

Document:-
A/CN.4/SR.2385

Summary record of the 2385th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

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

adopted on first reading. He also recognized the merits of Mr. Pellet's comments on terrorism. Article 25 should be deleted. Its subject did not fit in with the concept of a threat to international peace and security. The existing conventions on narcotic drugs and psychotropic substances focused on suppression of drug trafficking rather than establishing penalties for it at the international level. Increased international cooperation in law enforcement would be a more appropriate approach to the problem than to include the issue in a code of crimes against the peace and security of mankind.

73. Lastly, he endorsed the Special Rapporteur's recommendations on the material that should be deleted from the text adopted on first reading. Reopening those questions would confirm the validity of the concern that the Commission was engaged in a quixotic exercise.

The meeting rose at 1.05 p.m.

2385th MEETING

Wednesday, 17 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,² A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. LUKASHUK said that the construction proposed by the Special Rapporteur, although based almost entirely on existing law, had been given a mixed reception both in the Commission and in the Sixth Committee. The envisaged Code of Crimes against the Peace and Se-

curity of Mankind, in addition to the considerable impact which it might have on international law and on State policy, affected the interests and the status of persons occupying high positions of State. There was thus some purpose in shifting the location of the draft Code in the general process of the progressive development of international law.

2. The 50 years of the existence of the United Nations had been a period of restructuring of international law on the basis of the purposes and principles of the Charter of the United Nations. Mankind had finally woken up to the threat to its very survival posed by the lack of a reliable international legal order. If international law was to be able to offer solutions to current problems, it must move on to a new stage in its development and become the law of the international community as a whole. The Commission played an important role in that respect and it was at its initiative that the Vienna Convention on the Law of Treaties had embodied the fundamental idea that peremptory rules were adopted by the international community as a whole, in the sense not of adoption by all States in unanimity, but by a sufficiently representative majority. It was even being suggested, both in the statements of the representatives of some States in the Sixth Committee and in the work done by the Commission on the topic of State responsibility, that a kind of legal status should be conferred on this "international community", which was the victim, for example, when an international crime was committed and which was responsible for deciding what the reaction to such a crime should be. The move towards establishing the international community as a legal entity had implications for the formation of general international law and for the principal institutions responsible for applying such law, primarily the United Nations. But, while changes in the international system were clearly necessary in view of its imperfections, experience taught that it was always dangerous to destroy a system without knowing what could be put in its place.

3. The primacy of the interest of the international community was therefore what differentiated the law of the international community from "usual" international law. Thanks to the Commission's work, international criminal law was today a manifest fact and that was a sign of the maturity of the international community and its legal system. Such law was broken by individuals who were often officials enjoying immunity and it would be unrealistic to expect that leaders would cheerfully give up their privileges. Moreover, it was rarely easy to harmonize national legal systems effectively with international law. It was regrettable in that regard that national courts for most of the time had hardly any involvement in the formulation of international law, whose rules they would, however, be increasingly required to apply. There was thus a need to improve the access of national lawyers to the texts and commentaries produced by the Commission. All such constraints must be taken into consideration in the drafting of the Code and that might now perhaps entail a retreat to a restricted version. As the Special Rapporteur had stressed, the formulation of a whole new area of international law necessarily gave rise to many difficulties. The definition of aggression was a good example of such difficulties, for the existing definition was far from perfect, without there

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

being any reason for thinking that the Commission could quickly draft a better one.

4. Mr. TOMUSCHAT said that he wished to comment on the various crimes included by the Special Rapporteur. In the case of aggression, the Commission's aim was to identify the acts which should be punishable by the international community and not to define the acts which fell under the heading of "aggression" in relations between States. The Commission was therefore perfectly entitled to adopt an independent definition of aggression, applicable to the Code and only the Code. By limiting the definition of aggression for the purposes of the Code to a single "hard core" of particularly heinous and serious acts, the Commission would not be undermining in any way the prohibition of the use of force contained in the Charter of the United Nations, for that was a matter of inter-State relations. The Code would merely say that such acts laid their perpetrators open to criminal prosecution. In any event, in the 50 years since the Judgment of the Nürnberg Tribunal,³ no one had been prosecuted by the international community for the crime of aggression. With regard to the role of the Security Council, substantive law must be separated from procedural law and the crime as such must not be made dependent on an affirmative vote of the Council. The Council would have its role in procedure and the Commission could base its recommendations on that point on article 23 of the draft statute for an international criminal court,⁴ without necessarily adopting the wording of article 23 in every respect. Short of accepting the risks of abuse indicated by other speakers, universal jurisdiction should be excluded for aggression, which was to be tried by an international court.

5. Genocide was in a way the cornerstone of the draft Code. The corresponding provision repeated word for word the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide, which did not prompt any objection, but the Commission lacked a formal evaluation of the practical application of the Convention since its adoption and of the problems which it might have created for the competent jurisdictions. In that area, the drafting work should be guided by such an evaluation, which would probably be enriched by the imminent experience of the International Tribunal for Rwanda.

