Group concluded and as several representatives in the Sixth Committee underlined, one of the reasons for the broader acceptance of the role of international law in resolving matters relating to the nationality of natural persons is the increasing interest of the international community in the protection of human rights. In this respect, it is pertinent to recall that, as was observed during the debate in the Sixth Committee, contrary to the situation of natural persons who could, through a change of nationality, be affected in the exercise of fundamental civil and political rights and, to a certain extent, of economic and social rights, State succession

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[239] United Nations, *Materials on Succession of States* … (footnote 79 above), p. 81.

[240] *Yearbook ... 1995*, vol. II (Part Two), pp. 39–40, para. 205.

[241] Ibid., p. 37, para. 179, and pp. 39–40, para. 205.

[242] Ibid., p. 39, para. 200, comments of the Special Rapporteur.

[243] Seidl-Hohenveldern, *Corporations* …, p. 8; see also the same author in *Völkerrecht*, p. 280.

[244] *Yearbook ... 1995*, vol. I, 2388th meeting, statement by Mr. Crawford, pp. 60–61.

has mainly economic or administrative consequences for legal persons.[245] Consequently, why and how can international law intervene in the area of the determination of the nationality of legal persons?

167. As in the case of the nationality of individuals, the Working Group should also consider the question of the possible outcome of the Commission's work on this part of the topic and the form it could take.

[245] A/CN.4/472/Add.1, para. 12.

Chapter III

Recommendations concerning future work on this topic

168. Based on a study of the Commission's debate on the first report of the Special Rapporteur and the report of the Working Group and of the Sixth Committee's debate on chapter III of the report of the Commission, and after contrasting the hypotheses which the Working Group outlined in its report with the national legislation at its disposal on the topic of nationality,[246] and also taking account of the various nationality-related problems in relation to State succession identified by different international forums (*inter alia*, the Commission and the Sixth Committee), the Special Rapporteur herewith submits several proposals which the Commission, and particularly its Working Group, could consider with a view to completing its preliminary study of the topic and making appropriate recommendations concerning future work.

A. Division of the topic into two parts

169. In his first report, the Special Rapporteur raised the question of the possible division of the topic into two parts, i.e. the nationality of natural persons and the nationality of legal persons, and proposed that the former be considered first.[247] Several members of the Commission agreed with this suggestion. It was observed in this connection that natural persons, i.e. the population, constituted one of the essential elements on which the very existence of a State depended and that natural persons were more likely than legal persons to suffer in the event of a succession of States.[248] The point was made, however, that the problem of the nationality of legal persons was perhaps not so different from that of the nationality of natural persons and that, consequently, the Commission should, from the very beginning, seek to determine whether there were common principles applicable to the nationality of both legal and natural persons.[249]

170. Several representatives in the Sixth Committee also agreed with the recommendation that the Commission should deal separately with the nationality of natural persons and the nationality of legal persons and give priority to the former, which was considered more urgent. To justify such separate treatment it was argued, in particular, that:

(*a*) Natural persons constitute an essential element of statehood;

(*b*) It is difficult to establish, under general international law, a duty to grant nationality to certain legal persons, as might be the case for natural persons;

(*c*) Conventions on the reduction of statelessness and on nationality usually refer to natural persons;

(*d*) Human rights norms are not applicable to legal persons;

(*e*) The regime governing legal persons in cases of State succession depends mainly on the continued application of the civil law of the predecessor State (reception of the municipal law).[250]

No delegation saw any advantage in the joint consideration of the two aspects of the topic.

171. The Special Rapporteur therefore suggests that the Commission take the decision to separate the subject under consideration into two parts, namely "Succession of States and its impact on the nationality of natural persons" and "Succession of States and its impact on the nationality of legal persons", and that the former be studied first. In the light of the progress achieved on the first part of the topic and any decision concerning the inclusion of new items in its programme of work, the Commission can decide at a later stage whether the study of the second part should be delayed until completion of the work on the first part or whether it should be resumed earlier, in parallel with the consideration of the first part of the subject.

172. This division does not mean in any way that the Commission should ignore certain links existing between both parts of the topic. As was stated, for instance, in the Sixth Committee, the change of the nationality of legal persons might affect the property rights of natural persons.[251] Similarly, the change of the nationality of individual shareholders controlling the legal person as a result of State succession can have far-reaching consequences on the status of that legal person.

B. Non-consideration of the problem of continuity of nationality

173. Chapter VII of the initial report of the Special Rapporteur concerning the problem of continuity of nation-

[246] The idea that the preliminary study should be informed by practice and not simply be an academic exercise has been expressed both in the Commission and in the Sixth Committee.

[247] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 167, para. 50.

[248] Ibid., vol. I, 2388th meeting, statements by Mr. Pambou-Tchivounda and Mr. Crawford, pp. 55 et seq.

[249] Ibid., vol. II (Part Two), p. 37, para. 178.

[250] A/CN.4/472/Add.1, para. 11.

