

Document:-
A/CN.4/SR.2479

Summary record of the 2479th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1997, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

2479th MEETING

Tuesday, 20 May 1997, at 10 a.m.

Chairman: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, 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. 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 (*concluded*)

1. Mr. CANDIOTI, congratulating the Special Rapporteur on the quality of his third report (A/CN.4/480 and Add.1), said that he would confine himself to brief comments on the general economy of the draft articles, the proposed definitions and the preamble.

2. With regard to the economy of the draft articles, he agreed with the Special Rapporteur's approach of dividing the draft into two parts, the first dealing with principles applicable in all cases of State succession and the second with principles applicable in specific cases which were meant as a guide for States in their negotiations and the elaboration of their legislation in the matter. Like other members of the Commission, he believed that Part I (General principles concerning nationality in relation to the succession of States) should set forth and develop the general principles and customary rules of international law governing nationality in the context of State succession and, in particular, the rule—or presumption—whereby, in principle, individuals who passed to the jurisdiction of the successor State acquired its nationality at the actual moment of succession; the principle whereby everyone had a right to a nationality; the obligation of all the States concerned to avoid statelessness; and the recognition of the right of the persons concerned, where applicable, freely to opt for a nationality, according to the circumstances, without constraint or discrimination. When the

Commission took up the draft article by article, it should ascertain whether it would not be advisable to clarify or improve the wording of those principles and general rules.

3. With regard to the question of decolonization, which had been raised in the Commission when the economy of the draft articles had been analysed, the Special Rapporteur had explained that the proposed articles could, in many cases, also apply to State succession following decolonization. In paragraph 11 of the introduction to his third report, the Special Rapporteur noted that the Commission had decided in view of the current requirements of the international community and the completion of the decolonization process, to leave aside the category of newly independent States that emerged from decolonization. That statement, which was to a large extent true, was, however, not wholly justified. There were still Non-Self Governing Territories throughout the world where decolonization had not yet taken place and the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples was dealing with the situation of several of them. That statement also presupposed that decolonization was achieved only by attaining independence. That of course was the most frequent way, but it was not the only way. The transfer of a colonial territory to the jurisdiction of another State, the reintegration of the territory into that jurisdiction and unification and reunification were all possible means of decolonization which could also give rise to problems of nationality. He would therefore ask the Special Rapporteur to bear those considerations in mind should the Commission decide to refer to the question of decolonization in its commentary on the scope of the draft articles.

4. In principle, he favoured the inclusion of definitions in a set of draft articles, particularly in the case of such a complex and technical matter as the one under consideration. However, the Special Rapporteur's proposed definition of the term "nationality" merely specified the scope of application of the draft articles and restricted it just to natural persons, as the Commission had in fact rightly decided. That delimitation of the scope of application should eventually be reflected in the actual title of the draft articles or even, in general terms, in a separate article at the beginning of Part I.

5. The Special Rapporteur and other members of the Commission had emphasized the difficulty of defining the concept of nationality and had even maintained how pointless such a definition was in practical terms. The Commission should perhaps therefore revert later to the question whether it was advisable and possible to include a definition of "nationality" for the purposes of the draft articles so as to facilitate understanding and interpretation, having regard to the fact that in certain legal systems concepts such as "nationality" and "citizenship" differed in significance and content.

6. The Spanish translation of the terms "State concerned" and "person concerned"—*Estado interesado* and *interesado*, respectively—was ambiguous since the meaning of the word *interesado* was very broad. It would be advisable if the Spanish-speaking members of the Commission could in due course consider the question

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

and try to find a better translation of those terms in Spanish—*Estado involucrado* and *persona afectada* perhaps.

7. He agreed with the inclusion of a preamble in the draft articles, as well as with the wording proposed by the Special Rapporteur, on the understanding that, as the latter had explained and as indicated by the ellipsis at the end, that wording could even be expanded.

8. He endorsed the general economy and content of the draft articles and reserved the right to make any further comments when the draft was considered article by article.

9. Mr. RODRÍGUEZ CEDEÑO said that he wished, first and foremost, to pay a tribute to the Special Rapporteur for his constructive work. So far as the Commission's highly relevant debate on the relationship between international law and the internal law of States in the matter of nationality was concerned, he fully endorsed the idea that, in elaborating the draft articles, a balance must be maintained between the two branches of the law to ensure the acceptance and implementation by States of the future instrument and, hence, its legal status. Of course, as he had already stressed, questions of nationality were a matter for the internal jurisdiction of States, but they also bore a relationship to international law insofar as they affected human rights and, more specifically, the right to nationality enshrined in a number of universal instruments and insofar as the object of the exercise was to avoid statelessness.