6. Systematic or mass violations of human rights, rechristened "crimes against humanity", posed thornier problems. Did that category presuppose a link with other crimes in the Code, with war crimes in particular? As the Special Rapporteur had pointed out, that was neither necessary nor desirable. But how were such crimes to be distinguished from crimes under ordinary law? The Special Rapporteur thought that crimes against humanity could be committed by individuals having no official function, but was there not then a risk of bringing within the scope of the Code the activities of all the world's mafias, which were subject to national law? Finally, the use of vague notions such as "persecution" or "all other

inhumane acts" had perhaps been inevitable at the time of the Nürnberg Tribunal, but the Commission's task was precisely to furnish criminal law with the rigour which must characterize it in a State based on the rule of law. As in the case of the link with war crimes, the reference to the Nürnberg Tribunal was not sufficient. The list of crimes should be re-examined with a view to removing some of them and adding others, in particular enforced disappearances.

7. The definition of war crimes was even more complicated. Since the choice made by the Commission at the forty-third session, in 1991, had not been favourably received, the Special Rapporteur wisely proposed abandoning it. The statute of the International Tribunal for Rwanda adopted by the Security Council in 1994⁵ nevertheless prompted questions as to whether the scope of the notion of war crimes should be enlarged by the addition of the list contained in article 3 common to the four Geneva Conventions of 1949 and the crimes mentioned in Additional Protocols I and II of 1977. The Commission had no reason to stop short of the threshold crossed by the Security Council, especially since by so doing it might give the impression of questioning the choices made in the statutes of the two existing international tribunals.

8. In principle, international terrorism was a matter of ordinary law and, again in principle, the immunity generally enjoyed by the agents of another State did not cover ordinary-law crimes. It was none the less true that, in that type of case, international legal cooperation rarely produced the expected results, owing to the support enjoyed by the perpetrators of such acts. International terrorism therefore had a place in the draft Code, but minor adjustments must be made to its definition in the light of all the other national and international instruments which had tried to define the specific characteristics of international terrorism. With regard to drug trafficking, the concerns of the States which waged a daily battle against that kind of criminal activity were certainly understandable, but the international community could not take arms against the sea of troubles confronting Member States, which themselves could not shift elsewhere the responsibility for problems which it was their duty to solve. Moreover, how could large-scale trafficking be distinguished from "ordinary" trafficking? If the international community wished to include that crime in the Code, the Commission must comply, but that was a political decision and not a problem of legal logic.

9. The term "crimes against the peace and security of mankind" used in the title of the draft Code suggested an unbreakable link with the prohibition of the use of force contained in Article 2, paragraph 4, of the Charter. Could the term be retained while at the same time including the crime of serious violations of human rights, which in no way implied an armed conflict? The question stood even if the Commission did not have to answer it immediately. Lastly, the rules concerning the capacity of "perpetrator" or "accomplice" required detailed examination. The example of the "perpetrator" of a system of torture who did not personally commit any concrete act of torture was very relevant. The Com-

³ United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

⁴ See 2379th meeting, footnote 10.

⁵ *Ibid.*, footnote 11.

mission must therefore always ask itself whether the Code made it possible to punish the main guilty parties—persons occupying the higher levels in the State hierarchy. However, specific rules could not be provided on complicity for each crime, although that would be desirable, if the provisions of article 3 were retained at the same time. A choice must be made between the two approaches, for a combination of them would lead to an unacceptable over-abundance of punishable acts.

10. Mr. VILLAGRÁN KRAMER said that, in the case of aggression, it was useful for the Commission to take account of established international parameters and, in particular, of the prohibition of the threat or use of force as laid down in the Charter of the United Nations, a breach of which obviously gave rise to sanctions. It was the Security Council's prerogative to determine the existence of an act of aggression, in other words, to judge the conduct of a State. The sanctions applicable to a wrongdoing State were set forth in Chapter VII of the Charter; they differed in kind from the criminal sanctions that could be imposed on an individual, but that would none the less depend on the determination made by the Council. The question was therefore whether or not the Council played a role before the trial. If so, an international criminal court could not act without a prior decision by the Council. If not, it was entirely free to act or not to act.

11. In that respect, he saw a certain analogy with the procedure for impeaching an elected official, for instance, a member of a parliament whose immunity had to be lifted by the body of which he was a member before criminal proceedings could be brought against him. The members of the Security Council had reserved the right to characterize the conduct of one of them, or of another State Member of the United Nations. The only difference was that the five permanent members of the Security Council had a right of veto, but it was not impossible that, by amending the Charter, that right could be exercised by a State which was implicated.

12. The Definition of Aggression,⁶ no doubt exercised a definite influence. It was that Definition which, in 1975, had persuaded all the member countries of OAS to endorse the inclusion in the Inter-American Treaty of Reciprocal Assistance, of an article listing the constituent elements of aggression.

13. Mr. Vargas Carreño's proposal regarding the enforced disappearance of persons (2384th meeting) was most timely, in his view, and would, he trusted, be taken into account by the Drafting Committee. In order to assist the Drafting Committee in its task, the Commission should also discuss whether extenuating or aggravating circumstances should be the subject of a separate chapter or should appear in each article in the draft.

14. The CHAIRMAN, speaking as a member of the Commission, said that he would comment on the list of crimes which the Special Rapporteur proposed should be dealt with in the draft Code on second reading. He would again express regret that the list of crimes had been reduced from 12 to 6; in that sense, he agreed with another

member of the Commission that conduct should be regarded as a crime because it had been characterized as such and not because it was likely or unlikely that it had in fact taken place. To reduce the list of crimes by eliminating such crimes as colonial domination and other forms of alien domination, apartheid, intervention, and the recruitment, use, financing and training of mercenaries would not only rob the Code of its meaning and disappoint the expectations of members of the international community, but would also call into question its significance, particularly in the light of the statute for an international criminal court, since it was the intention of the Commission that the two instruments should form a comprehensive international criminal justice system. Moreover, the reinstatement in the list of the crimes it was proposed to drop would certainly act as a guarantee that they would not be committed in future.

15. Turning to article 15 (Aggression), he noted that, having regard to the comments of Governments and to the need to adapt the political Definition of Aggression, adopted by the General Assembly, to the Code, which dealt with criminal responsibility, the Special Rapporteur proposed a new version of the definition of aggression in his report. While that definition was useful, it should, in his view, be expanded a little in response to the various views and suggestions already made. For instance, in paragraph 1, the concept of "leader or organizer" as the main focus of criminal liability should be extended to include other decision-makers in the national hierarchy where they were vested with sufficient authority and power to initiate conduct which could be held in law to be a crime of aggression within the meaning of the Code. Paragraph 2 could be retained. Furthermore, paragraph 3 of the version adopted on first reading could be reinstated in the following amended form:

"3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, evidence which is rebuttable in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

That new paragraph 3 would meet the points raised by the Government of Australia and some members of the Commission, notably those who had argued that an act of aggression or a breach of Article 2, paragraph 4, of the Charter could not be deemed a crime under the Code unless the criterion of the gravity of its consequences was satisfied. There would also be some merit in retaining the illustrative list of conduct which constituted an act of aggression, as set forth in paragraph 4 of the version adopted on first reading, but with subparagraph (h) deleted to make the list more acceptable from the legal standpoint. Paragraph 5 of the definition, which appeared between brackets, and paragraphs 6 and 7 as adopted on first reading could be deleted, as the Special Rapporteur proposed, so as to make article 15 as well more acceptable on second reading, but without detracting from the value of the definition of aggression as a crime under the Code. He agreed with other members of the Commission that no distinction should be made between acts of aggression and wars of aggression in so far as their consequences were of sufficient gravity or magnitude to threaten the peace and security of mankind.

⁶ Ibid., footnote 3.

After all, as one member of the Commission had pointed out, any emphasis on wars of aggression would be misplaced, since declarations of war no longer existed in international relations.

16. He would suggest that, before finalizing the wording of article 19 (Genocide), the Commission should examine the points made by some members of the Commission and by the Government of the United States, inasmuch as the text proposed by the Special Rapporteur on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide contained all the basic elements which were the subject of a broad consensus.

17. He welcomed the new title, "Crimes against humanity", proposed for article 21 (Systematic or mass violations of human rights), which reflected the original concept of the Code. But for such crimes to be covered by the Code, they must satisfy the criterion of "systematic or mass violations" of human rights, as was in fact recommended by the Government of the United Kingdom and some members of the Commission. Furthermore, the Commission did not need to, and perhaps could not, define torture, and any attempt to do so could result in an interminable debate. The basic question was at what point a violation of a humanitarian principle or human rights violations, which were essentially matters of domestic concern that fell within the national jurisdiction, became an international problem that came within international jurisdiction. The issue became even more complicated where there was no agreement at the international level or consensus on applicable standards, the appreciation of the factors surrounding the occurrence of such violations and, indeed, credible and impartial means of establishing the facts. Again, as some members had pointed out in reference to other categories of proposed crimes, no matter how abhorrent certain conduct might be, it could not be regarded as a crime under the Code unless it threatened the peace and security of mankind. That criterion, which was logical, appeared to set a limitation or standard.

