

Document:-
A/CN.4/SR.2411

Summary record of the 2411th meeting

Topic:
<multiple topics>

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

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

41. Mr. BARBOZA said that he shared many of the views expressed by Mr. Pellet and Mr. Bennouna. The ideal thing, of course, would be to send to the General Assembly the draft articles that had not given rise to any objection, together with the relevant commentaries. The problem was therefore to decide whether or not it was too late for the Special Rapporteur to prepare such commentaries, if necessary, with the assistance of the secretariat.

42. The CHAIRMAN said that it was unrealistic to try to impose on the Special Rapporteur the extraordinary burden of preparing commentaries when the Commission would not be in a position to adopt them in plenary. The idea of reporting fully to the General Assembly on what had taken place in the Commission was valid, but, in the case in point, it would be tantamount to reporting a lack of any agreement in plenary.

43. Mr. ROSENSTOCK said that he strongly supported the proposal, which was the only way of informing the General Assembly while avoiding either an endless row in the Commission or conveying a misleading impression. Also, he saw no reason for “cobbling together” in a rush commentaries on draft articles that might themselves appear to be incompatible with other draft articles on second reading. In that connection, a parallel could be drawn with the Commission’s approach to the draft articles on the law of the non-navigational uses of international watercourses.

44. Mr. KUSUMA-ATMADJA said that he was reassured by the explanations the Chairman had given following the information provided by the secretariat. He therefore shared Mr. Rosenstock’s opinion as to the usefulness of the proposed formula.

45. Mr. EIRIKSSON said that he too supported the proposal, which could be compared with the decision the Commission had taken at its forty-second session, in 1990, on the topic of the jurisdictional immunities of States and their property.⁶

46. Mr. TOMUSCHAT said that, while he supported the proposal, it was essential that commentaries to the draft articles should be placed before the Commission at the very beginning of the forty-eighth session so that it could examine them calmly.

47. Mr. RAZAFINDRALAMBO said that, since it was physically impossible to prepare commentaries to draft articles on which all members of the Commission were more or less in agreement, he was ready, albeit very reluctantly, to accept the proposed solution.

The decision was adopted.

The meeting rose at 1.05 p.m.

⁶ *Yearbook* . . . 1990, vol. II (Part Two), para. 167.

2411th MEETING

Wednesday, 5 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

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

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Mr. Vereshchetin, a Judge of the International Court of Justice and a former member of the Commission, and thanked him for having taken time from his busy schedule at ICJ to spend time with the Commission. He wished in particular to place on record how greatly the Commission had valued his services as a member and as former Chairman of the Commission as well as his industry, scholarship and human qualities. He asked Mr. Vereshchetin to convey the best wishes of the Commission to two other former colleagues, Mr. Koroma and Mr. Shi, who had also made a significant contribution to the work of the Commission.

2. Mr. VERESHCHETIN, thanking the Chairman for his kind words, said that he would not fail to convey the good wishes of the Commission to Mr. Koroma and Mr. Shi. The close ties between the Court and the Commission were most gratifying and he trusted that they would continue. He wished the Commission every success in its future work which he followed with the greatest interest.

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]

REPORT OF THE WORKING GROUP

3. Mr. MIKULKA (Chairman of the Working Group on State succession and its impact on the nationality of natural and legal persons), introducing the report of the Working Group (A/CN.4/L.507), said that he was particularly pleased to be doing so in the presence of

* Resumed from the 2391st meeting.

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

Mr. Vereshchetin, who, as a member of the Commission, had supported the inclusion of the topic on the Commission's agenda.

4. The Working Group, which had met five times between 12 and 20 June 1995, had focused attention on an idea that had received broad support during the discussion in plenary: the obligation of States concerned, whether predecessor and/or successor States, to negotiate and to resolve by agreement problems of nationality that arose in a case of State succession. That obligation on States had been considered a corollary of the right of the individual to a nationality as proclaimed in the Universal Declaration of Human Rights.² In formulating the principles by which the States concerned should be guided during their negotiations, the Working Group had proceeded from the obligation of the States concerned to prevent statelessness caused by territorial change. In the course of its work, the Working Group had reached a number of preliminary conclusions. The Working Group had agreed that States concerned should have, first of all, the obligation to consult in order to determine whether a change in the international status of a territory had any undesirable consequences with respect to nationality; only if the answer was in the affirmative should they have the obligation to negotiate in order to resolve such problems. Depending on the case, an agreement should be concluded between the predecessor State and the successor State or States, in cases where the predecessor State continued to exist, or between the various successor States in cases where the successor State ceased to exist.

