

**Draft Articles on Nationality of Natural Persons
in relation to the Succession of States
with commentaries
1999**

Text adopted by the International Law Commission at its fifty-first session, in 1999, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 48). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1999*, vol. II, Part Two.



(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.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES
THERETO

48. The text of the draft articles, with commentaries thereto, adopted by the Commission on second reading at its fifty-first session are reproduced below:

**DRAFT ARTICLES ON NATIONALITY OF
NATURAL PERSONS IN RELATION TO THE
SUCCESSION OF STATES**

Commentary

(1) The draft articles on nationality of natural persons in relation to the succession of States have been prepared on the basis of a request addressed to the Commission by the General Assembly in paragraph 8 of its resolution 51/160. As the title indicates, the scope of application of the present draft articles is limited, *ratione personae*, to the nationality of individuals. It does not extend to the nationality of legal persons. *Ratione materiae* the draft articles encompass the loss and acquisition of nationality, as well as the right of option, as far as they relate to situations of succession of States.

(2) The draft articles are divided into two parts. While the provisions of Part I are general, in the sense that they apply to all categories of succession of States, Part II contains specific provisions on attribution and withdrawal of nationality and on the right of option applicable in different categories of succession of States.

(3) The provisions in Part II are grouped into four sections, each dealing with a specific type of succession of States. This typology follows, in principle, that of the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts (hereinafter "the 1978 Vienna Convention"). Notwithstanding the fact that the Commission has duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in Part I, it decided to limit the specific categories of succession dealt with in Part II to the following: transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory. It did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future.

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 1978,

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:

Commentary

(1) In the past, the Commission generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. In this instance, however, the Commission decides to follow the precedent of the Draft Convention on the Elimination of Future Statelessness and draft Convention on the Reduction of Future Statelessness, which were both submitted with a preamble.¹⁵

(2) The *first paragraph* of the preamble indicates the *raison d'être* of the present draft articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. Such concerns have re-emerged in connection with recent

¹⁵ *Yearbook . . . 1954*, vol. II, p. 143, document A/2693. The draft Declaration on Rights and Duties of States also included a preamble (*Yearbook . . . 1949*, p. 287).

cases of succession of States. A number of international bodies have been dealing with this question.¹⁶

(3) The *second paragraph* of the preamble expresses the point that, although nationality is essentially governed by national legislation, the competence of States in this field may be exercised only within the limits set by international law. These limits have been established by various authorities. In its advisory opinion in the case concerning *Nationality Decrees Issued in Tunis and Morocco*,¹⁷ PCIJ emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending upon the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion might be restricted by obligations which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law.¹⁸ Similarly, article 2 of the Draft Convention on Nationality prepared by the Harvard Law School asserts that the power of a State to confer its nationality is not unlimited.¹⁹ Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter “1930 Hague Convention”) provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only “insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality”. Moreover, the Commission considers that, in the specific context of a succession of States, international law has an even larger role to play, as such situation may involve a change of nationality on a large scale.

(4) Further international obligations of States in matters of nationality emerged with the development of human rights law after the Second World War, although the need for the respect of the rights of individuals had also been pointed out in connection with the preparations for the Conference for the Codification of International Law.²⁰

¹⁶ Thus, the Council of Europe adopted the European Convention on Nationality containing, inter alia, provisions regarding the loss and acquisition of nationality in situations of State succession. Another organ of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), adopted in September 1996 the Declaration on the consequences of State succession for the nationality of natural persons (Venice Declaration) (Council of Europe, Strasbourg, 10 February 1997, document CDL-INF (97) 1). As for the problem of statelessness, including statelessness resulting from a succession of States, it appears to be of growing interest to UNHCR. For a review of the recent activities of UNHCR in this field, see C. A. Batchelor, “UNHCR and issues related to nationality”, *Refugee Survey Quarterly*, vol. 14, No. 3 (autumn 1995), pp. 91-112. See also addendum to the report of the United Nations High Commissioner for Refugees (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1)*), para. 20, and the report of the Subcommittee of the Whole on International Protection (A/AC.96/858), paras. 21-27, as well as General Assembly resolution 51/75.

¹⁷ *Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24.

¹⁸ See also R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I, *Peace* (London, Longman, 1992), p. 852.

¹⁹ Harvard Law School, *Research in International Law. I. Nationality*, Supplement to the *American Journal of International Law*, vol. 23 (Cambridge, Mass., 1929), p. 13.

²⁰ “The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of

As it was stated more recently by the Inter-American Court of Human Rights, “the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; [the powers enjoyed by the States in that area] are also circumscribed by their obligations to ensure the full protection of human rights”.²¹

(5) As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided. Accordingly, the Commission finds it appropriate to affirm in the *third paragraph* of the preamble that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account.²²

(6) The *fourth, fifth and seventh paragraphs* of the preamble recall international instruments which are of direct relevance to the present draft articles. The instruments referred to in the seventh paragraph of the preamble are the product of the earlier work of the Commission in the fields of nationality and of succession of States.

(7) The *sixth paragraph* of the preamble expresses the fundamental concern of the Commission with the protection of the human rights of persons whose nationality may be affected following a succession of States. State practice has focused on the obligation of the new States born from the territorial changes to protect the basic rights of all inhabitants of their territory without distinction.²³ The Commission, however, concludes, that, as a matter of principle, it was important to safeguard basic rights and fundamental freedoms of all persons whose nationality may be affected by a succession, irrespective of the place of their habitual residence.

(8) The *eighth paragraph* of the preamble underlines the need for the codification and progressive development of international law in the area under consideration, i.e. nationality of natural persons in relation to the succession of States. It is interesting to note that, as early as 1956, O’Connell, while recognizing that “[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory affected by the succession] is one of the most difficult problems in the law of State succession”, stressed that “[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is urgently demanded”.²⁴ The

individuals and of other States.” (League of Nations, Conference for the Codification of International Law, *Bases for Discussion drawn up for the Conference by the Preparatory Committee*, vol. I, *Nationality* (Document C.73.M.38.1929.V), Reply of the United States of America, p. 16).

²¹ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4, p. 94, para. 32. See also *International Law Reports* (Cambridge), vol. 79 (1989), para. 32.

²² See also the first paragraph of the preamble of the Venice Declaration (footnote 16 above) and the fourth paragraph of the preamble of the European Convention on Nationality.

²³ See paragraphs (1) to (3) and (5) of the commentary to draft article 11 proposed by the Special Rapporteur in his third report (footnote 10 above).

²⁴ D. P. O’Connell, *The Law of State Succession* (Cambridge, United Kingdom, Cambridge University Press, 1956), pp. 245 and 258.

wording of this paragraph of the preamble is essentially based on the equivalent paragraphs of the preambles to the Vienna Convention on Succession of States in Respect of Treaties (hereinafter “1978 Vienna Convention”) and the 1983 Vienna Convention.

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.

Commentary

(1) Article 1 is a key provision, the very foundation of the present draft articles. It states the main principle from which other draft articles are derived. The core element of this article is the recognition of the right to a nationality in the particular context of a succession of States. Thus, it applies to this particular situation the general principle contained in article 15 of the Universal Declaration of Human Rights,²⁵ which was the first international instrument embodying the “right of everyone to a nationality”.

(2) The Commission acknowledges that the positive character of article 15 has been disputed in the doctrine.²⁶ It has been argued, in particular, that it is not possible to determine the State vis-à-vis which a person would be entitled to present a claim for nationality, i.e. the addressee of the obligation corresponding to such a right.²⁷ However, in the case of a succession of States, it is possible to identify such a State. It is either the successor State, or one of the successor States when there are more than one, or, as the case may be, the predecessor State.

(3) The right embodied in article 1 in general terms is given more concrete form in subsequent provisions, as indicated by the phrase “in accordance with the present draft articles”. This article cannot therefore be read in isolation.

(4) The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links

that persons referred to in article 1 may have with one or more States involved in the succession. In most cases, such persons have links with only one of the States involved in a succession. Unification of States is a situation where a single State—the successor State—is the addressee of the obligation to attribute its nationality to these persons. In other types of succession of States, such as dissolution, separation or transfer of territory, the major part of the population has also most, if not all, of its links to one of the States involved in the territorial change: it falls within the category of persons resident in the territory where they were born and with which they are bound by many other links, including family and professional ties.

(5) In certain cases, however, persons may have links to two or even more States involved in a succession. In this event, a person might either end up with the nationality of two or more of these States or, as a result of a choice, end up with the nationality of only one of them. Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality. This is the meaning of the phrase “has the right to the nationality of at least one of the States concerned”. The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State. Moreover, articles 8, 9 and 10 provide sufficient opportunities to the States which favour a policy of a single nationality to apply such a policy.

(6) Another element which is stated expressly in article 1 is that the mode of acquisition of the predecessor State’s nationality has no effect on the scope of the right of the persons referred to in this provision to a nationality. It is irrelevant in this regard whether they have acquired the nationality of the predecessor State at birth, by virtue of the principles of *jus soli* or *jus sanguinis*, or by naturalization, or even as a result of a previous succession of States.²⁸ They are all equally entitled to a nationality under the terms of this article.

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;

²⁵ General Assembly resolution 217 A (III) of 10 December 1948.

²⁶ See J. M. M. Chan, “The right to a nationality as a human right: The current trend towards recognition”, *Human Rights Law Journal*, vol. 12, Nos. 1-2 (1991), pp. 1-14.

²⁷ See the comment by Rezek, according to whom article 15 of the Universal Declaration of Human Rights sets out a “rule which evokes unanimous sympathy, but which is ineffective, as it fails to specify for whom it is intended”. J. F. Rezek, “Le droit international de la nationalité”, in *Collected Courses of the Hague Academy of International Law, 1986-III* (Dordrecht, Martinus Nijhoff, 1987), vol. 198, pp. 333-400, at p. 354.

²⁸ As stated in the comment to article 18 of the Draft Convention on Nationality prepared by Harvard Law School, “there is no reason whatsoever for drawing a distinction between persons who have acquired nationality at birth and those who have acquired nationality through some process of naturalization prior to the [succession]”. (“Comments to the 1929 Harvard Draft Convention on Nationality”, *Research in International Law* (footnote 19 above), p. 63.)

(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;

(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.

Commentary

(1) The definitions in *subparagraphs* (a), (b), (c), (e) and (g) are identical to the respective definitions contained in article 2 of the 1978 and 1983 Vienna Conventions. The Commission decided to leave these definitions unchanged so as to ensure consistency in the use of terminology in its work on questions relating to the succession of States.²⁹ The definitions contained in *subparagraphs* (d) and (f) have been added by the Commission for the purposes of the present topic.

(2) The term “succession of States”, as the Commission already explained at its twenty-sixth session in its commentary to this definition, is used “as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event”.³⁰ Unlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals. It is therefore to be noted that the said replacement of one State by another generally connotes replacement of one jurisdiction by another with respect to the population of the territory in question, which is of primary importance for the present topic.

(3) The meanings attributed to the terms “predecessor State”, “successor State” and “date of the succession of States” are merely consequential upon the meaning given to “succession of States”. It must be observed that, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.

(4) *Subparagraph* (d) provides the definition of the term “State concerned”, by which, depending on the type of the territorial change, are meant the States involved in a particular case of “succession of States”. These are the predecessor State and the successor State in the case of a transfer of part of the territory (art. 20), the successor State alone in the case of a unification of States (art. 21), two or more successor States in the case of a dissolution of a State (arts. 22 and 23) and the predecessor State and one or more successor States in the case of a separation of part of the territory (arts. 24 to 26). The term “State concerned” has nothing to do with the “concern” that any other State might have about the outcome of a succession of States in which its own territory is not involved.

(5) *Subparagraph* (f) provides the definition of the term “person concerned”. The Commission considers it necessary to include such a definition, since the inhabitants of the territory affected by the succession of States may include, in addition to the nationals of the predecessor State, nationals of third States and stateless persons residing in that territory on the date of the succession.

(6) It is generally recognized, that

Persons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor’s nationality. On the other hand . . . [t]here is an “inchoate right” on the part of any State to naturalize stateless persons resident upon its territory.³¹

Nevertheless, even the status of the latter category of persons is different from that of the persons who were the nationals of the predecessor State on the date of the succession.

