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Summary record of the 2493rd meeting

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

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immediately. The rule to that effect was thus residual, the main rule proposed for article 17 being that the entire population had a right of option for two years from the moment of the transfer of the territory. Until that period had expired, it was deemed to continue to be the population of the predecessor State. The position was entirely different in the case of separation of part of the territory, since the purpose of separation was precisely to create another State with a population from the moment of its creation. Such a State was in no way obliged to grant a right of option to the whole population and could, moreover, reasonably expect to have at least a certain population from the outset. Consequently, despite a certain similarity between the two rules, there was in fact a significant difference between the situations to which they applied.

The meeting rose at 12.40 p.m.

2493rd MEETING

Friday, 13 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, 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 II (Principles applicable in specific situations of succession of States) (*continued*)

SECTION 4 (Separation of part of the territory) (*continued*)

ARTICLE 22 (Scope of application)

ARTICLE 23 (Granting of the nationality of the successor State)

ARTICLE 24 (Withdrawal of the nationality of the predecessor State) and

ARTICLE 25 (Granting of the right of option by the predecessor and the successor States)

1. The CHAIRMAN invited the members of the Commission to state their views on the question of the relationship between article 23 (Granting of the nationality of the successor State) of section 4 (Separation of part of the territory) and article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) of section 1 (Transfer of part of the territory) of Part II (Principles applicable in specific situations of succession of States) 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).

2. Mr. PAMBOU-TCHIVOUNDA said that there were also similarities on a number of points between section 3 (Dissolution of a State) and section 4. He wondered whether dissolution, which formed the subject of section 3, might not simply be one of the aspects of the separation of States within the framework of the succession of States. If so, some of the questions arising from article 20 (Granting of the nationality of the successor States) of section 3, as well as from articles 23 and 25 (Granting of the right of option by the predecessor and the successor States), would perhaps find a solution.

3. Mr. CRAWFORD said he presumed that, so far as secondary nationality was concerned, the Commission would adopt the same solution for section 4 as for section 3.

4. Mr. MIKULKA (Special Rapporteur), reverting to the comments made by Mr. Economides (2492nd meeting), explained that the expression "persons concerned" did not appear in article 24 (Withdrawal of the nationality of the predecessor State), paragraph 1, because that provision did not relate specifically to "persons concerned" or, in other words, to persons who, on the date of the succession of States, had had the nationality of the predecessor State and whose nationality might be affected by the succession. It related to persons whose nationality would not be affected and who would quite simply retain the nationality of the predecessor State. In paragraph 2 of the same article, the use of the word "concerned" would be redundant because that paragraph referred back to article 23, which spoke expressly of "persons concerned".

5. Replying to another question by Mr. Economides, he drew attention to the possibility of duplication of nationalities entailing the granting of the right of option to the persons concerned, for example, in cases where a person habitually resident in the territory of the predecessor State or of one of the successor States had, at the same time, the secondary nationality of one of the successor States. That person would then be entitled to acquire the nationality both of the predecessor State and of the successor State. The right of option, which formed the subject of article 25, eliminated that risk. If, as Mr. Economides had proposed, the criterion of the origin of persons in the territory concerned were added to the two criteria already

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

mentioned, the risk of duplication would be even greater; hence the necessity for the right of option.

6. Recalling that Part II of the draft articles was intended to provide recommendations or guidelines, or model rules, for the use of the States concerned, he pointed out that, if the Commission decided that Part II should be designed for eventual codification, it would then have to change Part II completely and no longer maintain the distinction between the two parts.

7. He maintained his position on the question of secondary nationality. In his view, it would be regrettable if the Commission chose not to take account of the "category of nationality", which played an important role and reflected the formal link existing between a person and a constituent entity of a State. To delete that element would be to ignore all the new factors which had arisen in the sphere of the succession of States in the past few years and which had led to the inclusion of the topic in the Commission's agenda.

8. With regard to Mr. Economides' proposal that article 23, subparagraph (*b*) should be brought into line with article 20, subparagraph (*b*), he said that the possibility could be considered in cases where the distinction between dissolution and separation was difficult to draw. It could also be thought that the distinction lay in the disappearance or the survival of the predecessor State. In the event of dissolution, the predecessor State ceased to exist; it was therefore necessary to consider the situation of all categories of persons, and article 20, subparagraph (*b*) (i), then appeared justified. On the other hand, in the event of separation, the predecessor State continued to exist. There was therefore no overriding need to envisage the same solution, since persons who did not acquire the nationality of the successor State kept that of the predecessor State. While he recognized the validity of both approaches, his own position was that reflected in article 23.

