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Summary record of the 2390th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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pointed out by the Special Rapporteur in his report, the Commission had not been anxious to deal with the problem of nationality in relation to that of State succession. A former Special Rapporteur on the subject, Mr. Bedjaoui, had gone so far as to say that "in all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality".[10]

31. His second comment pertained to the function of international law in the relationship between State succession and nationality. Given the essential character of nationality, international law probably had only a limited role to play, but that role could not be denied. The role of international law properly involved preventing the successor State from enacting legislation that was unfair to or inequitable for individuals affected by a change in sovereignty. By the same token, international law could not acquiesce in the granting of nationality to a person who did not genuinely belong to the successor State. That function of international law, which the Special Rapporteur had aptly described in his report and which was corroborated by the judgment of ICJ in the *Nottebohm* case,[11] meant that there were limits on State action in respect of both the withdrawal and the granting of nationality. The Commission's task must accordingly be to define the limits of such State action under international law.

32. His third comment related to the human rights implications of the subject. Article 15 of the Universal Declaration on Human Rights[12] stated that "Everyone has the right to a nationality" and that "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". There seemed to be some controversy as to the real purport and effect of those provisions, but it was indisputable that article 15 had far-reaching consequences for the traditional rules in respect of the obligations of the successor State for the acquisition and termination of nationality. The Special Rapporteur had rightly stated that the development, after the Second World War, of international norms for the protection of human rights gave the rules of international law a greater say in the area of nationality. Accordingly, the negative effects of internal law on nationality that could lead to statelessness or discrimination of any kind should be questionable under contemporary international law. The classical position expounded by Mr. O'Connell that international law imposed no duty on the successor State to grant nationality and the statement by Mr. Crawford (ibid.) that, apart from treaty, a new State was not obliged to extend its nationality to all persons resident on its territory were both free from contention. The effect of article 15 of the Universal Declaration on Human Rights was, on the one hand, to restrict statelessness and, on the other, to give individuals the right to change their nationality as they wished. Those restrictions would be binding on all States, including the successor State. The human rights issue involved was the heart of the topic under consideration and it was the lack of such an angle that gave the impression that the report was tilted in favour of classical norms and principles. The Commission should seek to restore the balance and the Special Rapporteur should explore fully the effects and impact of article 15 on the classical rules of nationality as they related to State succession if the Commission's deliberations were to contribute to the development of rules of international law on the topic.

33. Fourthly, there was the dichotomy between customary international law, which offered only a few guidelines to States for the formulation of their legislation on nationality, and conventional international law, which was more developed. Although that dichotomy was convenient, it did not seem to help much to identify the norms that governed nationality in cases of State succession. An approach that helped to derive the applicable norms from the entire corpus of international law—doctrine, State practice and jurisprudence—would have been greatly preferable. The Commission could not formulate universally applicable principles unless it looked at all the solutions adopted following changes in sovereignty in Asia, Africa and the Caribbean in the post-colonial era and, more recently, in eastern Europe.

34. Fifthly, regarding the framework suggested for the preliminary study, the proposal by the Special Rapporteur that the scope of the problem should be delimited *ratione personae*, *ratione materiae* and *ratione temporis* seemed too doctrinaire. The Special Rapporteur himself pointed out, in his report, that the delimitation of the scope *ratione temporis* would for the most part remain theoretical because of the time it took States to adopt their laws on nationality. It would therefore be preferable to delimit the scope in terms of the practical problems encountered: acquisition of nationality, relevance of birth, residence and domicile, the element of a genuine link, loss of nationality, conflict of nationality, right of option and continuity of nationality. As to whether the study should deal with the regime of diplomatic protection on the grounds of its close association with the problem of continuity of nationality, he believed that an affirmative response would extend the topic beyond the mandate given to the Commission by the General Assembly. Lastly, he endorsed the Special Rapporteur's proposal that the Commission's work on the topic should have the character of a study which would be submitted to the General Assembly in the form of a report and in which priority would be given to the most urgent problems of the nationality of natural persons.

The meeting rose at 11.30 a.m.

2390th MEETING

Friday, 26 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney,

[10] *Yearbook... 1968*, vol. II, p. 114, document A/CN.4/204, para. 133.

[11] See 2385th meeting, footnote 15.

[12] See footnote 4 above.

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. KABATSI said that when, on a succession of States, one State assumed the international responsibilities of another over a particular territory, the nationals involved were quite frequently affected in a variety of ways, which were more often than not negative. It was the negative consequences of succession that must be addressed first, and the problems and causes must be carefully, and if possible exhaustively, identified so as to find solutions. As an initial step, an in-depth study of the topic was required and should concentrate primarily on the negative impact on natural persons, legal persons being dealt with later on perhaps.

2. Of the many negative consequences that could ensue from a change in sovereignty over territory, three of them called for special mention. In the first place, an individual or a group of individuals could—for a variety of reasons, including race or even tribe, religion, political ideology or system, or lack of a genuine link or emotional attachment to the new State—end up with the nationality of a State to which they might not wish to belong. Secondly, such an individual or individuals might fail to acquire the nationality of the State to which he or they would have liked to belong; and, thirdly—the worst situation of all—an individual or a group of individuals might end up stateless. The study must attempt to find a solution to those three situations in particular.

3. In his first report (A/CN.4/467), the Special Rapporteur had quoted the statement contained in the first report of a previous Special Rapporteur, Mr. Bedjaoui,[2] that, in all cases of succession, "there is in theory no succession or continuity in respect of nationality". Although that was in principle correct, the point might require careful study with a view to providing for continuity of nationality, if only on a temporary basis, to avoid unnecessary hardship for the individual or individuals concerned.