5. Although statelessness had been considered to be one of the most serious problems, the Working Group believed that once negotiations had begun, the States concerned should also address questions of the separation of families, military obligations, pensions and other social security benefits and the right of residence, which were all consequences of the acquisition or loss of nationality. It was important, particularly where individuals exercised the right of option, for them to know in advance what the consequences of their choice would be.

6. Regarding its methods, the Working Group had considered the effects of various types of State succession, classifying them in three groups. The first concerned cases in which the predecessor State continued to exist, and where it was necessary to decide whether the predecessor State had the right, or in some cases the obligation, to withdraw its nationality from certain individuals, and whether the successor State had the obligation to grant its nationality to certain individuals. A second type of State succession was that of unification, including absorption, in which loss of the predecessor State's nationality was an inevitable result of the disappearance of that State. The question of nationality was not complicated in such a case, because there was only one successor State. Finally, in the third case examined by the Working Group, that of dissolution, the loss of a State's nationality was automatic, but the acquisition of nationality was made more complicated by the existence of several successor States.

7. The Working Group had distinguished between a number of categories of natural persons, enumerated in paragraph 10 of the report: persons born in what had become the territory of the successor State; persons born in what had remained as the territory of the predecessor State; persons born abroad but having acquired the nationality of the predecessor State prior to succession by the application of the principle of *jus sanguinis*; persons naturalized in the predecessor State prior to the succession and, in the special case of federal States, persons having the secondary nationality of an entity that remained part of the predecessor State; and persons having the secondary nationality of an entity that became part of a successor State. All those cases were examined on the assumption that the persons concerned could, at the moment of State succession, have their habitual place of residence in the territory of the predecessor State, the successor State or a third State. Although that did not cover all situations, the Working Group was of the view that the most frequent cases had been addressed.

8. Paragraphs 11 to 20 of the report contained the Working Group's conclusions on obligations and rights of predecessor and successor States. The Working Group had also dealt with the "right of option", a term that it used in a broad sense to cover options based on a treaty or domestic law, and the possibilities of "opting in", that is to say making a positive choice, and "opting out", that is to say renouncing a nationality acquired *ex lege*.

9. The Working Group agreed that a predecessor State should be prohibited from withdrawing its nationality on the basis of ethnic, linguistic, religious, cultural and other similar criteria and from refusing to grant its nationality on the basis of such criteria. On the other hand, it thought that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria, including those mentioned.

10. As to the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality, the Working Group had not confined itself to identifying positive rules, but had also formulated rules to serve as guidelines for States in their negotiations, although it did not claim that those principles constituted positive law. The study of the consequences of non-compliance was complicated, and the Working Group had concluded that further efforts were needed. The findings set out in paragraph 29 should be understood as preliminary. It would be necessary to revert to the question of international responsibility for non-compliance with the above-mentioned principles.

11. Another area considered by the Working Group was that of continuity of nationality. Three situations had been pinpointed: *ex lege* change of nationality; change of nationality resulting from the exercise of the right of option between the nationalities of two or more successor States; and, a special case, change of nationality resulting from the exercise of the right of option between the nationalities of the predecessor and successor States. The assumption had been that the response might be different for the different situations. But ultimately, bearing in mind that the purpose of the rule of continuity

² General Assembly resolution 217 A (III).

was to prevent the abuse of diplomatic protection by individuals acquiring a new nationality in the hope of strengthening their claim thereby, the Working Group had agreed that the rule should not apply when the change of nationality was the result of State succession in any of those situations.

12. The Working Group was aware that it had not covered all of the elements mentioned in the report of the Special Rapporteur on the topic or carried out in full the mandate assigned to it by the Commission. If it continued to meet during the next session of the Commission, it would complete its work. The omission of the question of the nationality of legal persons, which had not been the subject of the report, did not mean the Working Group intended to discard it. In view of the time available, however, it had been thought best to concentrate on a set of problems that could give the Sixth Committee a better idea of the Working Group's work. Such a preliminary report could help States in making in-depth comments on the topic at the General Assembly. With that in mind, the report might be annexed to the Commission's report to the General Assembly.

