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Summary record of the 2579th meeting

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

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2579th MEETING

Tuesday, 1 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Nationality in relation to the succession of States¹ (continued)* (A/CN.4/493 and Corr.1,² A/CN.4/496, sect. E, A/CN.4/497,³ A/CN.4/L.572, A/CN.4/L.573 and Corr.1)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.573 and Corr.1) containing the titles and texts of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Drafting Committee on second reading.

2. Mr. CANDIOTTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had held five meetings, from 17 to 20 May 1999. He wished to thank the Chairman of the Commission, the members of the Drafting Committee, the former Special Rapporteur on the topic, Mr. Václav Mikulka, and the Secretariat for their valuable assistance.

3. Under its programme of work for the current quinquennium, the Commission had decided to complete the second reading of the topic at the current session. The Drafting Committee had facilitated the achievement of that goal by rapidly completing the second reading of the draft articles, allowing sufficient time for the revision and updating of the commentaries. In considering the articles, the Drafting Committee had had before it the report of the Chairman of the Working Group on nationality in relation to the succession of States (A/CN.4/L.572) and the Memorandum by the Secretariat (A/CN.4/497) giving an overview of the comments and observations of Governments, made either orally or in writing. Government com-

ments had by and large been favourable to the draft and that had alleviated the task of the Drafting Committee.

4. The titles and texts of the draft articles on nationality of natural persons in relation to the succession of States,** as adopted by the Drafting Committee on second reading, read:

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States concern the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

PART I. GENERAL PROVISIONS

Article 1. Right to a nationality

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Article 2. Use of terms

For the purposes of the present draft articles:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "Third State" means any State other than the predecessor State or the successor State;

* Resumed from the 2572nd meeting.

¹ For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ *Ibid.*

** The number within square brackets indicates the number of the corresponding article adopted on first reading.

(f) "Person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

Article 3 [27]. Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Article 4 [3]. Prevention of statelessness

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Article 5 [4]. Presumption of nationality

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Article 6 [5]. Legislation on nationality and other connected issues

Each State concerned should, without undue delay, enact legislation on nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Article 7 [6]. Effective date

The attribution of nationality in relation to the succession of States, including the acquisition of nationality following the exercise of an option, shall take effect on the date of such succession, if persons concerned would otherwise be stateless during the period between the date of the succession of States and such attribution or acquisition of nationality.

Article 8 [7]. Persons concerned having their habitual residence in another State

1. A successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Article 9 [8]. Renunciation of the nationality of another State as a condition for attribution of nationality

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Article 10 [9]. Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Article 11 [10]. Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the right of option.

Article 12 [11]. Unity of a family

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Article 13 [12]. Child born after the succession of States

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Article 14 [13]. Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Article 15 [14]. Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Article 16 [15]. Prohibition of arbitrary decisions concerning nationality issues

Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Article 17 [16]. Procedures relating to nationality issues

Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option, in relation to the succession of States, shall be processed without undue delay. Relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

Article 18 [17]. Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Article 19 [18]. Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Article [19]

[deleted]

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

SECTION 2

UNIFICATION OF STATES

Article 21. Attribution of the nationality of the successor State

Subject to the provisions of article 8 [7], when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

SECTION 3

DISSOLUTION OF A STATE

Article 22. Attribution of the nationality of the successor States

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

(a) Persons concerned having their habitual residence in its territory; and

(b) Subject to the provisions of article 8 [7]:

(i) Persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) Persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 23. Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24. Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

(a) Persons concerned having their habitual residence in its territory; and

(b) Subject to the provisions of article 8 [7]:

(i) Persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) Persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 25. Withdrawal of the nationality of the predecessor State

1. The predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Unless otherwise indicated by the exercise of a right of option, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:

(a) Have their habitual residence in its territory;

(b) Are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) Have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26. Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25, paragraph 2, who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

5. No changes had been made in the structure of the text, which consisted of a preamble and 26 draft articles. The articles were divided into two parts, as they had been on first reading, and Part II consisted of four sections. The draft's structure on first reading had been designed to present the articles in the form of a declaration. Since the form was a matter for the Commission to decide, the Drafting Committee was making no recommendation in that regard. One article had been moved from Part II to Part I, altering the numbering of the articles. The numbers in square brackets corresponded to the article numbers as adopted on first reading.