(7) Accordingly, the term “person concerned” includes neither persons who are only nationals of third States nor stateless persons who were present on the territory of any of the “States concerned”. It encompasses only individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession of States. By “persons whose nationality may be affected”, the Commission means all individuals who could potentially lose the nationality of the predecessor State or, respectively, acquire the nationality of the successor State, depending on the type of succession of States.

(8) Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total succession, when the predecessor State or States disappear as a result of the change of sovereignty (unification of States, dissolution of a State): all individuals having the nationality of the predecessor State lose this nationality as an automatic consequence of that State’s disappearance. But determining the category of individuals susceptible of losing the predecessor State’s nationality is quite complex in the case of partial succes-

²⁹ See also the earlier position of the Commission on this point. *Yearbook . . . 1981*, vol. II (Part Two), p. 22, document A/36/10, paragraph (4) of the commentary to article 2 of the draft articles on succession of States in respect of State property, archives and debts.

³⁰ *Yearbook . . . 1974*, vol. II (Part One), p. 175, document A/9610/Rev.1, paragraph (3) of the commentary to article 2 of the draft articles on succession of States in respect of treaties.

³¹ O’Connell, *The Law of State . . .* (footnote 24 above), pp. 257-258. Similarly, it was held in *Rene Masson v. Mexico* that the change of sovereignty affects only nationals of the predecessor State, while the nationality of other persons residing in the territory at the time of the transfer is not affected. See J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington D.C., United States Government Printing Office, 1898), vol. III, pp. 2542-2543.

sion, when the predecessor State survives the change (transfer of part of the territory, separation of part(s) of the territory). In the latter case, it is possible to distinguish among at least two main groups of individuals having the nationality of the predecessor State: persons residing in the territory affected by the change of sovereignty on the date of succession of States (a category which comprises those born therein and those born elsewhere but having acquired the predecessor's nationality at birth or by naturalization) and those born in the territory affected by the change or having another appropriate connection with such territory, but not residing therein on the date of the change. Within the last category, a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State (see article 25).

(9) The delimitation of the categories of persons susceptible of acquiring the nationality of the successor State is also multifaceted. In the event of total succession, such as the absorption of one State by another State or the unification of States (art. 21), when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. In the case of the dissolution of a State, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States (art. 22). Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession (art. 24) or transfer of a part or parts of territory (art. 20). This is a function of the complexity of the situations and the need to respect the will of persons concerned.

(10) The definition in subparagraph (f) is restricted to the clearly circumscribed category of persons who had in fact the nationality of the predecessor State.

Article 3. 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.

Commentary

(1) As it already stated in paragraph (1) of the commentary to article 6 of the draft articles on succession of States in respect of treaties

The Commission in preparing draft articles for the codification of the rules of international law relating to normal situations naturally assumes that those articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or

mention does it deal with facts or situations not in conformity with international law.³²

Nevertheless, the 1978 and 1983 Vienna Conventions contain a provision limiting explicitly their scope of application to successions of States occurring in conformity with international law.³³

(2) For purposes of consistency with the approach adopted in the 1978 and 1983 Vienna Conventions, the Commission decided to include in the present draft articles the provision in article 3 which is based on the relevant provisions of these instruments, although it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law. The Commission considered that it was not incumbent upon it to study questions of nationality which could arise in situations such as illegal annexation of territory.

(3) The Commission stresses that article 3 is without prejudice to the right of everyone to a nationality in accordance with article 15 of the Universal Declaration of Human Rights.³⁴

Article 4. 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.

Commentary

(1) The obligation of the States involved in the succession to take all appropriate measures in order to prevent the occurrence of statelessness is a corollary of the right of the persons concerned to a nationality. As has been stated by experts of the Council of Europe, "there is an international obligation for the two States to avoid statelessness",³⁵ this was one of the main premises on which they based their examination of nationality laws in recent cases of succession of States in Europe.

(2) The growing awareness among States of the compelling need to fight the plight of statelessness has led to the adoption, since 1930, of a number of multilateral treaties relating to this problem, such as the 1930 Hague Convention, its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, as well as the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. It is true that only very few provisions of the above Conventions directly address the issue of

³² *Yearbook . . . 1974*, vol. II (Part One), p. 181, document A/9610/Rev.1.

³³ See article 6 of the 1978 Vienna Convention and article 3 of the 1983 Vienna Convention.

³⁴ See footnote 25 above.

³⁵ See *Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation* (Council of Europe (Strasbourg, 2 April 1996), document DIR/JUR(96)4), para. 54.

nationality in the context of succession of States. Nevertheless, they provide useful guidance to the States concerned by offering solutions which can *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change.

(3) An obvious solution consists in adopting legislation which ensures that no person having an appropriate connection to a State will be excluded from the circle of persons to whom that State grants its nationality. The concern of avoiding statelessness is most apparent in the regulation of conditions regarding the loss of nationality. In the literature, it has thus been observed that the renunciation of nationality not conditioned by the acquisition of another nationality has become obsolete.³⁶

(4) A technique used by the legislators of States concerned in the case of a succession of States is to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. Examples of provisions of this nature include section 2, subsection (3), of the Burma Independence Act,³⁷ article 6 of Law No. 40/1993 of 29 December 1992 on the acquisition and loss of citizenship of the Czech Republic,³⁸ and article 47 of the Yugoslav Citizenship Law (No. 33/96).³⁹

(5) The effectiveness of national legislations in preventing statelessness is, however, limited. A more effective measure is for States concerned to conclude an agreement by virtue of which the occurrence of statelessness would be precluded. This is also the philosophy underlying article 10 of the Convention on the Reduction of Statelessness.⁴⁰

(6) Article 4 does not set out an obligation of result, but an obligation of conduct. In the case of unification of States, this distinction has no practical significance, for the obligation to take all appropriate measures to prevent persons concerned from becoming stateless means, in fact, the obligation of the successor State to attribute in principle its nationality to all such persons.⁴¹ However, the distinction between obligation of result and obligation

of conduct is relevant in other cases of succession of States where at least two States concerned are involved. Obviously, one cannot consider each particular State concerned to be responsible for all cases of statelessness resulting from the succession. A State can reasonably be asked only to take appropriate measures within the scope of its competence as delimited by international law. Accordingly, when there is more than one successor State, not every one has the obligation to attribute its nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection.

(7) Thus, the principle stated in article 4 cannot be more than a general framework upon which other, more specific, obligations are based. The elimination of statelessness is a final result to be achieved by means of the application of the entire set of draft articles, in particular through coordinated action of States concerned.

(8) As is the case with the right to a nationality set out in article 1, statelessness is to be prevented under article 4 in relation to persons who, on the date of the succession of States, were nationals of the predecessor State, i.e. "persons concerned" as defined in article 2, subparagraph (f). The Commission decides, for stylistic reasons, not to use the term "person concerned" in article 4, so as to avoid a juxtaposition of the expressions "States concerned" and "persons concerned".

(9) Article 4 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons. But this question is outside the scope of the present draft articles.

Article 5. *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.

Commentary

(1) The purpose of article 5 is to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on the question of the nationality of persons concerned following the succession. Since such persons run the risk of being treated as stateless during this period, the Commission feels it important to state, as a presumption, the principle that, on the date of the succession of States, the successor State attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession. The presumption stated in article 5 also underlies basic solutions envisaged in Part II for different types of succession of States.

³⁶ H. Batiffol and P. Lagarde, *Traité de droit international privé*, vol. I, 8th ed. (Paris, Librairie générale de droit et de jurisprudence, 1993), pp.126-127.

³⁷ United Nations, Legislative Series, *Materials on Succession of States in Respect of Matters Other than Treaties* (ST/LEG/SER.B/17) (Sales No. E/F.77.V.9), p. 145.

³⁸ See *Report of the experts of the Council of Europe* . . . (footnote 35 above), appendix IV.

³⁹ *Sluzbeni List Savezne Republike Jugoslavije* (Official Gazette of the Federal Republic of Yugoslavia). See also paragraphs (6) to (8) of the commentary to article 2 proposed by the Special Rapporteur in his third report (footnote 10 above).

⁴⁰ Article 10 reads as follows:

"1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.

"2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."

⁴¹ This obligation is limited by the provisions of article 8.

(2) This is, however, a rebuttable presumption. Its limited scope is expressed by the opening clause “subject to the provisions of the present draft articles”, which clearly indicates that the function of this principle must be assessed in the overall context of the other draft articles. Accordingly, when their application leads to a different result, as may happen, for example, when a person concerned opts for the nationality of the predecessor State or of a successor State other than the State of habitual residence, the presumption ceases to operate.

(3) Similarly where questions of nationality are regulated by a treaty between States concerned, the provisions of such treaty may also rebut the presumption of the acquisition of the nationality of the State of habitual residence.

(4) As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, “the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State”.⁴² Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one.⁴³ This is explained by the fact that

the population has a “territorial” or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a “transfer” of sovereignty, or a relinquishment by one State followed by a disposition by international authority.⁴⁴

Also, in the view of experts of UNHCR, “there is substantial connection with the territory concerned through residence itself”.⁴⁵

⁴² Loc. cit. (footnote 27 above), p. 357.

⁴³ O’Connell termed it “the most satisfactory test”. D.P. O’Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 518. See also the decision by an Israeli court concerning the Israeli Nationality Law of 1952, according to which

“[s]o long as no law has been enacted providing otherwise . . . every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals—a phenomenon the existence of which has not yet been observed”

(I. Brownlie, “The relations of nationality in public international law”, *The British Year Book of International Law*, 1963 (London), vol. 39, p. 318).

In another case, however, it was held that Israeli nationality had not existed prior to the adoption of the law in question (*ibid.*).

⁴⁴ I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford, Clarendon Press, 1990), p. 665.

⁴⁵ “The Czech and Slovak citizenship laws and the problem of statelessness” (UNHCR, Regional Bureau for Europe, *Citizenship in the Context of the Dissolution of Czechoslovakia*, European Series, vol. 2, No. 4, September 1996), part 1, p. 10. As it has also been noted, “it is in the interest of the successor State . . . to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are considered to be ‘foreigners’ in ‘their own country’ clearly that is not in the interest of the State itself”

(*Report of the experts of the Council of Europe . . .* (footnote 35 above), para. 144).

Article 6. 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.

Commentary

(1) Article 6 is based on the recognition of the fact that, in the case of a succession of States, in spite of the role reserved to international law, domestic legislation with regard to nationality has always an important function. The main focus of this article, however, is the issue of the timeliness of internal legislation. In this respect, the practice of States varies. While in some cases the legislation concerning nationality was enacted at the time of the succession of States,⁴⁶ in other cases the nationality laws were enacted after the date of the succession, sometimes even much later.⁴⁷ The term “legislation” as used in this article should be interpreted broadly: it includes more than the legal rules adopted by Parliament.⁴⁸

(2) It would not be realistic in many cases to expect States concerned to enact such legislation at the time of the succession. In some situations, for instance where new States are born as a result of a turbulent process and territorial limits are unclear, this would even be impossible. Accordingly, article 6 sets out a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States “without undue delay”. The period which meets such test may be different for each State concerned, even in relation to the same succession. Indeed, the situation of a predecessor State and a successor State born as a result of separation (Part II, sect. 4) may be very different in this regard. For example, the question of the loss of the nationality of the predecessor

⁴⁶ This was the case of a number of newly independent States. See *Materials on succession of States . . .* (footnote 37 above). For more recent examples, see Law No. 40/1993 of 29 December 1992 on the acquisition and loss of citizenship of the Czech Republic (*Report of the experts of the Council of Europe . . .* (footnote 35 above), appendix IV), enacted in parallel to the dissolution of Czechoslovakia, and the Law on Croatian Citizenship of 26 June 1991 (No. 53/1991), enacted in parallel to the proclamation of the independence of Croatia (*Narodne Novine: Sluzbeni list Republike Hrvatske* (Official Gazette of the Republic of Croatia) (8 October 1991), p. 1466).

⁴⁷ See, for example, the Israeli Nationality Law of 1 April 1952, referred to in footnote 43 above. See also United Nations, Legislative Series, *Laws concerning Nationality* (ST/LEG/SER.B/4) (Sales No. 1954.V.1), pp. 263-267.

⁴⁸ See a similar interpretation by Rezek of the notion of legislation in relation to nationality, loc. cit. (footnote 27 above), p. 372.