10. As to the economy of the draft articles, he endorsed the Special Rapporteur's proposal that the draft should be divided into two parts, one dealing with general principles and the other with principles applicable in specific situations of State succession. He also considered, like other members, that the draft articles should relate specifically only to cases of succession of States occurring in conformity with international law. In particular, he agreed with the Special Rapporteur's statement in paragraph 12 of the introduction to the third report that the draft articles do not apply to questions of nationality which might arise in cases of annexation of the territory of a State by force.

11. He also agreed with the incorporation in the draft of a preamble consisting of specific provisions that had a precise relationship with the other provisions. As the Special Rapporteur had left open the possibility of elaborating the proposed text, he himself would propose that it should also refer to matters relating to statelessness and the rights of the child.

12. The Special Rapporteur's proposed definitions should appear in the body of the text and should follow the definitions adopted in the 1978 and 1983 Vienna Conventions. Those definitions should include a definition of nationality, which would determine the scope of application of the draft articles and would be assimilated to the term "citizenship", borrowing from that term its legal dimension, which would be grafted on to its own sociological dimension. For the purposes of the draft articles, the term "nationality" should be understood to mean the legal link between a person, who was, in the event, a natural person, and a State and should be based on the defi-

inition given by ICJ² and the definition laid down in article 2 of the European Convention on Nationality.³

13. The draft articles should, in his view, relate to all the situations that could arise in the case of State succession, but should not be cumbersome or unduly detailed. In that connection, in article 1 (Right to a nationality)—one of the most important in the draft articles perhaps, since it set forth the right to a nationality in a specific context—paragraph 2 dealt with the question of the right to a nationality of children born after the date of the succession of States, the link being based solely on the territorial criterion. It might be advisable to broaden that basic criterion in order to avoid statelessness: in other words, the aim should be to envisage all possible situations so that the draft articles could achieve their main objective of guaranteeing the acquisition of a nationality in the event of a succession of States and avoiding statelessness.

14. He reserved the right to revert to the articles when they were considered article by article.

15. Mr. SEPÚLVEDA said that, by his perspicacity, scholarship and knowledge of the international realities with all their implicit limitations, the Special Rapporteur had made a major contribution to the systematization of the law on nationality in relation to the succession of States, thereby proving himself to be worthy of the best traditions of the Commission in respect of the codification and progressive development of international law.

16. He noted that the topic, which had originally been entitled "State succession and its impact on the nationality of natural and legal persons" was henceforth to be entitled "Nationality in relation to the succession of States", by analogy with the topics of State succession in respect of treaties and State succession in respect of State property, archives and debts. He wondered whether that subtle change introduced a nuance aimed at favouring the consideration of the question of nationality, as compared to the consideration of the effects of a change in sovereignty on the nationality of individuals. General Assembly resolution 51/160, in which the Commission had been requested to undertake the substantive study of the topic "Nationality in relation to the succession of States", did not entirely answer his question. The Commission should make it quite clear whether it wished to lay more emphasis on nationality or, on the contrary and as originally planned, to continue its work on the general theme of State succession and to determine its effects in particular areas.

17. Definitions should, in his view, be incorporated in the actual body of the text being drafted, which should be focused on individuals and not territories. It followed that the Special Rapporteur's proposed definition of the expression "succession of States", which was modelled on the definition in the 1978 and 1983 Vienna Conventions, was not suitable in that case, as the situation was different, since the draft dealt with persons, not territories, save of course in the extreme case of a succession of States involving an uninhabited territory. Perhaps, there-

² *Nottebohm* case (see 2475th meeting, footnote 6), p. 23.

³ See 2477th meeting, footnote 7.

fore, the notion of “population” should be added in that definition to the notion of “territory”.