13. Mr. MAHIOU thanked the Working Group for identifying problems that arose in connection with State succession. Its careful analysis had provided the Commission with a clear picture of the issue.

14. In a number of places in the report, the format caused some confusion. For example, in the enumeration in paragraph 10, subparagraph (f) appeared to be followed by (i), something which was a heading relating to another entirely different point. The confusion might be cleared up by adding a new heading after subparagraph (f) to read: "Obligations of the States concerned".

15. Concerning the substance, as the report had confined itself to natural persons, it should have stated that the Working Group would discuss legal persons at a later date. The nationality of legal persons was an area in much greater need of codification than was that of natural persons. Likewise, the calendar of action mentioned in paragraph 2 of the report should have been included, along with an indication of when the subject of legal persons would be taken up.

16. Paragraph 11 (d) spoke of persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of habitual residence. Surely, such a case could only concern federal States, and perhaps the subparagraph should be changed accordingly. In any event, if a person lived in a new State B and had the secondary nationality of that State, he did not see why State A should be prevented from withdrawing nationality at the end of a given period. In his opinion, the obligations upon the predecessor State in the case of paragraph 11 (d) were perhaps too stringent.

17. In paragraph 14, the notion of a reasonable time-limit should be introduced in speaking of the right of option. Such a right should not be eternal. It was necessary to avoid maintaining both a primary and a secondary nationality, because that would eventually cause problems. Furthermore, a time-limit should be introduced in connection with the issues discussed in paragraphs 15 and 22. Lastly, he endorsed the main idea in paragraph 7,

namely, the obligation to negotiate in order to avoid cases of statelessness.

18. Mr. PELLET commended the Working Group on a very concise and stimulating report. As to questions of principle, he agreed with Mr. Mahiou that the idea of an obligation to negotiate for arriving at an equitable agreement in matters pertaining to State succession was a good starting-point. As he saw it, the subject under consideration was first a question of State succession, and then a question of nationality.

19. Further consideration needed to be given to the notion of secondary nationality. He was somewhat reluctant to say that there could be different degrees of nationality under international law or that the word "nationality" could relate to different concepts. He agreed with Mr. Mahiou that an effort should be made to find another term for secondary nationality, perhaps the "nationality of a federal State". The example of the former Yugoslavia showed that the idea of secondary nationality only complicated things.

20. His strongest reservation concerned the fact that the report seemed to pursue a double standard, depending on whether nationality stemmed from *jus soli* or *jus sanguinis*. In reading subparagraphs (a) to (d) of paragraph 10, one gained the impression that *jus soli* was a kind of preemptory norm of general international law. Pursuant to subparagraphs (a) and (b), a person in the territory of a State had and retained its nationality, whereas in subparagraph (c), the formulation for acquiring nationality on the basis of *jus sanguinis* was much more convoluted. That was a mistake and posed important questions of principle and method, since the Working Group seemed to have based itself on the idea that persons had a nationality by virtue of international law, that they had the nationality of the territory in which they were born and that they could acquire a nationality by virtue of *jus sanguinis*. He did not think that that was a rule of international law. Instead, nationality flowed from national law, within a general, flexible framework posed by international law. In other words, he was not sure that the Working Group was justified in distinguishing between the four categories of persons set out in paragraph 10. The problem was that people had the nationality of the predecessor State, and he did not believe that the Working Group should draw such firm distinctions about the way nationality was acquired, even though the report was, of course, of a preliminary nature.

21. Some details of the report were of less importance. Paragraph 14 (a) spoke of the right of option between the nationality of the predecessor State and the nationality of the successor State, for persons born in what had become the territory of the successor State and residing either in the predecessor State or a third State. He was somewhat sceptical and thought that residence in a third State was irrelevant in the case in point.

22. It was gratifying to hear that the members of the Working Group considered that the granting of a right of option was desirable, but one that did not necessarily reflect to *lex lata*. The Working Group took a broad view of the concept of right of option, something that in itself posed no particular problem, as long as it was clearly understood that the Working Group was, in that instance,

engaging in progressive development of international law rather than codifying established practice.

