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Summary record of the 2484th meeting

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

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2484th MEETING

Wednesday, 28 May 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, 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*)

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

ARTICLES 7 AND 8 (*concluded*)

1. Mr. GOCO noted that paragraph (43) of the commentary to articles 7 (The right of option) and 8 (Granting and withdrawal of nationality upon option), contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1), stated that the Working Group on State succession and its impact on the nationality of natural and legal persons had indicated that it was using the term "option" in a broad sense, covering both the possibility of "opting in", that is to say making a positive choice, and the possibility of "opting out", that is to say renouncing a nationality acquired automatically.² He wondered whether the reference in article 8, paragraph 1, was exclusive to the possibility of "opting in", or whether it was also intended to cover "opting out" in situations where individuals did not wish to remain nationals of the successor State. What would be the consequences where such a right was invoked? Why was it that, when an individual voluntarily acquired or retained a nationality in the circumstances detailed in article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), the result was apparently different from the situation covered in article 8, paragraph 3? Did the State also have the obligation to grant the option even if the result of "opting out" would be to withdraw the nationality of the successor State that had been automatically acquired?

2. Mr. LUKASHUK said he had doubts concerning the expression "withdrawal of nationality". Withdrawal of nationality was an act of States; but article 8 referred to the right of option, which presupposed the will of a person. It would thus be more appropriate to use the expression "loss of nationality", as in article 6. Problems also arose with regard to constitutional law: the constitutions of some States, including that of the Russian Federation, forbade the unilateral withdrawal of a nationality by a State.³ Article 34 of the recently adopted Constitution of Poland,⁴ for example, provided that a national of Poland could not lose that nationality unless he or she voluntarily renounced it. The European Convention on Nationality also used the term "loss", rather than "withdrawal".⁵ Article 8 should therefore be redrafted. The title should be: "*Acquisition and loss of nationality upon option*" and paragraph 2 should read: "When persons entitled to the right of option in accordance with these draft articles have exercised such right, those persons shall lose the nationality which they renounced."

3. The CHAIRMAN said that that aspect of the option was expressly envisaged in paragraph 3: it was in cases where persons had renounced a nationality that they lost it, not in other cases.

4. Mr. BENNOUNA said that article 8, and in particular paragraph 3, was one of the most convoluted he had ever read. With regard to renunciation, the article tried to establish a general rule that would cover an extremely wide range of cases. It should be noted that under Moroccan law, for instance, in accordance with the principle of "perpetual allegiance", persons could take another nationality but were prohibited from renouncing their Moroccan nationality.

5. The CHAIRMAN said that article 8, paragraph 3, was drafted in such a way as to be without prejudice to the allegiance imposed by Morocco on its nationals in that regard.

6. Mr. MELESCANU, referring to the comments by Mr. Lukashuk and Mr. Bennouna, said that it was not the intention of article 8 to amend countries' statutory provisions, but merely to regulate one specific set of circumstances, namely, the impact of State succession on questions of nationality. Consequently, the Commission should not dwell unduly on the importance of national legislation in that context.

7. Mr. GALICKI said that there was a discernible trend away from recognizing the exclusive right of the State to grant or withdraw nationality, and towards placing the burden—or privilege—of such a decision in the hands of the individual. The trend was reflected in the European Convention on Nationality, which preferred the more neutral term "loss" to the term "withdrawal", and in the new Polish Constitution, already mentioned, which for the first time accorded individuals the right to renounce their nationality. Unfortunately, however, the trend was not

³ Article 6, paragraph 3, of the Constitution of the Russian Federation, adopted at the 12 December 1993 referendum (Moscow, "Juridical Literature" Publishing House, 1994), p. 86.

⁴ Adopted by National Assembly on 2 April 1997.

⁵ See 2477th meeting, footnote 7.

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

² See *Yearbook* . . . 1995, vol. II (Part Two), annex, para. 23.

reflected in article 8 as currently worded, which instead stressed the role of, and an act of, the State. He therefore supported the amendments proposed by Mr. Lukashuk.

8. The CHAIRMAN said that one way to deal with the concerns voiced by Mr. Lukashuk and Mr. Galicki would be to insert the word "loss" after the word "Granting".

9. Mr. ELARABY said that paragraph 2 of article 8 appeared to curtail the right of option of persons whose renunciation of a nationality would result in their becoming stateless. In his view, the right of option must be exercised fully and should not be limited in any way. Otherwise it would be possible for a State to impose its nationality on an individual who had renounced it in the knowledge that he would acquire another nationality in due course. He asked the Special Rapporteur to clarify the situation in that regard.