6. As to Part I (General provisions), the Drafting Committee had made no changes to articles 1 (Right to a nationality) and 2 (Use of terms).

7. With regard to article 3 [27] (Cases of succession of States covered by the present draft articles), the Commission, when completing the first reading, had indicated that its placement was provisional and had decided to revert to the matter on second reading.⁴ The Working Group had reconsidered the matter and had recommended that it be placed after article 2, as was the case with an analogous article in the 1983 Vienna Convention. The Commission had agreed with that suggestion, and the Drafting Committee had accordingly positioned article 27 as new article 3.

8. Governments, in their comments, had favoured deleting the opening phrase, "Without prejudice to the right to a nationality of persons concerned". They considered that it made the article ambiguous and that the matter illustrated by that phrase, despite its merits under general international law, did not call for an explicit reference in that article. The Working Group and the Commission had agreed, and the Drafting Committee had therefore deleted the phrase. The Drafting Committee had made a further modification, inserting the word "only" after "apply" in order to bring the article into line with article 3 of the 1983 Vienna Convention, something which would be made clear in the commentary to the article.

⁴ See paragraph (4) of the commentary to article 27, *Yearbook ... 1997*, vol. II (Part Two), p. 43.

9. No changes had been made to articles 4 [3] (Prevention of statelessness) and 5 [4] (Presumption of nationality). A minor editing change—replacing the word "concerning" in the title and in the text of the article by the word "on"—obviously had no effect on the meaning of article 6 [5] (Legislation concerning nationality and other connected issues).

10. Article 7 [6] (Effective date), consisted of a new text proposed by the Working Group to take account of the suggestion by Governments that the article's retroactive effect should be limited to the extent strictly necessary. Under the new formulation, retroactive attribution of nationality was limited to situations in which persons would be temporarily stateless during the period between the date of State succession and the attribution of nationality of the successor State or the acquisition of such nationality upon exercise of the right of option.

11. Governments had requested further clarification of the relationship between article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), and article 10 (Respect for the will of the persons concerned), as adopted on first reading, to which it had referred. In response, the Working Group had suggested replacing the opening phrase "Subject to the provisions of article 10," by "Without prejudice to" in article 8 [7] (Persons concerned having their habitual residence in another State). The Drafting Committee, however, had been of the view that article 8 [7] stated a principle and that it applied independently of article 11 [10] (Respect for the will of the persons concerned). Under article 8 [7], a successor State had no obligation to attribute its nationality to persons concerned if those persons had their habitual residence in another State and also had the nationality of that or any other State. Similarly, a successor State would not attribute its nationality to persons concerned who had their habitual residence in another State against the will of such persons, unless such persons would otherwise become stateless. The only part of article 11 [10] that could have any relationship with article 8 [7] was paragraph 3, under which, when a State concerned granted the right of option to persons concerned, it could not then refuse to grant its nationality if such persons opted for it. The operation of article 8 [7], stating a principle, was accordingly independent of that of article 11 [10], paragraph 3, which dealt with a specific situation, and there was no need to make any direct link between the two, something that only created confusion. The Drafting Committee had therefore deleted the opening phrase in article 8 [7], a change that had no effect on the meaning of the article. The title of article 8 [7] had been simplified.

12. Governments had commented favourably on articles 9 [8] (Renunciation of the nationality of another State as a condition for attribution of nationality), 10 [9] (Loss of nationality upon the voluntary acquisition of the nationality of another State) and 11 [10], and no changes had been suggested by the Working Group. The Drafting Committee had made no changes to article 9 [8] and, with respect to article 10 [9], had only added the word "concerned" after the word "persons" in paragraphs 1 and 2, a reference that had inadvertently been omitted on first reading. As for article 11 [10], the Drafting Committee had simplified paragraph 5 by replacing the words "rights set forth in paragraphs 1 and 2" by "right of option". No

changes had been made to articles 12 [11] (Unity of a family), 13 [12] (Child born after the succession of States), 14 [13] (Status of habitual residents) and 15 [14] (Non-discrimination).

13. In regard to article 16 [15] (Prohibition of arbitrary decisions concerning nationality issues), the Drafting Committee had deleted the opening phrase, “In the application of the provisions of any law or treaty”, which it regarded as being unnecessary, since it placed too much emphasis on the application aspect of the article when the article was enunciating a principle. The deletion did not affect the meaning. It simply shifted the emphasis and allowed proper place for the statement of principle. The fact that the principle would in practice mostly arise in connection with the application of provisions of laws or treaties would be explained in the commentary.