23. Accordingly, the title of section 2 (c) (ii)—“Obligation of the successor States to grant a right of option”—was not entirely consistent with paragraph 21, which immediately followed and which provided that successor States should grant a right of option. He preferred the formulation in paragraph 21, considering the title of the section in question to be slightly misleading. With regard to paragraph 23, the Working Group, by making the scope of the right of option very broad, had perhaps gone too far in its laudable efforts to ensure respect for human rights and provide freedom of choice to individuals. It was not entirely certain that the will of the individual could or must prevail, in all cases, over agreements between States if such agreements fulfilled a number of acceptable principles. The important thing was that individuals should not be deprived of a nationality.

24. The statement in paragraph 29 that a third State should be entitled to consider an individual as a national of a successor State with which he has effective links, though at first glance logical, could well give rise to undesirable consequences in regard to the protection of stateless persons and diplomatic protection. The matter called for further scrutiny and reflection. Paragraphs 31 and 32, on the rule of continuity of nationality, appeared unnecessary, since the Working Group’s conclusion, set out in paragraph 32, was that the distinctions those paragraphs made did not apply in the context of State succession.

25. Lastly, the question of legal persons was definitely as interesting from the legal standpoint and was surely significant in practical terms.

26. Mr. VARGAS CARREÑO said that he very much appreciated the efforts of the Working Group, which, basing itself on international practice and, where necessary, engaging in progressive development, had provided realistic solutions to a difficult and complex topic.

27. It should be noted that the proposed rules were residual in character and that in the area of State succession the will of States as well as any agreements between them had to prevail. The obligation to negotiate was, consequently, very important not only as a means of preventing statelessness but also with regard to all matters pertaining to State succession.

28. The report of the Working Group, with a few technical corrections such as those suggested by Mr. Mahiou, could be included in the Commission’s report to the General Assembly. Once the Sixth Committee had expressed its views, the Working Group would be able to complete its work in 1996. In that connection, he entirely agreed with Mr. Mahiou and Mr. Pellet that the issue of legal persons needed to be taken up. Plainly, the Special Rapporteur’s excellent report (A/CN.4/467) and the Working Group’s report afforded a sound basis on which to begin work on an important topic.

29. Mr. IDRIS expressed his thanks to the Working Group for its endeavours and for producing a report of very high calibre. Personally, he would have preferred the report to include a section covering applicable na-

tional legislation and State practice in the matter under consideration. Otherwise, the study would be too theoretical.

30. He agreed that States should necessarily be under an obligation to consult and negotiate in order to resolve any problems of nationality arising from State succession. In paragraph 7 of the report, the Working Group had recommended that, once embarked on negotiations to prevent statelessness, States should also address a number of other areas that might be affected by State succession, including dual nationality, military obligations and right of residence. However, all the areas listed in that regard were social concerns and had no direct bearing on legal provisions regarding nationality. They should not, therefore, be among the issues which States were supposed to negotiate between themselves.

31. He concurred with the comments by Mr. Pellet and Mr. Mahiou with regard to paragraph 10. It was overly theoretical and should be modified to reflect State practice and national legislation. According to paragraph 23, the term “right of option” was being used in a broad sense. He could not agree. In fact, the right of option dealt with a very precise matter: the possibility of making either a positive choice or, again, a negative one, in other words, of renouncing a nationality acquired *ex lege*. Paragraph 23 also implied that agreements between States might attribute nationality against the will of the individual. The Commission would be making recommendations to States rather than to individuals, and it should avoid giving the impression that its efforts were directed towards the latter.

32. Mr. VILLAGRÁN KRAMER said that the Working Group’s report dealt with a subject of concern mainly to the countries of eastern Europe, which currently shared certain regional preoccupations. Yet, other countries might at some other time be affected by the consequences of State succession. In its future work, the Working Group should accordingly give consideration to the impact of State succession for all States.

33. The topic discussed by the Working Group included both the interests and rights of States with regard to individuals and the interests and rights of individuals. In his view, the interests of individuals should prevail over those of States. In that connection, it was important to clear up any differences which might arise within the Commission in terms of how to approach the question under consideration.