4. The Special Rapporteur also stated, referring to internal law in the literature, that it is not for international law, but for the internal law of each State to determine who is, and who is not, to be considered its national. Internal law was, of course, the main source for the attribution of nationality, but it should also be borne in mind that, in the small world of today and with all the obligations incumbent on States under international law, the power of States to legislate in matters of nationality should not be unlimited. Denial of nationality in deserving cases had had disastrous consequences not only for the people and regions concerned but for the international community as a whole. The Palestinian situation was a case in point, for it had caused untold human suffering and had used the energies and vast resources of the international community. There was the case of Rwanda too. With the attainment of independence, the new regime had decided that one section of the population was not to enjoy nationality status. Those who had chosen not to go into exile had then been subjected to the persecution that had culminated in recent years in grotesque acts of genocide. In addition to the human tragedy endured by the persons involved, the other States in the region and the international community as a whole had also suffered.

5. The Commission owed it to the world to prepare a study that would reinforce international law in such a way as to minimize the chances of a recurrence of such tragedies elsewhere. To that extent, he agreed with Mr. Al-Baharna (2389th meeting) that it was regrettable that the report tended to emphasize the classical approach to the treatment of the subject at the expense of human rights considerations. As was apparent from the report, however, the Special Rapporteur had not neglected the role that international law and human rights could play in limiting the discretionary power of the State. In particular, the Special Rapporteur had clearly demonstrated that the obligations of States with respect to human rights protection called into question techniques such as that of statelessness and any other kind of discrimination.

6. Accordingly, the study should target the question of the human being and his rights, since that was an area of international law that could be developed for the benefit of mankind as a whole. There were a significant number of multilateral treaties, particularly human rights treaties, which pointed the way towards further progressive development of the law on the topic under consideration. They too could help to bring about an improvement with regard to the negative impact of State succession on nationality.

7. Mr. MAHIOU said that, when the Commission had first decided to take up the topic, he had not been entirely certain about the task that lay ahead; now, having read the Special Rapporteur's first report, he remained somewhat sceptical. Matters were still at the preliminary stage, however, and the purpose of the debate was to consider all the ins and outs of the question with a view to providing a working group with material for discussion.

8. While the report did bring out the special characteristics of the topic, it was a little too general and abstract in some respects. Obviously, it was not possible to clarify every single point in a preliminary report, but a few illustrations at that stage would have been helpful. For instance, the Special Rapporteur had referred to the

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

[2] See 2389th meeting, footnote 10.

ever, leave that delicate question to the Special Rapporteur and the working group to reflect upon.

15. A list of the concepts on which the Commission should focus its attention would help to pinpoint the complex phenomenon of nationality and its relation to international law. The first of those concepts—and it lay at the heart of the topic—was the right to nationality, its criteria and implications. An examination of that concept would enable a precise determination to be made of the rights and obligations of both States and individuals under international law, both conventional and customary. Among the other concepts that should command the Commission's attention were statelessness, non-discrimination and its scope, loss of nationality and its regime, effective nationality, the principle of non-retroactivity—nationality being the one area where that principle was sometimes thwarted—and the relationship between international human rights law and nationality. The task of a working group—the appointment of which he favoured—and, subsequently, of the Commission should be to identify the difficulties and possible solutions in regard to those concepts in the light of State practice, the rules of international law, both conventional and customary, and jurisprudence.

16. Mr. de SARAM said that he understood the Commission to be at the stage of a preliminary exchange of views and ideas as to the methodology of its work, as to possible general approaches, and as to questions, issues and implications to be identified for consideration. It was now quite clear that the working-group method was the appropriate one for a topic such as the one under consideration, but it had been very useful to hold such an exchange of views in plenary, before moving further consideration to a working group. It was to be hoped that the Commission would not be so overburdened with other pressing matters that it would be unable to reflect adequately on the working group's report.

17. As a first substantive observation, it seemed to him that the question of the impact of State succession on the nationality of natural persons should, for obvious reasons, not the least of which was want of sufficient time, be treated separately from the question of the impact on the nationality of legal persons. Yet the Commission could not entirely ignore the question of legal persons. Perhaps, at the current stage, some observations should be made in its reports on the type of legal questions that might arise in relation to the "nationality" of legal persons when there was a succession of States.

18. The impact of State succession on the nationality of natural persons was, of course, in itself a subject not without its problems: first, and perhaps principally, because it was difficult to isolate totally the purely legal issue from its non-legal context—or to put it more directly, from its political and social, and thus more emotional, surroundings. Moreover, considerations of relevance to cases of State succession in the past might no longer have the same relevance to contemporary cases of State succession. And each case of State succession had, as was well known, its own special context and its own sensitivities, and brought its own anguish to those who were badly affected. The fact that each case of State succession was in a sense unique was something that should be borne in mind, as must the fact that the Commission's principal objective was the codification and progressive development of general public international law.

19. Difficulties of a technical nature could arise, and could cause confusion, in view of the variety of State succession scenarios that could be thought to come within the scope of the topic, as the present preliminary exchange of views had shown in some measure, and as might be shown in much greater measure in the debates in the Sixth Committee. Thus the reports of the Commission should eventually clearly set forth what State succession scenarios should be brought within the Commission's present consideration of the topic, and for what reasons.

