

Document:-  
**A/CN.4/SR.2435**

**Summary record of the 2435th meeting**

Topic:  
**Succession of States with respect to nationality/Nationality in relation to the succession  
of States**

Extract from the Yearbook of the International Law Commission:-  
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5. He recalled that the Drafting Committee would have a different composition for the consideration of the draft articles on State responsibility.

*The meeting rose at 10.45 a.m.*

## 2435th MEETING

*Tuesday, 4 June 1996, at 10.05 a.m.*

*Chairman: Mr. Ahmed MAHIOU*

*Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.*

### State succession and its impact on the nationality of natural and legal persons (A/CN.4/472/Add.1, sect. B, A/CN.4/474<sup>1</sup>)

[Agenda item 6]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. MIKULKA (Special Rapporteur), introducing his second report on State succession and its impact on the nationality of natural and legal persons (A/CN.4/474), said that the object of the report was to enable the Commission to complete the preliminary study of the topic and thus comply with the request contained in paragraph 6 of General Assembly resolution 49/51 and reiterated in paragraph 4 of Assembly resolution 50/45. The Commission had decided to reconvene the Working Group on State succession and its impact on the nationality of natural and legal persons at the current session<sup>2</sup> and, having already explored in some detail the question of the nationality of natural persons, the Working Group currently had before it the task of considering—still, of course, in a preliminary fashion—the nationality of legal persons, the choices open to the Commission when it came to embark on the substantive study of the topic, and a possible timetable. The second report was designed to facilitate that task.

2. He said that, in accordance with the intention he had expressed when summing up the debate at the previous session, the report contained three substantive sections, not counting the introduction. Chapter I, on the nationality of natural persons, attempted to summarize the results of work already done on that aspect of the topic, to classify the problems in broad categories and to suggest material for analysis at a later stage of the Commission's work. Since the chapter took up the recommendations made by the Working Group at the previous session,<sup>3</sup> there was no reason for the Working Group to consider the subject-matter at the current one.

3. In his view, the Working Group should currently focus principally on the question of the nationality of legal persons, dealt with in chapter II of the second report. He hoped that, as at the previous session, the Working Group would discuss in an open atmosphere the advantages and drawbacks of considering that side to the topic and, as a result, be in a position to make concrete suggestions. He none the less wished to emphasize that it was not his intention to discourage immediate comments by members of the Commission on that part of the report; on the contrary, opinions expressed in plenary meetings would be of great value to the Working Group.

4. In response to criticisms on the first report,<sup>4</sup> he had thought it useful to give a broad picture of State practice with regard to nationality in the context of State succession. Examples of such practice accounted for almost one half of the second report. In choosing them he had tried to maintain a certain balance between those of nineteenth century practice, of the period between the two world wars, of the decolonization period and of more recent years. He had also endeavoured to find examples of practice relating to different types of territorial changes and to all continents. The task had not been easy and he did not claim that the results were exhaustive; any further examples that shed light upon the problem would be most useful. While collecting instances of State practice, he had refrained from analysing them, believing that such an exercise would form part of the substantive study the Commission would undertake if invited to do so by the General Assembly.

5. The reactions in the Sixth Committee, where the Commission's progress on the topic at its previous session had been generally welcomed, were discussed in the relevant parts of the second report. In that connection, he wished to thank all Governments which had responded to the Secretary-General's invitation to submit documentation concerning State succession and its impact on the nationality of natural and legal persons, in accordance with the request contained in General Assembly resolution 50/45.

6. With regard to chapter I, he again stressed the importance he attached to the views expressed in the Sixth Committee on each of the specific issues discussed in section B. On the first of those issues—the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State succession—delegations

<sup>1</sup> Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

<sup>2</sup> See *Yearbook* . . . 1995, vol. II (Part Two), para. 147.

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

<sup>4</sup> *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/467.

in the Sixth Committee had generally welcomed the Working Group's position that negotiations should be aimed at the prevention of statelessness. Doubts had none the less been raised as to whether the simple obligation to negotiate was sufficient to ensure that the relevant problems would actually be resolved. For some delegations, the main problem had seemed to be the source of the obligation in question and its legal nature, the view being expressed that, however desirable such an obligation might be, it did not appear to be incumbent upon States under positive general international law. In that connection, he drew attention to the European convention on nationality currently being drafted in the Council of Europe.