14. The only changes to article 17 [16] (Procedures relating to nationality issues) were stylistic. The Drafting Committee had divided one single sentence into two and had placed the phrase “in relation to the succession of States” between commas. In the decisions denying the granting of nationality should be reasoned, indicating the justification for such denial, but rather than burden the text of the article, the commentary should indicate that requirement. Articles 18 [17] (Exchange of information, consultation and negotiation) and 19 [18] (Other States) remained unchanged.

15. One of the issues of concern for Governments had been the relationship between Part I (General Provisions) and Part II (Provisions relating to specific categories of succession of States). The Commission itself had had lengthy discussions on the subject. On first reading, it had viewed the articles of Part I and Part II as a continuum, even if they presented different legal obligations and options for States. Part I dealt with general principles with respect to problems arising from State succession, while Part II indicated the manner in which provisions of Part I could be applied to specific categories of State succession. That understanding had been reflected in an article that had been numbered 19 (Application of Part II). As apparent from Government comments, however, that article not only did not clarify the relationship between the two parts but simply made it more confusing. Governments had suggested the deletion of article 19, the Working Group had agreed, and the Drafting Committee had followed the Working Group’s recommendation, taking the view that deletion of the article eliminated the status of Part I as governing the provisions of Part II and elevated the provisions of Part II to the same status as those in Part I.

16. Some members of the Drafting Committee had accepted the deletion of article 19 reluctantly. In their opinion, it changed the presumption on the basis of which the two parts had been drafted. They had been concerned about possible inconsistencies between the provisions in the two parts and lack of guidance on how such possible inconsistencies could be resolved. The majority of the Drafting Committee, however, had thought that the provisions of Parts I and II were in harmony. There were no inconsistencies between the two parts and there was no reason to create any special status for the articles in one part in relation to the other. To make that point clear, there

would be a general commentary dealing with the structure of the draft and the relationship between the two parts.

17. Turning to Part II, he said that in the light of comments made by Governments, the Working Group had suggested the inclusion of a new sentence in article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State), one that was identical to the last sentence of article 25 (Withdrawal of the nationality of the predecessor State), paragraph 1. The addition was intended to avoid the possible occurrence of statelessness. It was stipulated that the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory should be fulfilled only after such persons had acquired the nationality of the successor State. Even though that obligation stemmed from article 4 [3], it had been considered preferable to include a reference to it in article 20, since one already existed in article 25, paragraph 1. The addition made for consistency between articles 20 and 25.

18. The Drafting Committee had merely replaced the opening words of article 21 (Attribution of the nationality of the successor State), as adopted on first reading, “Without prejudice to article 7”, by the words “Subject to the provisions of article 8 [7]”, which more appropriately stated the fact that the provisions of article 8 [7] limited the operation of article 21.

19. Taking articles 22 (Attribution of the nationality of the successor States) and 24 (Attribution of the nationality of the successor State) together, since their wording and structure were the same and the Drafting Committee had introduced the same changes in both of them, he said that Governments had found them unclear, and the Drafting Committee had thought they could be improved by reducing cross-references and overlap. The *chapeau* of the two articles had contained the phrase “subject to the provisions of” article 23 (Granting of the right of option by the successor States) and article 26 (Granting of the right of option by the predecessor and the successor States), respectively, both of which referred to the right of option. The Drafting Committee had replaced the phrase by “unless otherwise indicated by the exercise of a right of option”.

20. As drafted on first reading, articles 22 and 24 had created the possibility of multiple nationality. To avoid that possibility, the Drafting Committee had added a new phrase to subparagraphs (b) (ii) of both articles to specify the persons covered therein: “persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i)”. The Drafting Committee had also replaced the phrase “without prejudice to” by “subject to” in subparagraph (b) of both articles.

21. While the Drafting Committee had made no changes to article 23, it considered that the commentary to the article should clarify the relationship between article 23, paragraph 2, and article 11 [10], paragraph 2, since both addressed the question of granting the right of option to certain categories of persons concerned.