20. Because of the differences in the scenarios considered, a number of questions, issues and implications would also arise with respect to each scenario, and those would need to be borne in mind as well. Hence it was important and worth repeating, that the Commission's reports should contain a listing—an itemized listing if possible—of the scenarios being considered, and of the questions, issues and implications that arose in relation to each one. That would not only be of considerable assistance in clarifying matters for the Commission as a whole; it would also be of invaluable assistance to Governments in identifying the various points on which their observations would be welcome, and were necessary. Indeed, it would be desirable, if the Commission was to progress with its work with the broadest possible understanding and support by Governments—and such was the essential objective of the consensus process, for Government observations on the various questions to be encouraged however and wherever possible.

21. In the present topic, as in others, the Commission would also encounter the inevitable "tension" between what some—in their view, with good reason—considered to fall properly within the domestic jurisdiction of a State, and what others—in their opinion, also with good reason—considered to be of non-domestic concern. While that certainly added to the legal and non-legal fascination of the subject, it would not make a difficult topic any easier to address. If it was any consolation, members of the Commission might care to remember that when their predecessors 40 years previously, having completed a draft convention on the elimination of future statelessness and a draft convention on the reduction of future statelessness, had turned in 1954 to the subject of present statelessness, they had completed seven draft articles on that subject.[4] In submitting them to the General Assembly, they had advised that, in view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted, though worded in the form of articles, should merely be regarded as suggestions which Governments might wish to take into account when attempting a solution of that urgent problem.[5] He did not recall that the General Assembly or the Commission had taken any further action on the matter.

[4] *Yearbook . . . 1954*, vol. II, document A/2693, chap. II, in particular p. 148, para. 37.

[5] Ibid., p. 147, para. 36.

dissolution of some eastern European States and the implications it would have on nationality. It would have been interesting to have some specific examples of the problems encountered by those countries and of the difficulties faced by individuals.

9. Nationality was, of course, closely linked to internal law, which encompassed not only statute law but also constitutional law and case law. As a consequence, the relationship between a State and its nationals was of so special a nature that it was a delicate matter to determine precisely what relationship nationality maintained with international law. The difficulty stemmed, in particular, from three features of nationality.

10. The first feature was the statutory link: there was no contractual aspect to nationality, no contractual relationship between the State and its nationals. That statutory link provided the basis for the definition of the population and hence for the identification of the State. It was therefore surprising to note the statement by Hans Kelsen, in a lecture delivered before the Academy of International Law, that

> For a State, within the meaning of international law, . . . it was not essential to have nationals, but only to have subjects, in other words, individuals living on its territory and on which the State system imposed obligations and conferred rights.[3]

Even more surprising, however, had been Kelsen's conclusion that the institution of nationality was not necessary, having regard to international law. That conclusion would no doubt perturb even the most enlightened. Kelsen's lecture had, however, been delivered in 1932, since which time international law had developed so that it was not just an assortment of abstract rules and norms but now had regard to the complexity of the situations actually encountered by States in the day-to-day exercise of their sovereignty, which included their relations with their own citizens. Moreover, when Kelsen had made his statements, international human rights law had been in its infancy. It had not reached its existing stage of development and had not had the same impact on the rules of international law. Kelsen's analysis of the position now would probably be quite different.

11. The second feature of nationality was its link with public law, for the attribution of nationality was a prerogative of the State and a manifestation of the exercise of its sovereign right. That was why States were reluctant—and even mistrustful—about binding themselves too strictly in that area, for that would interfere with their discretionary power to attribute—or not to attribute—nationality.

12. The third feature of nationality—closely allied to the second—was its link with internal law, inasmuch as every State determined the modalities for the attribution of nationality to natural and legal persons, in other words, decided whether or not to incorporate such persons into its national system of law. At the same time, the State had to have regard to those rules of international law that could influence the nature of the link. A State could adopt all the rules it wanted to nationally, but refusal by other States, relying on international law, to give effect to those rules would act as a kind of limitation on the State in question. In other words, the State had to take account of the effectiveness of the rules on nationality not only on its own territory but also on that of other States. In that sense, nationality could be said to stand at a crossroads between internal law, public law, private law, public international law and private international law: the technical intricacies involved might perhaps call to mind the Commission's earlier work on the jurisdictional immunities of States. The Commission's task, therefore, was to identify those principles of international law that involved an interplay with national law and the sovereign power of the State, with specific reference to State succession and change of nationality.

13. In his opinion, the Commission should deal with the nationality of natural and legal persons, though not necessarily at the same time. Indeed, the work of codification might well be concerned more with the nationality of legal persons than with that of natural persons. In the latter case, the Commission would have to deal with a wide variety of different and delicate problems—with all the unfathomed depths of the human situation. Individual situations, moreover, might not be amenable to common solutions and might therefore have to be examined on a case-by-case basis. He was not suggesting that the Commission should refrain from studying the question of the nationality of natural persons, but it was more difficult to realize the codification of that part of the topic. The nationality of legal persons, on the other hand, offered more fertile ground. The practice of different States had much more in common and could thus provide a basis for discussion and perhaps for a codification endeavour. Accordingly, without prejudice to the outcome of the work done by a working group and the Commission, a study should be carried out in the case of the nationality of natural persons, and an outline of the relevant rules should be prepared for possible codification in the case of the nationality of legal persons. As to the method of work and the form the results of that work should take, the Commission should deal with both aspects of the problem, but on the basis of slightly different perceptions perhaps.