State may be already adequately addressed by pre-existing legislation.⁴⁹

(3) The Commission considers it necessary to state explicitly that the legislation to be enacted by States concerned should be “consistent with the provisions of the present draft articles”. This underscores the importance of respect for the principles set out in the draft articles, to which States are urged to give effect through their domestic legislation. This is without prejudice to the obligations that States concerned may have under the terms of any relevant treaty.⁵⁰

(4) The legislation envisaged under article 6 is not limited to the questions of attribution or withdrawal of nationality in a strict sense, and, where appropriate, the question of the right of option. It should also address “connected issues”, i.e. issues which are intrinsically consequential to the change of nationality upon a succession of States. These may include such matters as the right of residence, the unity of families, military obligations, pensions and other social security benefits, etc. States concerned may find it preferable to regulate such matters by means of a treaty,⁵¹ a possibility that article 6 in no way precludes.

(5) The second sentence of article 6 reflects the importance that the Commission attaches to ensuring that persons concerned are not reduced to a purely passive role as regards the impact of the succession of States on their individual status or confronted with adverse effects of the exercise of a right of option of which they could objectively have no knowledge when exercising such right. This issue arises, of course, only when a person concerned finds itself having ties with more than one State concerned. The reference to “choices” should be understood in a broader sense than simply the option between nationalities. The measures to be taken by States should be “appropriate” and timely, so as to ensure that any rights of choice to which persons concerned may be entitled under their legislation are indeed effective.

(6) Given the complexity of the problems involved, and the fact that certain “connected issues” may sometimes only be resolved by means of a treaty, article 6 is couched in terms of a recommendation.

Article 7. Effective date

The attribution of nationality in relation to the succession of States, as well as the acquisition of nationality following the exercise of an option, shall take effect

⁴⁹ See paragraph 89 of the second report (footnote 7 above), as regards the cession by Finland of part of its territory to the Union of Soviet Socialist Republics (USSR) (Protocol to the Armistice Agreement between the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and Finland, on the other and the Treaty of Peace with Finland).

⁵⁰ The principle that “the contractual stipulations between the two [States concerned]... shall always have preference” over the legislation of States involved in the succession is also embodied in article 13 of the Code of Private International Law (Code Bustamante) contained in the Convention on Private International Law.

⁵¹ For examples of such practice, see the last footnote to paragraph (8) of the commentary to article 15 contained in the third report (footnote 10 above).

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.

Commentary

(1) The Commission recognizes that one of the general principles of law is the principle of non-retroactivity of legislation. As regards nationality issues, this principle has an important role to play, for as stated by Lauterpacht, “[w]ith regard to questions of status, the drawbacks of retroactivity are particularly apparent.”⁵² However, the Commission considers that, in the particular case of a succession of States, the benefits of retroactivity justify an exception to the above general principle, notwithstanding the fact that the practice of States is inconclusive in this respect.

(2) Article 7 is closely connected to the issue dealt with in article 6. It has, however, a broader scope of application, as it covers the attribution of nationality not only on the basis of legislation, but also on the basis of a treaty. If such attribution of nationality after the date of the succession of States did not have a retroactive effect, statelessness, even if only temporary, could ensue. Under the terms of article 7, the retroactive effect extends to both the automatic attribution of nationality and to the acquisition of nationality following the exercise of an option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option. The Commission decided to formulate this article in terms of obligations incumbent on States concerned, in particular to ensure consistency with the obligations of such States with a view to preventing statelessness under article 4.

(3) Article 7 is the first article where the expression “attribution of nationality” is used. The Commission considered it preferable, in the present draft articles, to use this term rather than the term “granting” to refer to the act of the conferral by a State of its nationality to an individual. It was felt that the term “attribution” best conveyed the point that the acquisition of nationality *upon a succession of States* is distinct from the process of acquisition of nationality by naturalization. It also indicates that the State does not have the same freedom of action with regard to cases of attribution as it has in cases involving naturalization. Where a provision is drafted from the perspective of the individual, the Commission has used the expression “acquisition of nationality”.

Article 8. 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.

⁵² H. Lauterpacht, “The nationality of denationalized persons”, *The Jewish Yearbook of International Law*, 1948 (Jerusalem, 1949), p. 168.

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.

Commentary

(1) The attribution of the nationality of the successor State is subject to certain exceptions of a general character which apply to all types of succession of States. These exceptions, spelled out in article 8, concern both the obligation of the successor State to attribute its nationality and the power of the State to do so. Their purpose is to establish a balance between the competing jurisdictions of the successor State and other States where persons concerned have their habitual residence outside the former while still pursuing the goal of preventing statelessness.

(2) This question has been widely debated in the doctrine, an analysis of which leads to the following two conclusions: (a) a successor State does not have the obligation to attribute its nationality to the persons concerned who would otherwise satisfy all the criteria required for acquiring its nationality but who have their habitual residence in a third State and also have the nationality of a third State; (b) a successor State cannot attribute its nationality to persons who would otherwise qualify to acquire its nationality but who have their habitual residence in a third State and also have the nationality of that State against their will.⁵³ When referring to a “third” State, commentators had in fact in mind States other than either the predecessor State, or, as the case may be, another successor State. The Commission, however, considers that there is no reason not to extend the application of article 8 also to persons concerned who have their habitual residence not in a “third State”, but in another “State concerned”. Finally, as explicitly stated in paragraph 1 and as implied in paragraph 2, article 8 covers both persons who have their habitual residence in the State of which they are nationals as well as persons who have their habitual residence in one State, while being nationals of yet another State.

(3) Accordingly, *paragraph 1* lifts, under specific conditions, any obligation which a successor State may have to attribute its nationality to persons concerned, as a corollary of a right of a person concerned to a nationality under the terms of article 1 of the present draft articles. However, if a person referred to in paragraph 1 who has an appropriate connection⁵⁴ with a successor State wishes to acquire the nationality of that State, e.g. by exercising an option to that effect, the obligation of the latter to attribute its nationality to that person is not lifted. Indeed in such a case article 11, paragraph 3, applies. Paragraph 1 of article 8 concerns the attribution of nationality by virtue of national legislation. It is, however, without prejudice to any obligation of a successor State vis-à-vis other States concerned under any relevant treaty.

⁵³ For State practice, see O’Connell, *The Law of State* . . . (footnote 24 above), pp. 251-258.

⁵⁴ As to the expression “appropriate connection”, see paragraphs (9) and (10) of the commentary to article 11 below.

(4) *Paragraph 2* restricts the power of a successor State to attribute its nationality to persons concerned not residing in its territory and having the nationality of another State. However, a successor State may attribute its nationality to such persons on a consensual basis. This raises the question as to how consent should be ascertained. Establishing a requirement of explicit consent would not be a practical solution, as it would put a heavy administrative burden on the successor State. The Commission considers it preferable to introduce a rebuttable presumption of consent where persons concerned being offered an option to reject the nationality of the successor State remain silent. This is reflected in the expression “not . . . against their will” used in paragraph 2.

(5) The restriction of the competence of the successor State under paragraph 2 does not apply when it would result in statelessness. In such case, that State has the right to attribute its nationality to a person referred to in paragraph 1, irrespective of that person’s will.

Article 9. 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.

Commentary

(1) It is generally accepted that, as a means of reducing or eliminating dual and multiple nationality, a State may require the renunciation of the nationality of another State as a condition for granting its nationality. This requirement is also found in some legislations of successor States, namely in relation to the voluntary acquisition of their nationality upon the succession.

(2) It is not for the Commission to suggest which policy States should pursue on the matter of dual or multiple nationality. Accordingly, the draft articles are neutral in this respect. The Commission is nevertheless concerned with the risk of statelessness related to the above requirement of prior renunciation of another nationality. Similar concerns have been voiced in other forums.⁵⁵

(3) The practice of States indicates that, in relation to a succession of States, the requirement of renunciation applied only with respect to the nationality of another State concerned, but not the nationality of a “third

⁵⁵ Accordingly, the experts of the Council of Europe concluded that “a State which gives an unconditional promise to grant its nationality is responsible at an international level for the *de jure* statelessness which arises from the release of a person from his or her previous nationality, on the basis of this promise”

(*Report of the experts of the Council of Europe* . . . (footnote 35 above), para. 56).

State".⁵⁶ In any event, only the former aspect falls within the scope of the present topic. Article 9 is drafted accordingly.

(4) The first sentence underscores the freedom of each successor State in deciding whether to make the acquisition of its nationality dependent on the renunciation by a person concerned of the nationality of another State concerned. Such is the function of the word "may". The second sentence addresses the problem of statelessness. It does not prescribe a particular legislative technique. It just sets out a general requirement that the condition in question should not be applied in such a way as to render the person concerned stateless, even if only temporarily.

(5) The expression "another State concerned" may refer to the predecessor State, or, as the case may be, to another successor State, as the rule in article 9 applies in all situations of succession of States, except, of course, unification, where the successor State remains as the only "State concerned".

Article 10. 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.

Commentary

(1) As in the case of the preceding article, article 10 contains a provision that derives from a rule of a more general application, which has been adapted to the case of a succession of States. The loss of a State's nationality upon the voluntary acquisition of the nationality of another State is a routine provision in the legislation of States pursuing a policy aimed at avoiding dual or multiple nationality. In the same vein, the Convention on Nationality of 1933 stipulates that any naturalization (presumably voluntary) of an individual in a signatory State carries with it the loss of the nationality of origin (art. 1). Likewise, according to the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, concluded within the framework of the Council of Europe, persons who of their own free will acquire another nationality, by means of naturalization, option or recovery, lose their former nationality (art. 1).⁵⁷

⁵⁶ See paragraph (31) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur in his third report (footnote 10 above).

⁵⁷ The possibility for a State to withdraw its nationality as a consequence of the voluntary acquisition of another nationality is also recognized under article 7, paragraph 1 a, of the European Convention on Nationality.

(2) Provisions of this kind are also to be found in legislation adopted in relation to a succession of States. Thus, article 20 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 provides that

[t]he citizenship of the Republic of Belarus will be lost . . . upon acquisition, by the person concerned, of the citizenship of another State, unless otherwise provided by a treaty binding upon the Republic of Belarus . . . The loss of citizenship becomes effective at the moment of the registration of the relevant fact by the competent authorities . . .⁵⁸

(3) Article 10 applies in all types of succession of States, except unification, where the successor State remains as the only "State concerned". It recognizes that any successor or predecessor State, as the case may be, is entitled to withdraw its nationality from persons concerned who, in relation to the succession of States, voluntarily acquired the nationality of another State concerned. It leaves aside the question of the voluntary acquisition of the nationality of a third State, as it is beyond the scope of the present topic.

(4) The rights of the predecessor State (paragraph 1) and that of the successor State (paragraph 2) are spelled out separately for reasons of clarity. As regards paragraph 2, depending on the type of succession of States, the assumption is the voluntary acquisition of the nationality of another successor State (in the case of dissolution) or the voluntary retention of the nationality of the predecessor State (in the case of separation or transfer of part of the territory) or even both (in the event of the creation of several successor States by separation of parts of territory from a predecessor State which continues to exist).

(5) Article 10 does not address the question as to when the loss of nationality should become effective. Since it is for the State concerned itself to decide on the main question, i.e. whether to withdraw its nationality from a person upon the voluntary acquisition of the nationality of another State, it is also for that State to determine when such withdrawal becomes effective. This may occur upon the acquisition of the nationality of another State or later, e.g. after a person concerned has effectively transferred his or her habitual residence outside the territory of the State whose nationality he or she is to lose.⁵⁹ In any event, the State concerned shall not withdraw its nationality from persons concerned who have initiated a procedure aimed at acquiring the nationality of another State concerned before such persons effectively acquire the nationality of the latter State.

Article 11. 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

⁵⁸ Law No. 1181-XII of 18 October 1991 as amended by law No. 2410-XII of 15 June 1993.

⁵⁹ This was for instance the case as regards the cession by Finland of a part of its territory to the Soviet Union in 1947 (see footnote 49 above).

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.