34. Previously, a State had been considered to have the right to grant nationality to individuals born on its territory or to individuals who were descendants of its nationals: the concepts of *jus soli* and *jus sanguinis*. More recently, the emphasis had shifted to individual rights: the right of individuals to a nationality, the right of individuals not to be deprived of their nationality or of the status and privileges accompanying nationality. Accordingly, it was regrettable that the Working Group had not placed enough emphasis on nationality as a fundamental human right. The importance of nationality in the context of human rights had to be affirmed and, in his view, the Commission had solid grounds on which to do so. Such a framework would do much more to advance the

work than would the formalistic concept of international law.

35. The Commission should bear in mind the difference between the legal situation of a person who possessed a particular nationality by virtue of *jus soli* or *jus sanguinis* and that of a person whose nationality could be affected by changes in the status of the State in which he was born or of which he was a national. The situations were different and the Working Group had placed too great an emphasis on the latter. Yet, the very roots—the fundamental basis—of nationality was found in the *règles de rattachement*, essentially *jus soli* and *jus sanguinis*. While he would not go so far as to characterize them as *jus cogens*, those rules were highly compelling and were certainly applicable in the new circumstances rightly identified by the Working Group.

36. It should be recalled that in the *Nottebohm* case,³ ICJ had made reference not to nationality but to naturalization, an act whereby a State granted its nationality to an individual who was a national of another State. The Court had ruled that a link in fact and in law must exist between the person and the State in order for the State to grant nationality and to exercise its right to diplomatic protection. The Commission should use prudence in invoking that precedent and others which related to naturalization. The Working Group had rightly provided examples of situations that might arise in practice and the Commission must give further consideration to the various scenarios. He wished to stress, in particular, that the right of option should, in the context of State succession, be considered as a fundamental human right, similar to the right to freedom. The right of option could not be taken away from one moment to the next, for it was anchored in the structure of international law.

37. While the Working Group's report was valuable, it did not provide clear guidance for the future work of the Commission.

38. Mr. YANKOV said that he wished to express his gratitude to Mr. Mikulka for his work both as Special Rapporteur and as Chairman of the Working Group.

39. With regard to the report of the Working Group, he had to admit that he had been expecting more than a simple summary of the first report of the Special Rapporteur. He had hoped that the Working Group's report would provide guidelines so that the Commission could start to engage in practical work on the topic in 1996. He feared that if the debate remained in the realm of theory, the General Assembly might protest. The Special Rapporteur already had at his disposal all the requisite elements to provide the members with a solid framework for considering the topic at the next session.

40. In his view the "conclusions" in the Working Group's report were misnamed. A working group was supposed to add information to what had already been discussed. In the case at hand, the report provided a very good summary of the first report of the Special Rapporteur but added very little that could assist the Commission in its future endeavours.

41. Mr. BENNOUNA said that the Working Group's report was simply a summary of the issues raised either by the Special Rapporteur in his first report or during the discussion in plenary and that it did not do much to advance the Commission's work.

42. He had been somewhat concerned to see both the topic of the law and practice relating to reservations to treaties and that of State succession and its impact on the nationality of natural and legal persons on the Commission's agenda. They were secondary issues which had already been dealt with. The Commission's work on the law and practice relating to reservations to treaties would probably encounter enormous problems and add little to its prestige or the place the Commission held within the United Nations system.

43. He had serious doubts about section 5 of the Working Group's report, which dealt with the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality. He agreed with Mr. Pellet that a choice must be made between codification of issues relating to nationality and codification of issues pertaining to State succession and, like his colleague, he would opt for the latter. The Special Rapporteur, too, must be convinced of that point of view and should refrain from veering off into issues of nationality. Yet, section 5 of the Working Group's report went well beyond the limits of State succession and into the realm of nationality. In so doing it took considerable risks, in particular by according third States the right to judge the actions of predecessor or successor States which had failed to comply with the principles applicable to the withdrawal or granting of nationality. In other words, a third State would be entitled to consider an individual as a national of a State without the agreement of the latter State. Such a practice was contrary to the principles of international law. A problem between a predecessor State and a successor State was a problem of succession. However, once a third State was entitled to act as judge, the issue changed entirely to one of nationality. It was audacious in terms of international law to contend that a State could regard a person as having the nationality of a State, without the agreement of that State.