18. The new wording proposed for article 22 (Exceptionally serious war crimes), for which the Special Rapporteur proposed the title "War crimes", was based on the statute of the International Tribunal for the Former Yugoslavia.⁷ In that connection, he could not support Mr. Tomuschat's proposal to expand the article along the lines of the statute of the International Tribunal for Rwanda. As the Security Council had rightly pointed out, the situation in the two countries was different: in the case of the former Yugoslavia, only acts committed at a particular time had been deemed, in law, to fall within the jurisdiction of the Tribunal, whereas, in the case of Rwanda, the Tribunal was meant to fill a gap and any generalization of its statute would therefore be unacceptable. Moreover, given the comments of States and their views on international humanitarian law in general and on the law and customs of war, the article proposed by the Special Rapporteur was unlikely to attract a wide consensus. Without developing the point, he would note that the Commission should examine and analyse in

much greater depth the various concepts involved in the definition of that category of crimes if it was to arrive at a sound formulation that would be widely acceptable in both legal and political terms. The proposal that the concept of "grave breaches" should be included in the article was, however, welcome.

19. He agreed with the Special Rapporteur that article 24 (International terrorism) should be included in the draft Code. He also endorsed his necessary and timely proposal, which would receive wider acceptance, that the article should cover individuals who engaged independently, in acts of terrorism. Furthermore, he shared the view of the Government of the United States of America, that, in a number of international conventions, terrorism was defined by way of enumeration rather than in a generic definition. The Commission must, however, strive to give international terrorism a precise definition that covered all its manifest forms. The word "terror" was preferable to other expressions, since its meaning was generally well understood. The comments made by the Governments of the United Kingdom of Great Britain and Northern Ireland and Switzerland would also be useful in enlarging the concept of terrorism.

20. He could support the inclusion in the draft Code of article 25 (Illicit traffic in narcotic drugs), given the increasingly insidious relationship between terrorism and illicit traffic in narcotic drugs and in view of the comments offered by the Special Rapporteur and the Government of Switzerland. It would, however, be better, in the light of the rather realistic comments of the Government of the United Kingdom, to leave prosecution and punishment to the effective and available national systems in so far as was possible and feasible. But where the crime was a threat to peace and the good order of a State or States and, if it was their wish, it should be possible for it to be tried by an international criminal court as a crime under the Code.

21. In conclusion, he would reiterate that, if the Code was to be universal and widely acceptable, it must encompass the other crimes which had been adopted on first reading and dropped on second reading. Failing that, the Code could not be linked to the draft statute for an international criminal court which the Commission had adopted at its forty-sixth session, whereas the two instruments could together provide a basis for the development of an objective, non-discriminatory and universal international criminal justice system. Secondly, the absence of such crimes from the Code would in no way alter their status as crimes under international law. Thirdly, the draft Code, like the draft statute, would require further intensive review by States with a view to clarifying the elements of the crimes involved, complementing them with rules on procedure and evidence, setting down criteria for the investigation and surrender of suspects, and establishing a proper balance between, on the one hand, the international criminal justice system that was set up and the national criminal justice system and on the other the Charter of the United Nations.

22. Mr. de SARAM said he agreed with Mr. Sreenivasa Rao that international terrorism, which could shake a society to its very foundations, had its place in the draft Code.

⁷ Ibid., footnote 5.

State succession and its impact on the nationality of natural and legal persons (A/CN.4/464/Add.2, sect. F, A/CN.4/467,⁸ A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

23. Mr. MIKULKA (Special Rapporteur) introduced his first report on State succession and its impact on the nationality of natural and legal persons (A/CN.4/467). It dealt with one of the new topics that the Commission had decided to place on its agenda at its forty-fifth session, in 1993.⁹ The General Assembly had approved that proposal in its resolutions 48/31 and 49/51. It had also requested, in resolution 49/51, the Secretary-General to invite Governments to submit, by 1 March 1995, relevant material including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

24. Nationality had once again become a question of great interest to the international community following the emergence of new States and, in particular, the dissolution of States in eastern Europe. Problems relating to nationality, and in particular the problem of statelessness, had attracted the attention of a number of international governmental and non-governmental organizations and international bodies, including the High Commissioner on National Minorities of OSCE, the Arbitration Commission of the Conference on Yugoslavia,¹⁰ UNHCR and the Council of Europe. The Commission's decision to include the question of nationality in the context of State succession on its agenda thus seemed fully justified by the practical needs of the international community.

25. The first report consisted of an introduction and seven chapters. With regard to the historical review of the work of the Commission, he noted that that topic currently under consideration stood at the intersection of two other topics that the Commission had already considered, namely, nationality, including statelessness, and succession of States and Governments. The results of the Commission's previous work on those two topics were the Convention on the Reduction of Statelessness, adopted in 1961, on the basis of the draft convention prepared by the Commission (the Convention had entered into force in 1975), the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. He wished to pay tribute to his predecessors, the special rapporteurs for the two topics under consideration, for their contribution to that work: Mr. Manley O. Hudson, Special Rapporteur for the topic of nationality, including statelessness; Mr. Roberto Córdova, who had replaced him; Mr. Manfred Lachs, Special Rapporteur for the topic of succession of States and Governments; Sir Humphrey Waldock, Special Rapporteur for succession in respect of treaties; Sir

Francis Vallat, who had replaced him; and Mr. Mohamed Bedjaoui, Special Rapporteur for succession in respect of matters other than treaties.