Commentary

(1) Numerous treaties regulating questions of nationality in connection with the succession of States as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

(2) This was, for example, the case of the 1848 Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America,⁶⁰ or the 1882 Treaty between Mexico and Guatemala for fixing the Boundaries between the respective States.⁶¹ The peace treaties adopted after the end of the First World War provided for a right of option mainly as a means to correct the effects of their other provisions on the automatic acquisition of the nationality of the successor State and loss of the nationality of the predecessor State by persons habitually resident in the territories involved in the succession of States.⁶² A right of option was also granted in article 19 of the Treaty of Peace with Italy, of 1947.

⁶⁰ *Treaties and Conventions concluded between the United States of America and Other Powers*, revised edition (Washington, D.C., United States Government Printing Office, 1873), p. 562. See also *Consolidated Treaty Series* (Dobbs Ferry, New York, Oceana Publications, 1969), vol. 102, p. 29.

⁶¹ *British and Foreign State Papers, 1881-1882*, vol. LXXIII, p. 273. See also paragraphs (5) and (8) of the commentary to draft article 17 proposed by the Special Rapporteur in his third report (footnote 10 above).

⁶² See articles 37, 85, 91, 106 and 113 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles); articles 78 to 82 of the Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye); respective articles 3 and 4 of the Treaty between the Principal Allied and Associated Powers and Poland, the Treaty between the Principal Allied and Associated Powers and Czechoslovakia and the Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, as well as the Treaty of Paris between the Principal Allied and Associated Powers and Roumania; articles 40 and 45 of the Treaty of Peace between the Allied and Associated Powers and Bulgaria; article 64 of the Treaty of Peace between the Allied and Associated Powers and Hungary (Peace Treaty of Trianon); article 9 of the Treaty of Peace between Finland and the Soviet Government of Russia (Treaty of Tartu) concerning the cession by Russia to Finland of the territory of Petsamo (Petschenga) (see paragraph (20) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur in his third report (footnote 10 above)); and articles 21 and 31 to 36 of the Treaty of Peace (Treaty of Lausanne), of 1923.

(3) Among the documents concerning nationality issues in relation to decolonization, while some contained provisions on the right of option, several did not. Thus, the Burma Independence Act, 1947,⁶³ after stipulating that the categories of persons specified in the First Schedule to that Act automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject.⁶⁴ The free choice of nationality was also envisaged under article 4 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954.⁶⁵ The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, contained provisions on the right of option as well.⁶⁶

(4) In recent cases of succession of States in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through the national legislation of the States concerned, the possibility of choice was in fact established simultaneously in the legal orders of at least two States. Thus, the Law on State Citizenship in the Slovak Republic, of 19 January 1993⁶⁷ contained liberal provisions on the optional acquisition of nationality. According to article 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia.⁶⁸ No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.

(5) The function which international law attributes to the will of individuals in matters of acquisition and loss of nationality in cases of succession of States is, however, among the issues on which doctrinal views considerably diverge.⁶⁹ Several commentators have stressed the importance of the right of option in this respect.⁷⁰ While most

⁶³ See footnote 37 above.

⁶⁴ See also section 2, subsection (3). For the remaining provisions of section 2 on the right of option and its consequences, see also subsections (4) and (6) (*Materials on Succession of States* . . . (footnote 36 above)), p. 146.

⁶⁵ *Materials on Succession of States* . . . (ibid.), p. 80.

⁶⁶ Ibid., p. 86.

⁶⁷ *Sbierka zákonov Slovenskej republiky* (Collection of laws of the Slovak Republic), law No. 40/1993. For a translation in English, see *Central and Eastern European Legal Materials* (Huntington, New York, Juris Publishing, 1997), Binder 2A.

⁶⁸ See paragraph (30) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur in his third report (footnote 10 above).

⁶⁹ There is a substantial body of doctrinal opinion according to which the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. See O'Connell, *The Law of State* . . . (footnote 24 above), p. 250.

⁷⁰ See, for example, C. Rousseau, *Droit international public*, 11th ed. (Paris, Dalloz, 1987), pp. 174-175.

of them consider that the legal basis of such right can be deduced only from a treaty, others, however, have asserted the existence of an independent right of option as an attribute of the principle of self-determination.⁷¹

(6) In the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount. However, this does not mean that every acquisition of nationality upon a succession of States must have a consensual basis. The Commission considers that a right of option has a role to play, in particular, in resolving problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned.

(7) The term “option” used in the present draft articles does not only mean a choice *between* nationalities, but is used in a broader sense, covering also the procedures of “opting in”, i.e. the voluntary acquisition of nationality by declaration, and “opting out”, i.e. the renunciation of a nationality acquired *ex lege*. Such right of option may be provided under national legislation even without agreement between States concerned.

(8) *Paragraph 1* of article 11 sets out the requirement of respect for the will of the person concerned where such person is qualified to acquire the nationality of two or several States concerned. The expression “shall give consideration” implies that there is no strict obligation to grant a right of option to this category of persons concerned. This principle, however, is further developed in articles 20, 23 and 26, relating to specific categories of succession of States, where the obligation to grant the right of option is enshrined and where the categories of persons entitled to such a right are also specified. Paragraph 1 does also not prejudice the policy of single or dual nationality which each State concerned may pursue.

(9) *Paragraph 2* highlights the function of the right of option as one of the techniques aimed at eliminating the risk of statelessness in situations of succession of States. Such an approach was adopted, e.g. in the Burma Independence Act, 1947⁷² (see paragraph (3) of the present commentary) or in article 6 of Law No. 40/1993 of 29 December 1992 on the acquisition and loss of citizenship of the Czech Republic.⁷³ The Commission chooses to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression “appropriate connection”, which should be interpreted in a broader sense than the notion of “genuine link”. The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case,

supersedes the strict requirement of an effective nationality.

(10) The core meaning of the term “appropriate connection” in a particular case is spelled out in Part II, where the criteria, such as habitual residence, appropriate legal connection with one of the constituent units of the predecessor State, or the birth in the territory which is a part of a State concerned, are used in order to define categories of persons entitled to the nationality of a State concerned. However, in the absence of the above-mentioned type of link between a person concerned and a State concerned further criteria, such as being a descendant of a person who is a national of a State concerned or having once resided in the territory which is a part of a State concerned, should be taken into consideration.

(11) The Commission decides to couch paragraph 2 in terms of an obligation, in order to ensure consistency with the obligation to prevent statelessness under article 4.

(12) *Paragraphs 3 and 4* spell out the consequences of the exercise of the right of option by a person concerned as regards the obligations of the States concerned mentioned therein. The obligations of various States involved in a particular succession may operate jointly, when the right of option is based on a treaty between them, but also separately, when the right of option (in the form of both opting-in or opting-out) is granted solely by the legislation of these States. Thus, acquisition upon option of the nationality of one State concerned does not inevitably imply the obligation of the other State concerned to withdraw its nationality. Such obligation exists only if provided in a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounces the nationality of the other in accordance with the provisions of the latter’s legislation.

(13) *Paragraph 5* stipulates the general requirement of a reasonable time limit for the exercise of the right of option, irrespective of whether it is provided in a treaty between States concerned or in the legislation of a State concerned. State practice shows that the length of the period during which persons concerned were granted the right of option varied considerably. For example, under the Treaty of cession of the territory of the Free Town of Chandernagore of 1951 between India and France,⁷⁴ the right of option was provided for a period of six months,⁷⁵ while the Treaty between Spain and Morocco regarding Spain’s retrocession to Morocco of the Territory of Sidi Ifni⁷⁶ established a three-month period.⁷⁷ In some cases, the right of option was granted for a considerable period

⁷¹ See J. L. Kunz, “L’option de nationalité”, *Recueil des cours . . . 1930-I* (Paris, Sirey), vol. 31, pp. 111–175; and “Nationality and option clauses in the Italian Peace Treaty of 1947”, *American Journal of International Law* (Washington, D.C.), vol. 41, No. 3 (July 1947), pp. 622–631.

⁷² See footnote 37 above.

⁷³ See *Report of the experts of the Council of Europe . . .* (footnote 35 above), appendix IV; and the last footnote to paragraph (31) of the commentary to draft article 8 proposed by the Special Rapporteur in his third report (footnote 10 above).

⁷⁴ United Nations, *Treaty Series*, vol. 203, No. 2744, p. 155.

⁷⁵ See paragraphs (17) and (18) of the commentary to draft article 9 proposed by the Special Rapporteur in his third report (footnote 10 above).

⁷⁶ Tratado por el que el Estado Español retrocede al Reino de Marruecos el territorio de Ifni (Fez, 4 January 1969), *Repertorio Cronológico de Legislación* (Pamplona, Aranzadi, 1969), pp. 1008–1011 and 1041.

⁷⁷ See paragraph (28) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur in his third report (footnote 10 above).

of time.⁷⁸ What constitutes a “reasonable” time limit may depend upon the circumstances of the succession of States, but also on the categories to which persons concerned entitled to the right of option belong. In the view of the Commission, a “reasonable time limit” is a time limit necessary to ensure an effective exercise of the right of option.

Article 12. 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.

Commentary

(1) There are a number of examples from State practice of provisions addressing the problem of the common destiny of families upon a succession of States. The general policy in the treaties concluded after the First World War was to ensure that the members of a family acquired the same nationality as the head of the family, whether the latter had acquired it automatically or upon option.⁷⁹ Article 19 of the Treaty of Peace with Italy, of 1947, on the contrary, did not envisage the simultaneous acquisition by a wife of her husband’s nationality following his exercise of an option. Minor children, however, automatically acquired the nationality for which the head of the family had opted.⁸⁰

(2) The principle of family unity was also highlighted, albeit in a broader context, in the comment to article 19 of the Draft Convention on Nationality prepared by Harvard Law School, where it was stated that “[i]t is desirable in some measure that members of a family should have the same nationality, and the principle of family unity is regarded in many countries as a sufficient basis for the application of this simple solution”.⁸¹

(3) The approach usually followed during the process of decolonization was to enable a wife to acquire the

nationality of her husband upon application, as evidenced by relevant legal instruments of Barbados, Botswana, Burma, Guyana, Jamaica, Malawi, Mauritius, Sierra Leone and Trinidad and Tobago,⁸² or by various treaty provisions, such as annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960⁸³ and article 6 of the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956.⁸⁴

(4) A concern for the preservation of the unity of the family is also apparent in some national legislations of successor States that emerged from the recent dissolutions in Eastern and Central Europe.⁸⁵

(5) The Commission is of the view that the thrust of article 12 is closely connected to nationality issues in relation to the succession of States, as the problem of family unity may arise in such a context on a large scale. It also concludes that, while it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, it is not necessary to formulate a strict rule to this end, as long as the acquisition of different nationalities by the members of a family did not prevent them from remaining together or being reunited. Accordingly, the obligation set out in article 12 is of a general nature. For example, whenever a family faces difficulties in living together as a unit as a result of provisions of nationality laws relating to a succession of States, States concerned are under an obligation to eliminate such legislative obstacles. The expression “appropriate measures”, however, is intended to exclude unreasonable demands of persons concerned in this respect.

(6) Concerning possible different interpretations of the concept of “family” in various regions of the world, the Commission is of the view that a succession of States usually involves States from the same region sharing the same or a similar interpretation of this concept, so that the said problem would not arise with frequency.

Article 13. 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.

Commentary

(1) Article 13 deals with the problem of children born to persons concerned after the date of the succession of States. It follows from its title that the present topic is limited to questions of nationality solely in relation to the

⁷⁸ See Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement (Paris and Rocher Noir, 3 July 1962), United Nations, *Treaty Series*, vol. 507, p. 25, at pp. 35 and 37.

⁷⁹ See the provisions cited in footnote 62 above.

⁸⁰ *Materials on Succession of States* . . . (footnote 37 above), p. 59.

⁸¹ *Research in International Law* . . . (footnote 19 above), p. 69. The main deficiency of provisions envisaging the simultaneous change of nationality of all the members of a family following the change of the nationality of the head of the family was the fact that they were placing the woman in a position of subordination. In an attempt to overcome this problem, article 4 of the resolution adopted by the Institute of International Law on 29 September 1896 stipulated that,

“[u]nless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant”

(cited in *ibid.*, p. 75).

⁸² *Materials on Succession of States* . . . (footnote 37 above), pp. 124-125, 137-138, 145-146, 203-204, 246, 307-308, 353-354, 389-390, and 429 respectively.

⁸³ *Ibid.*, pp. 172-178.