14. The existing terminology, as used 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, could provide a basis for the initial work, and could, if necessary, be revised, as the study progressed. There was, however, an apparent inconsistency, since, as quoted in the first report, a previous Special Rapporteur for succession of States in respect of rights and duties resulting from sources other than treaties, Mr. Bedjaoui, had stated that in all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. Yet the assumption adopted in the case of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts was that there was a succession. If this assertion was to be taken as the starting point for the Commission's discussion, it would seem that the terminology used for the topic would be based on a contradictory assumption. It might therefore be better to start out with special definitions suited to the topic under consideration. He would, how-

[3] H. Kelsen, *Recueil des cours de l'Académie de droit international* (Paris, Sirey), vol. 42 (1932), p. 244.

22. The final form of the work was a matter to be determined at a later date. Yet central to success or failure would be the way in which the Commission fashioned, if that were at all feasible, a satisfactory accommodation between, on the one hand, the position that a State's determination of the bases upon which its nationality was to be possessed was within its own domestic jurisdiction, having a crucial bearing on its social and political integrity as a State; and, on the other hand, the position that a State's determination as to who should possess its nationality might, on occasion, be so unsettling in degree as to be questionable at the level of humanitarian concerns.

23. It might, however, be extremely difficult at the current stage for the Commission to find formulations and terminology to put into textual form what would certainly have to be a very fine consensus balance between the two now seemingly contrary positions. It was for that reason that he found so persuasive Mr. Bowett's suggestion (2387th meeting) that the Commission should consider aiming at an eventual listing of the considerations which a predecessor State and a successor State might have to keep in mind in working towards a mutually satisfactory accommodation between the two contrary positions. Moreover, a beginning for such an accommodation might be possible: it was to be hoped that all States were aware that, if a State's nationality determinations went beyond what was generally regarded by States as reasonable (not necessarily as a matter of law but as a matter of good sense), then such determinations were unlikely to be sustainable if they ever became the subject of consideration in a non-domestic forum.

24. There was one further point which he raised with some hesitancy, as he was not entirely certain about its validity. It seemed to him that the "humanitarian" consequences of inappropriate nationality decisions were in themselves so obvious that it might well be unnecessary to introduce "human rights" considerations into one's reasoning in order to give additional force to a point being made. Moreover, when seeking fully to appreciate the point of view of those emphasizing the domestic jurisdiction aspects of the questions before it, the Commission should recognize that there were a number of matters that a State would need to address and weigh in making nationality-related determinations. Human rights considerations, though very persuasive, were just one of a number of aspects a State would need to address. Moreover, a general reference to "human rights" considerations without legal particularity would not take the point one was attempting to make very much further. Also, if it were to become embroiled in a debate as to what particular provisions other than treaties in force in the human rights field were binding upon a State as a matter of law, in the sense of general practice accepted as law, the Commission would be venturing into an area of extreme difficulty.

25. Where purely legal issues could become enmeshed in difficult social, political and human considerations, perhaps the best approach was to begin by ascertaining what public international law—within the meaning of Article 38 of the Statute of ICJ—now provided on the relevant matters: treaty law and the present status of adherence to the relevant treaties; such further rules as reflected a general practice accepted as law; general principles of law; and judicial decisions and writings of legal publicists, as a subsidiary means for determination of the rules of law. Of course, there might well be questions of relevance on which public international law might be inadequate. They would need to be listed as questions on which progressive development of the law might be desirable. However, the Commission had constantly reminded itself that it could not be insensitive to the views of Governments and the practice of States. He tended to agree with Mr. Idris (2388th meeting) that it was important that the opinions of Governments should be obtained as widely as possible and as early as possible.

26. Perhaps the Special Rapporteur would clarify two points. First, what State succession scenarios were to be included in the Commission's consideration of the topic? As he saw it, there were at least four possibilities for a State succession: (*a*) one State dissolving into two or more States; (*b*) two or more States merging into one State; (*c*) a part of one State becoming an independent State; and (*d*) a part of one State joining another State. The second point concerned the definitions that the Commission should utilize, having regard to the definitions incorporated in the above-mentioned Conventions. Mr. Idris had noted that, when dealing with definitions, one was setting out the scope of the subject to be considered, and both Mr. Idris and Mr. Mahiou had pointed out that the sole emphasis in those Conventions appeared to be on the relations of States with other States at the international level, whereas in the present topic, much—perhaps the overwhelming weight—of the emphasis concerned the relations of States with those who were to possess its nationality. Perhaps the Commission was in some way shifting the weight it should be giving to conflicting positions. They were not easy questions, and he would be grateful if the Special Rapporteur could respond to them.

27. Mr. YAMADA said that the Special Rapporteur's first report provided an excellent basis for a preliminary study to be submitted by the Commission to the General Assembly pursuant to Assembly resolution 49/51. Nationality was a prerequisite for the full enjoyment of human rights. Any limitation of the traditional principle of State freedom in determining nationality must be carefully studied in the light of the development of human rights laws.

28. He supported the proposal that the Commission should separate the issue of the impact of State succession on the nationality of legal persons from that of the nationality of natural persons, and that it should study first the impact on natural persons. As to the principle of effective nationality, it was widely accepted that the general rule required a "genuine link" between an individual and a State as a basis for conferring nationality. The Special Rapporteur's analysis of that point, in chapter IV, section A, of his report, was quite instructive. Application of that principle to collective naturalization in the case of State succession might result in undesirable situations. He believed that the Commission should, as the Special Rapporteur suggested, study the criteria for establishing a genuine link for each different category of State succession. It might also study the question whether the territorial sovereignty of a successor State

entailed the responsibility of that State for protection of the inhabitants in its territory, and how it affected the question of the nationality of that population.