9. The CHAIRMAN said that it would therefore be appropriate to leave it to the Drafting Committee to settle the issue.

10. Mr. BROWNLIE said he continued to think that there was no adequate reason for the lack of symmetry between article 17 and article 23. He still saw no substantial difference between cases of transfer and cases of so-called separation of parts of the territory of a State and the examples furnished in the respective commentaries to those two articles contained in the third report of the Special Rapporteur only served to reinforce his view. Article 23 seemed a little more explicit than article 17 in that it covered more possibilities. He failed to understand why there should be such a discrepancy between the contents of two articles dealing essentially with the same subject. That was an anomaly which had not been sufficiently explained. He would not press the point, but would like to see his views reflected in the record of the meeting.

11. Mr. MIKULKA (Special Rapporteur) said he agreed that there could be a similarity in some cases between the separation and transfer of part of a State's territory and that the solution adopted by the States concerned to regulate the question of nationality could also present similarities. However, there were even more pronounced similarities between the dissolution of a State and the separation of part of a State's territory. He asked if it followed that the same rules should be applied in all cases on the pretext that it was sometimes difficult to distinguish between dissolution and separation or between separation and transfer of part of a territory.

12. It should be noted that the transfer of part of a State's territory to another State had no effect on the existence of the two States concerned. In the case of separation, the predecessor State also continued to exist, but a new State was created and became a subject of international law. In both cases, the rule of granting the nationality of the successor State was generally applicable, but that general rule could be modified by the exercise of the right of option where part of a territory was transferred. For example, the two States concerned could decide that persons who had their habitual residence in a village located in the transferred territory could, if they so wished, keep the nationality of the ceding State. That possibility was ruled out in the case of separation, since it was inconceivable that the new State thus created should have no nationals of its own and a population consisting solely of foreigners. Such an extreme example illustrated the difference between transfer and separation of part of a territory. Moreover, it could be assumed in the case of separation that persons residing in the territory of the successor State would automatically acquire its nationality, whereas exactly the opposite would occur in the case of transfer. The majority of persons having their permanent residence in the transferred territory would probably opt for the nationality of the State that had ceded the territory, with only those who had not done so within a specific time limit being automatically granted the nationality of the successor State. There were many other arguments in favour of maintaining the distinction, which allowed provision to be made for all possibilities without imposing a general rule.

13. Mr. BROWNLIE said that he was not convinced by the Special Rapporteur's explanation, since the situations he had referred to involved only small parcels of territory or the population of a limited number of villages. But there was no hint in the commentary to article 17, contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1), that the situations envisaged fell into that category, which would account for the distinction between article 17 and article 23. The historical examples given in the commentaries to the two articles all related to transfers of very large territories.

14. He again emphasized that he was not advocating a general restructuring of the two parts of the draft. He simply wished to draw attention to the fact that the situations referred to in the two articles were very similar so that there was no reason for the provisions of article 23 to differ so markedly from those of article 17. That was the point of his criticism.

15. Mr. ECONOMIDES said he regretted that the Special Rapporteur had been influenced by minor border adjustments, whereas very large transfers of territory had occurred in the historical context of State succession. The rule of automatic acquisition of nationality had always applied in those cases just as in other cases of State succession, possibly with the subsequent granting of a right of option. In his own research on practice, he had never

come across a case such as that described by the Special Rapporteur in which the nationality of the predecessor State had been maintained by the successor State for a certain period, with provision for a right of option.

16. However, the general issue which concerned him and which, in his view, merited a full discussion in plenary was the fate of persons originating from the ceded territory who did not reside in the territory. At the preceding meeting, he had mentioned four general rules of international law applicable to all cases of State succession, one of which specifically concerned persons other than those residing in the territory, that is to say the hard core of State succession, namely persons originating from the territory and living abroad. He felt that the Special Rapporteur's definition of the term "originating" based on *jus soli* was too narrow and should be expanded by some element of *jus sanguinis*. For example, where a father was born in the territory concerned, that fact should have some consequence for the children. The idea was to leave individual States free to define the substance of the concept in their legislation. That point having been made, the real issue related to the fact that international law defined two separate cases for "originating" persons: if the predecessor State had disappeared, such persons would automatically acquire the nationality of the successor State so as not to remain stateless, which corresponded to the provisions of the draft articles; but, if the predecessor State did not disappear and originating persons had the nationality of the predecessor State, but lived abroad, the general inclination was to give such persons who had a special link with the territory the right to choose the nationality of the successor State on an individual and voluntary basis. But neither article 17 nor article 23 provided for the second case, and that raised a question of principle.