⁸⁴ *Ibid.*, p. 87.

⁸⁵ For relevant examples, see paragraphs (20) and (21) of the commentary to draft article 9 proposed by the Special Rapporteur in his third report (footnote 10 above).

occurrence of a succession of States. Questions of nationality related to situations which occurred prior or after the date of the succession are therefore excluded from the scope of the present draft articles. However, the Commission recognizes the need for an exception from the rigid definition *ratione temporis* of the present draft articles and for addressing also the problem of children born after the succession of States from parents whose nationality following the succession has not been determined. Given the fact that, in a considerable number of legal orders, the nationality of children depends to a large extent on that of their parents, the uncertainty about the parents' nationality may have a direct impact on the nationality of a child. The latter is generally determined after the final resolution of the problem of the parents' nationality, but, in exceptional situations, can remain undetermined if, for example, a parent dies in the meantime. That is why the Commission considered that a specific provision concerning the nationality of newborn children was useful.

(2) The inclusion of article 13 is justified in the light of the importance that several instruments attach to the rights of children, including their right to acquire a nationality. Thus, principle 3 of the Declaration of the Rights of the Child provides that "[t]he child shall be entitled from his birth to a name and a nationality".⁸⁶ Article 24, paragraph 3, of the International Covenant on Civil and Political Rights guarantees every child the right to acquire a nationality. Article 7, paragraph 1, of the Convention on the Rights of the Child⁸⁷ provides that "[t]he child shall be registered immediately after birth and shall have . . . the right to acquire a nationality". From the joint reading of this provision and article 2, paragraph 1, of the Convention, according to which "States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction** without discrimination of any kind", it follows that, unless the child acquires the nationality of another State, he or she has, in the last instance, the right to the nationality of the State on the territory of which he or she was born.

(3) It is also useful to recall that, according to article 9 of the Draft Convention on Nationality prepared by the Harvard Law School, "[a] State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth".⁸⁸ Likewise, article 20 of the American Convention on Human Rights: "Pact of San José, Costa Rica" stipulates that "[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality".

(4) There is a strong argument in favour of an approach consistent with the above instruments, namely that, where the predecessor State was a party to any such instruments, their provisions could be applicable, by virtue of the rules of succession in respect of treaties, to the successor State, including as regards the situation envisaged in article 13.

(5) Article 13 is limited to the solution of the problem of the nationality of children born within the territory of States concerned. It does not envisage the situation where a child of a person referred to in article 13 is born in a third State. Extending the scope of application of the rule set out in article 13 to situations where the child was born in a third State would mean to impose a duty on States other than those involved in the succession. While it is true that those third States that are parties to the Convention on the Rights of the Child may already have such obligation in any event, it is also true that this problem exceeds the scope of the present draft articles which should remain limited to problems where a "person concerned" is on one side of the legal bond and a "State concerned" on the other.

(6) While the application *ratione temporis* of article 13 is limited to the cases of children born after the date of the succession of States, there is no further limitation in time. The Commission is of the view that such an unlimited application is justified by the main purpose of this article, that is, avoidance of statelessness, and by the fact that the rule contained in article 13 is the same as the rule found in several other international instruments applicable to children born on the territory of a State, even outside of the context of State succession.

Article 14. 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.

Commentary

(1) *Paragraph 1* of article 14 sets out the rule that the status of habitual residents is not affected by a succession of States *as such*, or in other words, that persons concerned who are habitual residents of a territory on the date of the succession retain such status. The Commission considers that a succession of States, as such, should not entail negative consequences for the status of persons concerned as habitual residents. The question addressed in paragraph 1 is different from the question whether such persons may or may not retain the *right* of habitual residence in a State concerned if they acquire, following the succession of States, the nationality of another State concerned.

(2) *Paragraph 2* addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission feels that, in the light of recent experience in Eastern Europe, it was desirable to address explicitly the problem of this vulnerable group of persons.

⁸⁶ General Assembly resolution 1386 (XIV) of 20 November 1959.

⁸⁷ Paragraph 2 of the same article provides, moreover, that "States Parties shall ensure the implementation of these rights . . . in particular where the child would otherwise be stateless".

⁸⁸ *Research in International Law* . . . (footnote 19 above), p. 14.

Article 15. *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.

Commentary

(1) The interest in avoiding discriminatory treatment as regards matters of nationality in relation to a succession of States led to the inclusion of certain relevant provisions in several treaties adopted following the First World War, as attested by the advisory opinion of PCIJ on the question concerning the *Acquisition of Polish Nationality*, in which the Court stated that

[o]ne of the first problems which presented itself in connection with the protection of minorities was that of preventing [. . . new States, . . . which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States.⁸⁹

(2) The problem of discrimination in matters of nationality was also addressed, albeit in a more general context, in article 9 of the Convention on Reduction of Statelessness, which prohibits the deprivation of nationality on racial, ethnic, religious or political grounds and article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination which requires States to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to nationality. The European Convention on Nationality contains a general prohibition of discrimination in matters of nationality as well: article 5, paragraph 1, provides that “[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin”.⁹⁰

(3) While discrimination has been mostly based on the above-mentioned criteria, there may still be other grounds for discrimination in nationality matters in relation to a succession of States.⁹¹ The Commission therefore decides

⁸⁹ 1923, *P.C.I.J., Series B, No. 7*, p. 15.

⁹⁰ Article 18 of the Convention explicitly states that this provision is applicable also in situations of State succession.

⁹¹ See, for example, recent discussions concerning the application of the requirement of a clean criminal record for attributing nationality upon option. Experts of the Council of Europe stated in this connection that,

“[while a] clean criminal record requirement in the context of naturalization is a usual and normal condition and compatible with European standards in this area, . . . the problem is different in the context of State succession [where] it is doubtful whether . . . under international law citizens that have lived for decades on the territory, perhaps [were] even born there, can be excluded from citizenship just because they have a criminal record”

(*Report of the experts of the Council of Europe* . . . (footnote 35 above), paras. 73 and 76).

A similar view has been expressed by UNHCR experts, according to whom “[t]he placement of this condition upon granting of citizenship in the context of State succession is not justified [and] would appear

not to include in article 15 an illustrative list of such criteria and opted for a general formula prohibiting discrimination on “any ground”, avoiding, at the same time, the risk of any *a contrario* interpretation.

(4) Article 15 prohibits discrimination resulting in the denial of the right of a person concerned to a particular nationality or, as the case may be, to an option. It does not address the question whether a State concerned may use any of the above or similar criteria for enlarging the circle of individuals entitled to acquire its nationality.⁹²

Article 16. *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.

Commentary

(1) Article 16 applies to the specific situation of a succession of States the principle embodied in article 15, paragraph 2, of the Universal Declaration of Human Rights,⁹³ which provides that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”. The prohibition of arbitrary deprivation of nationality has been reaffirmed in a number of other instruments, such as the Convention on the Reduction of Statelessness (art. 8, para. 4), the Convention on the Rights of the Child (art. 8), and the European Convention on Nationality (art. 4, subpara. (c), and art. 18).

(2) Article 16 contains two elements. The first is the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from persons concerned who were entitled to retain such nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality either *ex lege* or upon option. The second element is the prohibition of the arbitrary denial of a person’s right of option that is an expression of the right of a person to change his or her nationality in the context of a succession of States.

(3) The purpose of the article is to prevent abuses which may occur in the process of the application of any law or treaty which, in themselves, are consistent with the present draft articles. The phrase “to which they are entitled” refers to the subjective right of any such person based on above-described provisions.

discriminatory vis-à-vis a sector of the population which has a genuine and effective link with the [successor State]” (“The Czech and Slovak citizenship laws . . . (footnote 45 above), p. 25) .

⁹² See the advisory opinion of the Inter-American Court of Human Rights of 19 January 1984 in the case concerning *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (footnote 21 above).

⁹³ See footnote 25 above.

Article 17. 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.

Commentary

(1) Article 17 is intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States is orderly, given its possible large-scale impact.⁹⁴ The elements spelled out in this provision represent minimum requirements in this respect.

(2) The review process regarding decisions concerning nationality in relation to the succession of States has been based in practice on the provisions of municipal law governing review of administrative decisions in general. Such review can be carried out by a competent jurisdiction of an administrative or judicial nature in conformity with the internal law of each State.⁹⁵ The adjective “effective” is intended to stress the fact that an opportunity must be provided to permit meaningful review of the relevant substantive issues. The term can thus be understood in the same sense as in article 2, paragraph 3 (a) of the International Covenant on Civil and Political Rights, where the same word is used. The phrase “administrative or judicial review” used in this article does not suggest that the two types of procedure exclude each other.⁹⁶ Moreover, the word “judicial” should be understood as covering both civil and administrative jurisdictions.

(3) The enumeration of requirements in article 17 is not exhaustive. Thus, for example, the requirement of giving reasons for any negative decisions concerning nationality should be considered as one of the prerequisites of an effective administrative or judicial review which is implicitly covered. The Commission is also of the view that, in principle, the attribution of nationality should not be subject to any fee, since the attribution of nationality in relation to succession of States occurs on a large scale and the process is not analogous to that of naturalization.

⁹⁴ In relation to recent cases of succession of States, the UNHCR Executive Committee stressed the importance of fair and swift procedures relating to nationality issues when emphasizing that “the inability to establish one’s nationality . . . may result in displacement”. (Addendum to the Report of the United Nations High Commissioner for Refugees (see footnote 16 above).)

⁹⁵ See “Nationalité, minorités et succession d’États dans les pays d’Europe centrale et orientale”, CEDIN, université Paris X-Nanterre, Table ronde, December 1993, responses to the questionnaire (unpublished).

⁹⁶ In the same vein, article 12 of the European Convention on Nationality sets out the requirement that decisions concerning nationality “be open to an administrative or judicial review”. The Convention further contains the following requirements regarding procedures relating to nationality: a reasonable time limit for processing applications relating to nationality issues; the provision of reasons for decisions on these matters in writing; and reasonable fees (arts. 10, 11 and 13, respectively).

Article 18. 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.

Commentary

(1) The Commission considers that exchange of information and consultations between States concerned are essential components of any meaningful examination of the effects of a succession of States on persons concerned. The purpose of such endeavours is to identify the negative repercussions that a particular succession of States may have both on the nationality of the persons concerned and on other issues intrinsically linked to nationality.

(2) *Paragraph 1* sets out the obligations of States concerned in this respect in the most general terms, without indicating the precise scope of the questions which are to be the subject of consultations between them. One of the most important questions is the prevention of statelessness. States concerned, shall, however, also address questions such as dual nationality, the separation of families, military obligations, pensions and other social security benefits, the right of residence, etc.

(3) Concerning *paragraph 2*, there are two points worth noting. First, the obligation to negotiate to seek a solution does not exist in the abstract: States do not have to negotiate if they have not identified any adverse effects on persons concerned as regards the above questions. Secondly, it is not presumed that every negotiation must inevitably lead to the conclusion of an agreement. The purpose, for example, could simply be achieved through the harmonization of national legislations or administrative decisions. States concerned may, however, prefer to conclude an agreement to resolve the problems they have identified.⁹⁷ The obligation in *paragraph 2* must be understood in the light of these two caveats.

⁹⁷ The Czech Republic and Slovakia, for example, concluded several agreements of this nature, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior, the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers’ licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

(4) In the view of the Commission, there is a close link between the obligations in article 18 and the right to a nationality in the context of a succession of States embodied in article 1, as the purpose of the former is to ensure that the right to a nationality is an *effective* right. Article 18 is also based on the general principle of the law of succession of States providing for the settlement of certain questions relating to succession by agreement between States concerned, embodied in the 1983 Vienna Convention.

(5) Article 18 does not address the problem which arises when one of the States concerned does not act in conformity with its provisions or when negotiations between States concerned are abortive. Even in such situations, however, there are certain obligations incumbent upon States concerned and the refusal of one party to consult and negotiate does not entail complete freedom of action for the other party. These obligations are included in Part I of the present draft articles.

Article 19. 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.

Commentary

(1) *Paragraph 1* safeguards the right of States other than the State which has attributed its nationality not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link. International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals, but it allows “some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect”, because “the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question”.⁹⁸ In the final analysis, although nationality pertains essentially to the internal law of States, the general principles of the international law of nationality constitute limits to the discretionary power of States.⁹⁹

⁹⁸ Oppenheim's *International Law* (footnote 18 above), p. 853.