18. As indicated in the third report, regulation of questions of nationality was basically a matter for internal law, but international law imposed some limitations on States’ freedom of action in that area. Consequently, it would be necessary to determine whether the draft articles set forth a set of rules entailing international obligations for States. They set forth the right to a nationality in the context of State succession, but it would perhaps be necessary to decide whether a corollary obligation existed for the States concerned to grant their nationality and whether the provisions of the draft articles were sufficient to establish that new obligation; and also to define with precision the obligations incumbent on the State in accordance with international law. It would thus be important to determine whether it was simply the will of the States concerned that established the existence of an obligation and, consequently, whether the codification and progressive development of international law on the matter lent themselves to the enunciation of guiding principles.

19. The question of the impact of State succession on the nationality of natural persons called for substantive decisions on all those problems. While it was true that the Commission had accepted at previous meetings that it would be better, for the time being, not to consider the question of the type of legal instrument to be prepared, the fact remained that it must define the scope of application and the legal nature of the obligations imposed and must therefore specify whether it intended simply to draw up guiding principles for the benefit of States, in the form of a declaration—in which case the scope of the obligations imposed would be extremely limited—or whether, on the contrary, it intended to go further and to consider drafting a convention that would set forth all the obligations and rights deriving therefrom.

20. Mr. OPERTTI BADAN congratulated the Special Rapporteur on having succeeded in striking a harmonious balance between internal and international law in his third report, particularly in article 3 (Legislation concerning nationality and other connected issues)—irrespective of whether the draft articles were ultimately to take the form of a binding instrument or merely of a declaration. That being said, he noted with regard to article 3, paragraph 2, that the acquisition of nationality was undoubtedly an aspect of international law that involved both public and private law. Nationality was still a common factor linking the regulation of a whole set of related rights. It was thus possible that the general rule stated in the paragraph in question affected the emerging right of nationality vis-à-vis individual and family rights.

21. Noting that Mr. Ferrari Bravo had expressed doubts about the desirability of article 9 (Unity of families) in view of the fact that it would be difficult to apply a univocal or universal concept of the family because the definition of the family varied according to the cultural systems of States, he nonetheless thought that it would be useful to retain article 9 and to add a reference at the end to the need to enable members of a family to remain together or to be reunited in accordance with their original legal status.

22. He had some doubts as to whether paragraph 3 of article 10 (Right of residence) was compatible with other international instruments, in particular, the Pact of San José. He feared that the provision might entail the corollary obligation to leave the territory of a State. While it was true that the proposed rule fell within the broader framework of the succession of States and nationality in relation to the succession of States, the fact remained that regulation of that question must not be detrimental to other established principles, such as the right of every individual to choose his or her residence. He looked forward to hearing further comments from the Special Rapporteur in that regard.

23. In conclusion, he said he endorsed the scheme of the draft articles and the solutions proposed. Lastly, noting that article 2, paragraph 3, of its statute permitted a candidate for membership of the Commission to hold dual nationality, he expressed the hope that, in regulating the question of nationality in relation to the succession of States, the Commission would recognize the possibility of holding dual nationality.

24. Mr. KABATSI congratulated the Special Rapporteur on producing, in just one year, a complete set of draft articles and commentaries for submission to the Commission, which would thus be able to make rapid progress in its consideration of the topic. The draft articles set out principally to reaffirm the right of every individual to a nationality and the need to avoid statelessness, particularly in cases of the succession of States, and he fully endorsed their general structure and the division into two separate parts. He also supported the fundamental ideas set forth in the preamble and the definitions proposed.

25. With regard to the final form of the draft articles, he did not see why it must necessarily be a declaration. He was personally in favour of drafting a treaty or a convention. In that connection, he noted that, contrary to what was stated by the Special Rapporteur in paragraph 4 of the introduction to his third report, the General Assembly had not expressly requested the Commission to prepare draft articles with commentaries in the form of a declaration to be adopted by the Assembly. While it was true that many representatives in the General Assembly had indicated their preference for a declaration, a substantial number had considered it premature to decide on the form that the final result of the work should take, while others had even favoured drafting a binding instrument, as could be seen from paragraphs 11 and 12 of the topical summary of the discussion in the Sixth Committee (A/CN.4/479, sect. B). In his opinion, there was thus nothing to prevent the Commission from opting for a binding instrument of that type.

26. As to the question of the automatic granting of the nationality of the successor State to the persons concerned, he thought that, contrary to what he had initially felt, that idea was not given sufficient emphasis in the draft articles and that it was in fact very important, as other members of the Commission had said, to formulate it explicitly. That would avoid the risk of statelessness to which the persons concerned and, in particular, the members of minorities were exposed between the date of the succession of States and the date of the promulgation of an internal law on the question.