22. In article 25, the reference to article 26 at the beginning of paragraph 1 had been deleted, because it was unnecessary. In paragraph 2 of the article, the reference to

article 26 had been replaced by the words “Unless otherwise indicated by the exercise of a right of option”. The Committee had also inserted the word “legal” before “connection”, a correction that had been made only to bring the paragraph into line with subparagraph (b) (i) of articles 22 and 24.

23. The Drafting Committee had simply supplemented the reference in article 26 to articles 24 and 25 by the more specific reference to articles 24 and 25, paragraph 2.

24. In the first paragraph of the preamble, the Drafting Committee had simply replaced the words “are of concern to the international community” by “concern the international community”. The reason had been to avoid using the words “of concern”, which had been given a special status in the context of crimes under the Rome Statute of the International Criminal Court.⁵ The Drafting Committee believed that the commentary following the preamble should stress the fact that in cases of State succession, the human rights and fundamental freedom of persons whose nationality might be affected could be at high risk. That remark was particularly relevant with respect to the sixth paragraph of the preamble.

25. Mr. LUKASHUK said he wished to extend sincere thanks to the former Special Rapporteur on the topic, Mr. Václav Mikulka, and all those who had facilitated the work on the draft articles. The text was of excellent quality and had been prepared in a very short period of time. Judging from the experience of his own country, which was dealing with hundreds of cases arising from State succession, the text was likely to be put to use very soon after its adoption.

26. The mechanical transposition to the draft articles of the definition of succession of States in the 1978 and 1983 Vienna Conventions had not been the best solution, but that was simply a technical point and would probably have no substantive effect. On the other hand, article 8 [7], paragraph 2, would enable a State to attribute its nationality to persons concerned against their will, something that was difficult to reconcile with the status of the individual and human rights. In the past, it had been impossible for an individual to decline nationality or citizenship—only the State had had the power to withdraw nationality. The right of individuals to change their nationality had gradually been recognized, and the next stage would be to accept that the right to nationality included the right to statelessness as well. Nationality had always been understood as the person’s belonging to a State, a purely feudal concept that had somewhat evolved with time, now having come to mean membership. The parties were accordingly equal in their rights and duties. The right to diplomatic protection must be construed as a right of the individual, and not as a right merely accorded at the discretion of the State.

27. On the whole, however, the draft was very well done and met a tangible need. In the interests of consensus, he would willingly support it.

28. Mr. GOCO praised the work done by the Drafting Committee and pointed out that it had made no recommendations concerning the form of the draft articles. According to the Memorandum by the Secretariat, most

States had favoured a declaration by the General Assembly, which they viewed as sufficient for achieving the purpose of providing States involved in a succession with a set of legal principles and recommendations to be followed by their legislators when drafting nationality laws. However, other States had expressed a preference for a convention on the grounds that it would be problematic to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. As the Commission would have to take a final decision on form, he asked whether the Drafting Committee could offer it any guidance on the matter.

29. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the Drafting Committee had not considered the issue of form precisely because it was a matter for the Commission to decide.

30. Mr. ECONOMIDES commended the Drafting Committee on its efforts to improve the text of the draft articles. He conceded, however, that it was difficult to make substantial changes to a very complex text at such a late stage. The improvements to be welcomed included, in particular, article 27, as adopted on first reading, which had become article 3. It followed, word for word, the corresponding articles in the 1978 and 1983 Vienna Conventions, strongly reaffirming the established rule that no succession of States occurring unlawfully as a result of force would be covered by international law or entail legal consequences. Another welcome improvement was the insertion of a new last sentence in article 20, which remedied an inconsistency with article 25, paragraph 1. The principle stated in the new sentence, which formed part of the new law of State succession, should also be included in Part I of the draft as a general principle establishing the obligation of a predecessor State not to withdraw its nationality from persons who had not acquired or had been unable to acquire the nationality of the successor State.

31. Other inconsistencies had not, however, been rectified. The right of option under new article 20 should be recognized for all persons concerned, without discrimination. But article 23 recognized its existence only for those who, in the event of the dissolution of a State, were qualified to acquire the nationality of two or more successor States, and article 26 for those who, in the event of separation of part or parts of the territory, were qualified to have the nationality of both the predecessor and successor States or of two or more successor States. He saw no justification for such unequal treatment in respect of the right of option, whose *raison d’être* was the same for all. He was also puzzled as to how the provisions of articles 23 and 26 could be applied in practice. The right of option, being left to the discretion of each State concerned and its internal legislation, was far from being guaranteed by the draft articles. In his view, it was a retrograde step vis-à-vis past international practice and was all the more regrettable in that it concerned a fundamental human right. The Commission had, unfortunately, been unwilling to deal with the right of option in the context of international law, ignoring an institution that had existed for several centuries. Kunz, in a lecture on the option of nationality,⁶ had

⁵ See 2575th meeting, para. 30.