⁹⁹ It is within this meaning that part of the doctrine refers to the negative role of international law in matters of nationality. See Rezek, loc. cit. (footnote 27 above), p. 371; P. Lagarde, *La nationalité française* (Paris, Dalloz, 1975), p. 11; J. de Burlet, “De l'importance d'un ‘droit international coutumier de la nationalité’”, *Revue critique de droit international privé* (Paris, Sirey, 1978), vol. 67, No. 2, pp. 304-327. See also paragraph (4) of the commentary to the preamble above.

(2) The need to “draw a distinction between a nationality link that is *opposable* to other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State [in question]”¹⁰⁰ has led to the development of the theory of effective nationality.¹⁰¹ As regards the specific situation of a succession of States, it is also widely accepted that

[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned.¹⁰²

(3) A number of writers¹⁰³ on the topic of the succession of States who hold the above view that the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned base their argument on the decision of ICJ in the *Nottebohm* case.¹⁰⁴ In its judgment, the Court indicated some elements on which an effective nationality can be based. As the Court said,

[d]ifferent factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.¹⁰⁵

It is to be noted, however, that the Italian-United States Conciliation Commission, in the *Flegenheimer* case, concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in

¹⁰⁰ Rezek, loc. cit. (footnote 27 above), p. 357.

¹⁰¹ See Brownlie, *Principles of Public International Law* (footnote 44 above), pp. 397 et seq.; H. F. van Panhuys, *The Role of Nationality in International Law* (Leiden, Sijthoff, 1959), pp. 73 et seq.; P. Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Germantown, Maryland, Sijthoff-Noordhoff, 1979), pp. 197 et seq.; de Burlet, “De l'importance . . .” (footnote 99 above), pp. 323 et seq. For Rousseau, the theory of effective nationality is “a specific aspect of the more general theory of effective legal status in international law” (op. cit. (footnote 70 above), p. 112).

¹⁰² O'Connell, *State Succession in Municipal Law*. . . (footnote 43 above), p. 499.

¹⁰³ See, for example, R. Donner, *The Regulation of Nationality in International Law*, 2nd ed. (Irvington-on-Hudson, New York, Transnational Publishers, 1994), p. 260; O'Connell, *State Succession in Municipal Law*. . . (footnote 43 above), p. 510; and K. Zemanek, “State succession after decolonization”, in *Recueil des cours*. . . , 1965-III (Leiden, Sijthoff, 1965), vol. 116, p. 272.

¹⁰⁴ According to the Court,

“a State cannot claim that the rules [pertaining to the acquisition of its nationality that] it has laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States”

(*Nottebohm*, *Second Phase, Judgment*, I.C.J. Reports 1955, p. 4, at p. 23).

¹⁰⁵ *Ibid.*, p. 22. The Court's judgment admittedly elicited some criticism. It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he or she had no effective link with the State of nationality but only with a third State.

cases of fraud, negligence or serious error.¹⁰⁶ Moreover, the judgment in the *Nottebohm* case only dealt with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless.

(4) In practice, different tests for determining the competence of the successor State to attribute its nationality on certain persons have been considered or applied, such as habitual residence or birth. Thus, for example, the peace treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence.¹⁰⁷ But, as has been pointed out, “[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law”.¹⁰⁸ Some authors have favoured the test of birth in the territory affected by the succession as proof of an effective link with the successor State.¹⁰⁹ In recent dissolutions of States in Eastern Europe, the main accent was often put on the “citizenship” of the component units of the federal State that disintegrated, which existed in parallel to federal nationality.¹¹⁰

(5) The term “link” in paragraph 1 of article 19 is qualified by the adjective “effective”. The intention was to use the terminology of ICJ in the *Nottebohm* case.¹¹¹ Although the question of non-opposability of nationality not based on an effective link is a more general one, the scope of application of paragraph 1 is limited to the non-opposability of a nationality acquired or retained following a succession of States.

(6) *Paragraph 2* deals with the problem that arises when a State concerned denies a person concerned the right to retain or acquire its nationality by means of discriminatory legislation or an arbitrary decision and, as a consequence, such person becomes stateless. As already stated, international law cannot correct the deficiencies of internal acts of a State concerned, even if they result in statelessness. This, however, does not mean that other

¹⁰⁶ Decision of 20 September 1958 (UNRIAA, vol. XIV (Sales No. 1965.V.4), p. 327).

¹⁰⁷ The peace treaties of Saint-Germain-en-Laye (Treaty of Peace between the Allied and Associated Powers and Austria, Treaty between the Principle Allied and Associated Powers and Czechoslovakia and the Treaty between the Principle Allied and Associated Powers and the Serb-Croat-Slovene State) and of Trianon (Treaty of Peace between the Allied and Associated Powers and Hungary), however, adopted the criterion of *pertinenzza (indigénat)*, which did not necessarily coincide with habitual residence.

¹⁰⁸ O’Connell, *State Succession in Municipal Law . . .* (footnote 43 above), p. 518.

¹⁰⁹ In the case of *Romano v. Comma*, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national (*Annual Digest of Public International Law Cases, 1925-1926* (London, 1929), vol. 3, p. 265, case No. 195).

¹¹⁰ See paragraphs (5) to (10) of the commentary to draft article 20 proposed by the Special Rapporteur in his third report (footnote 10 above).

¹¹¹ It must be noted that, in the English version of the Judgment, the Court also uses the expression “genuine connection”, the equivalent of which is *rattachement effectif* in the French version (see footnote 104 above).

States are simply condemned to a passive role. There have indeed been instances where States did not recognize any effect to the legislation of another State aimed at denying its nationality to certain categories of persons, albeit in a context other than a succession of States: e.g. such was the position of the Allies with respect to the Decree of 25 November 1941, in pursuance of the Law for the Protection of German Blood and German Honour (Reich Citizenship Law), denationalizing German Jews.¹¹²

(7) The provision of paragraph 2 is, however, not limited to the case where statelessness results from an act of a State concerned. It also applies where a person concerned has, by his or her negligence, contributed to such situation.

(8) The purpose of paragraph 2 is to alleviate, not to further complicate, the situation of stateless persons. Accordingly, this provision is subject to the requirement that the treatment of such persons as nationals of a particular State concerned be for their benefit, and not to their detriment. In practical terms, this means that other States may extend to these persons a favourable treatment granted to nationals of the State in question. However, they may not, for example, deport such persons to that State as they could do with its actual nationals (provided that there would be legitimate reasons for such action).

PART II

PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Commentary

(1) The provisions of Part II are divided into four sections devoted to specific categories of succession of States, namely “Transfer of part of the territory”, “Unification of States”, “Dissolution of a State” and “Separation of part or parts of the territory”. The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of succession of States.

(2) As regards the criteria used for establishing the rules concerning the attribution of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option in Part II, the Commission, on the basis of State practice, has given particular importance to habitual residence.¹¹³

¹¹² See Lauterpacht, loc. cit. (footnote 52 above).

¹¹³ See paragraphs 50 to 81 of the second report (footnote 7 above). See also paragraph (4) of the commentary to article 5 above. As regards the nationality laws of newly independent States, it must be observed that, while some countries applied residence as a basic criterion, others employed criteria such as *jus soli*, *jus sanguinis* and race. See 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. 1, at pp. 15-16; and J. de Burlet, *Nationalité des personnes physiques et décolonisation: Essai de contribution à la théorie de la succession d’États*, Bibliothèque de la Faculté de droit de l’Université catholique de Louvain, vol. X (Brussels, Bruylant, 1975), pp. 144-180.

Other criteria such as the place of birth or the legal bond with a constituent unit of the predecessor State, however, become significant for the determination of the nationality of persons concerned who have their habitual residence outside the territory of a successor State, in particular when they lose the nationality of the predecessor State as a consequence of the latter's disappearance.

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.

Commentary

(1) Section 1 consists of a single article, namely article 20. As indicated by the opening phrase "When part of the territory of a State is transferred by that State to another State", article 20 applies in the case of cessions of territory between two States on a consensual basis. While this phrase refers to standard modes of transfer of territory, the substantive rule embodied in article 20 also applies *mutatis mutandis* to the situation where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a Non-Self-Governing Territory which achieves its decolonization by integration with a State other than the colonial State.

(2) The rule in article 20 is based on the prevailing State practice:¹¹⁴ persons concerned who have their habitual residence in the transferred territory acquire the nationality of the successor State and consequently lose the nationality of the predecessor State, unless they opt for the retention of the latter's nationality.¹¹⁵

(3) As to the effective date on which persons concerned who have not exercised the right of option become nation-

als of the successor State, the Commission believes that it depended on the specific character of the transfer: thus, when a transfer of territory involves a large population, such change of nationality should take effect on the date of the succession; on the contrary, in cases of transfers involving a relatively small population, it may be more practical that the change in nationality take place on the expiration of the period for the exercise of the option. The latter scenario is not inconsistent with the presumption in article 5 of automatic change of nationality on the date of the succession, since the said presumption is rebuttable as explained in the commentary to that article.

(4) Whatever the date of the acquisition of the nationality of the successor State, the predecessor State must comply with its obligation to prevent statelessness under article 4, and shall therefore not withdraw its nationality before such date.¹¹⁶

(5) Although there have been a number of instances where the right to opt for the *retention* of the nationality of the predecessor State was granted only to some categories of persons residing in the transferred territory, the Commission considers that *all* such persons should be granted this right, even if this were to entail a progressive development of international law. The Commission does not believe that it is necessary to address in article 20 the question whether there are any categories of nationals of the predecessor State having their habitual residence outside the transferred territory who should be granted a right to opt for the *acquisition* of the nationality of the successor State. Naturally, the successor State remains free, subject to the provisions of article 8, to offer its nationality to such persons when they have an appropriate connection with the transferred territory.

(6) In the Commission's view, persons concerned who have opted for the nationality of the predecessor State under the terms of article 20, thereby cancelling the presumption in article 5, should be deemed to have retained such nationality from the date of the succession. Thus, there would be no break in the continuity of the possession of the nationality of the predecessor State.

SECTION 2. UNIFICATION OF STATES

Article 21. Attribution of the nationality of the successor State

Subject to the provisions of article 8, 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

¹¹⁴ See paragraphs (1) to (27) of the commentary to draft article 17 proposed by the Special Rapporteur in his third report (footnote 10 above).

¹¹⁵ See also article 18, paragraph (b) of the Draft Convention on Nationality prepared by Harvard Law School which provided that

"[w]hen a part of the territory of a State is acquired by another State . . . , the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof"

(*Research in International Law* . . . (footnote 19 above), p. 15).

¹¹⁶ In the same spirit, provision 12 of the Venice Declaration (see footnote 16 above) provides that "[t]he predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State".

The Convention on the Reduction of Statelessness addresses the problem of statelessness in case of a transfer of territory from a different perspective: article 10, paragraph 2, provides that, should a person concerned become stateless as a result of the transfer, and in the absence of relevant treaty provisions, the successor State shall attribute its nationality to such person.

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.

Commentary

(1) Section 2 also consists of one article, namely article 21. As indicated by the phrase “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”, article 21 covers the same situations as those described in the commentaries to the draft articles on succession of States in respect of treaties¹¹⁷ and those on succession of States in respect of State property, archives and debts¹¹⁸ concerning the case of unification of States. The Commission finds it preferable to spell out the two possible scenarios in the text of the article itself.

(2) The unification of States envisaged in article 21 may lead to a unitary State, to a federation or to any other form of constitutional arrangement. It must be emphasized, however, that the degree of separate identity retained by the original States after unification in accordance with the constitution of the successor State is irrelevant for the operation of the provision set forth in this article.¹¹⁹ It must also be stressed that article 21 does not apply to the establishment of an association of States which does not have the attributes of a successor State.¹²⁰

(3) As the loss of the nationality of the predecessor State or States is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of such State or States, the main problem addressed in this article is that of the attribution of the nationality of the successor State to persons concerned. In this case, the term “persons concerned” refers to the entire body of nationals of the predecessor State or States, irrespective of the place of their habitual residence.