7. The preliminary comments in the Sixth Committee on the second issue—granting of the nationality of the successor State—were briefly summarized in chapter II, section B, of the report. Some representatives had explicitly or implicitly supported the fundamental assumption that the successor State was under an obligation to grant its nationality to a core body of its population, but it had not been easy for him to draw more specific conclusions. On the third issue—withdrawal or loss of the nationality of the predecessor State—some delegations had endorsed the Working Group's preliminary conclusion that the nationality of a number of categories of individuals should not be affected by State succession. On the other hand, no comments had been made on the right of the predecessor State to withdraw its nationality from certain categories of persons and the conditions in which such withdrawal could be made. The Sixth Committee's more wide-ranging debate on the fourth issue, that of the right of option, was briefly summarized in chapter II, section B. Some representatives had considered that contemporary international law recognized such a right, whereas others had held that the concept lay in the realm of progressive development.

8. As to the fifth issue, that of criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option, one representative in the Sixth Committee had commented that too much attention had been given to categorization. Actually, the classification used by the Working Group more or less coincided with that most frequently used in State practice. Divergent opinions had been expressed in the Sixth Committee about the preference to be given to the various criteria. For example, one delegation had emphasized the advantages, in the case of a federal predecessor State composed of entities which attributed a secondary nationality, of applying the criterion of such nationality. Other representatives had stressed the importance of habitual residence in the successor State. Indeed, the debate both in the Sixth Committee and in the Commission sometimes showed a tendency to confuse two different things, namely the question of using a particular criterion as an analytical tool to check certain hypotheses and the question of whether or not it was desirable for a particular criterion to be used by States in their practice. The distinction was an important one and should be maintained.

9. On the sixth issue, that of non-discrimination, representatives in the Sixth Committee had agreed with the Working Group's preliminary conclusion that the appli-

cation of criteria such as ethnicity, religion or language in refusing to grant nationality to categories of persons who would otherwise be entitled thereto was a discriminatory practice and therefore unacceptable. Lastly, on the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality, members of the Sixth Committee had expressed the view that the question whether any relevant principles could be invoked by individuals or whether the debate should concentrate solely on the question of State responsibility merited further consideration.

10. It could generally be inferred that, as far as the problem of nationality of natural persons was concerned, his first report, the report of the Working Group<sup>5</sup> and the debates in the Commission and the Sixth Committee provided all the elements necessary to complete a preliminary study of that aspect of the topic.

11. That was not yet the case with the other aspect, that is to say the nationality of legal persons. In chapter II, section A, of his second report, he had attempted to outline the scope and characteristics of the matter, which was further complicated by the many forms that legal persons could take. Generally speaking, the problem of the nationality of legal persons arose mainly in the areas of conflicts of laws, the law on aliens, diplomatic protection and in relation to State responsibility. Only the last subsection of section A dealt with the impact of States succession on the nationality of legal persons and thus had a direct bearing on the topic under consideration; the other subsections were intended to present the problem as whole in general terms and to bring out its many and considerable complexities. The comments of members on the various points raised in chapter II, section A, would be particularly appreciated.

12. In 1995, the reactions of the Commission and of the Sixth Committee had been somewhat varied. Whereas some had been in favour of a more in-depth consideration of that facet of the issue, others had been more hesitant. At that session, he had expressed his own preference for putting that area of the problem aside and for focusing on the nationality of natural persons, but as the Commission had requested more information for the debate, he had felt compelled to respond accordingly, and it was to be hoped that the Working Group currently had sufficient material for study and could present more detailed proposals to the Commission.

13. With regard to chapter III, containing recommendations concerning the future work on the topic as a whole, and assuming that no other proposals were forthcoming from the Working Group, he suggested dividing the subject into two parts. He would focus first on the nationality of natural persons, and the Commission might then turn to the rule of the continuity of nationality at a later date in the framework of the topic of diplomatic protection, especially as it was considering proposing that topic as a future agenda item.

14. Concerning working methods, he had nothing to add to what he had already said in his first report with regard to the balance between codification and progres-

<sup>5</sup> See footnote 3 above.

sive development of international law on the subject, terminology used, categories of State succession and the scope of the problem. When the Working Group did its work on legal persons, it could review those elements and make proposals to the Commission.