10. The CHAIRMAN said that he failed to see how Mr. Elaraby's objection was compatible with article 7, paragraph 2, which postulated that the right of option did not include the right to opt for statelessness.

11. Mr. MELESCANU said that there was an ambiguity in article 8, paragraph 2. If persons entitled to the right of option had chosen a nationality, how could they thereby become stateless? Those persons had already made a choice and the choices available did not include the choice of being stateless. Perhaps the phrase "unless they would thereby become stateless" should be deleted from paragraph 2.

12. The CHAIRMAN, speaking as a member of the Commission, said that he had had the same doubts as Mr. Melescanu concerning article 8, paragraph 2. If persons had exercised a right of option, they must by definition have chosen a nationality and therefore could not become stateless. He had supposed that the solution to that objection was to be found in the fact that article 7 set forth "soft" rules with which States "should" comply. If States failed to comply with those "soft" obligations, then situations of statelessness could theoretically arise.

13. Mr. ADDO said he agreed with members who proposed deleting the phrase "unless they would thereby become stateless", at the end of paragraph 2. He did not think that if a person had renounced a particular nationality and opted for another, the State whose nationality he had renounced should have the obligation to impose its nationality on that person merely because he might become stateless. How would a person who renounced one nationality in order to acquire another become stateless solely because of that renunciation?

14. Mr. THIAM said that he was concerned about the wording of article 8, paragraph 1. The affirmation that the State whose nationality such persons had opted for must grant them its nationality implied that it was not sufficient for persons to exercise their right of option. Yet if it was a right, he did not see why the State must then grant its nationality. When a person exercised a right of option, he had the right to opt: there were no further formalities. As paragraph 1 was currently formulated it could be inferred that the State did not simply recognize the choice made but had the right to refuse to grant its nationality. How

could that be possible? He sought clarification on that point from the Special Rapporteur.

15. Mr. ECONOMIDES noted that a number of members had questioned the logic of article 8, paragraph 2. If a person exercised a right of option, it was assumed that he acquired another nationality, and the problem of statelessness was thus irrelevant. The phrase "unless they would thereby become stateless", could indeed be deleted, or replaced by the words "upon the acquisition of the new nationality", because that was the point at issue.

16. Mr. GOCO said that article 8 covered a number of different situations. Paragraph 2 provided for the right of option but also recognized the right of the State to withdraw nationality subject to the condition that that would not result in statelessness. Thus, the situation contemplated in that provision was the substitution of one nationality for another, a notion which could be found in the nationality legislation of many States. If a person opted for the nationality of one State, he must renounce the nationality he currently held. Of course, the State which withdrew its nationality should ensure that the renunciation did not automatically lead to statelessness.

17. Paragraph 3, on the other hand, dealt with a situation in which there were two States, and renunciation was not required. In accordance with that provision, a person with two nationalities opted for one. The State concerned other than the State whose nationality the persons concerned had opted for did not have the obligation to withdraw its nationality from them. That situation differed from the one described in paragraph 2.

18. Mr. BENNOUNA said that the discussion was becoming absurd. It could not be argued that under paragraph 2 loss of nationality was automatic without taking account of paragraph 3. The proposal by Mr. Economides was worth considering. However, it did not fit in with paragraph 3, because paragraph 2 provided that a State withdrew its nationality when persons acquired another, whereas pursuant to paragraph 3, there was no obligation to withdraw nationality unless the person concerned expressly renounced his nationality or his renunciation was presumed. Thus, withdrawal of nationality was not automatic.

19. He agreed with Mr. Thiam that paragraph 2 seemed to be suggesting that there were two stages: exercise of a right of option, followed by the granting of nationality by the State concerned, and that there was no reason for the second stage.

20. The phrase "unless they would thereby become stateless" should indeed be deleted from paragraph 2. Furthermore, he drew attention to a contradiction with paragraph 3: while paragraph 2 provided that the State for which a person had not opted must withdraw the nationality of the person concerned, paragraph 3 stipulated that the State was not under an obligation to withdraw its nationality. In the final analysis, that was to be welcomed, because the right of option meant that it was possible to have two nationalities. Why not? In that case, paragraph 2 should be deleted.