⁶ J.L. Kunz, “L’option de nationalité”, *Recueil des cours de l’Académie de droit international de La Haye, 1930-1* (Paris, Sirey), vol. 31 (1930), pp. 111-175.

traced the right of option as far back as 1640 and concluded that it was an embryonic norm of the law of nations. Admittedly it had not yet become customary law, as ruled, *inter alia*, by the Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia in the *Celebici* case. However, there was no doubt in his mind that the right of option, as a treaty rule and a rule of *lex ferenda*, should have a central place in the draft articles. It should be stated, as in the Declaration on the consequences of State succession for the nationality of natural persons (the Venice Declaration) of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe,⁷ that in all cases of succession of States except that of unification, persons concerned who acquired the nationality of the successor State *ex officio* and who had effective links with the predecessor State or another successor State should enjoy a right of option within a reasonable period of time. If the Commission did not wish to accord the right of option the status of an international obligation, it should at least explain why it was ignoring an aspect of international practice that had worked satisfactorily for several centuries.

32. The draft dealt somewhat perfunctorily, from the point of view of international law, with the question of the rights and obligations of States concerned in the case of State succession. The matter had been approached largely from the standpoint of internal law. His impression was borne out by the fact that the major principles of international law relating to the subject had not been enunciated, for example the customary principle according to which the successor State had the right in all cases of succession to attribute its nationality *ex officio* to all nationals of the predecessor State who were habitual residents of the territory affected by the succession, a right that became a legal obligation if those persons would otherwise become stateless. That obligation also applied, in the case of unification or dissolution, to nationals of a predecessor State who were not resident in the transferred territory but who would become stateless if they failed to acquire the nationality of the successor State. Some of the draft articles were quite obviously based on the internal law of States, for example articles 9, 10 and 13, and, in particular, articles 22, subparagraph (b), and 24, subparagraph (b), which listed categories of persons who could acquire the nationality of the successor State not by virtue of international law but by virtue of internal law. Obviously, each State concerned could freely, under internal law, attribute its nationality to persons concerned, other than those who were resident in the transferred territory or resident abroad and were in danger of becoming stateless, the only cases regulated essentially, not to say exclusively, by international law. Indeed, the successor State could attribute its nationality to such persons provided they had effective links with the State and acquired its nationality on the basis of individual procedures that were entirely subject to their will.

33. The draft articles thus resembled an instrument of internal law rather than one of international law designed to codify the question of the nationality of natural persons

in cases of succession of States. It followed that, in his view, they could only be given the form of a declaration.

34. Mr. GOCO suggested that the Commission should discuss the matter of the form of the proposed draft articles.

35. Mr. Sreenivasa RAO said that the Commission customarily discussed the articles of a draft instrument before deciding on the question of form. He proposed that the decision on the form of the draft articles should be deferred.

It was so agreed.

36. The CHAIRMAN invited the members of the Commission to consider the text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Drafting Committee on second reading, article by article.

PREAMBLE

37. Mr. PAMBOU-TCHIVOUNDA suggested that the words *question de* should be inserted in the French version of the second paragraph of the preamble before *la nationalité*.

The preamble was adopted.

PART I (General provisions)

ARTICLE 1 (Right to a nationality)

38. Mr. HE commended the Drafting Committee as well as the Special Rapporteur on their excellent work. The draft articles constituted a valuable contribution to international law and a helpful supplement to the 1978 and 1983 Vienna Conventions.

39. The views of the members of the Drafting Committee had been duly reflected in the new version of the draft. However, he was still not convinced of the need to state in article 1 that every individual had the right to the nationality of “at least” one of the States concerned. It had been understood that the Commission was to adopt a neutral stance on the issue of multiple nationality, but the words “at least” could be interpreted as encouraging a policy of dual or multiple nationality. If the article was adopted as it stood, the commentary should make it clear that the draft was neutral on the issue.