27. Mr. HERDOCIA SACASA congratulated the Special Rapporteur on his remarkable work on the question of nationality in relation to the succession of States. He supported the general structure of the draft articles and their division into two separate parts. The decision to divide them was a wise one, given that territorial changes had differing consequences and that it was necessary to treat some particular cases separately. In view of the importance it had for the interpretation of the text, the preamble was not merely useful, but indispensable, and he shared the Special Rapporteur's view that it was for the Commission, not for a diplomatic conference, as was generally the case, to draft it. He also supported the Special Rapporteur's idea of leaving the Commission the possibility of adding other paragraphs to the preamble. The definitions were essential for an understanding of the draft articles and they should consequently appear in the text as a separate article, even though that was not the general practice in declarations.

28. He thought that, in order to improve the balance of the draft articles, the relationship between international law and internal law should be spelled out and more emphasis should be placed on the new dimension that the principles of nationality acquired in the exceptional context of the succession of States, bearing in mind the general principles applicable in that regard. The State's obligations corresponding to those rights should also be spelled out more clearly. The Venice Declaration,⁴ for example, provided that, in all cases of State succession, the successor State must grant its nationality to all nationals of the predecessor State who had habitually resided in the territory of that State. It was thus important to give more thought to that question so as to ensure that any gaps in the law that might become apparent in that regard were filled.

29. He also thought that the text should stress the development of international law. The Special Rapporteur had not retained certain concepts, on the grounds that insufficient precedents existed. However, international law was developing much more rapidly in the sphere of the protection of human rights than in other spheres and there was a close link between human rights and the effects of State succession. That question should therefore be reviewed, for nothing could justify the incompatibility of an internal law with that body of rules for the protection of human rights.

30. Lastly, he welcomed the inclusion in the text of the concept of the fundamental right to a nationality. In that context, further thought should be given to the related right to choose one's nationality, a right that must not have detrimental effects on the right of residence, which was recognized in the European Convention on Nationality.

31. Mr. GOCO noted that, in his commentaries, the Special Rapporteur stressed the primacy of internal law in matters of nationality and reaffirmed that it was for each State to determine who its nationals were. That was not simply a prerogative, but a right, of the State. Most national constitutions contained an article on the granting, loss or acquisition of citizenship. The fact that the topic under consideration was nationality in relation to the suc-

cession of States gave the question a new dimension calling for a different treatment, bearing in mind, *inter alia*,⁵ the fact that the Universal Declaration of Human Rights⁵ proclaimed the right of every individual to a nationality.

32. Be that as it might, even if it were possible, in accordance with international law, to invite each State, as did article 3, to "enact laws concerning nationality . . . without undue delay", the fact remained that that legislation must be compatible with the Constitution or basic law of the State concerned. It was impossible to promulgate laws contrary to the Constitution. Furthermore, even if the law adopted was in conformity with the Constitution, it would certainly establish the modalities or conditions to be fulfilled with regard to the acquisition of nationality by the persons concerned in the event of a succession of States. That was the idea implicit in the phrase "other connected issues arising in relation to the succession of States", in article 3, paragraph 1.

33. Lastly, in view of the requirements of the law, a certain period of time would inevitably elapse between the date of the succession and the completion of the administrative or judicial process of granting nationality. The problem then arose of the status of the person concerned during that period. That problem remained unsolved, although article 3 stipulated that the legislation of the State concerned should provide that acquisition of nationality should take effect on the date of the succession of States and that the persons concerned should be apprised of the choices they might have under that legislation. It was essential to solve that problem, for during the transition period, the person concerned might be called upon to perform certain obligations or to exercise certain rights linked with citizenship, such as the right to vote or military service. The concept of a presumption, referred to by the Special Rapporteur, was interesting, but might conflict with several other provisions that appeared in the general principles, particularly those dealing with habitual residence or the right of option.

34. He therefore wondered whether, in the case of an actual succession of States, namely, when the predecessor State had disappeared entirely, it might not be preferable to stipulate that the nationality of the successor State was automatically granted to all the persons concerned. That would not prevent the successor State from subsequently promulgating legislation setting the conditions under which that nationality might be withdrawn or lost, for example, in the case of opting for another nationality or rendering services to an enemy State. In general, citizenship was considered to be a privilege conferred by the State.