17. He agreed with the Special Rapporteur's proposal that article 24, paragraph 1, should be deleted because paragraph 2 said exactly the same thing in reverse. Lastly, the discussion had, in his view, confirmed the inadequacy of the definition of the term "person concerned" from the legal point of view.

18. The CHAIRMAN, noting that the members of the Commission should preferably avoid querying provisions that had already been referred to the Drafting Committee, such as the definitions or article 17, said that the provisions of Part I of the draft articles should always be borne in mind when reading Part II, corresponding to what the Commission advocated *de lege ferenda* rather than *de lege lata*. For example, it should be borne in mind, in connection with the problem of children of "originating" persons, that there was an article 9 (Unity of families) dealing with the non-separation of families.

19. Mr. ROSENSTOCK asked Mr. Economides what he meant exactly by "originating from". Should the term be understood as meaning simply "born in" or did it apply to successive generations? In particular, did the concept differ in intent from that of "secondary nationality" as applied in Eastern Europe?

20. Mr. ECONOMIDES said he was unable to reply to the second question because the relationship between the concept of secondary nationality and the concept of origin depended on the internal law of countries that had secondary nationalities. In reply to the first question, he could say that the concept of "origin" comprised several elements, the first of which was birth in the territory, to which could be added the father's birth in the territory and, in general, a person's links with the territory, the fact of having resided or lived there for a certain period of time. His only concern was to give a person originating in a territory and residing abroad the possibility, if that person so desired, of acquiring the nationality of the new State in the territory. The concept of family unity was insufficient in that regard since it was too general. The notion of origin was taken into consideration in article 20; its absence from articles 17 and 23 was therefore illogical.

21. The CHAIRMAN, speaking as a member of the Commission, said that the wording of articles 20 and 23 was both too precise and probably incomplete. More general wording based on the concept of an effective link or attachment would be sufficient, since the concept was familiar to all international lawyers and referred both to an origin-based link and secondary nationality.

22. Mr. BROWNLIE said that both the members of the Commission and, to a large extent, the Special Rapporteur consciously avoided referring to the concept of an effective link. He personally found that regrettable since it was, in his view, an important and, in a sense, an inescapable principle. However, he thought that the approach adopted in the draft was defensible on practical grounds. The concept of habitual residence had been used as a sort of shorthand for the simpler forms of the effective link, and that avoided the subtle problems of defining the latter concept. By omitting all explicit reference to effective links, the Commission would possibly also avoid considerable controversy in the Sixth Committee and elsewhere, so that there was a political justification for its approach. The situation was in reality much more complicated because an effective link might exist with several States and it all depended on how the concept was applied. The use of the connecting factor of habitual residence in the draft articles therefore presumably avoided many problems.

23. Mr. MIKULKA (Special Rapporteur) confirmed that he had avoided referring specifically to the idea of a genuine link because, as far as he knew, much of the doctrine was not favourable to the transposition of that idea from the context of diplomatic protection to other contexts. Consequently, the idea had been simply an underlying one and, as Mr. Brownlie had pointed out, the application of criteria such as that of habitual residence ensured a genuine link.

24. With regard to the idea of taking account of "persons originating" from a territory, he explained that his intention had been to limit Part II to provisions that were strictly necessary in order to avoid statelessness and deal with the problem of multiple nationality that might result from the application of the envisaged criteria. Otherwise, States could do what they wished, the sole exception being that, if they failed to respect certain rules listed in Part I, the nationality that they granted would not be recognized. As to the specific proposal made by Mr. Economides, he did not understand whether he thought that the successor State must have the obligation to extend its nationality to "persons originating", particularly those whose father had been born in the territory. The Commis-

sion had already decided in article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1, that no such obligation existed in respect of the persons concerned, whether or not they had originated in the territory, who had their habitual residence in another State and already had another nationality. As to the possible right of the State to extend its nationality to persons originating in it, but residing abroad, the option was always open to the successor State to extend its nationality to categories of persons other than those mentioned in Part II, subject, however, to the limits established in article 4, paragraph 2, which likewise applied to "originating" persons. The consideration of the issue thus revealed that no special treatment needed to be given to "originating" persons. If the fact that a person to whom a successor State granted its nationality was an "originating" person did not override the criterion of "genuine link", then that nationality would not be recognized. He therefore believed that the problem was taken care of in the draft articles as long as all the articles in their entirety were read together. He referred in that connection to paragraph (37) of the commentary to article 17, where the issue was clearly elucidated in the context of transfer of a part of the territory. In conclusion, he said it would be dangerous to attempt to list the whole range of opportunities available to States, for such a list might be incomplete and consequently give the impression *a contrario* that the State could do nothing else.