40. The CHAIRMAN said that, if the words “at least” were deleted, the Commission would undermine other rights recognized by the draft articles, such as the right of option. The choice between two possible nationalities must be available. Moreover, if a person had a right to more than one nationality on the basis of existing legislation, that right should not be diminished or abolished. Those views had been expressed during the discussion in the Working Group and the Drafting Committee. The draft articles should be and were in fact neutral on the question of multiple nationality. It was for States and persons concerned to act as they saw fit in given situations. The wording of article 1 had been explained in the com-

⁷ Council of Europe, 10 February 1997, document CDL-INF(97)1, pp. 3-6.

mentary but if Mr. He wished to include a more detailed explanation, he could make that point when the commentaries were discussed at a later stage in the proceedings.

41. Mr. KABATSI said he wondered what the loss would be if the words “at least” were deleted. Would it not be sufficient if every individual had a right to the nationality of one of the States concerned?

42. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the Drafting Committee had discussed the possibility of deleting the words “at least” and had decided to retain them as the best way of ensuring that the Commission’s neutral stance concerning the question of multiple nationality was maintained, without prejudging the question of the possible right of a natural person to more than one nationality. It must be clearly spelled out in the commentaries that the draft articles were neutral with regard to the question of multiple nationality, a question which was a matter entirely for States’ discretion.

43. The CHAIRMAN said it was no secret that a proposal had been made to include an additional sentence in the commentary to article 1, to the effect that articles 7, 8 and 9 provided sufficient guarantees to States that favoured a policy of single nationality to enable them to apply such a policy. Nonetheless, deletion of the words “at least” would create the false impression that the Commission was totally opposed to multiple nationality. The Working Group and the Drafting Committee had felt that retention of the words “at least” was a compromise formula which avoided prejudging the question.

44. Mr. Sreenivasa RAO endorsed the view of the Chairman of the Drafting Committee and of the Chairman of the Commission that the words “at least”, which had been introduced on first reading as a means of maintaining the Commission’s neutrality on the issue of single versus multiple nationality, should be retained.

45. Mr. ECONOMIDES said he shared Mr. Kabatsi’s opinion that the words “at least” served no useful purpose. Indeed, they actually detracted from the Commission’s neutral stance. In the first place, all international provisions previously adopted on the question spoke of “the right to a nationality”. Secondly, the Commission’s aim was to avoid situations of statelessness by guaranteeing every person a nationality; multiple nationality was, however, purely a matter for States’ internal law. Thirdly, many States rejected the phenomenon of dual nationality and there was no reason to antagonize such States. Last but not least, the words gave the impression that the Commission was in favour of dual or multiple nationality, an issue which in any case fell outside the scope of the topic under consideration. In short, while the right to a nationality was a hallowed right, the right to at least one nationality was a highly debatable proposition, especially in international law.

46. Mr. ROSENSTOCK endorsed the view that to delete the words “at least” would prejudice the issue of dual nationality, whereas to retain them, together with an explanation in the commentary, would not prejudice the issue one way or the other.

47. Mr. LUKASHUK said it was necessary to dispel a misconception. The Commission was discussing, not the

right to dual nationality, but a right to choose between two nationalities—a right of option. The words “at least”, far from prejudging the issue, provided persons with an opportunity to acquire one or another nationality, and should therefore be retained.

48. The CHAIRMAN noted that many States, too, had favoured retention of the words “at least”, and had supported the neutral approach adopted by the Commission on the question of multiple nationality. It was not true to say that the formulation ran counter to existing practice: the European Convention on Nationality clearly recognized the possibility of dual nationality. Deletion of the words “at least” might thus create more problems than it solved. The point at issue was, not application of the formula by States—whose right to apply a policy of single nationality was safeguarded elsewhere—but protection of natural persons’ right of option.

49. Mr. Sreenivasa RAO said that the words “at least” had been added on first reading in order to emphasize from the outset that, in situations of State succession, statelessness was the outcome to be avoided.

50. The CHAIRMAN said that, if need be, further clarification could be added when the Commission came to adopt the commentaries to the draft articles.

51. Mr. ECONOMIDES reiterated, for the record, his view that an article 1 worded “... has the right to the nationality of one of the States concerned ...” would fully cover all eventualities. He could not accept the contention that deletion of the words “at least” would prejudice the issue of dual nationality one way or the other.

