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Summary record of the 216th meeting

Topic:
Nationality including statelessness

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which the territory was transferred, and it was also a principle of existing international law that the State to which the territory was transferred should allow the right of option to persons who wished to retain their own nationality. There were, of course, cases in which it was impossible to apply the second principle, for example, when a whole territory was absorbed by the elimination of a State. In those circumstances, all the inhabitants of the territory had to acquire the nationality of the State into which the territory was incorporated. Article VII as drafted would make it a rule that the State to which the territory was transferred should confer its nationality on the inhabitants of the territory, subject to the right of option, but would at the same time ensure that the State from which the territory had been transferred did not deprive the inhabitants of their old nationality until they had acquired the new one.

81. There was, however, one point which was not covered by the article, namely, the case of a person who had previously inhabited the transferred territory but who had left it. It was open to question whether he should retain his original nationality or acquire the nationality of the State to which the territory was transferred. He (Mr. Córdova) thought that such a person should have the right of option, and that there should be a third paragraph in the article to deal with that.

82. He realized that States tended to conclude treaties as they pleased, and that transfers of territory were a constant cause of statelessness; article VII would attempt to limit the right of States so to act. He was opposed to the view that because States were sovereign they should not be asked to surrender the right to act in all circumstances as they chose; in his view, international law should have precedence over the unfettered will of States, and States should comply with it.

The meeting rose at 1 p.m.

216th MEETING

Wednesday, 15 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

* The number within brackets corresponds to the article number in the Commission's report.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Article VII [9]

1. The CHAIRMAN invited the Commission to take up article VII of the draft Convention on the Elimination of Future Statelessness (A/CN.4/64, Part I).

2. Mr. LAUTERPACHT said that article VII raised a number of questions. In paragraph 1, reference should be made not only to existing States to which territory might be transferred, but also to new States created on the territory of one or more States. In the latter case one could hardly speak of the transfer of territory.

3. Again, the phrase "persons inhabiting the said territory" would not, if interpreted literally, cover persons who, though they might have had the nationality of the State from which the territory was transferred, did not habitually reside in the transferred territory. Such persons might in some cases become stateless unless specific provision were made for their case.

4. Moreover, some persons might have grounds for not wishing to acquire the nationality of the State to which the territory was transferred; that nationality might be hateful to them. The possibility of option was therefore necessary.

5. On the other hand, it should be made clear that when the text referred to the possibility of option, only an effective or an exercised option was meant.

6. He therefore proposed the following text for article VII:

> "Existing States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality on persons possessing the nationality attaching to such territory unless such persons effectively opt for the retention of that nationality, or unless they have or acquire another nationality."

7. Mr. SCELLE said that he agreed in part with Mr. Lauterpacht. It seemed to him, however, that article VII as drafted provided yet another example of the tendency, which he remarked throughout the convention, to lay down unrealistic rules. The draft failed to take into account territorial changes other than those brought about by the cession of territory; but there was

also, for example, the succession of a number of States to one previous State, as had occurred on the division of British India. Nor did article VII distinguish between peaceful cession and cession resulting from war; the latter, if due to aggression, might be void of legal effect, but it could not be ignored. For those reasons he had come to the conclusion that the reference to transfer of territory was inadequate.

8. The phrase "The State... shall *confer* its nationality..." was also inadequate. In his view, the State should be compelled to *recognize* the persons concerned as its nationals.

9. His third objection was that article VII made it appear possible for persons opting to retain the nationality of the transferring State to remain in the transferred territory. But it would have been absurd had the inhabitants of Alsace-Lorraine had the possibility of remaining French in 1871 or of remaining German in 1919. It was obviously necessary, as international law had already recognized, that persons who retained their former nationality should leave the transferred territory.

10. Accordingly, he concluded that article VII was useless in its existing form, and should be thoroughly revised. Mr. Lauterpacht's suggestion was interesting, but was incomplete and too long.

11. Mr. SPIROPOULOS agreed with Mr. Scelle, and asked whether it was possible to legislate at all in the matter. Each case of transfer of territory was a special case, and he doubted whether it was either desirable to make general rules in advance, or possible to devise an acceptable formula. The issue was one on which many governments felt strongly, and the Commission must be careful in dealing with it if acceptance of the convention as a whole was not to be compromised. The Commission must see to it that the convention was acceptable at any rate to some governments, and was not rejected by all.

12. Mr. PAL, referring to paragraph 1 only of article VII, said that he shared Mr. Scelle's and Mr. Spiropoulos' difficulties. He, too, was concerned about the phrase "effectively opt" in Mr. Lauterpacht's amendment. The exercise of the option and the conferring of nationality were two different acts performed by two different entities — the individual and the State. When was the option to be regarded as becoming effective, and how much delay was to be allowed. Further, the possibility of option might frequently be unreal, particularly in the case of property owners; for if they retained the nationality of the transferring State but remained where they were they would become aliens, and their interests might be jeopardized by the property laws of the successor State. He asked therefore whether effective option implied effective remedies against loss of property. Care must be taken to ensure that any general rule did not harm the inhabitants of the transferred territory.

13. Faris Bey el-KHOURI agreed with Mr. Pal that it was difficult to establish a general rule. The problem with which the Commission was faced should normally be solved by means of treaties in which the detailed procedures necessary would be laid down; he thought therefore that the opening phrase of article VII should read somewhat as follows: "In the absence of conventional agreement...". The Treaty of Lausanne, which was concerned with the effects of the disintegration of the Ottoman Empire, was an example of such a treaty. Nevertheless, though the principles contained in that treaty were identical with the principles followed in paragraph 1 of article VII, in the result many persons had become stateless. Many subjects of the Ottoman Empire living abroad had not exercised their right of option; they had either remained Turkish subjects, a status which in general they did not acknowledge, or they had become stateless. Furthermore, a special arrangement had been necessary to take care of the tens of thousands of persons living in the Arab countries who had wished to retain their Turkish nationality.

14. Mr. HSU said that objections to the phrase which referred to the possibility of option for the retention of nationality could be met by modifying the latter part of Mr. Lauterpacht's amendment to read:

> "... shall confer their nationality on persons possessing the nationality attaching to such territory and choosing to remain in it, unless their nationality is otherwise provided for and accepted by those persons".

15. People could leave the transferred territory if they did not wish to become nationals of the new State.

16. Mr. PAL doubted whether article VII was a necessary part of the draft convention. Transfers of territory had been a source of statelessness in the past, but would probably not continue to be so. To his mind, article VII constituted an attempt to settle a conflict of nationalities rather than to eliminate a source of statelessness.

17. Mr. YEPES shared the doubts of other members about the scope of article VII as submitted by the Special Rapporteur; it should be redrafted. Article VII did not take all experience into account; in particular, it failed to provide for the case of States that were split up to form several new States. Cases of the kind had occurred in American history, as for instance in 1830, when Grand Colombia had split into three different States, Ecuador, Venezuela and present-day Colombia. A rule should be established which would cover situations of that kind.

18. Mr. KOZHEVNIKOV said that his first impressions made him, too, very doubtful about the need for article VII, and suggested that the solution provided did not correspond to the problem facing the Commission. He was sceptical of the value of the article because abstract and general provisions which failed to take into account the variety of practical situations could only lead to confusion. Experience showed that the problems raised by transfer of territories had been and could continue to be dealt with by treaties.

19. Mr. LAUTERPACHT said that, notwithstanding the attitude of previous speakers, he considered that the

draft convention ought to deal with the problem in as much detail as might be necessary. Although there were admittedly difficulties, it should not be beyond the Commission's capacity to solve the problem.

20. Existing international law provided no solution. He agreed that the matter should be dealt with primarily by treaty, as indeed it had been hitherto; the Minority Treaties of 1919, for example, had been concerned with conferring the nationality of the successor States on persons who would otherwise have been stateless.[1]

21. Mr. Scelle had objected to article VII on the ground that it might result in the removal from the transferred territory of persons opting to retain the nationality of the transferring State. However, it was a rule of international law that such optants would be required to leave the territory.