35. Article 4 (Granting of nationality to persons having their habitual residence in another State) dealt only with persons who had their habitual residence in another State and also had the nationality of that State. That meant that, in other cases, the successor State might have the obligation to grant its nationality to any individual who, according to article 1, "had the nationality of the predecessor State . . . or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State". It followed from paragraph 2 that the

⁴ See 2475th meeting, footnote 22.

⁵ *Ibid.*, footnote 8.

successor State might impose its nationality against their will on persons who had their habitual residence in another State if it appeared that they might otherwise become stateless.

36. By stipulating that the nationality of the successor State was to be granted to the person concerned automatically, it might be possible to do without many provisions which dealt with situations already referred to in the general principles. Certain articles were too detailed and set conditions which were covered in most national legislation on citizenship. That was the case of article 5 (Renunciation of the nationality of another State as a condition for granting nationality) or article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State). Those articles dealt with basic conditions and it would be better to formulate the general ideas expressed in the articles as precepts or principles to guide the States parties to the future declaration.

37. Article 12 (Non-discrimination) should be reworded because, as it stood, it gave the impression that the application of criteria based on ethnic, linguistic, religious or cultural considerations was not prohibited. That might be admissible in internal law, but not in international law.

38. Mr. MIKULKA (Special Rapporteur) pointed out that Mr. Goco had made comments on a number of specific articles and not on the general structure of the draft, its title, its preamble and the proposed definitions, as had been agreed. He regretted that misunderstanding and hoped that the debate would remain organized as planned so that he could reply to the questions asked.

39. Mr. DUGARD said he hoped that the Special Rapporteur might indicate to the members of the Commission whether a final decision had been taken on the form—declaration or convention—that the instrument being drafted would take because that would have an impact on the wording of the draft articles.

40. Mr. MIKULKA (Special Rapporteur) said that he was obliged to remind members that, pursuant to General Assembly resolution 51/160, the Commission was requested to draw up draft articles with commentaries in the form of a declaration, but without prejudice to a different decision which the General Assembly might take at a later stage in its work, on the recommendation of the Commission. He stressed, nevertheless, that the question of the form of the instrument had an impact on the content of the draft. Contrary to a declaration, a convention would allow the parties the possibility to derogate from rules of customary law.

41. Mr. PAMBOU-TCHIVOUNDA said that, since General Assembly resolution 51/160 did not prejudge the final decision, account would need to be taken of the very firm positions already taking shape in the Commission in favour of one or the other alternative. He therefore proposed that, at the end of the general debate on the overall question of the structure of the text, the secretariat should summarize the various positions which emerged from the comments by the members of the Commission.

42. Mr. ECONOMIDES said that the question of the nature of the draft was of overriding importance and that the idea of a declaration was still only a hypothesis. It

would be premature at the current stage for the Commission to open the debate on that point, but it should decide to return to it later when the draft had been more or less completed, because the Commission would choose one of the alternatives on the draft's own merits. Every member of the Commission should therefore bear in mind that the text could take the form of either a declaration or a convention.

43. Mr. FERRARI BRAVO said that, if the Commission produced a declaration, it must respect general international law as much as possible, assuming that the content of that law was exactly known. He nevertheless had the feeling that the area under consideration was somewhat special in that it related to the internal law of States and the way in which the latter interpreted and applied, in internal law, certain general rules of the law of nationality in relation to the effects of State succession. Consequently, a kind of model law or a set of principles might instead serve as a guide for future legislation; that was most necessary, given the emergence of new States and new entities lacking the necessary expertise in the field of international law. He therefore agreed that the Commission should return later to the form of the instrument, but was opposed to the idea of immediately drawing a distinction between declaration and convention because there might be grey zones between the two owing to the fact that, in that area more than in others, international law must serve the internal law of States and must not remain isolated in its own context.

44. Mr. OPERTTI BADAN said he was of the view that the Commission might exhaust the question of principles and the structure of the text without having to decide once and for all about the nature of the instrument being drafted, but, once it started its consideration of Part II (Principles applicable in specific situations of succession of States), it would be difficult to make headway in the absence of such a decision. He therefore proposed that, when it had completed the study of Part I, including perhaps the article-by-article consideration, the Commission should take a position on the form of its draft before beginning Part II. Without such a decision, its work might be limited and that would be prejudicial to its validity.