52. The CHAIRMAN said that, with all due respect to Mr. Economides, it seemed to him that by deleting the words “at least” the Commission would, *a contrario*, be rejecting the possibility of dual nationality. The words “nationality of one of the States concerned” implied “one and only one”. The point at issue was the right to a nationality, which must be distinguished from nationality itself, the final effect of realization of that right.

53. As the overwhelming majority of members appeared to favour retaining the words “at least”, he would take it that the Commission wished to adopt article 1 in the form proposed by the Drafting Committee, bearing in mind the suggestions that the commentary to the article might be redrafted so as to place even greater emphasis on the Commission’s neutral stance on the question of multiple nationality.

Article 1 was adopted.

ARTICLE 2 (Use of terms)

54. The CHAIRMAN said that the Drafting Committee had proposed no changes to article 2 as adopted on first reading.

55. Mr. PAMBOU-TCHIVOUNDA proposed amending subparagraph (e) of article 2 by replacing the words “other than the predecessor State or the successor State” by the words “other than the State(s) concerned”, a term already defined in subparagraph (d).

56. Mr. ROSENSTOCK said he saw some merit in having each definition in article 2 stand as a self-contained entity, without cross-reference to other subparagraphs of the article.

57. Mr. CANDIOTI (Chairman of the Drafting Committee) supported the view expressed by Mr. Rosenstock. An article dealing with use of terms should strive for definitions of the utmost clarity. So as to leave absolutely no room for doubt, it would be better to adopt the subparagraph unchanged.

Article 2 was adopted.

ARTICLE 3 [27] (Cases of succession of States covered by the present draft articles)

58. The CHAIRMAN reminded members that, after extensive discussions in the Working Group and Drafting Committee taking account of the comments of States, it had been decided to place the former article 27 near the beginning of the text, as article 3.

Article 3 was adopted.

ARTICLES 4 [3] (Prevention of statelessness) and 5 [4] (Presumption of nationality)

59. The CHAIRMAN said that the Drafting Committee had proposed no changes to articles 4 and 5.

Articles 4 and 5 were adopted.

ARTICLE 6 [5] (Legislation on nationality and other connected issues)

60. The CHAIRMAN said that as a minor stylistic change, in the title and the text, the expression “legislation concerning nationality” had been altered to “legislation on nationality”.

61. Mr. PAMBOU-TCHIVOUNDA proposed amending the words *de l'effet de sa législation sur leur nationalité, des options que cette législation peut leur offrir*, in the second sentence of the French text, to *de l'effet de cette législation sur leur nationalité, des options qu'elle peut leur offrir*.

62. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the proposed amendment better reflected the original English text, of which the French text was a translation. He could thus support Mr. Pambou-Tchivounda's proposal.

63. The CHAIRMAN requested members to submit any proposals for linguistic amendments to versions other than the English text directly to the secretariat, for consolidation.

64. Mr. GOCO asked whether the Drafting Committee had heeded the suggestions made by States, first, to change the word “should” to “shall”; and secondly, to replace the word “consequences” by some stronger formulation.

65. The CHAIRMAN said that the Working Group and the Drafting Committee had opted for the more general and neutral “should”, as there was no objective requirement to adopt legislation and some States might already have done so.

66. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 6 as it stood.

Article 6 was adopted.

ARTICLE 7 [6] (Effective date)

67. Mr. PAMBOU-TCHIVOUNDA proposed two changes in the French version: *y compris* should be replaced by *tout comme* and, accordingly, *prend* by *prennent*. The current wording gave the impression that the acquisition of nationality following the exercise of an option was a subcategory of the attribution of nationality in relation to the succession of States, when in fact they were two different matters.

68. The CHAIRMAN said the matter had been thoroughly discussed in the Working Group, which had decided to merge the two situations.

69. Mr. SIMMA supported Mr. Pambou-Tchivounda's view. Attribution and acquisition were different matters and one could not be a subcategory of the other. In the English version, “including” might be replaced by “as well as”.

70. The CHAIRMAN, citing article 11 [10], paragraph 3, said that attribution and acquisition were in fact two sides of the same situation. The rendering of nationality was an attribution for the State and an acquisition for the person concerned. In the light of article 11 [10], paragraph 3, the acquisition of nationality following the exercise of a right of option was included in the general concept of attribution of nationality in relation to the succession of States.