29. Another point was the question of "option of nationality". The Special Rapporteur cited Opinion No. 2 of the Arbitration Commission of the Conference on the Former Yugoslavia,[6] pointing out that the function of the option of nationality was among the issues that must be clarified in the Commission's study. In that Opinion, the Arbitration Commission stated that where there were one or more groups within a State constituting one or more ethnic, religious or language communities, they had the right to recognition of their identity under international law. The—now peremptory—norms of international law required States to ensure respect for the rights of minorities. Opinion No. 2 also stated that article 1 common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights established that the principle of the right of self-determination served to safeguard human rights. By virtue of that right, every individual might choose to belong to whatever ethnic, religious or language community he or she wished. The Arbitration Commission concluded that such rights included the corollary right to choose their nationality. The right of option of nationality had been accorded in treaties of cession. Could one say that that right had come to be recognized by general international law?

30. There was another aspect to the question. Nationality provided the holder with the basis for political and civil rights. At the same time, it entailed duties on the part of nationals *vis-à-vis* the State. Did human rights or the rights of minorities include the right to refuse nationality? In other words, did the successor State have the obligation to recognize the existence of a large group of non-nationals in its territory? He hoped that the working group to be set up to consider the topic would be able to make an in-depth study of the many questions posed by the Special Rapporteur.

31. Mr. HE said that, although the valuable first report on the topic was intended to be only preliminary in character, it clearly demonstrated the importance, complexities and sensitiveness of the issue, at a time when the world was changing with dramatic rapidity and the emergence of new States had made the issue of nationality a matter of concern and special interest to the whole of the international community. Those developments justified the effort to produce a study on the rules concerning nationality that might be applicable in the case of State succession.

32. It must first be stressed, and was also generally recognized, that the question of nationality was governed primarily by internal law. It was the sovereign right of a State to determine who was, and who was not, to be considered its national. However, such a right was not unlimited, and States should take into account the constraining factors stemming from requirements at the international level, even though the role of international law with respect to nationality was very limited.

33. Thus, with regard to State succession, States should resolve satisfactorily such questions as the loss of nationality, the acquisition of nationality, and conflict of nationality, so as to avoid dual or multiple nationality and to reduce statelessness. Furthermore, while some authors insisted that nationality should be granted irrespective of the wishes of individuals, the right of option, subject to compliance with certain conditions on the part of individuals, should also be respected. Change of nationality had also to meet the requirements of the principle of non-discrimination.

34. As the report was a preliminary study, some issues still had to be clarified and merited further examination. The main task of the Commission's study was to ascertain what specific rules of international law would have an effect on the power of the State to determine nationality in the event of State succession. The Convention on Certain Questions relating to the Conflict of Nationality Laws referred only to the limitations imposed by international conventions, international custom and the principles of law generally recognized with regard to nationality. The precise content of that provision had still to be further explored in the study of the topic.

35. As to the categories of State succession, the Special Rapporteur was right to address separately the problem of nationality in the context of different types of territorial changes. The Special Rapporteur proposed using the three categories incorporated in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. It was debatable, however, whether those categories were appropriate for State succession in respect of nationality, and particularly, changes of nationality. The problem should be studied further.

36. A number of other issues were also worthy of further consideration, notably reduction of conflicts of nationality both positive (dual or multiple nationality) and negative (statelessness); constraints on the granting of nationality; the right of option; and the matter of deprivation of nationality and international law. Concerning deprivation of nationality, article 15 of the Universal Declaration of Human Rights[7] stated: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Because of the adjective, a distinction was drawn between "arbitrary deprivation" and deprivation in general. It remained to be seen how that provision would fit in with the nationality laws of those countries that retained the capacity to deprive individuals of nationality.

37. The Special Rapporteur was right to say that the Commission should first take up the most urgent aspect, namely the nationality of natural persons, and leave the question of the nationality of legal persons for later. In that way, the study could be done more efficiently, on a step-by-step basis. He also agreed that the Commission should use a flexible approach and discuss the form of the final outcome of its work after it had conducted an in-depth study of the relevant issues. As a first step, the Commission's work would have the character of a study to be presented to the General Assembly in the form of a

[6] See 2389th meeting, footnotes 6 and 7.

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

report. Establishing a working group would be a suitable way to proceed towards that goal.

38. Mr. KUSUMA-ATMADJA said that the first report provided an excellent basis for the Commission's work. The Special Rapporteur had been criticized for adhering to the classical doctrine according to which the determination of nationality was an attribute of State sovereignty. It had been said that that doctrine could leave the door open for abuse, and that a humanitarian approach should be used instead. He agreed with those sentiments, but wondered how they could be put into practice in an international system essentially based on relations between sovereign States.

39. The Commission's objective could be seen as one of limiting the opportunities for misuse or abuse of the discretionary power of the State with regard to nationality or of mitigating the consequences. An important limitation on opportunities for abuse was the right to nationality as embodied in the Universal Declaration of Human Rights. The possible detrimental effects on individuals of conferral of nationality following State succession fell into three categories: a nationality not desired by the individual; dual nationality; or statelessness.