45. Mr. ADDO said that he was puzzled because, when he had raised the question of form (2478th meeting), the Chairman had replied and had ruled out any reopening of discussion on the subject. In his opinion, the Commission must decide whether or not it intended to take a position on the question of form before starting the detailed consideration of the draft.

46. Mr. YAMADA said that, having taken part in the activities of the Working Group on State succession and its impact on the nationality of natural and legal persons over the past two years, he had only a few comments to make at the current stage of the general consideration of the topic. First of all, he would prefer the definitions to be the subject of a separate article rather than a footnote to the title, although that was not an essential aspect of the draft. He agreed with the Special Rapporteur that it was not necessary to have a substantive definition of nationality, but thought that the definition in subparagraph (f) covered not so much the terminology, but the scope of the

draft articles. He therefore wondered whether the definition might not be placed in a separate article.

47. As to the preamble, drawing on the lessons of his recent experience in the General Assembly with regard to the drafting of a convention on the law of the non-navigational uses of international watercourses, he agreed with the Special Rapporteur that it was preferable for the Commission itself to prepare a draft, even if that departed somewhat from practice. Concerning the idea set out in the second paragraph of the preamble, he thought that the Commission should not discuss the question of the relationship between internal law and international law in the area of nationality in general because the topic under consideration related only to the impact of State succession on nationality. The laws on nationality in force in the various States permitted the acquisition of nationality either through the application of the principles of *jus soli* or *jus sanguinis* or through naturalization, which came under the discretionary power of the State, but they did not take account of the possibility of State succession. When the latter occurred, the question of nationality was settled by agreement between the States concerned or through the adoption of special retroactive internal legislation. The Commission thus had to decide on the relationship between the draft articles and the particular legislative rules which would be adopted to settle questions of nationality following State succession. Hence the question whether, when it adopted its own legislative rules, the State would have an obligation to comply strictly with the principles laid down in the draft articles or whether it could depart from them. That was the basic problem which the Commission must deal with candidly, if necessary in the framework of a specific article, and which tied in with the question of the nature and form of the instrument to be drafted.

48. Mr. LUKASHUK said he agreed with other members that the Commission must first prepare a draft before tackling the question of the status and form of the future instrument. As to the link between internal law and international law in respect of nationality, he proposed that the Commission should use the perfectly satisfactory wording of article 1 of the 1930 Hague Convention, on which the European Convention on Nationality had already been modelled.

49. Mr. Sreenivasa RAO, paying a tribute to the Special Rapporteur's exemplary work, said that the Commission had set itself a first limit by deciding to consider problems of nationality solely in the context of the succession of States. Moreover, it had decided to confine itself for the time being to the nationality of natural persons, while reserving the possibility of studying the question of legal persons at a later stage. It was in that framework that the Special Rapporteur's proposed definition of "nationality" should be examined.

50. Most of the definitions contained in the draft were simple and acceptable, although it might be better to incorporate them in the text rather than in a footnote. The idea of a preamble had not prevailed at first, but, after more thorough consideration and reflection, he was convinced of the need for it, as it would make work all the easier at a later stage, when the draft articles were taken

up in the General Assembly or in the framework of any other appropriate body.

51. Since the proposed draft articles concentrated mainly on the problem of the dissolution of a State, although other cases were in fact dealt with in Part II, they did refer to recent situations in which a State had totally disappeared, leaving several successor States. It would be wrong to give too much emphasis to specific problems of a particular era. For where nationality was concerned no instrument could claim to have an absolutely uniform, universal and rigid character. Experience showed that the problems received different solutions depending on the region, the countries and the time. The application through internal legislation of the great principles of *jus soli* and *jus sanguinis* sometimes led to the creation of dual or multiple nationalities. In view of that complexity and diversity, the Commission ought to propose a set of draft articles in the form of a declaration of a general nature which could be applied by States according to their needs and their particular situation.

52. In such a framework, the Commission would not be able to deal with the question of the substance of nationality, although it was of particular interest in the context of human rights in general and of the problems of minorities and other categories of person in particular.

53. The complexity of the situations which had emerged over recent years showed that, apart from the obvious case of the annexation of a territory by force, it was not always easy to apply the yardstick of the legitimacy of the succession. The principle of continuity and the presumption derived therefrom ought to provide a safe solution of many of the problems considered by the Special Rapporteur. The Special Rapporteur had dealt very well with the right of option, a fundamental individual right. However, it must be stressed that option was a right which all persons were held to possess and that States were required to grant rather than a right afforded by internal law.