44. Unlike Mr. Yankov, he did not think that the time had come for the Working Group to draw up a plan of future work on the topic. What needed to be done at the present stage was to define the precise scope of the ground to be covered. As Mr. Pellet had pointed out, many uncertainties still persisted in that respect. The question of human rights in relation to the topic under consideration had been raised by Mr. Villagrán Kramer. As he saw it, in matters pertaining to *jus cogens*—which of course covered all fundamental human rights—the Commission's work would consist of codification, but in matters of succession of States it would come under the heading of progressive development. The question of relations with third States was of particular importance in that connection. The Commission must beware of creating new problems in that area. In short, before drawing up any plan of future work, the Commission needed to know precisely what it was talking about. He none the less wished to thank the Working Group for its efforts, which had provided a stimulus for an interesting discussion in plenary.

³ See 2385th meeting, footnote 15.

45. Mr. KUSUMA-ATMADJA, after joining previous speakers in thanking the Special Rapporteur for his excellent first report, said that his remarks would be preliminary in nature. First of all, he wished to refer to the experience of his own country, Indonesia, as a successor State to a former colonial State, the Netherlands. With the help of the secretariat, he had taken the liberty of having copies of a document describing Indonesia's experience circulated to members of the Commission. It related to nationality issues arising from three separate types of succession: first, succession in respect of the major part of what was now Indonesia, where the relevant nationality issues had been settled by an agreement between Indonesia and the Netherlands signed in 1950;⁴ secondly, succession in respect of the former territory of Western New Guinea, settled, with the help of the United Nations, in 1962;⁵ and thirdly, succession in respect of East Timor which, as was known, Indonesia held to have been incorporated into Indonesian territory by integration rather than annexation.⁶ While not agreeing with all of Mr. Yankov's strictures regarding the Working Group's work, he felt that a certain amount of structuring was called for, and hoped that his country's experience might prove useful in that connection.

46. As to the question of the right of option, he would point out that the right of the individual to exercise his human right to a nationality was different from, but not necessarily inconsistent with, the concerns of the State, which related primarily to nation-building. In its first Nationality Act, in 1946, which had reflected the desire of a newly emergent State to abolish the discriminatory practices of the former colonial regime, Indonesia had adopted the *jus soli* principle, whereby all persons living on Indonesian territory had become Indonesian citizens unless they opted otherwise. A decree issued at the time by the then Minister of Justice had expressly prohibited referring to Indonesian citizens of Chinese origin as "Chinese". A new Nationality Act combining *jus soli* with *jus sanguinis* had been passed in 1958, when Indonesian nationals had begun to travel abroad and to need a new basis for diplomatic protection. Experience had shown that the generously granted *jus soli* principle had been misused by an ethnic minority which, being strong in economic terms, wished also to gain special political rights. Thus, Indonesia had had good political reasons for changing the law, and it had succeeded in persuading the People's Republic of China to change its relevant domestic laws in the spirit of the Conference of Asian and African Nations (Bandung Conference).⁷

47. He believed he was justified in saying that Indonesia had applied the right of option in a liberal manner. Under a Sino-Indonesian treaty on prevention of dual nationality, for example, minors kept the father's nationality until the age of 18 but could then choose Chinese nationality if they so wished.⁸ A foreign spouse of an Indonesian national was allowed a year in which to opt for one of the two nationalities; if the marriage was dis-

solved and the non-Indonesian spouse wished to revert to his or her former nationality, that too was permitted.

48. He did not agree with Mr. Pellet that concerns of the State should take precedence over individual rights in all cases. There was a point of convergence in the issue of diplomatic protection, where Indonesia's practice was to instruct its nationals to abide strictly by the laws of the foreign country in which they were present, while, of course, providing Indonesian nationals with consular protection.

49. Another example where the right of option had been granted liberally by Indonesia was an agreement reached in respect of Moluccan members of the former colonial army who had fought against the forces of independence in Indonesia and had chosen to move to the Netherlands with their families at the end of the conflict. Twenty years or so later, many of them, being dissatisfied with life in the Netherlands for a number of reasons, had asked to be granted Indonesian nationality. As his country's Minister of Justice at the time, he had been responsible for the so-called Moluccans Law which had enabled several thousands of such people to return to Indonesia as nationals, certain individuals even retaining their right to a generous Netherlands pension.