26. With regard to the delimitation of the topic, he pointed out that the problems the Commission must study were part of the branch of international law dealing with nationality rather than State succession. By their nature, they were very similar to those which the Commission had already considered under the topic of nationality, including statelessness. However, they differed from it in two respects: on the one hand, the Commission's vision was broader than before (it covered all of the issues resulting from changes of nationality and was not limited to the topic of statelessness), and, on the other hand, the scope of consideration was limited to changes of nationality resulting from State succession and thus having the nature of collective naturalizations.

27. In contrast to international treaties or debts, which comprised an international legal relation, which was subject to transfer, the relation of the State to the individual, which was covered by the concept of nationality, excluded a priori any notion of "substitution" or "devolution". Nationality was always inherent and was not a "successional matter", as, for example, were State treaties, property, debts, and so on.

28. The topic under consideration, which stood, as had been said, at the point where the law of nationality and the law of State succession intersected, also related to the problem of diplomatic intercourse and immunities, included in the list of topics selected for codification at the first session in 1949¹¹ which had never been considered. The problem of the continuity of nationality, which arose in the context of collective naturalizations resulting from territorial changes, was part of diplomatic intercourse and immunities. It was for the Commission to decide whether and to what extent that issue should be considered in the context of the current topic.

29. With regard to the working method, the Commission should adopt a flexible approach in dealing with the topic, using both the method of codification and that of progressive development of international law.

30. As to the form which the outcome of the work on the topic might take, he drew the Commission's attention to the fact that, at its forty-fifth session, when it had included the topic of "State succession and its impact on the nationality of natural and legal persons" in its agenda, it had indicated in its report that the outcome of the work could for instance be a study or a draft declaration to be adopted by the General Assembly and had decided that the final form of the work would be determined at a later stage.¹² The General Assembly, in resolution 49/51 endorsed the Commission's decision to undertake work on the new topics, on the understanding that the final form to be given to the work on those topics would be decided after a preliminary study had been presented to the General Assembly.

⁸ Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

⁹ *Yearbook . . . 1993*, vol. II (Part Two), p. 97, document A/48/10, para. 440.

¹⁰ See the "Declaration on Yugoslavia" (A/C.1/46/11, annex).

¹¹ *Yearbook . . . 1949*, Part Two, p. 279, para. 16.

¹² *Yearbook . . . 1993*, vol. II (Part Two), p. 97, document A/48/10, para. 339.

31. With regard to the terminology used, he considered that, in order to ensure uniformity, the Commission should continue to use the definitions it had formulated previously in the context of the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, particularly with regard to the basic concepts, defined in article 2 of both Conventions, and especially with respect to the definition of the expression “succession of States”. As the Commission had explained in its commentary to those provisions, that expression was 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.¹³ At that time, the Commission had considered that expression preferable to other expressions such as “replacement in the sovereignty in respect of territory”. It had stated that the word “responsibility” should be read in conjunction with the words “for the international relations of territory” and was not intended to convey any notion of “State responsibility”, a topic currently under study by the Commission. The meanings attributed to the terms “predecessor State”, “successor State” and “date of the succession of States” were merely consequential upon the meaning given to the expression “succession of States”.¹⁴

32. Introducing chapter I of the report, entitled “Current relevance of the topic”, he said that he had decided to include that chapter in the report in the light of certain comments that had been made when the Commission had decided to include the topic in its agenda, some members of the Commission having taken the view that the topic was an academic one and devoid of practical scope. He had thus deemed it useful to mention in the report some of the international bodies that had concerned themselves with the problem of nationality in relation to recent territorial changes, in order to stress the importance of the problem under consideration from the point of view of the practical needs of the international community. Chapter I also contained several references to international symposia and meetings that had been attended by legal experts from different countries and that had dealt with issues relating to nationality. In his view, the records of those meetings might be of benefit to the Commission in its work on the topic.

33. Chapter II of the report dealt with the concept and function of nationality. On that question, a clear distinction must be made between the nationality of individuals and that of legal persons. On the nationality of individuals, the various components of the concept of nationality had been identified by ICJ in the *Nottebohm* case. According to the definition given by the Court, nationality was

a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the

¹³ *Official Documents of the United Nations Conference on the Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (A/CONF.80/16/Add.2), p. 6, commentary to article 2, para. (3).

¹⁴ *Ibid.*, para. (4).

juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.¹⁵

34. The notion or the concept of nationality could be defined in widely different ways depending on whether the problem was approached from the perspective of internal or international law. For the function of nationality was, in each case, different. Seen from the perspective of international law, to the extent that individuals were not direct subjects of international law, nationality was the medium through which they could normally enjoy benefits from international law; whereas, in internal law, the function of nationality was different and there could be various categories of “nationals”. The existence of different categories of nationality within a State had been a phenomenon specific to the federal States of Eastern Europe: the Soviet Union, Yugoslavia and Czechoslovakia.