22. He reverted to the difficulty which he had described earlier. Article VII was concerned with what should happen to persons living in the territory ceded, or having a connexion with it. The former were adequately described by the word "inhabitants"; the latter were not. There were persons who would lose their nationality but who, for various reasons, would not acquire a new one.

23. The Commission had undertaken to draft a convention eliminating all sources of future statelessness. He urged members not to take the view that, because the subject matter of article VII was particularly difficult, it should be left on one side.

24. The CHAIRMAN, speaking as a member of the Commission, suggested that article VII, as drafted by the Special Rapporteur, be replaced by the following article:

> "Treaties governing territorial changes must include the provisions necessary to ensure that inhabitants of the territories affected do not become stateless."

25. Mr. SANDSTRÖM agreed with the Chairman that the Commission should formulate a general clause for article VII which would make it incumbent on States, in any treaties relating to territorial changes that they might conclude, to prevent statelessness arising. Additional rules might, however, be necessary, and a number of suggestions had been made in the Commission which would provide a useful basis for future discussions.

26. Mr. ALFARO said that there seemed to be general agreement on the substance of paragraph 1 of article VII as drafted by the Special Rapporteur. Some members of the Commission, however, were of the opinion that the draft convention should not concern itself with the problems of nationality in connexion with transfers of territory.

27. Mr. Scelle had opposed article VII on the ground that it would permit persons to retain their nationality and yet continue to live as aliens in the transferred territory, a procedure which would give rise to danger and difficulty. There were, however, cases in which States had in such circumstances recognized the right of persons to retain their former nationality, An example was provided by the arrangements made for the independence of Panama, according to which persons who had wished to retain Colombian nationality, had been free to do so. National criteria in the matter differed, and he thought that it would be more prudent for the Commission to avoid controversy. Its aim was to prevent statelessness, and the first paragraph might therefore be confined to a statement of the duty of the successor State to confer its nationality on the inhabitants of the transferred territory. For example, the article might read somewhat as follows:

> "The State to which territory is transferred or a new State formed on territory previously belonging to another State shall receive as nationals all persons who were nationals of the State which transferred the territory."

28. In his view, however, the Commission would be wise to follow the Chairman's advice and adopt a general article stipulating that States which were concluding treaties should settle the matter of nationality in any way that would prevent persons being rendered stateless.

29. Mr. SCELLE agreed with Mr. Lauterpacht that an article governing the nationality of persons in territories transferred from one State to another was necessary. He repeated, however, that in his view article VII was inadequate in its existing form. All eventualities should be covered: cession by treaty as well as formation of new States following the expressed will of the inhabitants. The Chairman's proposal was too vague. He (Mr. Scelle) felt that the Commission could not rely exclusively on treaties; there must be a definite rule, imposed on all governments. The convention should state that governments were obliged to take specific measures, and it should further specify exactly what measures were to be taken. It was not enough to allow governments to take what treaty action they liked.

30. Faris Bey el-KHOURI suggested that the first clause of article VII should read:

> "In the absence of a conventional agreement determining the nationality of the inhabitants of a territory to be transferred to another State or forming a new State..."

31. Mr. HSU agreed with Mr. Scelle that it was not safe to depend merely on treaties. The Commission should ensure that human beings were not treated as chattels, and that the inhabitants of transferred territories had the right to choose their future nationality.

32. Mr. CÓRDOVA (Special Rapporteur) said that the object was to abolish future statelessness entirely, or to the greatest possible extent. In his draft of article VII, he had followed the sense of the Montevideo Convention on Nationality of 26 December 1933 and of other treaties. He had intended the word "transfer" to

[1] See *Laws concerning nationality* (United Nations publication, Sales No. 1954.V.1), pp. 586-587.

include the absorption of an entire State in another State, the transfer of part of a State, the formation of a new State from several States, and the creation of a number of States from a single State. Perhaps the word "transfer" did not, in fact, cover all those meanings, but his object had been to make it clear that, whatever territorial change took place, a State should confer its nationality on the inhabitants of the territory attributed to it as a result of the change, and that the inhabitants should enjoy the possibility of option, as well as the possibility of physical removal to the territory of the State of which they had previously been nationals. To his mind, the mention of the possibility of option in article VII should not be construed as meaning that States were thereby relieved of their obligation to provide for requirements additional to the mere option itself: for example, for emigration and physical transfer.