50. To sum up, he would say that the right of option of the individual should not be subject to the right of the State to determine nationality. The State's exercise of its rights in the interests of nation-building was, of course, very important, but it should be used judiciously, as had been the case in Indonesia, where very great importance was attached, for example, to the principle of the unity of the family. Without being as critical as Mr. Yankov of the Working Group's performance, he had the impression that it had been interested only in eastern Europe. More attention should be paid in future to the experience of former colonial States. If invited to do so, he would be pleased to make his services available to the Working Group in that connection.

51. Lastly, he did not think that the question of the nationality of legal persons needed to be dealt with by the Commission. Multinational corporations had the means to take care of their own interests. The Commission should focus its attention on the question of the nationality of individuals, especially in countries which had emerged from colonial rule.

52. Mr. LUKASHUK said that he had already commented favourably on the Special Rapporteur's first report and could therefore be brief. He believed that the Working Group was on the right track in linking the individual's right to a nationality, on the one hand, with the obligation of States to prevent statelessness, on the other. The question of legal persons was a separate and highly specific one, and it should be considered at some later stage. The principle of the individual's right to a nationality would undoubtedly come to be incorporated in many national legislations, in which connection he drew attention to an important provision contained in the new Russian Constitution stipulating that no organ of the

⁴ See 2390th meeting, footnote 8.

⁵ Agreement (with annex) concerning West New Guinea (West Irian) (United Nations, *Treaty Series*, vol. 437, p. 273).

⁶ Indonesian law promulgated on 17 July 1976.

⁷ Held at Bandung, Indonesia, from 18 to 24 April 1955.

⁸ See 2390th meeting, footnote 9.

State had the right to deprive a person of Russian nationality.

53. In his next report, the Special Rapporteur might devote more attention to matters of a general nature, in particular a definition of the concept of nationality and of the different types of State—federation, confederation, and so on—of which a person could be a national. As other members had already pointed out, the question of the relationship between international law and national legislations in respects other than that of settling nationality issues also deserved attention. The report of the Special Rapporteur and that of the Working Group convincingly demonstrated that nationality was not only a matter of internal law.

54. He agreed with Mr. Bennouna that some of the Working Group's conclusions concerning the position of third States as set out in section 5 of the report might have rather dangerous repercussions in practice. For example, an individual who had been deprived of his or her nationality would still be liable to be extradited under an extradition agreement between the predecessor and successor States, a situation that would constitute a clear violation of the individual's human rights.

55. While entirely sharing Mr. Yankov's concern with productivity, he could not agree with his criticism of the Working Group's work, subscribing instead to the more positive assessment made by Mr. Kusuma-Atmadja. Indeed, he thought that the Working Group had achieved better results than might have been expected at such an early stage, and he wished to commend both the Working Group and the Special Rapporteur on the topic on the excellent work they had done in a previously unexplored area.

56. Mr. RAZAFINDRALAMBO said that, like previous speakers, and Mr. Mahiou in particular, he considered that the report of the Working Group should have been more explicit about its intention with regard to the question of legal persons and should have included at least a reference to the question. Specifically, it was his view that legal persons should not be allowed complete freedom to elect the nationality of the country in which they wished to carry out their activities.

57. The Working Group should pay particular attention to the important question of dual nationality, a question in regard to which the Special Rapporteur had remained virtually silent. It was a very important problem and one of particular interest to certain developing countries, because it was tied in with decolonization.

58. As to other criteria applicable to the withdrawal and granting of nationality, dealt with in section 4 of the report of the Working Group, paragraph 27 stated that "as a condition for enlarging the scope of individuals entitled to acquire its nationality" a successor State should be allowed to take additional criteria into consideration. Bearing in mind that the predecessor State was prohibited from adopting such criteria, he wondered whether the result would not be that they would be improperly used in order to turn down certain categories of persons, thus allowing the possibility of discrimination.

59. He agreed with the reservations voiced by Mr. Bennouna and Mr. Pellet about the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality. He failed to see which principle of international law enabled a third State to interfere in problems which, a priori, concerned the predecessor and successor States alone.

60. Although the principles governing international responsibility, referred to in paragraph 30, would apply automatically, they would not suffice since they concerned States. Actually, the problem of nationality and particularly of statelessness was primarily of concern to the individual, who might be left in a difficult situation for many years if the traditional method of recourse to ICJ was followed. The Working Group should therefore consider the possibility of provisions on settlement of disputes which would provide for specific procedures, including arbitration, with a view to reaching a decision within a reasonable period of time. