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Summary record of the 2388th meeting

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

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2388th MEETING

Tuesday, 23 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, 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. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State succession and its impact on the nationality of natural and legal persons (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/467,[1] A/CN.4/ L.507, A/CN.4/L.514)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA said that the didactic approach adopted by the Special Rapporteur in his first report (A/CN.4/467), with respect both to the form and to the substance, was probably warranted by the novelty of the subject-matter. The report reflected the mood of the times—a mood in which the principle of sovereignty that had governed international law since the nineteenth century was heading, at the dawn of the twenty-first century, towards a watershed where sovereignty and solidarity in the service of humankind converged. New times, and a new topic, called for an urgent treatment: that message was to be found in every section of the report. Yet one might ask whether that message needed a report of so many pages, and whether the situations calling for urgency cited by the Special Rapporteur—namely, those relating to the recent changes in eastern Europe—were not already a thing of the past. Admittedly, the past was useful, but the Commission's task was to work for the future. Russia and Chechnya; Morocco and Western Sahara; China and Hong Kong; Rwanda; Burundi; Canada and Quebec; Senegal, faced with a wave of Casamance irredentism; the European countries currently engaged in building a European Union; Ethiopia, now shorn of Eritrea, yet which in April 1995 had acquired a new federal constitution favouring ethnic particularism: those were some of the questions that should be given urgent treatment in the context of the present topic. Could the approach adopted to the problems posed by the former Soviet Union, the former Yugoslavia, or the former Czechoslovakia be transposed to the future, and to the situations just mentioned? It was a moot point, but it was not a theoretical question. On the contrary, it was central to the topic under consideration.

2. As to the Special Rapporteur's approach and the structure of the report, after the historical review of the work of the Commission on drafting a regime of State succession, one might have expected to find an indication of what the Special Rapporteur understood to be the content of the topic assigned to him. Did its title refer to State succession in matters of nationality, and thus mean that, as in the case 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, the Commission was called on to draw up a specific regime as a positive response to the problems posed by nationality in a situation of State succession? Or, did it refer to the impact of any type of State succession on nationality, and thus raise the question, in the light of those same conventions, of what rules and principles were applicable to nationality, and of the extent to which they were applicable? Those two questions should have been considered in detail in a section of the report preceding chapter I entitled "Current relevance of the topic". Yet not until much further on in, at the end of chapter V, did one read that the Special Rapporteur had opted for "the current study of State succession and its impact on the nationality of natural and legal persons". Both the Commission and the General Assembly, to which its preliminary study would be submitted, would benefit from an elucidation of the content of the topic.

3. The preliminary study should avoid two pitfalls. First, the Commission must avoid the temptation to exaggerate the role of international law in the field of the topic under consideration. Secondly, it should also take cognizance of the fact that the question to be regulated concerned, first and foremost, not inanimate objects, but human beings. His comments would relate to those two contentions, which encapsulated the highly political scope of the topic.

4. On the first point of contention, which was not necessarily a reproach, namely, that the Special Rapporteur idealized the role played by international law, especially with regard to its impact on natural persons, three comments could be made. To begin with, due primacy must be restored to internal law, for there was an inherent link between the State—regardless of the circumstances and context of its emergence—and the nationality of the population claiming to be its nationals. As acknowledged in the report, both the literature and the practice of the courts agreed on the exclusive character of the competence of the State in determining nationality. In other words, the State defined the conditions for granting nationality. But it was also the State that defined the conditions for loss of nationality, and the State that could confer on individuals the freedom to choose from among more than one nationality. Admittedly, in a celebrated opinion delivered in 1984, the Inter-American Court of Human Rights had ruled that that principle was limited by the requirements imposed by international law;[2] but

[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[2] Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (Advisory Opinion OC-4/84, *International Law Reports* (Cambridge), vol. 79 (1989), p. 283).

the scope of that opinion, which was in any case only an opinion, should be viewed relatively. In the case of international recognition, for example, it was well known that the act whereby a State recognized another State in the context of State succession was almost never accompanied by a requirement that the legislation enacted by the new State regarding nationality should be in conformity with international law. It was an internal administrative matter, a matter for the Government, and one with which international law did not concern itself.

5. Secondly, even if international law were to deal with that question, it would still be necessary to determine the substance—namely, the rules and sources of that international law. The Special Rapporteur referred to the Draft Convention on Nationality of 1929,[3] but that Convention had remained at the drafting stage, and was not positive law. The report also contained a reference to article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws. There again, the Convention had not entered into force and, in his view, therefore, it was not law.

6. The practice of the courts and customary rules were two ways of generating international law which served as the background to the principle of effective nationality referred to at length in the report. That principle, however, was highly controversial. The *Mavrommatis Palestine Concessions*[4] and *Nottebohm*[5] cases had conferred a practical function on the principle of effective nationality, providing rules on the basis of which to decide between the rival claims of two States in the exercise of diplomatic protection, nationality being one condition for their implementation. That rule did indeed apply to cases of conflict of nationality, provided they remained within the framework of diplomatic protection. Outside that framework, the principle of effective nationality lost its pertinence and scope. That assertion was borne out by the arbitral award in the *Flegenheimer* case,[6] and by the judgment of the Court of Justice of the European Communities in case No. C-369/90[7] which had virtually ridiculed the principle of effectiveness, as the product of a romantic epoch in the history of international relations.

7. Thirdly, when the Special Rapporteur found it undesirable that, as a result of change of sovereignty, persons should be rendered stateless against their will, he was invoking international human rights law, which, as he pointed out in his report, imposed additional limits on States in the exercise of their discretion when it came to granting or withdrawing their nationality. However, international human rights law was riddled with fundamental contradictions. One could conceive that determination of the nationality of individuals in a context of State succession should require consultation with the population, in the light of the principle of the right of peoples to self-determination, which was surely a people's collective right. In its advisory opinion on the question of *Western Sahara*,[8] ICJ had reaffirmed the obligation of a State to consult with the population. The implementation of that obligation devolved on States. In 1987, the Human Rights Committee had clearly recognized that an individual could not claim to be the victim of a violation of the right of peoples to self-determination as set forth in article 1 of the International Covenant on Civil and Political Rights. In Czechoslovak constitutional law—the most recent example referred to by the Special Rapporteur—a law on referendums had been enacted in 1991, but had not been implemented, because of the need to address the political crisis of 1992. That law had been allowed to lapse, yet no one had regarded that state of affairs as a violation of international law. And when the Czech Republic and Slovakia had each adopted legislation on nationality, that legislation had been unequal, with regard to the conditions each imposed for the acquisition of nationality, and also with regard to the settlement of questions of dual nationality.[9] Thus, article 15 of the Universal Declaration of Human Rights[10] must be seen as declaratory law, rather than as binding law. That article, like the relevant provisions of the Covenant, left States free to take account of their own interests and fears, and of other political rather than purely legal considerations, in questions regarding the determination of nationality.

8. As to his second contention, the Special Rapporteur recommended that the Commission should not 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. The Commission was invited to separate the two issues and to study first the most urgent one—that of the nationality of natural persons. He endorsed that approach, which would also help to highlight the specific features of a subject which needed to be placed in an appropriate legal framework. As he had said at the outset, the subject-matter of the topic was not inanimate objects such as treaties, debts, archives, or property—issues that had already been addressed by the Commission, and on which the very existence of the State did not fundamentally depend. On the contrary, it concerned the essential bases of the State perceived, not from an abstract or descriptive standpoint, but as implied by territorial and demographic variables, and the legal structure appropriate to organize a framework to deal with the interaction of those variables. That structure concerned both the predecessor State and the successor State, for the primary goal of the law of State succession was to ensure the social and political stability of each of the entities involved.

9. Still with reference to his second contention, he noted that the Special Rapporteur invited the Commission to devote its first efforts to the search for a link. The two categories of succession envisaged by the Commis-

[3] "Nationality, responsibility of States, territorial waters", *American Journal of International Law* (Washington, D.C.), vol. 23, Special Number (April 1929), p.13.

[4] *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 6.

[5] See 2385th meeting, footnote 15.

[6] United Nations, *Reports of International Arbitral Awards*, vol. XIV (Sales No. 65.V.4), pp. 327 *et seq.*

[7] Court of Justice of the European Communities, *Recueil de la jurisprudence de la Cour et du Tribunal de première instance, 1992-7*, judgment of 7 July 1992, *Mario Vicente Micheletti e.a.* v. *Delegación del Gobierno en Cantabria.*

[8] *Advisory Opinion, I.C.J. Reports, 1975*, p. 12.

[9] The Czech law and the Slovak law on nationality were amended by Laws Nos. 92/1990 and 88/1990 of the Czech National Council and the Slovak National Council, respectively.