40. Those situations had to be averted, though he agreed with the Special Rapporteur that there was very little international law could do in that regard: it could not prevent a State from conferring nationality or refusing to grant nationality in a specific case. The Commission's task was, therefore, to enhance the opportunities for individuals to choose their nationality or, in the case of collective conferral of nationality following State succession, to strengthen the right of option in international law. The practice of States in respect of the right of option could shed some light on how the Commission should proceed. Essentially they applied a bilateral approach.

41. The right of option should be strengthened for individuals and, if necessary, should transcend the requirement of a genuine link. A person could have a genuine link with a territory but, because of State succession, could be placed in severe difficulties by continuing to possess the nationality of that territory. In such instances, individuals should be given the right to opt for another nationality.

42. As for definitions, he would restrict nationality to effective nationality in the sense of full citizenship—nationality as the basis for realizing the full potential of a human being—and would not wish to confuse the term with concepts like *ressortissant* and *Staatsangehöriger* that were often encountered in citizenship laws dating from colonial times.

43. An example from such times could, however, be usefully cited as an illustration of how the right of option could solve nationality problems. The agreement signed in 1950 between Indonesia and the Netherlands on the assignment of citizenship between the two countries provided for a right of option for citizens of the two countries for a two-year period.[8] The right had operated on the basis of residence: individuals who had still been in Indonesia on the expiry of that period had acquired Indonesian nationality. The right had been further refined by drawing a distinction between minors, who automatically acquired the nationality of their parents, and juveniles or adolescents, who had been given the option to choose their nationality on reaching 18 years of age. Another refinement had been introduced when it had been found that some individuals who had gone to live in the Netherlands and had opted for Dutch nationality had subsequently decided they wished to regain Indonesian nationality. In order to avoid lengthy naturalization proceedings, the two countries had agreed that Indonesia would enact a special law enabling those who had chosen their citizenship in the early 1950s to revert to their earlier nationality within two years of the law's entry into effect in 1976.

44. As for the operation of the right of option where groups were concerned, invoking human rights in a general sense could raise serious problems. In some countries some groups that were minorities were subjected to persecution. In former colonial countries, however, there were often powerful, dominant groups whose members were far too numerous to be deemed a minority and who were in no way in need of protection. In fact, it was often other population groups that needed protection from them. Furthermore, minorities were often created through the importation of indentured labour, and their position was quite different from that of oppressed minorities in, for example, eastern European countries.

45. Another problem that could arise in connection with the impact of State succession on groups was one of dual nationality or statelessness. The Treaty on Dual Nationality had been concluded between Indonesia and China on the abolition of dual nationality.[9] The treaty had not succeeded in preventing statelessness—one of its stated objectives—because a number of people of Indonesian origin at that time would have preferred to become citizens of Taiwan and, rather than become citizens of the Republic of China, had opted for statelessness.

46. All of the examples he had cited merely showed that no matter how many categories, definitions and concepts were devised, problems still cropped up, largely because of deficiencies in the international legal system. It was only in coping with individual situations, and particularly through the bilateral approach, that real solutions would be found. The Commission should nevertheless endeavour to discover how the right of option could be strengthened through international law.

47. Mr. THIAM said that the Special Rapporteur's remarkable work on a very delicate subject augured well for the Commission's future endeavours.

48. The topic was a difficult one indeed, as it was situated at the crossroads of public international law, private international law and internal law. He for one regretted the minimal role played by public international law in nationality matters and hoped that the Commission's

[8] Signed at The Hague, 29 November 1950 (*Treaty Series of the Kingdom of the Netherlands*, 1951, No. 5).

[9] Signed at Beijing, 13 June 1955 (*Indonesian Official Gazette*, 1958, No. 5).

work would tend towards expansion of the emphasis given to public international law in the area of nationality law.

49. He agreed that the Commission should first concentrate on the nationality of natural persons. Nationality was something that had a profound effect on individuals in terms of their deepest feelings and beliefs, their cultural affinities, their very fibre. Legal persons in any event were merely theoretical inventions. Accordingly, the impact of nationality on natural persons, as opposed to legal persons, had to be discussed separately, and separate rules had to be devised.

50. He endorsed the categories suggested by the Special Rapporteur with one exception. Special provision had to be made for the newly independent States. Decolonization was a fairly recent phenomenon and had greatly marked certain countries, particularly in nationality matters. People were still being torn between their allegiance to the former colonial Power and to the formerly colonized country, and were still facing painful choices. The matter had to be scrutinized and rules had to be worked out to deal with it.

51. In the subject under consideration, no one disputed the fact that internal law held pride of place. States had sovereignty over individuals and could determine who was or was not to be included among their nationals. Yet State sovereignty could also be abused—and had been in far too many cases. Some countries openly distinguished between their nationals, placing them in categories of full or less than full citizenship. France, for example, had formerly separated "active" citizens from "passive" ones. Colonial Powers had distinguished between full citizens and non-citizens. Such measures went directly against international law: full civil and political rights had to be provided for all citizens.

52. The Commission should therefore look very closely into nationality issues and try to strengthen the relevant rules of international law. Individuals must be given some form of support or recourse against the all-powerful State: otherwise, they were simply being thrown into the lion's den. What if apartheid were to re-emerge—in a different country, perhaps, and under a different name? Should individuals be forced to live under a system of unequal civic rights? He agreed very strongly with Mr. Al-Baharna (2389th meeting) that it was not enough for nationality law to be analysed on the basis of existing laws. It should also be progressively developed, notably by introducing rules on human rights.

53. As to the final form of the Commission's work, he was convinced that it was necessary not only to draft a report for submission to the General Assembly but above all to elaborate positive rules of international law on nationality. Only in that way would the Commission be performing a real service for the international community.