71. Mr. SIMMA suggested that replacing “including the acquisition” by “including the attribution” might be a possible solution.

72. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the remarks of both Mr. Pambou-Tchivounda and Mr. Simma had merit. He himself did not have strong feelings either way.

73. Mr. MELESCANU said that both Mr. Pambou-Tchivounda's and Mr. Simma's proposals were preferable to the current formulation. Of the two he preferred Mr. Pambou-Tchivounda's proposal, as article 7 [6] was an attempt to link two articles which had originally concerned two different ways of obtaining nationality. However, he could also accept Mr. Simma's proposal.

74. Mr. SIMMA said that, in the light of Mr. Melescanu's comments, the best solution would be to replace “including” by “as well as”.

75. The CHAIRMAN said there appeared to be a consensus in favour of Mr. Pambou-Tchivounda's proposal. In the French version, *y compris* would be replaced by

tout comme and *prend* by *prennent*, and in the English version “including” would be replaced by “as well as”. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 7 with that amendment.

Article 7, as amended, was adopted.

ARTICLE 8 [7] (Persons concerned having their habitual residence in another State)

76. Mr. PAMBOU-TCHIVOUNDA proposed that “another State” in the title should be replaced by “third State”.

77. Mr. ECONOMIDES said that the expression “another State” was preferable because it could cover a State concerned, such as the predecessor State. Article 8 [7] also raised a sensitive question of international law: could a successor State automatically attribute its nationality to persons outside both its territorial jurisdiction because they lived abroad and its personal jurisdiction because they already had a nationality? He did not think so, and the article should say as much. Otherwise the Commission would be committing an error of international law.

78. Mr. MELESCANU said that paragraph 2 met Mr. Economides’ concern. The draft article had achieved a balance between respect for the fundamental principle of public international law to which Mr. Economides was referring, and the concern to reduce the number of stateless persons throughout the world, especially in connection with State succession.

79. Mr. ELARABY, supported by Mr. PAMBOU-TCHIVOUNDA, said that there was a contradiction between “unless they would otherwise become stateless” and “against the will of the persons concerned” which could not be resolved in the commentary alone. Perhaps a phrase such as “Notwithstanding the need to ensure that no person remains stateless”, or something similar, might be added at the beginning of paragraph 2; that would leave intact the most important element in the paragraph, namely the fact that no State could attribute its nationality against a person’s will.

80. Mr. SIMMA said that Mr. Elaraby’s proposal did not make the Commission’s preference clear.

81. The CHAIRMAN said that the formula “unless they would otherwise become stateless” in article 8 [7] was a direct reflection of the principle of prevention of statelessness in article 4. In the opinion of the Working Group and Drafting Committee, it created a proper balance between the principles of individual will and prevention of statelessness. Statelessness should be an exception; it was not the Commission’s role to create stateless persons.

82. Mr. PAMBOU-TCHIVOUNDA said that the difficulty arose from the failure to determine the basis for the successor State’s power to attribute nationality. It seemed to him that the Commission was creating, *a contrario*, an obligation for the successor State to confer nationality on persons who had not chosen its nationality and whom it did not recognize.

83. Mr. ELARABY said that Mr. Simma’s point was well taken. Since the question of statelessness was covered in article 4, perhaps the phrase “unless they would otherwise become stateless” could simply be deleted.

84. Mr. ROSENSTOCK said the difference between article 4 and article 8 [7] was that article 4 did not allow States to impose a nationality under certain circumstances. Article 8 [7] provided clear guidance in the event of a clash between an individual’s will and the avoidance of statelessness, in which case the avoidance of statelessness was considered to take precedence. That clear value choice was not provided in article 4.

85. The CHAIRMAN suggested that, if the “unless ...” formula was not acceptable, a phrase such as “Subject to the provisions in article 4” might be placed at the beginning of the article.

The meeting rose at 1.10 p.m.

2580th MEETING

Wednesday, 2 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Nationality in relation to the succession of States¹ (concluded) (A/CN.4/493 and Corr.1,² A/CN.4/496, sect. E, A/CN.4/497,³ A/CN.4/L.572, A/CN.4/L.573 and Corr.1)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
ON SECOND READING (*concluded*)

1. The CHAIRMAN invited the members of the Commission to continue consideration of the titles and texts of

¹ For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ *Ibid.*