[10] General Assembly resolution 217 A (III).

sion, for succession of States in respect of treaties and in respect of State property, archives and debts, were clearly described by the Special Rapporteur in his report, but from a purely formal standpoint. The report failed to create a tie-in with the material or substantive principles of the two systems, such as the principles of continuity *ipso jure*, of *tabula rasa*, of equitable sharing, or of non-transmissibility. All those principles, individually or as a whole, reflected a concern to ensure fairness; one might go so far as to say that the international law of the succession of States was a reaction, in the form of positive provisions, to a situation of intolerable unfairness. A reminder of those principles would thus not have gone amiss.

10. He failed to understand why the Special Rapporteur stated that for the purposes of the current study, it would be appropriate to keep the categories which the Commission had adopted for the codification of the law of succession of States in respect of matters other than treaties, in other words, the regime in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. One very soon realized, however, that the Special Rapporteur himself was not convinced of the soundness of that approach, for he returned to the regime in the Vienna Convention on Succession of States in respect of Treaties, referring to transfer of territory, uniting of States, and dissolution (in other words, separation) of a State—all major categories in that Convention. Was the Commission to opt for one regime and reject the other, or to draw on elements from both? He himself would have opted for the latter approach. At all events, he considered that if the Commission was to give priority to the nationality of natural persons, it must base itself primarily on the regime in the Vienna Convention on Succession of States in respect of Treaties, while exploiting the overlaps between the two, having regard to the material principles to which he had referred.

11. The territorial location of populations was a further essential indicator to be used in the definition of the scope of the problem *ratione loci*, in addition to those used by the Special Rapporteur in chapter VI of his report. That criterion could help to pinpoint extreme cases not referred to in the report, thereby broadening the range of cases proposed for consideration.

12. Mr. BENNOUNA said the first report on State succession and its impact on the nationality of natural and legal persons was obviously intended to clear the way for more in-depth discussion. Recent events in eastern Europe had revealed that State succession was indeed a topical issue, though he himself would have preferred the Commission to add a different subject to its agenda, one that deeply affected all countries of the world, especially the developing countries: investment rights. The final form for the Commission's work on State succession had not yet been established, though he agreed with the Special Rapporteur's statement that, as a first step, it should be a study for submission to the General Assembly.

13. The Special Rapporteur was correct in pointing out that, while internal and international law overlapped in respect of State succession and nationality, the topic had traditionally been held to fall within the province of internal law. Since State sovereignty was involved, the Commission would be well advised to follow the Special Rapporteur's suggestion that it confine its work to the elaboration of general criteria for use by States. States would then be free to adapt the criteria to specific cases and to take into account particular regional or national features.

14. As Mr. Bowett (2387th meeting) had pointed out, the concept of an obligation to negotiate had now been accepted and incorporated in legal practice. It might be useful to adopt it as one of the general criteria for State succession, so as to avert any harmful effects on individuals of changes in the configurations or borders of States or in the balance of power among them.

15. The reference to the various categories of "nationals" in internal law raised a delicate, indeed explosive, issue. Some States openly discriminated against certain groups of citizens by establishing separate categories, which amounted to denying them their full civil and political rights. The case of Palestine, for example, could usefully be studied in the context of State succession and nationality. There were currently 800,000 Arab Israelis relegated to the status of second-class citizens. The Commission should look into whether that was compatible with international law and what the implications were for the succession of States under the agreement signed on 13 September 1993.[11]

16. The Special Rapporteur suggested that priority should be given to the impact of State succession on the nationality of natural, as opposed to legal, persons, since that was the more urgent issue. Urgent it was, yet the nationality of legal persons was also an important matter and should not be left entirely unattended. Recent events had brought the issue to the fore, particularly in the context of investment rights. In that regard, he drew attention to the judgment of ICJ in the case concerning *Elettronica Sicula S.p.A.* (ELSI) (*United States of America* v. *Italy*).[12] The question of ownership or control of a legal person was now taken into account in most investment agreements. Perhaps a reference to such issues should be included in the Commission's work on the topic, even if a thorough consideration of the nationality of legal persons was to be deferred until a later date.

17. Another highly sensitive, indeed politicized, issue was the extent to which a State had the ability to grant or withdraw the nationality of an individual. The problem arose frequently in connection with family reunification and immigration. In some cases, children acquired nationalities that were different from those of their parents and, as a result, were physically separated from them. Such issues should be brought up in the course of the work on State succession.