54. The CHAIRMAN, speaking as a member of the Commission, said the objective of the Commission's work must be to ensure that the creation of new States did not result in statelessness. Dual nationality was a matter to be handled by nationality law rather than by laws on State succession. Both legal persons and natural persons had to be covered in the Commission's analysis of the impact of State succession on nationality, even though the problem of natural persons was obviously the most complex and important one.

55. Within the category of natural persons, the case of collective naturalization was more complex than that of naturalization of individuals, something that was generally regulated by the principles of *jus soli* and *jus sanguinis*. The issue was probably the most pressing of all in the case of persons who had chosen to live in a successor State but wished to claim the citizenship of the predecessor State some time after the effective date of succession. State practice and nationality laws should provide the necessary guidance to enable the Commission to identify solutions. Special cases should be noted, without entering into generalities. Uniform or universal principles were less likely to be accepted by States in nationality matters because of the variety of existing laws and variations in factual situations.

56. Few cases cited in the report appeared to be central to the issues that were likely to arise in the context of State succession. Cases actually negotiated through treaties and agreements between States, cases decided by national courts and laws and regulations adopted by new States after their creation would be more pertinent.

57. The Commission's report to the General Assembly should focus on factual situations arising out of State succession and should indicate the variety of solutions adopted by States in the past. He fully endorsed Mr. Mahiou's recommendation that the Commission should approach the topic in a less general and abstract way and make an illustrative analysis of issues affecting particular regions. He also agreed with Mr. Kusuma-Atmadja that most problems of nationality were better left to bilateral regulation, which had in the past been found to be the most effective method.

58. Finally, he would recommend that, before any in-depth analysis of the issues involved was undertaken, States should be allowed to respond to the preliminary report to be produced by the Commission at the end of the present session.

Organization of the work of the session (*continued*)*

[Agenda item 2]

59. The CHAIRMAN announced that the Drafting Committee was suspending for the time being its work on the draft Code of Crimes against the Peace and Security of Mankind and on 29 May would start its consideration of the draft articles on State responsibility which were still pending, so as to take advantage of the Special Rapporteur's presence in Geneva during the next two weeks. The members of the Drafting Committee for the topic of State responsibility were Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr.

* Resumed from the 2379th meeting.

Rosenstock, Mr. Szekely and Mr. Yamada. The Special Rapporteur, Mr. Arangio-Ruiz, was a member *ex officio*.

60. Mr. THIAM said that he had no problem with the suspension of the work on the draft Code, but would like to know how many meetings of the Drafting Committee would be available later for that work.

61. Mr. YANKOV (Chairman of the Drafting Committee) said the original plan had been for the Drafting Committee to assign 14 meetings to the draft Code; it had spent 16 on that topic so far. He hoped that not more than three more meetings would be needed; certainly, at least two would be required to tidy up the text and reconsider any issues pending. The Committee's report on the topic would probably still be a preliminary one, requiring finalization at its forty-eighth session in 1996.

62. Fourteen meetings of the Committee had been envisaged for the topic of State responsibility. The Committee would make use of all available time, and he hoped that some progress would be made. In his opinion, the work should begin with the draft articles on countermeasures. However, subject to any specific suggestion the Special Rapporteur might have, it would be better for the Committee itself to decide on the order of its work. Mr. Villagrán Kramer had kindly undertaken to act as Chairman when he, Mr. Yankov, was away from Geneva from 14 to 22 June.

63. Mr. ROSENSTOCK said that he took it that the only material before the Drafting Committee at present was part three of the draft articles proposed by the Special Rapporteur, the discussion of which had been concluded in 1993.

64. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that the Drafting Committee should start with part three because it was the most neglected part of the draft. After its consideration of part three, the Committee should devote perhaps two meetings to article 12 and to some minor matters relating to articles 11 and 13, which were raised in his seventh report (A/CN.4/469 and Add.1-2),[10] as well as to any draft articles on crimes which the Commission sent to the Drafting Committee.

65. Mr. MAHIOU said that he supported the Special Rapporteur's suggestion because of the importance and complexity of the question of countermeasures, on which the Commission must try to find the best possible compromise.

66. Mr. ROSENSTOCK said that the Commission was under an obligation to finish its first reading of all the draft articles within the present quinquennium. The Drafting Committee had adopted the draft articles on countermeasures at the forty-fifth session in 1993[11] but, at the request of the Special Rapporteur at the following session, it had agreed to take another look at them, on the clear understanding that if there was no agreement on a revision of draft article 12 the existing text would stand.[12] Despite a number of meetings allocated to the matter at the forty-sixth session, the Drafting Committee had been unable to find a form of language satisfactory to itself and to the Special Rapporteur. The decision that article 12 should stand as drafted had therefore been confirmed. However, all the draft articles were still being considered on first reading, and there might be a need to revert to some of the articles in part two once the drafting of the articles on crimes had been completed. But to decide now to go back yet again to article 12 and to bits and pieces of articles 11 and 13 would not be remotely consistent with the obligation to do everything possible to complete the first reading within the quinquennium.

67. Mr. ARANGIO-RUIZ (Special Rapporteur) said Mr. Rosenstock seemed to be agreeing that the Drafting Committee could take another look at the articles in question provided it had first completed its consideration of the articles on crimes. He agreed that the Committee should begin its work with the articles on crimes and he hoped that it would be able to complete them. Once it had done that, it would be close to completing the whole undertaking and could allocate some meetings to a final tidying up of the text. Mr. Rosenstock's apprehensions therefore seemed unjustified, unless he had some particular reason for not wishing to return to articles 11, 12 and 13.

