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Summary record of the 2478th meeting

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

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

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

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

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

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

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

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

The meeting rose at 1.05 p.m.

2478th MEETING

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

Chairman: Mr. Alain PELLET

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

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

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

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

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

¹ Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

² See 2477th meeting, footnote 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ *Judgment, I.C.J. Reports 1996*, p. 595.

⁴ See 2475th meeting, footnote 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵ Ibid., footnote 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.