35. By way of analogy with the position of individuals, legal persons (corporations) had a nationality as well. As in the case of an individual, the existence of the bond of nationality was necessary for the purposes of the application of international law in relation to a legal person and, most often, for the purposes of diplomatic protection. There was, however, a limit to the analogy that could be drawn between the nationality of individuals and the nationality of legal persons.

36. It could be said that there was no rigid notion of nationality with respect to legal persons. For that reason, it was a usual practice of States to provide expressly, in a treaty or in their internal laws, which legal persons could be regarded as “nationals” for the purposes of the application of the treaty or of national laws. Owing to the fact that legal persons might have links with several States, the establishment of the “national” status of a legal person involved a balancing of various factors.

37. The preceding comments raised a question that the Commission must answer, namely, whether it was truly useful to undertake the study of the impact of State succession on the nationality of legal persons in parallel with the study concerning the nationality of natural persons. Did the study of problems of nationality of legal persons have the same degree of urgency as the study of problems concerning the nationality of individuals? In his view, the Commission might separate the two issues and study first the most urgent one—that of the nationality of natural persons.

38. Turning to chapter III, which dealt with the roles of internal law and international law, he noted that it was generally accepted that it was not for international law but for the internal law of each State to determine who was, and who was not, to be considered its national. That conclusion remained valid in cases of State succession. It was for the internal law of the predecessor State to determine who had lost the nationality of that State following the change; it was for the internal law of the successor State to determine who had acquired it. That principle had been confirmed by article 1 of the Convention on

¹⁵ *Nottebohm, Second phase, Judgment, I.C.J. Reports, 1955*, pp. 4 et seq., at p. 23.

Certain Questions relating to the Conflict of Nationality Laws, by PCIJ in its advisory opinion with regard to the *Nationality Decrees issued in Tunis and Morocco*¹⁶ and in its advisory opinion on the question concerning the *Acquisition of Polish Nationality*,¹⁷ and had been reiterated by ICJ in the *Nottebohm* case.¹⁸ At the same time, however, according to the opinion of some writers, there could be exceptional cases where individuals might possess a nationality for international purposes in the absence of any applicable nationality law. That begged the question whether the existence of two distinct concepts of nationality—one under internal law and another under international law—was accepted. That issue had a special importance in the context of State succession. The Commission must ask itself the following questions: if the concept of nationality for international purposes was to be considered as generally accepted, what were its elements and what exactly was its function?

39. With regard to the function of international law, while it could be said that the legislative competence of the State with respect to nationality was not absolute, it must also be accepted that the role of international law with respect to nationality was very limited. In principle, States were subject to two types of limitations in the areas of nationality, the first type relating to the delimitation of competence between States and the second, to the obligations associated with the protection of human rights. In any event, international law could not substitute for internal legislation indicating who were and who were not nationals of the State.

40. International law intervened through both customary and conventional rules. The Convention on Certain Questions relating to the Conflict of Nationality Laws referred to international conventions, international custom, and the principles of law generally recognized with regard to nationality. While the rules of customary law were still rudimentary, conventions and treaties aimed at the harmonization of national legislations with a view to eliminating the unfortunate consequences which resulted from the use by States of differing processes of acquisition or loss of nationality. Some of those consequences—such as statelessness—were considered more serious than others—such as double nationality. Among the conventions, one could cite the above-mentioned Convention, the Protocol relating to a Certain Case of Statelessness, its Special Protocol concerning Statelessness and its Protocol relating to Military Obligations in Certain Cases of Dual Nationality, as well as the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. Among the regional instruments, mention could be made of the Convention on Nationality of the Arab League of 1954 and the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded between the States members of the Council of Europe.

41. As to whether those instruments were relevant in the context of State succession, he noted that, first of all, they provided useful guidance to the States concerned by

offering solutions which could *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change. Secondly, such conventions, when the parties thereto included the predecessor State, could be formally binding upon successor States in accordance with the relevant rules of international law governing State succession in respect of treaties. Those instruments could thus add to the general limitations imposed by customary rules of international law on the discretion of the successor State in the field of nationality. Other international treaties directly concerned with problems of nationality in cases of State succession had played an important role, in particular after the First World War. The Convention on Certain Questions relating to the Conflict of Nationality Laws included the principles of law generally recognized with regard to nationality among the limitations to which the freedom of States was subjected in the area of nationality. But the Convention remained silent with respect to the precise content of that concept, which the Commission might therefore attempt to spell out in its study of the subject.