18. The Special Rapporteur indicated that the Commission's study should cover only "normal" situations of State succession, not those involving force or annexation. He was not sure there was a clear-cut distinction to

[11] Declaration of Principles on Interim Self-Government Arrangements, including its Annexes, and its Agreed Minutes (A/48/486-S/26560, annex).

[12] *Judgment, I.C.J. Reports 1989*, p. 15.

be drawn in such matters, but even if there was, it was precisely in "abnormal" situations of State succession that human rights were most likely to be violated. All the more reason, therefore, for the Commission to seek to establish criteria for State conduct. As to the right of option, he agreed with Mr. Bowett that it came into play only in very limited and exceptional circumstances.

19. Finally, he endorsed the Special Rapporteur's apt comments on continuity of nationality, namely, that in the context of State succession, continuity of nationality could not operate as in the regime of diplomatic protection.

20. On the whole, he would have preferred a less theoretical, more experience-oriented approach than the one used in the report. Far too few examples had been cited of State practice, particularly in eastern Europe and in the territories of the former Soviet Union. The Commission did not wish to provide abstract guidelines or any general theory. In his next report, the Special Rapporteur should fill in the gaps, looking particularly closely at the advantages and drawbacks of the actual solutions found in recent cases of State succession. He did agree with the Special Rapporteur, however, that the best service the Commission could render the General Assembly and States was to provide a series of factors and general criteria that could be used for negotiation in cases of State succession. Naturally, such criteria must be aligned with the peremptory norms of international law and with humanitarian law.

21. One element of the nationality question that had not been touched on, and which he believed fundamental, was an individual's emotional attachment to his or her roots. No regulations or rules could prevent a person from identifying with the place where he or she was born and raised, and that was something that had to be taken into account in the Commission's future work on State succession.

22. Mr. IDRIS said that any analogy with State succession to treaties, property or debts should be closely tied in with the question of nationality. Nationality was, after all, a prerequisite for the exercise of civil and political rights. The basic principle to be established was that succession of States did not give legal title to the individual in regard to succession to nationality. That was a manifestation of the State's sovereignty and territoriality.

23. There was broad consensus in the literature and the practice of the courts in favour of acknowledging that nationality was essentially governed by internal law. That was also true in cases where the acquisition of nationality was covered by treaty, or when internal law required that nationality be acquired under a convention. A good example of such a provision was article 3 of Slovenia's law on citizenship. The principle that it was for each State to determine, in its own law, who were its nationals, had been adopted in the Convention on Certain Questions relating to the Conflict of Nationality Laws.

24. Nevertheless, having agreed that nationality was not a "successional matter", he said that he experienced some difficulty with the Special Rapporteur's suggestion of using the definitions the Commission had already formulated for 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. The term "succession of States" would thus refer to the replacement of one State by another in the responsibility for the international relations of a territory. Yet he wondered whether the notion of responsibility for international relations was really relevant in the context of nationality. Since nationality was a matter that fell essentially within the sovereignty of a State, it would be more appropriate to use a concept already considered by the Commission—sovereignty in respect of territory. The definition of State succession in respect of nationality would then be the replacement of one State by another in sovereignty in respect of territory.

25. He said that he was uncomfortable with the definition of nationality given by the Special Rapporteur in his report, namely that "Nationality", in the sense of citizenship of a certain State, must not be confused with "nationality" as meaning membership of a certain nation in the sense of race.[13] The distinction drawn in that definition was both controversial and confusing, and the reference to race was undesirable. Although nationality was basically an institution of internal law, as ICJ had recognized in the *Barcelona Traction* case,[14] and because the international application of that notion must be based on the nationality law of a given State, a decision by a State to grant its own nationality did not necessarily have to be accepted internationally without question. In the *Nottebohm* case, ICJ had decided that

> a State cannot claim that the rules it had thus laid down are entitled to recognition by another State unless it has acted in conformity with the 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 against other States.[15]

The Court's adoption of the principle of a genuine link had sparked considerable discussion, and much criticism. The critics had argued that the "link theory" had not been advanced by the parties to the dispute, and that the Court had transferred the requirement of an "effective connection" from the domain of dual nationality to the domain of only one nationality. Thus, the "genuine link" requirement in limiting the successor State in its discretion to extend its nationality had yet to be clarified.

26. Regarding the scope of the topic, the General Assembly had endorsed the Commission's recommendation that it should include both natural and legal persons. It was too late now to restrict the study to natural persons alone as such a course would fall short of the expectations of Governments.

27. He supported the idea of establishing a working group as a good way of moving forward on the controversial issue of nationality. The group should identify the fundamental aspects of the topic and elicit further comments by Governments. Such comments were indispensable, particularly with a view to obtaining a clear picture of State practice. The working group should not,

[13] R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I, parts 2-4 (London, Longman, 1992), p. 857.

[14] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

[15] See 2385th meeting, footnote 15.

however, propose any solutions at the present stage. It was more important to identify problems and investigate State practice.

28. Mr. MIKULKA (Special Rapporteur) said that it might be useful for him to respond to some of the points already raised. First, with regard to categories of succession, Mr. Pambou-Tchivounda had stated a preference for a mixture of those contained in 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. Such a mixture would be difficult because, although some of the matters dealt with in the former had received similar treatment in the latter, others had been handled in a radically different way. He had therefore concluded that the latter Convention provided a better basis for the Commission's consideration of the matter.

29. For example, the Vienna Convention on Succession of States in respect of Treaties covered three entirely different situations in one category: the unification of States; the dissolution of States; and the separation of part of a State to form an independent State. Such a simplification had of course been possible for the purposes of a convention on the succession of States in respect of treaties, for those who had drafted that Convention had concluded that in all three situations only one rule should apply: the rule of continuity of treaties *ipso facto*. In the case of problems of nationality, however, clear distinctions must be made between the three situations because they gave rise to entirely different problems. It was impossible to disregard the differences between cases when the predecessor State continued to exist (separation), when the predecessor State disappeared completely (dissolution), and when the international personality of one of the predecessor States disappeared (unification).

30. He had also tried in his report to enrich the categories by introducing a distinction based on the German precedent. German unification had not taken place on the basis envisaged in the Vienna Convention on Succession of States in respect of Treaties, namely, that two predecessor States disappeared and a new State was born, but rather on the basis of the "absorption" of the German Democratic Republic by the Federal Republic of Germany. In other words, the international personality of the Federal Republic was never contested, whereas the German Democratic Republic disappeared as an independent State. That meant, for the purposes of nationality, that the problem lay with the nationality of citizens of the former German Democratic Republic. Of course, the German situation had another special feature: whether to recognize the effects of the Second World War on nationality, but there was no need for the Commission to go into that question.

31. He understood Mr. Bennouna's doubts about the proposal in the report that the Commission should leave aside the problem of situations not in conformity with international law. Doubts had always arisen when the Commission had debated that topic in the past, and the proposal was intended merely to facilitate the present work in the initial stages. The topic was so difficult that complicating factors must be set aside for the moment, and the Commission must try to clarify matters relating to normal situations, but without stating explicitly that the rules which it drafted did not apply to abnormal situations. Naturally, the Commission's exclusion of such situations certainly could not be used to justify wrongful acts. Similarly, some of the rules applicable to normal situations might well apply to abnormal ones as well. No doubt an annexing State would be breaking a fundamental rule of international law and committing violations of the human rights of the population of the annexed territory. Furthermore, the fact that international law prohibited annexation by force did not mean that international law was not interested in the consequences of such a wrongful act.

32. On the question of the existing practice of States, he had explained in his introduction that he had not yet had time to examine all the information submitted by States. Furthermore, it was not usual to conduct a detailed examination of State practice in the preliminary stages of a study. At a later stage he would, of course, give close attention to national legislation. It would be a sensitive undertaking because States were jealous of their internal competence with respect to questions of nationality, and the Commission must not give the impression that it was trying to decide whether a State's practice conflicted with international law. Some States had expressed concern on that point in the Sixth Committee. Clearly, without setting itself up as a court, the Commission might eventually conclude that the practice of some States was not in conformity with the general trend of international law.

33. Mr. Idris had commented on the definitions set out in section E of the introduction to the report. For the moment they were the definitions already adopted by the Commission and they had no implications for the substance of the topic. He wanted the Commission to speak a common language because the notion of succession had been used in the literature with entirely different definitions. The Commission and the two diplomatic conferences had opted for a given terminology which the Commission should continue to use in order not to confuse the issues further.

34. Mr. Idris would prefer to replace "responsibility" in the definition of succession of States by a reference to sovereignty. The Commission had debated that point 20 years before and had decided not to use the notion of sovereignty simply to avoid the impression that sovereignty as such could devolve from one State to another. If "responsibility" were replaced by "sovereignty" in the definition, the succession of States would mean the replacement of one State by another in territorial sovereignty. That would mean that sovereignty itself was a matter of succession and did not have an "original" character and that all the limitations on sovereignty accepted by the predecessor State devolved on the successor State. The Commission would then have to hold as lengthy a debate on the point as had taken place during the drafting of the two above-mentioned Conventions and it would never get to the basic issues of nationality.