54. It would be wrong to set internal law against international law systematically and proclaim the primacy of one over the other. The two components were both equally useful and mutually complementary. Rather than stating a general principle on that point, as was done in the draft preamble, it would be better to indicate in the body of the draft articles the restrictions or limitations regarded as essential or desirable in that regard. Lastly, the regime to be instituted would gain in stability and continuity from the reaffirmation of the importance of customary law and the value of any treaty provisions regulating the problems of nationality in relation to the succession of States.

55. Mr. MIKULKA (Special Rapporteur), summing up the general debate on the title of the draft articles and their scope and on the preamble and the definitions, said that, as other members of the Commission had pointed out, the title of the draft articles did not have to be the same as the title of the topic. The topic was "Nationality in relation to the succession of States", which always covered both natural and legal persons and it had to be left unchanged so that the Commission could later take up the question of the nationality of legal persons without having to request approval for a new agenda item. However, the draft articles under consideration were limited at the current stage

to the nationality of natural persons and that limit could be stated in the title or equally well in an article on the scope of the text or even in a paragraph of the preamble. The Drafting Committee was in any event the best place for that point to be decided. The title of the topic had itself evolved, for initially it had referred, in the English version at least, to the “impact” of the succession of States on nationality. The Commission had decided that such a formulation was restrictive and excluded certain problems of nationality which were connected with State succession without being a direct consequence thereof. In order to avoid doctrinal debates as to what was a direct consequence of the succession of States and what already fell within the jurisdiction of the successor State, the Commission had opted for the more neutral current wording: “Nationality in relation to the succession of States”.

56. Some members had argued that the scope of the draft articles should not exclude questions of nationality, but that it did not strictly relate to nationality as such. The draft articles already contained some provisions dealing with such related questions. The obligation to negotiate, for example, related not only to nationality, but also to problems of pensions, social security, and so on. It was for the Commission to determine the right balance.

57. Turning to the general scheme of the draft articles, he said that the Commission seemed in agreement on the proposed structure, which had been taken from the 1978 and 1983 Vienna Conventions, that is to say one part devoted to general principles (and not to “absolute” principles, as stated in the French text of the commentary preceding article 1) and a second part on the principles to be applied in specific cases of State succession. He would return to some of the questions raised about the structure of Part II when the Commission began its consideration of the draft, article by article.

58. Lastly, with regard to the ultimate form of the draft instrument, the formulas of a declaration or a convention were not mutually exclusive. The General Assembly had requested the Commission to prepare at the current stage a draft declaration, which was a useful approach, since a declaration could be adopted relatively more quickly than a convention and did not give rise to the same problems of ratification, but there was nothing to prevent the Commission from considering other possibilities, which might well include the preparation of a draft convention or the drafting of some parts of the declaration in treaty form, or even the production of a draft additional protocol to the Convention on the Reduction of Statelessness. It was in any event too early to try to draw a line, a somewhat artificial one indeed, between the two formulas.

59. Where the definitions were concerned, the ones taken from the 1978 and 1983 Vienna Conventions had not prompted any comment and the Commission seemed to see in them, as he did, a factor promoting the uniformity of instruments, which were in the end all the work of the Commission. Of the three new definitions proposed, the definitions of “person concerned” and “State concerned” had not prompted any comment either and it was perhaps a task for the Drafting Committee to add the finishing touches, with a view to the Commission’s revisiting the definitions once the whole draft had been considered.

60. In contrast, the third new definition, of “nationality”, had caused a heated discussion. The formulation proposed in the draft was in fact not really a definition, but the same comment could be made about all the instruments of the same type. The European Convention on Nationality defined nationality as the legal link between a person and a State, but did not spell out the nature of the link in any greater detail and the definition was in fact defective in that a debt, for example, was also a legal link. Indeed, all the definitions of nationality described what nationality was not rather than what it was. Therefore it might well be possible to delete the definition proposed in the draft and include its content in the title or the preamble, just as it would be possible, although difficult, to try to give a positive definition, that is to say to combine the elements common to all concepts of nationality or even to offer a descriptive definition in the commentary. If the Commission chose that route, the Drafting Committee, with the help of the Special Rapporteur, could take up the task.