42. With regard to limitations on the freedom of States in the area of nationality, the first limitation arose from the principle of effective nationality based on the concept of a genuine link, a principle often cited in connection with the decision of ICJ in the *Nottebohm* case. That judgment had elicited some criticism, although the principle of effective nationality as such had not been challenged. Another category of limitations, whose importance had increased considerably after the Second World War, arose from some obligations of States in the area of human rights which imposed limits on the exercise of their discretion when it came to granting or withdrawing nationality. That held true for naturalizations in general, as well as in the particular context of State succession. Article 15 of the Universal Declaration of Human Rights¹⁹ provided that everyone had the right to a nationality and that no one was to be arbitrarily deprived of his nationality nor denied the right to change his nationality. Similarly, article 8 of the Convention on the Reduction of Statelessness provided that a contracting State could not deprive a person of its nationality if such deprivation would render him stateless. According to article 9 of the same Convention, the contracting State could not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. The Commission could study the precise limits of the discretionary competence of the predecessor State to deprive of its nationality the inhabitants of the territory it had lost, as well as the question whether an obligation of the successor State to grant its nationality to the inhabitants concerned could be deduced from the principles previously mentioned.

43. Concerning categories of succession, he held the view that the Commission must address separately the problems of nationality arising in the context of different types of territorial changes. That would reveal whether it was appropriate to maintain, as some writers did, that most of the principles referred to in connection with universal succession apply, *mutatis mutandis*, to the effects of partial succession on nationality. In the context of its

¹⁶ P.C.I.J. 1923, Series B, No. 4, p. 24.

¹⁷ Ibid., No. 7, p. 16.

¹⁸ *Nottebohm* (see footnote 15 above), p. 4.

¹⁹ General Assembly resolution 217 A (III).

work on succession of States in respect of treaties, the Commission had specified three broad categories: succession in respect of part of territory; newly independent States; and uniting and separation of States.²⁰ Those categories had been maintained by the diplomatic conference and had been incorporated in the Vienna Convention on Succession of States in respect of Treaties. For the purposes of the draft on succession of States in respect of matters other than treaties, the Commission had deemed that some further precision in the choice of categories was necessary. Consequently, with regard to succession in respect of part of territory, the Commission had decided that it was appropriate to distinguish and deal separately with three cases: the case where part of the territory of a State was transferred by that State to another State; the case where a dependent territory achieved its decolonization by integration with a State other than the colonial State; and the case where a part of the territory of a State separated from that State and united with another State.²¹ Regarding the uniting and separation of States, the Commission had found it appropriate to distinguish between the “separation of part or parts of the territory of a State” and the “dissolution of a State”.²² Those categories had been approved by the diplomatic conference and were at the basis of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. In the judgement of the Special Rapporteur, for the purposes of the study of State succession and its impact on nationality, it would be appropriate to keep the categories adopted for the codification of the law of succession of States in respect of matters other than treaties. The continuity or discontinuity of the international personality of the predecessor State in cases of cessation or dissolution of States had direct implications in the area of nationality. The issues which arose in the first case were by nature substantially different from those which arose in the second case. Moreover, for cases of uniting of States, a distinction was required between the situation in which a State united freely with another State, consequently disappearing as a subject of international law—the “absorption” hypothesis—and the situation in which the two predecessor States united to form a new subject of international law and therefore both disappeared as sovereign States. The nationality issues that had arisen during the decolonization process should be studied only in so far as such study shed light on nationality issues common to all types of territorial changes. He also believed that, like the Commission’s previous work, the study should be limited “only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations”.²³ Accordingly, the study should not deal with questions of nationality which might arise, for example, in cases of annexation by force of the territory of a State.

²⁰ *Yearbook . . . 1974*, vol. II (Part One), p. 172, document A/9610/Rev.1, para. 71.

²¹ *Ibid.*, pp. 208-211, article 14 of the draft articles on succession of States in respect of treaties and commentary thereto.

²² *Yearbook . . . 1981*, vol. II (Part Two), para. 75.

²³ Article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

44. The Commission must delimit the scope of the problem *ratione personae*, *ratione materiae* and *ratione temporis*. For the scope of the problem *ratione personae*, there was some uncertainty regarding the categories of persons who were susceptible of having their nationality affected by change of sovereignty. That applied to all individuals who could potentially lose the nationality of the predecessor State, as well as all individuals susceptible of being granted the nationality of the successor State. It was obvious that the two categories of persons would not necessarily be identical. *Ratione materiae*, the preliminary study should deal with questions of loss of the nationality of the predecessor State and with questions of conflict of nationalities susceptible of resulting from State succession, namely, statelessness and double or multiple nationality. With regard to loss of nationality, the study should aim at clarifying the extent to which the loss of the nationality of the predecessor State occurred automatically, as a logical consequence of the succession of States, and the extent to which international law obliged the predecessor State to withdraw its nationality from the inhabitants of the territory concerned or, on the contrary, limited the discretionary power of that State to withdraw its nationality from certain categories of individuals susceptible of changing nationality. In terms of acquisition of nationality, the delimitation of categories of persons susceptible of acquiring the nationality of the successor State was not easy. In the event of total State succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States, respectively, ceased to exist, all nationals of the predecessor State or States were candidates for the acquisition of the nationality of the successor State. But in the case of dissolution of a State, which also then ceased to exist, the situation became more complicated owing to the fact that two or more successor States appeared and the range of individuals susceptible of acquiring the nationality of each particular successor State had to be defined separately. Similar difficulties would arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of succession or transfer of a part or parts of a territory. In respect of conflict of nationalities, the Commission could investigate whether the States concerned, namely, the predecessor State and the successor State or States, were required to negotiate and settle nationality questions by mutual agreement with a view to warding off conflicts of nationalities, especially statelessness. Finally, the Commission should study the right of option, which was provided for in a substantial number of international treaties and had quite recently been envisaged by the Arbitration Commission of the Conference on Yugoslavia.²⁴