[251] See the statement by Slovenia, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 22nd meeting (A/C.6/50/SR.22, para. 56).

ality[252] drew two kinds of comments from the members of the Commission. First, several members agreed that the implications of State succession for the law of diplomatic protection were worth examining. Some members even expressed preliminary views on the problem itself, pointing out that it would be appropriate to make the rule of continuity apply only to situations where a change of nationality came about through the free choice of an individual and not as a result of a change in the status of a territory.[253] In its consideration of the issue, the Working Group reached a similar preliminary conclusion. The Working Group agreed that the rule of continuity of nationality should not apply when the change of nationality was the result of State succession, and stressed that the purpose of that rule was to prevent the abuse of diplomatic protection by individuals who acquired a new nationality in the hope of thereby strengthening their claim to such protection.[254]

174. Secondly, it was asked whether it was appropriate to deal with that particular problem in the context of the topic under consideration.[255]

175. During the debate in the Sixth Committee, some representatives expressed agreement with the Working Group's conclusion that the rule of continuity of nationality should not apply when the change of nationality resulted from State succession. It was at the same time suggested that this question should be examined under the proposed topic of diplomatic protection, if such topic were to be included in the Commission's agenda.[256]

176. Taking into account paragraph 8 of General Assembly resolution 50/45, in which the Assembly noted the suggestions of the Commission to include in its agenda the topic "Diplomatic protection" and decided to invite Governments to submit comments on these suggestions through the Secretary-General for consideration by the Sixth Committee during the fifty-first session of the Assembly, the Special Rapporteur recommends leaving the question of the rule of the continuity of nationality for further consideration in the framework of the topic of diplomatic protection, should the latter be included in the Commission's programme of work.

C. Working method of the Commission in dealing with the topic

1. Codification and progressive development of international law on the subject

177. The Commission supported the Special Rapporteur's suggestion that it should adopt a flexible approach involving codification and development of international law.[257] In the same vein, it was noted that the Commission could base its approach partly on *lex lata* and partly on *lex ferenda*.[258] The outcome of the Working Group's efforts was considered, in that regard, to involve both codification (inasmuch as fundamental human rights were involved) and progressive development (as far as matters of succession of States were concerned).[259]

178. As for future work, although a mixed approach was preferable, it would nevertheless be necessary to clarify the sources and rules of law underlying any obligations incumbent on predecessor and successor States which the Commission might identify. The Commission should also indicate the areas in which international law seemed inadequate and which, consequently, lent themselves to progressive development. It should also ensure that any progressive development of law which it might propose was consistent with realistic expectations.[260] During the discussion, emphasis was placed, in that regard, on the importance of examining State practice, essentially in order to give specific illustrations and to focus on the advantages and drawbacks of the solutions actually adopted, though the Commission would not set itself up as a court of State practice in the area of nationality.[261] A detailed study of national laws and of State practice was considered all the more necessary in that nationality comprised economic, social, cultural and political aspects.[262]

179. However, there was some disagreement as to how much weight should be given to recent practice: while some members thought that the latter should be taken as a starting point,[263] others felt that the Working Group's report had placed undue emphasis on the experience of the Eastern European States and that too little attention had been paid to the experience of former colonial States, from which useful lessons could be drawn.[264]

180. During the debate in the Sixth Committee, it was also emphasized that the Commission should carefully examine State practice.[265]

2. Terminology used

181. The Special Rapporteur's suggestions on the terminology used[266] were generally approved by the Commission and were not specifically commented upon in the Sixth Committee.

3. Categories of State succession

182. The classification of cases of State succession proposed by the Working Group which was based on the suggestions contained in the first report of the Spe-

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[252] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 176, paras. 112–114.

[253] Ibid., vol. II (Part Two), p. 37, para. 180.

[254] Ibid., p. 116, annex, para. 32. For the discussion on the usefulness of distinguishing, in this context, between the different legal bases for a change of nationality, see pp. 41–42, paras. 218 and 227.

[255] *Yearbook ... 1995*, vol. I, 2389th meeting, statement by Mr. Pellet, pp. 64–66.

[256] A/CN.4/472/Add.1, paras. 26–27.

[257] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 161–162, paras. 20–21, and vol. II (Part Two), pp. 33–34, para. 151.

[258] Ibid., vol. I, 2389th meeting, statement by Mr. Villagrán Kramer, p. 64.

[259] Ibid., vol. II (Part Two), p. 39, para. 203.

[260] Ibid., para. 204.

[261] Ibid., p. 36, para. 167.

[262] Ibid., vol. I, 2413th meeting, statement by Mr. Sreenivasa Rao, p. 230.

[263] Ibid., vol. II (Part Two), p. 36, para. 167.

[264] Ibid., vol. I, 2411th meeting, statement by Mr. Kusuma-Atmadja, p. 218.

[265] A/CN.4/472/Add.1, para. 3.