33. Article VII, as drafted, did not refer to treaties because changes of sovereignty might result from other events — for example, rebellions — as well. States should not be at liberty to act as they pleased, causing statelessness and anarchy; the Commission's object must be to ensure that the freedom of action of the new government of the transferred territory was appropriately limited in that respect.

34. The two major causes of statelessness were persecution on grounds of race, religion or political opinion, and treaties drawn up in such a way that some persons were rendered stateless. He could not agree with Mr. Spiropoulos that the relevent international law was already adequate, and it was the Commission's function to develop international law where it was inadequate.

35. Mr. Scelle had objected to the use of the phrase "shall confer their nationality", but "confer" was the word customarily used.

36. What was to be understood by "effective option" in Mr. Lauterpacht's amendment? If the word "option" was used at all, its efficacy was necessarily implied, though the Commission could not prescribe in detail the procedure for making it so; that must remain the responsibility of the State concerned.

37. As Mr. Scelle had pointed out, the Chairman's amendment did not cover cession other than cession by treaty. Of course, a general rule that States should not take any action that might render persons stateless would cover the whole issue; nothing more would be required than a simple article such as:

> "No State shall legislate or make treaties in such a way as to cause statelessless."

But that would hardly be a convention: the Commission should suggest precise remedies for precise causes. In short, the object of article VII was to ensure that States conferred their nationality on the inhabitants of territories transferred to them; that those persons should have the right of option; and that the State from which the territory was transferred should provide that the inhabitants of the transferred territory would not lose its nationality unless and until they acquired the nationality of the State to which the territory was transferred, should they so opt.

38. Mr. SPIROPOULOS said that he had been charged with adopting a negative attitude to article VII; but it seemed to him that his attitude was no more negative than that of many of his colleagues. In any event, it was positive so far as the problem with which the Commission was faced was concerned.

39. The point at issue was not transfers of territory alone but all changes of territorial status. The financial consequences of such changes were provided for in international law, but there were no established rules relating to nationality in such cases. There was no customary international law on the matter, and article VII as drafted was derived from conventional law. In the field of debts, States were still free to take what decisions they deemed appropriate; but the convention would limit their freedom in respect of nationality, for States would be deprived of the possibility of making rules contrary to its provisions.

40. Referring to Mr. Hsu's plea that particular account should be taken of the interests of the human beings involved, he pointed out that the object of the convention was to eliminate future statelessness rather than to take into account purely humanitarian considerations. He agreed with Faris Bey el-Khouri, Mr. Alfaro, Mr. Sandström and others that the convention should provide for contingencies which were not otherwise covered by existing practice. In general, he was in favour, providing statelessness was in fact eradicated, of allowing States to choose whatever method of elimination they might deem appropriate. However, he might modify that view in the light of the way in which the discussion evolved.

41. Mr. ZOUREK said that article VII was intended to cover many different circumstances, such as the cession of territory, the division of territory, the absorption of a State within another State and so forth. It should not, however, cover cases in which transfer of territory was the result of aggression contrary to the Charter of the United Nations; and in that context he thought that the last phrase of paragraph 1 of article VII, "if the latter continues to exist", had many dangerous potentialities. In fact, it seemed to him that the great variety of international practice demonstrated the necessity for taking into account specific circumstances as they arose. He wondered, therefore, whether the Commission could commit States to adherence to detailed provisions. He felt that it could hardly do more than lay down in the draft convention certain guiding principles likely to induce States to take appropriate measures to eliminate or to avoid statelessness in the future.

42. Mr. LAUTERPACHT said that if Faris Bey el-Khouri intended the phrase "In the absence of a conventional agreement..." to mean "In the absence of treaty provisions sufficient for the purpose...", then he had no objection to it. States were always at liberty to find a better method than any suggested by the Commission if they could do so, and that also applied to

[2] *Ibid.*, p. 585.

the Chairman's suggestion that States be placed under an obligation to make effective provision in treaties to prevent statelessness arising. Nevertheless, the Commission was still bound to provide in the convention complementary rules to meet the possible inadequacy of treaties.