45. With regard to the scope of the problem *ratione temporis*, since the topic was the question of nationality solely in relation to the phenomenon of State succession, the scope of the study excluded questions relating to changes of nationality which occurred prior to or following the date of the succession of States. It should not be forgotten, however, that, in the majority of cases, successor States took time to adopt their laws on nationality

²⁴ See footnote 10 above.

and that, in the interim period, human life continued. There could therefore be problems concerning nationality which, although not resulting directly from the change of sovereignty as such, nevertheless deserved the Commission's attention.

46. Turning to continuity of nationality, he said he wished to make three points. First, the rule of the continuity of nationality was a part of the regime of diplomatic protection. Secondly, neither the practice nor the doctrine gave a clear answer to the question of the relevance of that rule in the event of involuntary changes in nationality brought about by State succession. There were good reasons to believe that, in the case of State succession, that rule could be modified. Lastly, since the problem of continuity of nationality was closely associated with the regime of diplomatic protection, the question arose whether it should be brought within the scope of the current study.

47. Mr. IDRIS expressed his congratulations to the Special Rapporteur on his extremely detailed and thought-provoking first report, as well as on his excellent introduction. Before the Commission entered into the debate, he would like two things to be clarified in connection with General Assembly resolution 49/51. First, the resolution included the words "on the understanding that the final form to be given to the results of the work will be decided after a preliminary study is presented to the General Assembly". It was therefore clear that the Commission's work would involve a preliminary study. The Special Rapporteur, however, had referred to a report as opposed to a study. He would like to know how the Special Rapporteur envisaged such a report.

48. Secondly, in its resolution 49/51, the General Assembly requested the Secretary-General to invite Governments to submit materials including national legislation and decisions of national tribunals. Since a preliminary study, and not a preliminary report, was involved, it would be useful to know how much material had been compiled.

49. Mr. MIKULKA (Special Rapporteur) said he had deliberately said very little about the final form to be given to the results of the Commission's work. He had a number of ideas on that subject, of course, but, before outlining them, he wished to give members of the Commission an opportunity to discuss the topic itself. He saw no contradiction between the preparation of a preliminary study and the drafting of a report. Any preliminary study carried out by the Commission could in any case be transmitted to the General Assembly only as part of its report. The Commission could apply the solution used for the draft statute for an international criminal court: the report of the Working Group on a draft statute for an international criminal court had been submitted to the Commission and then annexed to the Commission's report to the General Assembly.²⁵ In order to comply with the wishes of the General Assembly, the Commission could transmit a summary outlining possible approaches and various positions and options in order to

enable the Sixth Committee to advise the Commission about the preferences of States.

50. The final form to be given to the results of the work could not be decided on before the preliminary study was submitted to the General Assembly, even though the Commission could express its preferences in that regard.

51. Turning to the second point made, he noted that relatively few States had submitted documentation on their national legislation, but that those States included several that had recently undergone territorial transformation: in other words, successor States. The secretariat had also made a number of documents available to him. But a great many cases of State succession were covered neither by recent documents nor by older ones and nothing could be done but to await the replies of Governments. If the Commission decided to set up a small working group on the topic, however, its members would have access, with the secretariat's assistance, to all the documents that had been available to him.

52. Mr. LUKASHUK said that, after having carefully studied the first report of the Special Rapporteur, he found that it clearly outlined all aspects of the topic. The Special Rapporteur faced a particularly arduous task, since he had to establish a link between two important yet distinct problems: State succession and nationality not governed by international law. In that connection, he wished to make two comments.

53. In the first place, nationality was the legal link between an individual and a State, but that did not really make matters very clear. Moreover, the link had undergone significant changes in connection with the protection of human rights. At present, nationality might be regarded as the attribute of a member of the organization of a State.

54. Secondly, the right of the individual to nationality was recognized at both the international and the national levels: hence, arbitrary treatment or absolute sovereignty of the State was excluded. In that connection as well, State succession must be analysed with due regard for the relationship between nationality and human rights.

The meeting rose at 12.55 p.m.

2386th MEETING

Thursday, 18 May 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Ro-

²⁵ *Yearbook* . . . 1993, vol. II (Part Two), document A/48/10, annex.