35. One point not yet raised by any member had been put as a question in chapter III of the report: if the concept of nationality for international purposes is to be considered as generally accepted, what are its elements

and what exactly is its function? In that regard, he would certainly welcome clarification from members.

36. Mr. CRAWFORD said that the Special Rapporteur's statement in his report that nationality was not a "successional matter" was true in one sense, but there remained the compelling situation of individual human rights as embodied in a variety of treaties and the more general position of individuals. State succession had traditionally been viewed from the perspective of States, but, as the Special Rapporteur had made clear, that was no longer sufficient. He was in general agreement with the Special Rapporteur's conclusions, but none the less wished to comment on some points.

37. First, he agreed that the question of continuity of nationality should be included in what was a general study. In fact, there were two problems of continuity: continuity in respect of acts occurring prior to the date of the succession; and continuity as between the date of succession and the date when issues of nationality were settled. It must be made clear that any subsequent clarification of the position should be deemed to operate retrospectively at least to the date of the succession. That was an area where the concept of a "successional matter" should not be applied too rigidly. There were some areas of the law of State succession in which the succession occurred *ipso jure* on the date of succession, although some consequences had to be dealt with subsequently. There were many other areas which were not of that kind: matters of State debt, for example, where problems had to be sorted out afterwards, although the succession did not necessarily bring about an innovation.

38. More generally, the Commission should view with favour the use of a series of presumptions. It was possible that international law had not yet developed far enough to determine which persons acquired which nationality, but it could certainly establish presumptions that would be regarded as applicable to, and would help to regulate, a particular situation, though that situation would of course be regulated primarily by the legislation of the successor State or States and by agreement between them.

39. He agreed with the flexible approach the Special Rapporteur proposed to adopt with respect to the outcome of the work and, in particular, with his view that the Commission should in the first instance submit a report to the General Assembly describing the nature of the problem and the way in which it should be tackled. On the other hand, he did not agree with Mr. Idris that the Commission should confine itself to identifying the problems rather than indicating the solutions. Although the Commission should not be categorical in proposing solutions, it would be useful if, in the context of the consideration of the matter in the Sixth Committee, it could indicate any possible solutions in a given area.

40. He strongly agreed on the desirability of using the existing definitions, particularly those laid down in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts as well as the existing categories of succession set forth in that Convention, with the refinement proposed by the Special Rapporteur to cover the case of Germany. The Convention was clearly the right instrument to follow because, in principle, the problems of succession to treaties occurred within the international domain, whereas the problems of succession with respect to matters other than treaties occurred in both the internal and the international domain and thus gave rise to many more difficulties.

41. While it was entirely defensible for the Commission to deal first with the nationality of natural persons—since that was the area in which human rights issues and in which tragedies occurred—the Commission's report to the General Assembly should not omit consideration of the question of legal persons altogether. The distinctions the Special Rapporteur had drawn between natural and legal persons were helpful. Indeed, there were some legal systems that did not have their own internal conception of the nationality of corporations. International law attributed a nationality to those corporations for its own purposes. The position with regard to individuals was quite different: all States had a concept of the nationality of individuals, and so there was an important distinction between them, which might have corollaries in the framework of succession. None the less, it must be the case that, where a corporation was established under the law of a State or territory affected by a succession and the corporation continued to exist, the nationality attributed to it by international law must have changed—a fact that should attract comment.

42. The Special Rapporteur had given a very interesting account of the concept of nationality for international purposes. Within the framework of the strictly dualistic account of nationality that was characteristic of the older sources—but was to be found even in as non-dualistic a source as the work of O'Connell[16]—the idea of nationality for international purposes presented something of a conundrum. Nationality was a creation of national law but international law could not be excluded even though it might not perform the primary role. Consequently, provided that some flexibility was maintained, it seemed to him that it was useful to talk about the idea of nationality for international purposes—about a kind of imputed nationality, as it were, which might have consequences particularly in the framework of a set of presumptions.

43. In general, he preferred the idea of presumptions to the idea of factors to which Mr. Bennouna had referred. If it could be established on the basis of practice and presumptions what the outcome ought to be, that would be useful in guiding States and in examining any anomalous situations. For example, there should be a presumption that a nationality acquired by a person consequential to a succession of States was effective from the date of that succession. There should also be a rather strong presumption that no person should become stateless as a result of a succession of States, though exactly how that was to be achieved was another matter. He looked forward to an analysis of modern State practice in that regard in the Special Rapporteur's subsequent reports.