[266] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 162–163, paras. 26–28.

cial Rapporteur[267] was considered by representatives in the Sixth Committee to be a practical analytical tool for the consideration of the rights and obligations of the predecessor and successor States in respect of nationality. Attention was drawn to the fact that some situations involving a change of sovereignty were very complex and did not fit exactly into any of the categories considered by the Working Group.[268] The decision of the Commission to deal exclusively with cases of succession considered lawful under international law also received support in the Sixth Committee.[269]

4. Scope of the problem under consideration

183. The scope of the study as circumscribed in the first report of the Special Rapporteur[270] encompasses all questions raised during the debate in the Sixth Committee.[271]

184. The Special Rapporteur's comments on the scope of the problem *ratione temporis*[272] seem to have been supported by the members of the Commission. In fact, it was considered necessary to provide for a transitional status to be applied while legislation on nationality was being prepared in a successor State or while an agreement was being negotiated on the conferral of nationality following State succession, and even while the individual concerned was exercising his right of option.[273]

185. One representative in the Sixth Committee mentioned, as an issue calling for further consideration, the problem of the length of the transition period before successor States adopted their nationality laws.[274] This observation also supports the conclusions as to the scope *ratione temporis* of the study contained in the first report of the Special Rapporteur.[275]

D. Form which the outcome of the work on this topic might take

186. Paragraph 7 of General Assembly resolution 48/31 and paragraph 6 of General Assembly resolution 49/51, by which the Assembly endorsed the intention of the Commission to include the present topic in its agenda of work, provide that that decision was adopted on the understanding that the final form to be given to the work on that topic would be decided after a preliminary study was presented to the Assembly.

187. The first report of the Special Rapporteur left open the question of the possible outcome of the work on the topic and the form it might take. However, during the debate in the Commission, several members made preliminary remarks on the issue. Some felt that the Commission should present the General Assembly with a number of options and possible solutions.[276] It was also held that the elaboration of a treaty was a lengthy process which could not respond to the current pressing need of certain States for criteria that should guide their conduct in the area under consideration. Moreover, the need was stressed for the utmost prudence before embarking on the elaboration of new instruments.[277]

188. A distinction was further drawn between the two parts of the topic, and it was stated that, while the issue of the nationality of legal persons offered more fertile ground for codification, the issue of the nationality of natural persons, which owing to the wide variety and sensitivity of individual situations required a case-by-case approach, would be more appropriately dealt with in the framework of a study.[278]

189. The following options were suggested:

(*a*) Elaboration of a list of principles to be laid down in agreements concluded between States on the subject;

(*b*) Consideration of general factors or criteria which States would be free to adapt to specific cases;

(*c*) Consideration of a series of presumptions, such as the presumption that every person has the right to a nationality, that every person has, in fact, a nationality, that no person should become stateless as a result of State succession, that a nationality acquired as a result of State succession is effective from the date of succession, and that the nationality of a person is that of the strongest attachment.[279]

190. In summing up the discussion on his first report, the Special Rapporteur stressed that, if the Commission wished to lay down general principles for submission to States, a declaration would be the appropriate instrument, whereas if it concentrated on a specific area, such as statelessness, it could contemplate a more ambitious instrument, such as an amendment or optional protocol to the Convention on the Reduction of Statelessness.[280]

191. The question of the possible outcome of the Commission's work on the topic was also addressed by some representatives in the Sixth Committee. The following options were proposed:

(*a*) Drafting of guidelines;

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[267] Ibid., pp. 173–174, paras. 90–95.

[268] A/CN.4/472/Add.1, para. 28.

[269] See the statement by Greece, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 22nd meeting (A/C.6/50/SR.22, para. 63).

[270] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 174–175, paras. 96–111.

[271] The question nevertheless arises whether the proposal made by one representative in the Sixth Committee to address the issue of the conferral of the nationality of the successor State upon certain categories of persons on an individual basis and upon request (see A/CN.4/472/Add.1, para. 18) falls within the scope *ratione materiae* envisaged for the study of the topic. Although the answer seems to be in the negative, in practice some successor States have substituted the procedure of conferral of nationality upon request for the procedure of option and the Commission might therefore show some flexibility and take the above suggestion into consideration.

[272] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 175, para. 111.

[273] Ibid., vol. I, 2387th meeting, statement by Mr. Bowett, p. 53.

[274] See the statement by Finland, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 24th meeting (A/C.6/50/SR.24, para. 65).

[275] See footnote 272 above.

[276] *Yearbook ... 1995*, vol. II (Part Two), p. 36, para. 168.

[277] Ibid., para. 169.

[278] Ibid., p. 37, para. 179.

[279] Ibid., p. 36, para. 170.

[280] Ibid., p. 38, para. 193.

(*b*) Drafting of model clauses;

(*c*) Drafting of a declaration setting forth general principles;

(*d*) Drafting of a convention covering a specific aspect of the topic;

(*e*) Drafting of a comprehensive convention on the matter.[281]

192. In view of the fact that the Working Group suggested the elaboration of a set of guidelines for States concerned to implement the obligation to resolve by agreement possible problems concerning the nationality of natural persons, the most appropriate outcome of the Commission's work seems to be an instrument of a declaratory nature, drafted in the form of articles accompanied by commentaries.

[281] A/CN.4/472/Add.1, paras. 13–15. The last proposal was made only by one delegation and met with the opposition of several others. One representative, without specifying the form of the instrument she had in mind, cautioned against the adoption of an instrument which would contain standards stricter than those of existing norms on the subject and would not reflect current practice.