43. A formula derived from the final remarks of the Special Rapporteur would provide for all contingencies; article VII might then read:

> "Existing States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise, or unless they have or acquire another nationality."

44. There was still a doubt in his mind about the use of the word "inhabitants". Did the word refer to persons who were domiciled in the territory, or to persons who were resident in it? That was a matter which could, however, be clarified in the comment or in the Commission's report; it was not necessary to deal with it in article VII.

45. Faris Bey el-KHOURI then proposed that paragraph 1 of article VII be replaced by the following two paragraphs:

> "1. The nationality of the inhabitants of a detached territory to be transferred to another existing or newly created State shall be determined by treaty among the parties concerned. The principle of avoiding giving rise to statelessness shall be respected in the conclusion of such treaties."
>
> "2. In the absence of such treaties as are mentioned in the previous paragraph, the State to which a territory is transferred shall... [here follows the rest of the first paragraph of Article VII]

46. Mr. AMADO said that the crux of the whole question lay in the right of option. Under article 4 of the Montevideo Convention on Nationality of 26 December 1933 the inhabitants of a transferred territory could "expressly opt" to change their original nationality. Article 18 of the Harvard Draft of a Convention on Nationality, on the other hand, provided that they should become nationals of the successor State "unless in accordance with the law of the successor State they decline the nationality thereof".[3]

47. The Commission could not hope to foresee all the possibilities which might arise in practice. The considerations by which States might be affected in cases of transfers of territory were infinite in their variety and complexity. He was therefore in favour of a general provision such as that proposed by the Chairman, clearly stating that provision should be made to ensure that inhabitants of transferred territories did not become stateless, but leaving States free to arrange the matter in the way best suited to the circumstances of the particular case.

48. Mr. ALFARO felt that there was general agreement that the text must contain an article dealing with statelessness arising as a result of transfers of territory. There was also agreement that, as a general rule, the State to which any territory was transferred should confer its nationality on the territory's inhabitants. He was not so sure that there was general agreement on the principle that the inhabitants, individually or collectively, should have the right to opt to retain their former nationality, still less on the question whether that principle should be recognized in the text. With regard to the principle, he personally believed that each inhabitant should have the right of option.

49. The text proposed by the Chairman and supported by himself did not constitute a recommendation, as had been suggested, but a rule. If that rule was not complied with, the various measures provided for in the Charter of the United Nations would come into effect. Faris Bey el-Khouri's proposal was similar in purpose to the Chairman's, and he could accept it if it was generally preferred.

50. With regard to what would now be the second paragraph, he supported the first part of the amendment proposed by Mr. Lauterpacht, but preferred the wording used by Mr. Córdova in connexion with the right of option.

51. Mr. SCELLE felt that the question was becoming clearer. He agreed with Mr. Lauterpacht and Mr. Spiropoulos that the text proposed by the Special Rapporteur was, in the present instance as in many others, far too categorical and sweeping. A general statement such as that proposed by the Chairman, however, unexceptionable though it might be, would solve none of the problems which at present arose, and he could not vote for a draft which purported to settle the problem of statelessness arising as a result of transfers of territory in that way. The result would be anarchy, for whatever their desires in the matter, governments were subject to too many kinds of pressure before which they were powerless to take decisions freely. It was idle to argue that the Commission should leave governments free to make the necessary arrangements, for they were not free. Unless it wished to make quite clear that the Convention represented an ideal, at present impossible of fulfilment, the Commission could best help governments by stating precisely what should be done, thus not leaving them at the mercy of the pressures to which they were subject.

52. For that purpose, however, the text proposed by the Special Rapporteur was, as he had said, too categorical. Application, in every case, of the principle that the successor State should confer its nationality on the inhabitants of a transferred territory would sometimes work against the interests not only of the inhabitants in question but also of the successor State. If a colony, for example, were, on emancipation, under an obligation to confer its nationality on settlers who had until then

[3] Harvard Law School, *Research in International Law*, Special Supplement to the *American Journal of International Law*, vol. 23 (1929), p. 60.