44. It followed that he strongly agreed with the Special Rapporteur's statement in the report rejecting the categorical dualist view of O'Connell that international law

[16] D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge, England, Cambridge University Press, 1967), p. 498.

did not at the present stage of development impose any duty on the successor State to grant nationality. It seemed to him that, in certain cases, international law did or should impose such a duty. It would be monstrous if, for example, a national of the former German Democratic Republic had become stateless as a result of the integration of that Republic into the Federal Republic of Germany. If there was no argument about that, then international law should reflect the position, at least at the level of a presumption and quite possibly at the level of an obligation.

45. Guidance could certainly be obtained from the various provisions on statelessness even though such provisions might not apply textually to cases of total succession. They certainly might apply textually to cases of partial succession. It would be interesting to know whether they were taken into account in the context of the German case with respect to the continuing obligation of the Federal Republic of Germany concerning issues of statelessness.

46. He fully concurred with the Special Rapporteur, and for the reasons he gave, that cases of unlawful succession should be excluded from the report. It would, however, be useful to make the point that such exclusion did not necessarily mean that particular solutions would be inapplicable. It was simply that cases of aggression and the like gave rise to special situations which it was obviously inappropriate to deal with within the framework of particular studies. That conclusion had already been reached by the Commission and it did not seem helpful to reopen the matter.

47. He also agreed with the Special Rapporteur about the role of the right of option in the resolution of problems. The presumption that persons did not have more than one nationality was much less strong than the presumption against statelessness. Indeed, it might be that, notwithstanding recent developments that had tended to eliminate dual nationality, there was no such presumption at all. A State which was entitled to extend its nationality to an individual did not become disentitled to do so merely because another State might have the same entitlement. On the other hand, the right of option was certainly a way of regulating conflicts of nationality and it should definitely be included within the framework of the general study. It would not, on the other hand, be useful to discuss the problem of different categories of nationals under national law, which was rather a problem of discrimination in the context of the law of the States which maintained such a distinction. The Commission's concern should be with the general conception of nationality, but it might be worth pointing out in the report that all States were subject to obligations of non-discrimination and that those obligations extended to the conduct they adopted under laws relating to nationality.

48. He was very much in favour of the consideration of the topic by the Commission and of the Special Rapporteur's treatment of it thus far.

49. Mr. GÜNEY said that it would seem advisable at the present stage to limit the topic to the nationality of natural persons, as recommended by the Special Rapporteur, leaving aside the nationality of legal persons for the time being, and to study in further detail existing international norms regarding change of nationality and dual nationality. He took that view, first, because the nationality of legal persons did not have the same effect in all legal relations and, secondly, because there must be no discrimination when it came to change of nationality and dual nationality. With the free movement of persons for migration and other reasons, it was becoming increasingly necessary to envisage dual nationality, to bring internal law in the matter up to date, and to ensure that individuals were not deprived of their nationality. In that connection, Mr. Tomuschat's question (2387th meeting) whether an act divesting an individual of his nationality could be declared null and void merited close consideration. First, however, as rightly pointed out by Mr. Bennouna, it was essential to have recourse to the obligation to negotiate—an obligation that had been recognized in a number of judgments of ICJ and in particular in its judgment in the *North Sea Continental Shelf* case.[17]

50. The question of nationality was closely linked to that of State succession. In that connection, it should not be forgotten that the codification and progressive development of the law on State succession, as laid down in the above-mentioned Conventions, had not met with much success in contemporary State practice; those two conventions had not, in fact, yet entered into force. They governed fundamental aspects of State succession, unification and dissolution, however, and the experience gained therefore dictated the need for the utmost prudence before one embarked on the preparation of new instruments, whatever their nature. State practice, and in particular the practice of the eastern European countries within the framework of internal law, would have a decisive role to play in pointing the way towards the establishment of principles and rules with a view to providing States with the relevant guidelines.

51. He agreed that a working group should be appointed to consider the topic further and to expedite the work on it. An open-ended working group would provide an excellent forum for doing so.

52. Mr. FOMBA said that among the substantive questions the proposed working group should seek to determine were the specific effects of State succession on the nationality of natural and legal persons, and the position of international law with regard to the problems involved. For instance, did positive law provide any enlightenment in that connection? If so, what did that law consist of, and if not, what legal principles could usefully be adopted in terms of the rights and obligations of States, and in what kind of instrument should they be incorporated?