68. Mr. VILLAGRÁN KRAMER said he shared Mr. Rosenstock's understanding of the situation but thought that the Drafting Committee could return to part two after its consideration of part three and look at the Special Rapporteur's suggested amendments.

69. Mr. ROSENSTOCK said he was not suggesting that the Drafting Committee should revert to articles 11, 12 and 13 when it had finished considering the new material, but rather that the whole text would have to be looked at again in the light of that new material. There should be no differentiation in the Drafting Committee's position *vis-à-vis* article 12 and any other article. The Commission should adopt article 12 in plenary sooner rather than later, in order to submit to the General Assembly a complete set of draft articles adopted on first reading.

70. Mr. AL-KHASAWNEH said that he was only half convinced by Mr. Rosenstock's arguments. Of course, he would like the first reading of the draft articles to be completed within the quinquennium, but that aim would not be thwarted if the Drafting Committee spent two or three meetings on the articles which the Special Rapporteur regarded as so important and which had a bearing on the other parts of the text. The Special Rapporteur's suggestion was sensible and warranted support.

71. Mr. PAMBOU-TCHIVOUNDA said that a discussion of the question of countermeasures in the Drafting Committee would make it easier to conclude the consideration of other draft articles. The Committee could allocate two meetings to articles 11, 12 and 13, as requested by the Special Rapporteur, without prejudicing consideration of the new material. In any event, the Commission should try to meet the Special Rapporteur's wishes.

72. Mr. YANKOV (Chairman of the Drafting Committee) said that paragraph 350 of the Commission's report to the General Assembly on the work of its forty-sixth session[13] confirmed Mr. Rosenstock's position. However, he could go along with the general feeling

[10] See footnote 1 above.

[11] *Yearbook... 1993*, vol. II (Part Two), p. 35, document A/48/10, para. 204.

[12] Ibid., vol. I, 2353rd meeting, para. 42.

[13] *Yearbook... 1994*, vol. II (Part Two).

that, while priority should be given to part three, if time permitted, consideration could also be given to article 12 and perhaps article 11.

73. In fact, article 12 as such had not been referred to the Drafting Committee. The report stated that the Commission "had deferred taking action on article 12", that "article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12"[14] and that, pending adoption of article 12, the Commission had decided not to formally submit articles on countermeasures to the General Assembly in 1994 but expected to be able to do so in 1995.[15] That did not mean the Drafting Committee should rearrange its priorities. On the other hand, it should not rule out the possibility of making an effort to comply with the Commission's recommendations.

74. Mr. ROSENSTOCK said there was no doubt that article 12 was not before the Drafting Committee unless the Commission now decided to refer it. Such a decision would be wrong and he would insist on a vote on the issue. If the Commission voted to refer article 12 to the Drafting Committee the Commission would bear a cumulative responsibility for the outcome.

75. Mr. TOMUSCHAT said that he sympathized with Mr. Rosenstock's position but thought that some corrections to earlier articles might be needed in the light of new articles 15 to 20. Some review of the articles already adopted, perhaps only a technical one, therefore seemed inevitable. But the Drafting Committee should certainly begin its work with part three.

76. Mr. ROSENSTOCK said that the need for a review would apply without distinction to articles 1 to 14. The implications of that were horrendous. Article 12 should not be given special treatment. In any event, the Commission's decision must be a formal one. On that understanding, he could go along with Mr. Tomuschat's position.

77. The CHAIRMAN asked the Chairman of the Drafting Committee whether he needed a decision on the matter immediately or whether the Drafting Committee could begin its work on part three of the draft articles pending further consultations on the fate of article 12.

78. Mr. ROSENSTOCK, speaking on a point of order, said that the Commission needed to bite the bullet and not waste more time by putting off a decision. It was most regrettable that the whole problem had resurfaced despite the gentlemen's agreement reached in 1994.

79. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the wisest thing would be to let the Drafting Committee begin its work on part three and, as the Chairman had suggested, leave the question of article 12 open without biting any bullets. The Drafting Committee would be able to decide whether to revert to any of the articles adopted earlier, with a view to making minor changes.

80. Mr. EIRIKSSON said that the current discussion in plenary had not uncovered the whole history of the issue. Perhaps the question of reopening it should be left open.

81. Mr. MAHIOU said that he endorsed the position taken by Mr. Tomuschat.

82. Mr. YANKOV (Chairman of the Drafting Committee) appealed to the Chairman to end the discussion. The Drafting Committee's first priority was part three. If time allowed, other articles, including article 12, could be considered. Further consultations would just waste more time. The Drafting Committee should be allowed to take its own decisions on the order of its work in the light of the recommendations contained in the Commission's report.

83. The CHAIRMAN said that Mr. Rosenstock was pressing for a vote on the issue. As Chairman, he would prefer to avoid a vote because a consensus did seem to be emerging on how to proceed. He suggested that the Drafting Committee should begin its work with part three and that he should hold informal consultations on the present difficulty.

It was so agreed.

The meeting rose at 12.50 p.m.

2391st MEETING

Tuesday, 30 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, 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 (*concluded*)

1. Mr. MIKULKA (Special Rapporteur), summing up the debate, thanked the members of the Commission for

[14] Ibid., p. 86, para. 352.

[15] Ibid., para. 353.

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