21. In his view, paragraph 3 was so incredibly complicated as to be incomprehensible. It should at least be simplified.

22. Again, there was a difference between "withdrawal" and "loss" of nationality. Withdrawal was an intentional act of a State, whereas loss was the result of an event. A clear distinction must be made between those two situations.

23. In the final analysis, it could be argued that article 8 simply complicated matters and article 7, on the right of option, was sufficient on its own.

24. Mr. LUKASHUK said that the provisions of article 8 had a very important place in the text. That was particularly true of paragraph 1, in which there was a clear legal construct: persons had the right to choose a nationality, and a State therefore had the obligation to grant its nationality. That position of principle must be retained.

25. The provision in paragraph 3 made a clear point: the State was not required to withdraw its nationality. The only doubt he experienced was about the last sentence, which was open to different interpretations and thus might well be deleted.

26. Mr. ROSENSTOCK said that there appeared to be no disagreement on the substance of article 8, apart from Mr. Elaraby's point on whether to have a right to statelessness. Paragraph 2 was not about choosing to acquire a certain nationality, it was about opting not to acquire such nationality. The "unless" clause in paragraph 3 basically meant: "unless the situation in paragraph 2 applies". The last sentence of paragraph 3 merely spelt out what would have been covered implicitly. Thus, the concepts were clear. He was inclined to agree that the proposal by Mr. Economides on paragraph 2 would simplify matters. But apart from the question of a right to statelessness, all the problems raised were actually drafting issues and, the sooner the Commission referred article 8 to the Drafting Committee the better.

27. Mr. GALICKI said he agreed with Mr. Lukashuk that article 8 had a precise logical construction but he felt that there were too many stages in the procedure: first, the entitlement to exercise the right of option; next, the exercise of the right, which did not necessarily mean the person would obtain the desired nationality; and then the granting of the nationality by the State concerned. During that procedure the problem referred to in paragraph 2 arose: renunciation of another nationality and the withdrawal of such nationality by the State concerned, which took place at the moment the right of option was exercised, that is to say not necessarily at the same time as the new nationality was acquired. Statelessness could therefore occur at that point in the procedure, and it would be preferable for the obligation to withdraw nationality to be triggered by the person's acquisition of the nationality that he opted for.

28. Furthermore, paragraph 2 dealt with a specific situation and to some extent spoiled the scheme of the article. It would also be noted that paragraphs 2 and 3 used different formulas: the obligation to withdraw nationality contained in paragraph 2 started at the moment of renunciation, while in paragraph 3 it was qualified by the

proviso "unless those persons have clearly expressed their will to renounce its nationality". He would be grateful for an explanation of the difference.

29. The CHAIRMAN said perhaps the answer was that paragraph 3 made an exception to the provision contained in paragraph 2 and that the second part of paragraph 3 made an exception to the first part.

30. Mr. ECONOMIDES said that he understood article 8 but agreed with other members that paragraph 3 was complex and hard to apply. The problem was that persons concerned in a succession must complete two procedures: they must not only opt for a nationality but also renounce the nationality of the predecessor State. In contrast, when the right of option was regulated by an international treaty, both the acquisition of the new nationality and the loss of the previous one were automatic. Article 8, however, appeared to be dealing with a right of option exercised not under a treaty but under national legislation. It would perhaps be useful to distinguish between those two quite different situations, for the article as it stood complicated a rule which was very clear in international law. As far as internal law was concerned, it might be possible to take a step forward by adopting the solution provided at the end of paragraph 3 as a global compromise solution.

31. The CHAIRMAN pointed out that the right of option might have to be exercised between the nationality of several successor States in cases where the predecessor State disappeared.

32. Mr. SIMMA said that he supported Mr. Economides' proposed amendment to paragraph 2. As he understood things, paragraph 1 covered a situation in which an individual exercised the right of option and the State concerned had an obligation to accept his choice; paragraph 2 covered a situation in which an individual exercised the right of option and the State of his previous nationality had an obligation to withdraw that nationality; and paragraph 3 provided that the State whose nationality was renounced did not have to comply with an obligation to withdraw its nationality contained in its domestic legislation. Accordingly, paragraph 3 had a meaning of its own which made sense to him, but he hoped for further clarification from the Special Rapporteur.

33. Mr. RODRÍGUEZ CEDEÑO said that article 8 was important as a complement to article 7 and its current formulation should generally be retained. It must be remembered that option for and granting of nationality were two different issues: the right of option had to be supplemented by the granting of nationality by the State concerned. Accordingly, he had at first been in favour of the proposed deletion of "unless they would thereby become stateless" from paragraph 2, but it was a provision that might be needed to cover a gap between exercise of the right and the granting of a nationality. The problem could probably be solved in the Drafting Committee.