53. He agreed entirely with Mr. Tomuschat (ibid.) about the form to be taken by the results of the work on the topic. In that connection, he would note in passing that Eritrea was the only African State mentioned as having responded to the invitation to submit relevant materials. He had, in fact, just received the text of its Proclamation 21/1992 of 6 April 1992, but had not had time to examine it.

[17] *I.C.J. Reports 1969*, p. 3

54. Like a number of other speakers, he considered that the Commission should deal first with the nationality of natural persons. The Special Rapporteur asked, in his report, whether it was conceivable that an international authority, or at least the rules that were binding on States, could play a role in the allocation of individuals among different States. His own reaction to that question was that it would already be an achievement if just a few principles could be laid down. It would be even better, however, if an authority along the lines of UNHCR could be envisaged.

55. The Special Rapporteur stressed that it was difficult to specify exactly the legal limitations on the freedom of States, also indicating that the record of international law in that regard was, on the whole, somewhat thin. Actually, it did set out the golden rule, the key to all the problems likely to arise, namely the principle of effective nationality. Accordingly, that principle should be laid down formally, its content specified and its use made systematic; it should also be accompanied by effective international monitoring machinery. To that end, it was important to draw on the recent practice of eastern European countries. As to the limitations imposed by international humanitarian law on the freedom of States was concerned, he believed that the few existing treaty provisions did recognize a human right to nationality and also a right of option.

56. With regard to categories of succession, the Special Rapporteur considered that the problem of nationality arising in the context of different types of territorial changes should be dealt with separately. It would be an acceptable approach provided a common denominator could be found in all cases. If not, each case would have to be decided individually, although the form that the Commission's work on the topic took would also influence the matter. As far as newly independent States were concerned, the French-speaking States of Black Africa had a wealth of legal literature and members might wish to consult the *Encyclopédie juridique de l'Afrique*,[18] which provided a synthesis of African practice.

57. The Special Rapporteur further stated that, as the decolonization process had now been completed, the Commission could limit its study to issues of nationality that had arisen during that process only in so far as it was necessary to shed light on nationality issues common to all types of territorial changes. Even if the era of decolonization had gone forever—a question hotly debated during the discussion on the draft Code of Crimes Against the Peace and Security of Mankind—and notwithstanding the terms of article 19 of part one of the draft articles on State responsibility[19] and the view expressed in the report concerning the annexation by force of the territory of a State, he saw no good reason not to study practice in that area.

58. In the matter of the scope of the problem, and specifically the obligation to negotiate and to reach agreement, he agreed with Mr. Bowett (ibid.), particularly about the need to introduce transitional arrangements for the period between the date of the succession of States and the date on which the law on nationality was enacted.

59. The question of the right of option must not be reduced to a mere academic discussion of the relationship between the attribution of the sovereignty of the State and the will of individuals. Rather, it was a question of recognizing and preserving the right of option while providing sufficient guarantees with regard to the principle of effective nationality.

60. The Special Rapporteur averred that neither practice nor doctrine gave a clear answer to the question whether the rule of continuity of nationality applied in the event of involuntary changes brought about by State succession. Further research into that point was perhaps required, especially in the light of recent practice in eastern Europe. In that connection, he shared the view of one writer, according to whom, in the event of State succession, the legal position with regard to nationality, from the standpoint of diplomatic protection, should be evaluated in a far more flexible way.[20] The most practical solution possible must therefore be found. Above all it must be designed to achieve effective protection of the interests of the individual as also of the State. In that regard, it was difficult to see how an involuntary change of nationality could have the effect of suspending proceedings or denying justice in a claim for diplomatic protection. But perhaps he was being a little naive. He was not opposed to the idea of dealing with the matter in the context of a preliminary study, provided the study took the form of, for instance, an annex to any declaration or general principles ultimately adopted on the topic as a whole.

The meeting rose at 1.05 p.m.

[18] S. Melone, "La nationalité des personnes physiques", *Encyclopédie juridique de l'Afrique*, vol. 6, *Droit des personnes et de la famille* (Abidjan, Dakar, Lomé, Les Nouvelles Éditions Africaines, 1982), pp. 83 *et seq.*

[19] See 2379th meeting, footnote 8.

[20] United Nations, *Reports of International Arbitral Awards*, vol. V (Sales No. 1952.V.3), pp. 488 *et seq.*

2389th MEETING

Wednesday, 24 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

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