(4) Accordingly, article 21 provides that, in principle, the successor State has the obligation to attribute its nationality to *all* persons concerned. As regards, however, a person concerned who has his or her habitual residence outside the territory of the successor State and also has another nationality, whether that of the State of residence or that of any other third State, the successor State may not attribute its nationality to such person against his or

her will. This exception is taken into account by the inclusion of the phrase “Subject to the provisions of article 8”.

(5) The provision in article 21 reflects State practice. Where unification has involved the creation of a new State, such State attributed its nationality to the former nationals of all States that merged, as did, for instance, the United Arab Republic in 1958¹²¹ and Tanzania in 1964.¹²² Where unification has occurred by incorporation of one State into another State which has maintained its international personality, the latter extended its nationality to all nationals of the former.¹²³ This was the case, for example, when Singapore joined the Federation of Malaysia in 1963.¹²⁴ The Commission believes that the rule set forth in article 21 is sufficiently broad as to cover the obligations of a successor State under both scenarios.

(6) The Commission is of the view that article 21 embodies a rule of customary international law. In any event, the successor State, which after the date of the succession, is the *only* remaining State concerned cannot conclude an agreement with another State concerned which would depart from the above provision. It would be, moreover, difficult to imagine how the successor State could “give effect to the provisions of Part I” in a different manner.

¹²¹ Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that “[n]ationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect” (text reproduced in E. Cotran, “Some legal aspects of the formation of the United Arab Republic and the United Arab States”, *The International and Comparative Law Quarterly*, vol. 8 (1959), p. 374). This provision was re-enacted in article 1 of the Nationality Law of the United Arab Republic No. 82 of 1958 (*ibid.*, p. 381).

¹²² According to Part II, section 4, subsections (1), (2) and (3) of the Tanzania Citizenship Act, 1995, aimed at consolidating the law relating to citizenship, “[e]very person who . . . was immediately before Union Day a citizen . . . of the Republic of Tanganyika or of the People’s Republic of Zanzibar shall be deemed to have become, on Union Day, . . . a citizen . . . of the United Republic”. These provisions encompass persons who became citizens of any of the two predecessor States by birth, registration, naturalization or by descent.

¹²³ The Draft Convention on Nationality prepared by Harvard Law School only dealt with the case of unification by incorporation. Paragraph (a) of article 18 provided that, “[w]hen the entire territory of a state is acquired by another state, those persons who were nationals of the first state become nationals of the successor state, unless in accordance with the provisions of its law they decline the nationality of the successor state” (*Research in International Law* . . . (footnote 19 above), p. 15). The comment to this provision stressed that this rule “is applicable to naturalized persons as well as to those who acquired nationality at birth” (*ibid.*, p. 61).

¹²⁴ Upon unification, persons who had been citizens of Singapore acquired the citizenship of the Federation, but also maintained the status of citizens of Singapore as one of the units constituting the Federation (Goh Phai Cheng, *Citizenship Laws of Singapore* (Singapore, Educational Publications, 1970), pp. 7-9). For other cases of unification by incorporation, namely the incorporation of Hawaii into the United States of America and the reunification of Germany, see paragraphs (2), (5) and (6), respectively, of the commentary to draft article 18 proposed by the Special Rapporteur in his third report (footnote 10 above).

¹¹⁷ *Yearbook* . . . 1974, vol. II (Part One), pp. 253-260, document A/9610/Rev.1, commentary to draft articles 30 to 32.

¹¹⁸ *Yearbook* . . . 1981, vol. II (Part Two), p. 43, document A/36/10, commentary to draft article 15.

¹¹⁹ This was also the view expressed by the Commission in relation to draft articles 30 to 32 on the succession of States in respect of treaties. See paragraph (2) of the commentary to those articles (footnote 117 above).

¹²⁰ This is for instance the case of the European Union, despite the fact that the Treaty on European Union (Maastricht Treaty) established a “citizenship of the Union”. Under the terms of article 8, “[e]very person holding the nationality of a member State shall be a citizen of the Union”. The Commission notes that the concept of citizenship of the European Union does not correspond to the concept of nationality as envisaged in the present draft articles.

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:

(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.

Commentary

(1) Section 3 consists of two articles, articles 22 and 23, and applies to the case of a dissolution of States, as distinguished from the case of separation of part or parts of the territory, the latter being the object of section 4. Although it may not always be easy in practice to clearly differentiate between those two situations, such distinction is necessary. When a State disappears by dissolution, its nationality also disappears, while in the case of separation of part of the territory, the predecessor State continues to exist and so does its nationality.¹²⁵

¹²⁵ For comparable reasons, the Commission also distinguished between "dissolution" and "secession" when it dealt with the question of succession of States in respect of matters other than treaties. See *Yearbook . . . 1981*, vol. II (Part Two), p. 45, document A/36/10, paragraph (3) of the commentary to draft articles 16 and 17 of the draft articles on succession of States in respect of State property, archives and debts.

(2) The substantive rules embodied in articles 22 and 23 apply *mutatis mutandis* when the various parts of the predecessor State's territory do not become independent States following the dissolution, but are incorporated into other, pre-existing, States. In such case, the obligations spelled out in articles 22 and 23 would become incumbent upon those States.

(3) As the loss of the nationality of the predecessor State is an automatic consequence of dissolution, the issues to be addressed in section 3 are the attribution of the nationality of the successor States to persons concerned and the granting of the right of option to certain categories of persons concerned.

(4) The core body of nationals of each successor State is defined in article 22, *subparagraph* (a), by reference to the criterion of habitual residence, which is consistent with the presumption in article 4. This criterion, widely accepted by publicists,¹²⁶ was used on a large scale, in particular, to resolve the issue of attribution of nationality after the dissolution of the Austro-Hungarian Monarchy.¹²⁷

(5) In the cases of the dissolutions of Yugoslavia and Czechoslovakia, some successor States used the criterion of the "citizenship" of the republics constituting the federation¹²⁸ as the main criterion for determining their nationals, irrespective of their place of habitual residence.¹²⁹ Consequently, some nationals of the predecessor

¹²⁶ See Onuma, *loc. cit.* (footnote 113 above), note 5 referring to various scholars.

¹²⁷ The effects on nationality of the dismemberment of the Austro-Hungarian Monarchy, involving also the dissolution of the core of the dualist Monarchy, were regulated in a relatively uniform manner. Article 64 of the Treaty of Saint-Germain-en-Laye provided that

"Austria admits and declares to be Austrian nationals *ipso facto* and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (*pertinenza*) within Austrian territory who are not nationals of any other State"

(*Laws concerning nationality* (footnote 47 above), p. 586).

Similar provisions are contained in article 56 of the Peace Treaty of Trianon concerning the acquisition of Hungarian nationality. Concerning the ambiguities of the concept of *pertinenza*, see footnote 107 above.

¹²⁸ As pointed out by Rezek,

"there are federations where the federal nationality coexists with a provincial allegiance and the (federal) State is sometimes authorized to legislate on this matter. . . . The federal nationality would not appear as a consequence of the nationality of the (federal) State, established according to the rules laid down by the various provincial legislatures"

(*loc. cit.* (footnote 27 above), pp. 342-343).

¹²⁹ See article 39 of the Law on Citizenship of the Republic of Slovenia, of 5 June 1991, *Uradni list Republike Slovenije* (Official Gazette of the Republic of Slovenia), No. 1/1991 (English translation of "Law on the Republic of Slovenia Citizenship, of June 5, 1991" (release 27, November 1994), in *Central and Eastern European Legal Materials* (Huntington, New York, Juris Publishing, 1997), Binder 5A); articles 35 and 37 of the Law on Croatian Citizenship of 26 June 1991 (footnote 46 above); article 46 of the Yugoslav Citizenship Law (No. 33/96) (footnote 39 above); article 1 of Law No. 40/1993 of 29 December 1992 on the acquisition and loss of citizenship of the Czech Republic (*Report of the experts of the Council of Europe . . .* (footnote 35 above), appendix IV); article 2 of the Law on State Citizenship in the Slovak Republic, of 19 January 1993 (No. 40/1993) (footnote 67 above); article 26, paragraph 1, of the Act on Citizenship

sor State habitually resident in the territory of a particular successor State were not attributed the latter's nationality. The legislation of the successor States contained separate provisions on the acquisition of their nationality by such persons.¹³⁰ In those instances where they were offered the possibility to acquire the nationality of their State of residence nearly all took advantage of such offer.¹³¹ Where such possibility was considerably limited, serious difficulties arose in practice.¹³²

(6) Having examined State practice, including most recent developments, the Commission reaffirmed the importance of the criterion of habitual residence and decided to resort to "citizenship" of a constituent unit of a State only with respect to persons residing outside the territory of a particular successor State. In the same vein, provision 8.a of the Venice Declaration confirmed the rule that "[i]n all cases of State succession, the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on [its] territory".¹³³

(7) Article 22, *subparagraph* (b) sets out rules for the attribution of the nationality of a successor State to per-

(Footnote 129 continued.)

of the Former Yugoslav Republic of Macedonia of 27 October 1992 (No. 67/1992), *Sluzben vesnik na Republika Makedonija* (Official Gazette of the Republic of Macedonia) (see also C. Batchelor, P. Leclerc and B. Schack, *Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia* (UNHCR, 3 April 1997), p. 21); and article 27 of the Decree Having the Force of Law on the Citizenship of the Republic of Bosnia and Herzegovina of 7 October 1992 (No. 18/1992, as amended by No. 11/1993), *Sluzbeni list Republike Bosne i Hercegovine* (Official Gazette of the Republic of Bosnia and Herzegovina) (*ibid.*, p. 27).

¹³⁰ Thus, article 40 of the Law on Citizenship of the Republic of Slovenia, of 5 June 1991 (footnote 129 above) provided that

"[a] citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite on the independence and autonomy of the Republic of Slovenia on 23 December 1990 and is actually living there, can acquire citizenship of the Republic of Slovenia, on condition that such a person files an application with the administrative organ competent for internal affairs of the community where he resides."

Article 30, paragraph 2, of the Law on Croatian Citizenship of 26 June 1991 (see footnote 46 above) provided that any person belonging to the Croat people who did not hold Croat nationality on the day of the entry into force of the Law but who could prove that he had been legally resident in the Republic of Croatia for at least 10 years, would be considered to be a Croat citizen if he supplied a written declaration in which he declared that he regarded himself as a Croat citizen. Article 29 of the Decree Having the Force of Law on the Citizenship of the Republic of Bosnia and Herzegovina of 7 October 1992 (see footnote 129 above), as amended in April 1993, provided that all citizens of the former Socialist Federal Republic of Yugoslavia resident on the territory of Bosnia and Herzegovina as of 6 April 1992 automatically became nationals of Bosnia and Herzegovina (see Batchelor, Leclerc and Schack, *op. cit.* (*ibid.*), p. 27).

¹³¹ For instance, the practice of the Czech Republic indicates that nearly all persons concerned habitually resident in its territory who did not acquire Czech nationality *ex lege* on the basis of the criterion of "citizenship" of the constituent unit of the federation acquired such nationality via optional application. Thus, some 376,000 Slovak nationals acquired Czech nationality in the period from 1 January 1993 to 30 June 1994, mostly by option under article 18 of Law No. 40/1993 of 29 December 1992 on acquisition and loss of citizenship of the Czech Republic (*Report of the experts of the Council of Europe . . .* (footnote 35 above), appendix IV). The outcome was not substantially different from what would have resulted from the use of the criterion of habitual residence (*ibid.*, para. 22 and note 7).

¹³² Batchelor, Leclerc and Schack, *op. cit.* (footnote 129 above), pp. 4 et seq.

¹³³ See footnote 16 above.

sons concerned having their habitual residence outside *its* territory.

(8) The obligation of a successor State to attribute its nationality to such persons, as well as its right to do so, is of course limited by the provisions of article 8, as indicated in the *chapeau* of subparagraph (b). Subparagraph (b) (i) deals with persons concerned who have their habitual residence either in a third State or in another successor State. The criterion used is "an appropriate legal connection with a constituent unit of the predecessor State" that has become part of a particular successor State. It goes without saying that this criterion can only be used where a bond of a legal nature between constituent units of the predecessor State and persons concerned existed under the internal law of that State. As discussed above, this was mostly the case of certain federal States.¹³⁴

(9) Where subparagraph (i) is applicable, the majority of persons concerned having their habitual residence outside the territory of a particular successor State will fall under this category and subparagraph (ii) will come into play rather exceptionally, i.e. with respect to persons not already covered by subparagraph (i).