34. Mr. MIKULKA (Special Rapporteur) said that, as several members had noted, the provisions of article 8 must be read jointly but for completely different situations. Sometimes the right of option was regulated by a treaty but, even when it was not, there was still a right of option resulting from the combination of two or three

national legislations of States concerned. With the Working Group's support he had tried to formulate common rules covering all situations.

35. He had no problem with the suggestion made by Mr. Galicki and Mr. Lukashuk that the reference to "withdrawal" of nationality should be replaced by a reference to "loss" of nationality. He could likewise accept the similar comments made on the "granting" of nationality. It was not the intention to stipulate that the exercise of the right of option was to be followed by a separate stage of granting the nationality opted for. The problem raised was purely one of language and could be solved by the Drafting Committee.

36. As to the other points of substance, he re-emphasized that article 8 was indeed intended to cover the right of option regulated by a treaty, which might be described as an exclusive option. But there were other situations in which an individual could choose to acquire or not to acquire the nationality of one of the successor States in addition to the nationality he already possessed. In response to those who held that the right of option must necessarily mean a choice between nationalities, he recalled that Kunz had written: "The one who opts does not choose between two nationalities, but only has the right to retain one's old nationality."⁶ The Working Group had agreed that the option was sometimes an exclusive choice between nationalities, but in other situations, and certainly when exercised under a national legislation, it could have other meanings. One such meaning was "opting in", when the person concerned could choose the nationality of a State concerned regardless of the consequences for another nationality he might already possess. The other possibility was that the law automatically extended a State's nationality to a certain category of persons while at the same time envisaging the possibility of renouncing that nationality, that is to say "opting out". That was how the three paragraphs should be read. It was not a question of the exercise of a single right of option but of the exercise of that right in three completely different situations.

37. He took it that no one was opposed in principle to the simple rule set out in paragraph 1 and that all the objections could be overcome by the Drafting Committee. Paragraph 2 was concerned basically with the situation in which a person exercised an "opting out" right and the State of his previous nationality did not have the right to impose its nationality on him. The only substantive problem was with the proviso "unless they would thereby become stateless". The suggestion by Mr. Economides that the proviso should be replaced by a reference to the automatic acquisition of another nationality did not cover the case of a person who already possessed the nationality of a third State. In the current wording, paragraph 2 covered both situations. Furthermore, he had included the proviso precisely because the Commission had asked him to do so in order to avoid the possibility of statelessness.

⁶ J. L. Kunz, *Die völkerrechtliche Option*, vol. 1 (Breslau, F. Hirt, 1925), p. 83. See also Y. Onuma, "Nationality and territorial change: In search of the state of the law", *The Yale Journal of World Public Order*, vol. 8, No. 1 (Fall 1981), p. 6.

38. Paragraph 3 sought to answer the question of what consequences arose when exercise of the right of option was not coordinated by the two legislations concerned. He would take the example of the situation in which a State disappeared as such, leaving successor States A and B. State A did not allow dual nationality and so adopted legislation to the effect that any person acquiring the nationality of another State "upon request" automatically lost the nationality of State A. State B which had no problem with dual nationality allowed that any national of the predecessor State who did not automatically acquire the nationality of State B might do so by opting in without having renounced the nationality of State A. Accordingly, a person automatically having the nationality of State A might also opt for the nationality of State B, reasoning that State A would object only if the latter nationality was acquired by request and that he would not risk losing the nationality of State A if acquiring the nationality of State B by option. The provisions of paragraph 3 were thus designed to cover the situation in which two national legislations operated independently. To Mr. Lukashuk, who wished to delete the last sentence of the paragraph, he would say that such a provision was quite common in national legislations and was not just an invention for the purposes of State succession. He could not see how the point could be disregarded.

39. The CHAIRMAN said that two different trends of opinion were discernible in the Commission, one of which favoured avoiding any case of statelessness, while the other preferred to recognize a right to statelessness. At that stage, the most reasonable course would be to refer articles 7 and 8 to the Drafting Committee.

40. Mr. BENNOUNA said that he could agree to such a course, but trusted that the Drafting Committee would ultimately merge the two articles.

Articles 7 and 8 were referred to the Drafting Committee.

ARTICLES 9 TO 14

41. Mr. CRAWFORD said that articles 9 to 13 involved an issue of principle which would, to some extent, have to be left to the Drafting Committee as some fine-tuning would be required. The problem was to distinguish between those matters that were either directly related to or directly consequential upon the issue of State succession and nationality, and those that were in some sense related to State succession but also raised broader issues such as human rights. While he had great sympathy with all the substantive proposals put forward in articles 9 to 13, the Special Rapporteur seemed to have overstepped the line somewhat, with the result that some of those provisions dealt more with the human rights of persons who were subject to situations in which their nationality was liable to change rather than with the direct consequences for the status or rights of such persons by reason of the change in their nationality.

42. That essential point of principle could be seen, for instance, in the context of the right of residence. To some extent, article 10 (Right of residence) was really concerned with the problem of people who left an area

affected by State succession and who later wished to return to that area when their nationality might have changed but would not necessarily have done so. The question of their right of return—no matter how much one wished to ensure it—was different from the question addressed in the draft articles. His particular concern was that the Commission should not be seen to go beyond the scope of State succession with respect to nationality, and risk rejection on that ground, thereby giving rise to a *contrario* interpretations of the broader issues concerned. There would be opposition—and not necessarily well-intentioned opposition—if the Commission enacted what amounted to an international covenant on the civil, political, social, economic and cultural rights of persons whose nationality might have been affected by State succession.

43. He was very sympathetic to the principle of non-discrimination (art. 12) which, accurately formulated, was essential, for persons should not be discriminated against on account of the fact that they had acquired or lost the nationality of a State in the context of State succession. The prohibition of arbitrary decisions concerning nationality issues (art. 13) was equally appropriate. In the context, however, articles 9 (Unity of families), 10 and 11 (Guarantees of the human rights of persons concerned) went too far and he spoke as one who supported all the substantive values reflected in them.

44. On a point of terminology, some of the problems in the draft articles might be solved if a slightly more general formulation were adopted. In particular, he would propose that the word “acquired” should be replaced throughout the draft by the word “obtained”. Also, the words “the acquisition or loss of” in article 9—which, again, raised a question of principle as to how far the provision could properly go—were not really necessary.

45. Rather than engaging in a lengthy debate on a difficult point, it might be better to refer the matter to the Drafting Committee and to request it to distinguish those issues that were sufficiently directly related to nationality and succession to justify inclusion in the draft.

46. The CHAIRMAN said his personal view was that articles 9 and 11 were general provisions that had no place in a precise draft on State succession.

47. Mr. FERRARI BRAVO said that article 9 raised the interesting problem of the unity of members of the family who might have different nationalities. In that connection, he was concerned to note that at no point in the draft was there any indication of the precise nature and extent of the family. The only reference appeared to be in paragraph (28) of the commentary to article 9, which suggested that members of the family should be able to live at the same place. That, however, could have a major effect on emigration laws and he therefore wished to underline the need to spell out the nature of the family either in the article or in the definitions.

48. Mr. BROWNLIE said he agreed with Mr. Crawford that, in analytical terms, articles 9 to 13 went beyond the problem of succession of States but he did not himself have any problem with the general economy of the draft articles. That was because the articles in question were highly relevant to the whole problem of succession and—to borrow a term of the common law—could be said to form part of the *res gestae*.

49. Mr. DUGARD said he too found it difficult to see how articles 9 to 13 could belong in a declaration or convention of the kind contemplated. Essentially, they were designed to protect the basic rights of individuals who did not qualify for nationality and the Special Rapporteur clearly wished to ensure that their human rights were protected. In the case of article 9, however, it was not clear how members of the family could be reunited or allowed to remain together if they were not given the nationality of the State in question. That article seemed more in the nature of a plea to the State to treat the members of the family decently and allow them to live together. The same applied to article 11: the States concerned were enjoined to allow persons concerned habitually resident in their territory to exercise their human rights. Obviously, they would be unable to exercise all of those rights since some of them would be attached to nationality, such as franchise, which would be granted only to those persons who enjoyed the nationality of the State.

50. In the circumstances, it might be better to contemplate a general provision acknowledging that the basic rights of persons who did not qualify for nationality in the process of State succession were not in any respect to be undermined.

51. The CHAIRMAN said that Mr. Crawford had raised a fundamental point on which he would invite comments at the next meeting.

The meeting rose at 11.35 a.m.

2485th MEETING

Thursday, 29 May 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.