25. Mr. ECONOMIDES said that the concept of "resident" played an irreplaceable role in respect of State succession. As the Special Rapporteur had pointed out, however, it was also possible that a resident would not wish to acquire the nationality of the successor State. That might be the case if there was a genuine link with another State. In order not to impose nationality on such a person by force, something that would be contrary to human rights, that genuine link should be taken into account and the person should be granted the right of option on that basis. At the current time, however, the right of option was provided for only at the national level in various laws which might be mutually contradictory owing to the lack of specific reference criteria.

26. He said that the Special Rapporteur had understood the first part of his statement correctly, but not the last part. In his opinion, the State must—and that was an obligation—grant its nationality to persons originating from the territory under consideration, but on the condition that those persons request it. In a sense, that was a legitimate exception to article 4. The draft articles would not be complete unless provision was made for that possibility.

27. Mr. CRAWFORD said he wholeheartedly agreed with the analysis made by the Special Rapporteur and did not believe that the State should be obliged to grant its nationality to persons other than those referred to in article 4. Nevertheless, Mr. Economides had every right to express his point of view and to have it recorded.

28. The CHAIRMAN noted that that point of view was not shared by the majority of the members of the Commission. In view of the decision on article 20 adopted by the Commission at its preceding meeting, article 23 could not be retained as it stood. The problem was a complex one. The Special Rapporteur was obviously maintaining his position and, in the light of the consideration of section 4, would like to go back to section 3. He himself did not wish to reopen the debate and was leaning towards considering that the decision adopted on section 3 applied automatically and naturally to section 4.

29. Mr. CRAWFORD said that the debate should not be reopened. The Commission must await the results of the work to be done by the Drafting Committee in accordance with the terms of reference it had been given.

30. Mr. MIKULKA (Special Rapporteur) said he did not think that two separate rules should be stated in articles 20 and 23, but he did not agree with the decision the Commission had adopted on article 20 and he wished to maintain article 23 as he had proposed. It was, of course, up to the Commission to decide the matter.

31. Mr. ROSENSTOCK endorsed the comments made by Mr. Crawford. The Commission should give the Drafting Committee specific instructions on the issue of "secondary nationality" so that it could adopt an informed decision without necessarily endorsing the idea put forward by Mr. Dugard on that subject. In any event, the approach taken must obviously be a uniform one.

32. The CHAIRMAN said he continued to believe that the position the Commission had taken at its preceding meeting on article 20 should be reflected in articles 23 and 24.

33. Mr. MIKULKA (Special Rapporteur) said that there seemed to be a misunderstanding about the interpretation of the expression "secondary nationality". Mr. Dugard understood it as a shameful discriminatory measure taken against a part of the population which, because it had inferior status, was deprived of the opportunity to have regular nationality. As he himself saw it, it was a practical means of regulating the conditions for nationality laid down in the legislation of a federal State and quite simply a reflection of the federal nationality, that is to say the one that was valid at the international level.

34. The CHAIRMAN said that, since the idea of "secondary nationality" was still vague, he would take it that the decision adopted at the preceding meeting not to use that term in article 20 and to delete subparagraphs (*b*) (i) and (*b*) (ii) was final.

35. Mr. GALICKI said that he was in favour of retaining article 24, but would like to make some comments on the form and substance.

36. First, since it was entitled "Withdrawal of the nationality of the predecessor State", it would be more logical to reverse the order of paragraphs 1 and 2 and to deal first with cases where the predecessor State withdrew its nationality and next with those where it did not withdraw its nationality.

37. Secondly, paragraph 1 referred to two cases where the predecessor State did not withdraw its nationality, but that obligation was self-evident in the case covered in subparagraph (*a*), that is to say that of persons having their habitual residence either in its territory or in a third State. It was true, as the Special Rapporteur had pointed out, that that was a provision aimed at protecting such persons by

preventing a State from using the pretext of separation of a part of its territory to justify the withdrawal of its nationality. As it stood, however, the provision was much too broad because it covered practically all persons having their habitual residence in the territory of the predecessor State. Under those circumstances, it might be better to restrict the scope of application of the article to the "persons concerned".

38. Thirdly, with regard to the reference to "secondary nationality" in paragraph 1 (*b*), a final solution must be found that would also be applied in all the relevant articles.

39. Fourthly, he noted that, in paragraph 1, subparagraphs (*a*) and (*b*) were linked by the conjunction "and", which was also used in article 23, whereas, in article 20, the conjunction "or" was used. The Drafting Committee might consider using the conjunction "or" in article 24. It should be noted that the 1978 Vienna Convention used the conjunction "or" most often. In any event, the conjunction "and" presupposed the simultaneous carrying out of obligations, and that was not the case in the current instance.

40. The CHAIRMAN reminded the Commission that the Special Rapporteur considered that, in principle, paragraph 1 of article 24 should be deleted.

41. Mr. ROSENSTOCK said that the word "persons", as used in article 24, referred to persons who already had a nationality, but one they could not lose. The term "persons concerned" meant persons who had a nationality, but one they could lose. That was the definition and it should not be altered.

42. Mr. THIAM, reverting to the question of decolonization, noted that, in paragraph (4) of the commentary to article 24, the Special Rapporteur stated that there were certain similarities between decolonization and the category of succession of States called separation. He did not understand why he had not dealt with that point in the article itself. Unlike the Special Rapporteur, he was convinced that decolonization was a phenomenon of State succession that necessarily involved a separation of territory or of part of territory.

43. Mr. PAMBOU-TCHIVOUNDA said that, in his view, the dissolution of a State was a variant of the separation of States inasmuch as it was parts of the territory of a State A that separated from each other and that dissolution could, but did not necessarily, lead to the disappearance of State A.

44. The title of section 4 reflected reality to the extent that words had a meaning. What was the purport of such a distinction as it appeared from article 22 (Scope of application)? It was simply a case of decolonization.

45. The CHAIRMAN said that, in his view, Mr. Pambou-Tchivounda's conception of decolonization was arguable in law. Under the Charter of the United Nations, the status of the territory of a colony or a dependent territory was distinct from that of the State that administered it. And it was because decolonization was a special phenomenon that he regretted the gap in the draft articles on that point. Article 22 did not cover cases of decolonization because a colony was not part of the territory of the State that administered it. It was therefore impossible to say that it separated from it.

46. Mr. MIKULKA (Special Rapporteur) said he was convinced that the Commission would be ill-advised to revert to the codification work completed in the 1960s. At that time, the newly independent countries had unequivocally expressed the wish not to be deemed to have formed part of the territory of the colonizing country.

47. As the Chairman had rightly pointed out, separation was, in law, something entirely different from decolonization. It involved separation from a territory that had formed part of a State, whereas the dependent territories had never formed part of the territory of the colonizing State.

48. He had omitted cases of decolonization quite simply to give effect to an earlier decision of the Commission. That had not stopped him, however, from drawing, insofar as possible, on the practice of newly independent States, as was apparent from the commentary to section 4. That practice could assist the Commission in finding solutions to the problems of nationality posed by the separation of a part of territory or even by other cases of State succession.

49. He would formally request that the question whether or not provisions on decolonization should be included in the draft articles should be put to the vote. In the event that the majority of members were in favour, he was ready to submit cases of decolonization in his next report, on the understanding that the Commission, therefore, would not be able to complete the consideration of the draft articles on first reading at the current session.

50. The CHAIRMAN, noting that the Commission had already taken a position on the matter, said that the problems involved were important and he would prefer to defer any vote until the next meeting.

51. Mr. THIAM said that he was not asking for the "so-called" decision taken by the Commission to be questioned. He simply wanted it to be duly noted that he disagreed with the Special Rapporteur on paragraph (4) of the commentary to article 24.

52. Mr. KATEKA, speaking on a point of order, said he would remind the Commission that a decision had already been taken on the decolonization question, as attested to by the statement which had been made by the Chairman (2488th meeting) and which contained a good summary of the feeling in the Commission. The Special Rapporteur should bear that summary in mind and the debate should not be reopened.

The meeting rose at 11.35 a.m.