(10) Subparagraph (ii) only deals with persons concerned who have their habitual residence in a *third* State, i.e. who, on the date of the succession of States, had their habitual residence outside the territory of the predecessor State. The criteria referred to in subparagraph (ii) are those which were most often used in State practice, namely place of birth and place of the last habitual residence in the territory of the predecessor State. The Commission, however, did not want to exclude the use of other criteria, as indicated by the phrase "or having any other appropriate connection with that successor State". It emphasized, at the same time, that the use of any such criteria must be consistent with the general obligation of non-discrimination under article 15.

(11) Article 22 does not address the question of the mode of attribution by the successor State of its nationality. A successor State may fulfil its obligation under this provision either by means of automatic attribution of its nationality to persons concerned or by providing for the right of these persons to acquire such nationality upon option.

(12) The application of the criteria in article 22 may result in a person concerned being qualified to acquire the nationality of more than one successor State. In such case, the attribution of nationality will depend on the option of such person, as indicated in the *chapeau* of article 22. Moreover, subparagraph (b) is subject to the provision in article 8 whereby a State is prohibited from attributing its nationality to persons concerned having their habitual residence outside its territory against their will. Accordingly, the obligation of a State under subparagraph (b) is to be implemented either through an "opting-in" procedure or by *ex lege* attribution of its nationality with an option to decline ("opting-out" procedure).

(13) *Paragraph 1* of article 23 provides for the right of option of persons concerned who are qualified to acquire

¹³⁴ See footnote 128 above.

the nationality of two, or, in certain cases, even more than two, successor States. Such “double qualification” may occur, for instance, when a person concerned habitually resident in one successor State had, prior to the dissolution, the “citizenship” of a constituent unit of the predecessor State which became part of another successor State. There are several recent examples of State practice in which a right of option was granted in such circumstances.¹³⁵ This may also occur when a person concerned habitually resident in a third State was born in the territory which became part of one successor State but also has an appropriate connection, such as family ties, with another successor State. Article 23, paragraph 1, is not meant to limit the freedom of the successor States to grant the right of option to additional categories of persons concerned.

(14) *Paragraph 2* deals with persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 22, subparagraph (b), such as those who acquired the nationality of the predecessor State by filiation or naturalization and were never residents thereof. Unless they have the nationality of a third State, these persons would become stateless. The purpose of the option envisaged under paragraph 2, however, is not limited to the avoidance of statelessness, a problem which might be resolved on the basis of article 11, paragraph 2. Its purpose is, furthermore, to enable such persons to acquire the nationality of at least one successor State, thus giving effect to the right to a nationality as embodied in article 1.

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

¹³⁵ Section 3, paragraph 1, of the Law on State Citizenship in the Slovak Republic, of 19 January 1993 (No. 40/1993), provided that every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia. It was mainly addressed to those persons who, by virtue of the Czech law, became *ex lege* Czech nationals but were habitual residents of Slovakia (see footnote 67 above). Similarly, article 18 of Law No. 40/1993 of 29 December 1992 on acquisition and loss of citizenship of the Czech Republic set out the conditions for the optional acquisition of Czech nationality by persons habitually resident in the Czech Republic who acquired *ex lege* the Slovak nationality (see *Report of the experts of the Council of Europe* . . . (footnote 35 above), appendix IV). Another example is the Yugoslav Citizenship Law (No. 33/96). In addition to basic provisions concerning the *ex lege* acquisition of nationality, article 47 stipulated that

“Yugoslav citizenship may be acquired by any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of another . . . republic [of the Federation] . . . whose residence was in the territory of Yugoslavia on the date of the proclamation of the Constitution” (see footnote 39 above).

(b) Subject to the provisions of article 8:

- (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.

Commentary

(1) Section 4 consists of three articles, 24, 25 and 26, and applies to the case of separation of part or parts of the territory. The distinction between this situation and the case of the dissolution of a State has been explained in the

commentary to section 3 above. As stressed by the Commission in its commentaries to draft articles 14 and 17 on succession of States in respect of State property, archives and debts,¹³⁶ the case of separation of part or parts of the territory of a State must also be distinguished from the case of the emergence of newly independent States, the territory of which, prior to the date of the succession, had a “status separate and distinct from the territory of the State administering it”.¹³⁷

(2) The substantive rules in articles 24 to 26, however, may be applied *mutatis mutandis* in any case of emergence of a newly independent State.

(3) Given the fact that it is sometimes difficult in practice to distinguish between dissolution and separation, the Commission considers it important that the rules applicable in those two situations be equivalent. Accordingly, article 24 is drafted along the lines of article 22.

(4) *Subparagraph* (a) of article 24 sets out the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory. It must be recalled that an analogous provision regarding the case of separation was included in paragraph (b) of article 18 of the Draft Convention on Nationality prepared by Harvard Law School.¹³⁸

(5) This rule was applied in practice after the First World War in the case of the establishment of the Free City of Danzig¹³⁹ and the dismemberment of the Austro-Hungarian Monarchy.¹⁴⁰ More recently, it was applied in the case of the separation of Bangladesh from Pakistan in 1971,¹⁴¹ and also when Ukraine¹⁴² and Belarus¹⁴³ became independent following the disintegration of the Union of Soviet Socialist Republics. It may also be noted

that the criterion of habitual residence was used in practice by some newly independent States.¹⁴⁴

(6) A different criterion was used in the case of the separation of Singapore from the Federation of Malaysia in 1965, namely that of the “citizenship” of Singapore as a component unit of the Federation, which existed in parallel to the nationality of the Federation.¹⁴⁵ Yet another criterion, the place of birth, was applied in the case of the separation of Eritrea from Ethiopia in 1993,¹⁴⁶ probably inspired by the earlier practice of a number of newly independent States.¹⁴⁷

(7) As it did in article 22 with respect to the case of dissolution, the Commission decided to resort to the criterion of habitual residence for the determination of the core body of the population of a successor State. In so doing, it took into consideration both the prevailing practice as well as the drawbacks of the use of other criteria to this end, such as rendering a considerable population alien in its homeland.¹⁴⁸

(8) As regards *subparagraph* (b), it was included in article 24 for reasons similar to those leading to the inclusion of *subparagraph* (b) in article 22.¹⁴⁹ The commentary to the latter provision is therefore also relevant to *subparagraph* (b) of article 24.

(9) *Paragraph 1* of article 25 deals with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State. This provision is based on State practice which, despite some inconsistencies, indicates that such withdrawal has been to a large extent an automatic consequence of the acquisition by persons concerned of the nationality of a

¹³⁶ *Yearbook . . . 1981*, vol. II (Part Two), pp. 37 and 45, document A/36/10, paragraph (2) of the commentary to draft article 14 and paragraph (5) of the commentary to draft articles 16 and 17.

¹³⁷ See the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex).

¹³⁸ For the text of this provision see footnote 115 above.

¹³⁹ See article 105 of the Treaty of Versailles.

¹⁴⁰ See article 70 of the Treaty of Saint-Germain-en-Laye. The rule applied equally to States born from separation and those born from dissolution. It was also embodied in respective article 3 of the Treaty between the Principal Allied and Associated Powers and Poland, the Treaty between the Principal Allied and Associated Powers and Czechoslovakia, the Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State and the Treaty between the Principal Allied and Associated Powers and Roumania.

¹⁴¹ Residence in its territory was considered to be the primary criterion for the attribution of the nationality of Bangladesh, regardless of any other considerations. However, non-Bengalese inhabitants of the territory were required to make a simple declaration in order to be recognized as nationals of Bangladesh; they could also opt for the retention of Pakistani nationality. (See M. Rafiqul Islam, “The nationality law and practice of Bangladesh”, *Nationality and International Law in Asian Perspective*, Ko Swan Sik, ed. (Dordrecht/Boston/London, Martinus Nijhoff, 1990), pp. 5-8.)

¹⁴² Article 2 of the Law on Ukrainian Citizenship of 8 October 1991 (see *Pravda Ukrainy* of 14 November 1991).

¹⁴³ Article 2 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 (see footnote 58 above), as amended by the Law of 15 June 1993 and the Proclamation of the Supreme Soviet of the Republic of Belarus of 15 June 1993.

¹⁴⁴ See Onuma, loc. cit. (footnote 113 above), p. 15.

¹⁴⁵ Goh Phai Cheng, op. cit. (footnote 124 above), p. 9. Comparable criteria were also used by some newly independent States in order to define the core body of their nationals during the process of decolonization. See de Burlet, *Nationalité des personnes physiques . . .* (footnote 113 above), p. 120, who makes reference to “special nationalities” created in view of a future independence that were only meant to fully come into being with that independence; see also pp. 124 and 129. See further the example of the Philippines cited in Onuma, loc. cit. (footnote 113 above), note 96.

¹⁴⁶ See Eritrean Nationality Proclamation No. 21/1992 of 6 April 1992 (*Gazette of Eritrean Laws*, vol. 2 (1992), No. 3).

¹⁴⁷ For examples of such practice, see Onuma, loc. cit. (footnote 113 above), pp. 13-14, and paragraphs (15) to (18) of the commentary to draft article 23 proposed by the Special Rapporteur in his third report (footnote 10 above).

¹⁴⁸ See Onuma, loc. cit. (footnote 113 above), p. 29.

¹⁴⁹ See paragraphs (7) to (10) of the commentary to section 3 above. For the practice relating to the use of the criterion referred to in *subparagraph* (b) (i) of article 24, see footnote 145 above. For the use of the criterion of the place of birth listed in *subparagraph* (b) (ii), see the third report (footnote 10 above), paragraphs (5) and (6) of the commentary to draft article 23 proposed by the Special Rapporteur. See also article 2, paragraph (2), of the Law on Ukrainian Citizenship of 8 October 1991 (footnote 142 above), stipulating that the citizens of Ukraine include

“persons who are . . . permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine.”

successor State.¹⁵⁰ The withdrawal of the nationality of the predecessor State is subject to two conditions. First, that persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State. This condition is spelled out in the *chapeau* of article 24 to which article 25, paragraph 1, refers. Second, that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. The purpose of this condition is to avoid statelessness, even if only temporary, which could result from a premature withdrawal of nationality.¹⁵¹

(10) *Paragraph 2* of article 25 lists the categories of persons concerned who are qualified to acquire the nationality of the successor State but from whom the predecessor State shall not withdraw its nationality, unless they opt for the nationality of the successor State. The criteria used for the determination of these categories of persons are the same as those in article 24.

(11) Article 26 deals with the right of option. There are numerous cases in State practice where a right of option was granted in case of separation of part or parts of the territory.¹⁵²

¹⁵⁰ For examples of State practice, see paragraphs (1) to (8) of the commentary to draft article 24 proposed by the Special Rapporteur in his third report (footnote 10 above). As regards the doctrine, see footnote 115 above.

¹⁵¹ See also provision 12 of the Venice Declaration (footnote 116 above) which prohibits the predecessor State from withdrawing its nationality from its own nationals who have been unable to acquire the nationality of a successor State.

¹⁵² See paragraphs (1) to (5) of the commentary to draft article 25 proposed by the Special Rapporteur in his third report (footnote 10 above).

(12) Article 26 covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities of two or more successor States. Contrary to what is provided in article 20 with respect to a transfer of territory, in the case of separation of part or parts of the territory, the right of option for the retention of the nationality of the predecessor State is not envisaged for all persons concerned qualified to acquire the nationality of the successor State. This right is limited to those persons who, at the same time, fulfil one of the criteria in article 24 and one of those in article 25, paragraph 2. This would be, for instance, the case of a person concerned habitually resident in a third State who was born in the territory of what became a successor State but before leaving for abroad had his or her last habitual residence in the territory that has remained part of the predecessor State.

(13) Similarly, the right of option between the nationalities of two or more successor States has to be granted only to persons concerned who, by virtue of the criteria in article 24, are qualified to acquire the nationality of more than one successor State. Leaving aside the case where the criterion referred to in subparagraph (b) (i) would be applicable, the right of option is only envisaged for some persons concerned who are habitually resident in a third State.

(14) As in the case of article 23, article 26 is not meant to limit the freedom of the States concerned to grant the right of option to additional categories of persons concerned.