61. Some members of the Commission had proposed defining other concepts, those of population and right to a nationality, for example. But the first concept was not used in the draft and there thus seemed no point in defining it. The second was used only in the title and at the end of paragraph 1 of article 1; the rest of the draft described exactly what that right consisted of, that is to say retention of the nationality of the predecessor State, acquisition of the nationality of the successor State or exercise of the right of option between the nationalities of the predecessor State and of the successor State or States, as the case may be. It was thus a concept which would be better explained in the commentary than defined in the body of the text.

62. The preamble was based largely on the similar provisions of the 1978 and 1983 Vienna Conventions; its first paragraph did not refer only to the situation in Central and Eastern Europe, for recent cases of State succession had also led to the birth of Eritrea and the reunification of Yemen. Since the 1978 and 1983 Vienna Conventions mentioned possible future cases of succession of States, a similar provision might be added in the draft preamble. The second paragraph, dealing with the relationship between internal law and international law, had prompted a lively discussion, but the Drafting Committee currently had all the elements which it needed for establishing an appropriate link between the two types of law.

63. In any event, the proposed text did not conflict in any way with article 3 of the European Convention on Nationality or with the 1930 Hague Convention, which both emphasized internal law, but stated that international law imposed certain limits in the matter. The Treaty on European Union (Maastricht Treaty) gave even more priority to internal law, specifying that the question whether a person possessed the nationality of a State member of the European Union was exclusively a matter for the internal law of that State. It was therefore necessary in the current exercise to bear in mind the realities and study the various relevant instruments in order not to be accused of giving undue priority to international law. The third paragraph was similar to the provision in the 1978 and 1983 Vienna Conventions and the fourth paragraph, which referred to the Universal Declaration of Human Rights,

had been included because, unlike those Conventions, the current draft concerned relations between the State and individuals; hence the need to mention the question of human rights in the preamble.

64. He stressed, in conclusion, that the Working Group had always been kept informed of the progress of the work done on the topic in other bodies. He proposed that the title, the definitions and the preamble of the draft articles should be referred to the Drafting Committee. Of course, the Drafting Committee would not be able to undertake anything more than preliminary work until the whole of the draft had been considered, but such an exercise would be very useful, especially with regard to the definitions.

65. Mr. SEPÚLVEDA said that he had not proposed that the Commission should define the notion of population, but had simply commented that, since the Commission was dealing with questions of nationality, it should not restrict itself to the notion of territory alone, for a territory could be unpopulated.

66. The CHAIRMAN said that the question whether the draft articles should take the form of a declaration or a convention had been clearly settled in paragraph 8 of General Assembly resolution 51/160, which referred to paragraph 88 of the Commission's report on the work of its forty-eighth session.⁶ Paragraph 88 (b) stated "For present purposes—and without prejudicing a final decision—the result of the work on the question . . . should take the form of a declaration of the General Assembly...". He therefore proposed that the title, the definitions and the preamble of the draft should be referred to the Drafting Committee and that its consideration, article-by-article, should begin at the next meeting, starting with articles 1, 2 and 3.

It was so decided.

Organization of work of the session (continued)*

[Agenda item 1]

67. The CHAIRMAN announced that the Working Group on State responsibility, established at the 2477th meeting, would meet later that day.

The meeting rose at 1.05 p.m.

* Resumed from the 2477th meeting.

⁶ *Yearbook . . . 1996*, vol. II (Part Two).

2480th MEETING

Wednesday, 21 May 1997, at 10.10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez 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)

1. The CHAIRMAN invited the Commission to consider the first three articles of Part I of the draft articles on nationality in relation to the succession of States contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1).

PART I (General principles concerning nationality in relation to the succession of States) (continued)*

ARTICLES 1 TO 3

2. Mr. MIKULKA (Special Rapporteur) said that he wished to re-emphasize some of the points made in his initial introduction of Part I (General principles concerning nationality in relation to the succession of States). However, he must first point out that the French version of article 1 (Right to a nationality), paragraph 1, was incorrect. He read out the correct French text and also noted that in paragraph 2, "concerné" should be inserted after "État", in the last part of the paragraph.

3. The main purpose of article 1, paragraph 1, was to ensure that all persons in a successor State ended up with the nationality of at least one of the States concerned. However, that rule did not function in isolation from the other draft articles: other rules were needed to cover particular cases. As to whether the provision stated only the subjective right of individuals concerned or a more gen-

* Resumed from the 2475th meeting.

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