15. As to the form which the outcome of the work might take, he had already indicated that he was in favour of elaborating a declaratory instrument made up of articles together with commentaries. If the Commission opted for such an instrument, it might give more time to the subject at the next session, particularly as there would be fewer items on the agenda. In view of the international community's current interest in the subject, it would not be wise for consideration to drag on for too long. The Commission might be able to finish its first reading of all the articles and the commentaries in the course of a single year and would then be able to submit them to the General Assembly. That possibility might be discussed in the Working Group.

16. In preparing the second report, in which connection he expressed his appreciation to the secretariat for its support, he had been encouraged by the progress made on the question of nationality in the Council of Europe and UNHCR. It was heartening to see that the Commission's work had met with a response in other international bodies.

17. Mr. BENNOUNA, thanking the Special Rapporteur for his excellent and well-documented second report, said he agreed on the need to aim for a declaratory instrument. The Commission was in an area which, despite the criticism levelled at the term, consisted of "soft law", namely a general framework and a set of guidelines for States. The Special Rapporteur was right to say in his report that a question of human rights was involved; natural persons who were the victims of changes in the territorial configuration of States should not be left without a nationality.

18. It was much less clear, on the other hand, to understand the value of venturing into the area of the nationality of legal persons and succession. The Special Rapporteur had focused more on nationality than on succession, leaving out a number of issues which had an enormous impact on the subject, for example the protection of investments and agreements on dispute settlement in that regard, not to mention the Convention on the settlement of investment disputes between States and nationals of other States. Nor had he touched on the succession of States to assets or debts. One could cite as an example the case of a company that had debts towards a State which no longer existed or which had split in two. The Special Rapporteur had actually raised one point: the impact of the change of the nationality of natural persons on the structure of legal persons. Personally, however, he saw no interest in touching upon succession for legal persons, which came under another framework and which, in fact, was very easy to settle. Either the headquarters were in the successor State in the event of secession or, in the case of two States that merged, in the new State, he did not see where the problem was? In any event, a company, which, unlike natural persons, was not bound by emotional ties, could change its headquarters at any time. Furthermore, transnational corporations

were so interlocked and complex that it was difficult to imagine how criteria could be set in that area.

19. In his view, it would be wiser to focus solely on natural persons. Once finished with that issue, the Commission could then decide whether or not it wished to move on to the question of legal persons.

20. Mr. Sreenivasa RAO, joining Mr. Bennouna in congratulating the Special Rapporteur on an excellent report, said he tended to agree that an effort should be made to achieve as much progress as possible at the next session on what was a topical subject, although it might not be possible to cover the entire set of articles at one go. The topic should focus on resolving issues of succession with an impact on nationality. Nationality per se was not a matter that concerned the Commission. There was no need to embark upon the intractable question of nationality as conferred by States on persons they considered as their citizens. Accordingly, he hoped that the Working Group would confine itself to the subject of State succession, and not nationality.

21. Mr. de SARAM, thanking the Special Rapporteur for an illuminating report, said that he was not sure whether the impact of State succession on the nationality of natural persons was limited to consideration of whether the nationality of a natural person had been lost or changed or whether it also extended to the consequences which flowed from such a loss or change and, if so, whether it was a matter with which the Commission needed to deal.

22. A second, somewhat less troubling aspect, was not so much the criteria to be taken into account in determining what particular nationality should be accorded to a natural person in the event of loss or change of nationality because of State succession as State practice in that regard was sufficient. He was unclear as to whether, in the absence of treaty provisions, the Commission could conclude *de lege lata* that there was an obligation on one State to consult another. Consultations always took place in context, and sometimes the context was a very difficult one. Although he saw the necessity in particular situations for consultations to take place, he was not certain it could be said as a rule that, in the absence of a treaty agreement, there was a general obligation to consult. The Special Rapporteur had raised that point and had said that if it was not a *de lege lata* provision, one could move into progressive development; he had no quarrel with that. The answer to that question would determine to a large extent the ultimate form of the instrument being prepared and also touched on a question that the Special Rapporteur had rightly raised, that of State responsibility for not pursuing a particular course of action. It was to be hoped that the Working Group would be able to shed some light on his questions.

23. Mr. IDRIS, thanking the Special Rapporteur for an exceptionally lucid report, said he wondered whether the title of the topic was well chosen. The Commission was not discussing State succession per se, but the impact of State succession on the nationality of natural and legal persons. The Working Group would therefore need to clarify whether the topic was State succession and its impact or whether the Commission should be focusing on the impact on the nationality of natural and legal persons

arising out of State succession. In his view, the first "and" in the title was misleading.

*The meeting rose at 11.15 a.m.*

## 2436th MEETING

*Wednesday, 5 June 1996, at 10.10 a.m.*

*Chairman:* Mr. Ahmed MAHIOU

*Present:* Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### State responsibility (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,<sup>1</sup> A/CN.4/L.524 and Corr.2)

[Agenda item 2]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his eighth report on State responsibility (A/CN.4/476 and Add.1), said that he proposed to focus his statement on two closely interrelated issues with regard to which a further effort of clarification seemed indispensable before the Drafting Committee took up draft articles 15 to 20 referred to it at the forty-seventh session in 1995.<sup>2</sup> The first issue was the relationship between the law of State responsibility, on the one hand, and the law of collective security, on the other; the second, that of the comparative merits of article 4 of part two<sup>3</sup> and draft article 20.<sup>4</sup> It was essential that the Commission should clearly indicate its position on those two issues, which pertained to the most crucial aspect of the development and codification of the law of State responsibility with regard not only to crimes, but also to ordinary interna-

tionally wrongful acts or, in other words, also with regard to delicts.

2. Before taking up those two problems, he wished to revert to the question of the Commission's competence to interpret the Charter of the United Nations. While it was true that the Commission was no more entitled than any other principal or subsidiary organ of the United Nations to produce Charter interpretations *ex professo*, it was bound to take Charter interpretation problems into account in the performance of its duties whenever the solution of such problems was relevant to the solution of the issues before it. Thus, Charter interpretation had rightly been called for when the Commission had debated the issue whether an international criminal court could be established by a resolution of a United Nations organ such as the General Assembly or the Security Council. It was therefore correct for the Commission to interpret the Charter also in the context of the consideration of the institutional aspects of the consequences of crimes. To his mind, there was not the shadow of a doubt that the two issues he had indicated involved problems of Charter interpretation; those who denied that fact were either disregarding legal logic or simply using a very poor pretext to thwart the discussion of important issues. In that connection, he referred the members of the Commission to the report of the Commission on the work of its forty-seventh session,<sup>5</sup> which showed that some of the participants in the previous year's debate had gone well beyond a mere interpretation of the Charter. They had referred to, and had approved without reservation, extensive interpretations of the Charter implied in the practice of a political organ. By wondering whether, given the Council's liberal interpretation of a "threat to the peace" there was anything left for the Commission to consider in connection with the consequences of crimes, those members had admitted a fortiori that it would be perfectly appropriate for the Commission to deal with Charter interpretation in order to solve a problem that was before it.

3. Turning to the first of the two issues he had mentioned, namely, the relationship between the law of State responsibility and the law of collective security, he said that he was convinced of the necessity to keep them distinct. Considering the lack of institutionalization of the law of State responsibility and the relatively advanced degree of institutionalization, however imperfect, of the law of collective security, to bundle the two together *de lege lata* or *de lege ferenda* would inevitably lead to the subjection of the former to the latter. It would simply lead to the provisions and procedures relating to the maintenance of international peace and security being extended to the area of State responsibility.

4. At the forty-sixth and forty-seventh sessions, it had become clear that some members of the Commission were opposed to the preservation of article 19 of part one<sup>6</sup> because they considered that the consequences of international crimes of States simply should not be covered by the draft on State responsibility. Their most important argument seemed to be that the acts qualified as examples of crimes in article 19 of part one were of such

<sup>1</sup> Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

<sup>2</sup> See 2434th meeting, footnote 2.

<sup>3</sup> For the text of the draft articles of part two provisionally adopted by the Commission, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53-54.

<sup>4</sup> For the text, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 113.

<sup>5</sup> *Yearbook . . . 1995*, vol. II (Part Two), paras. 271 and 272.

<sup>6</sup> See 2427th meeting, footnote 7.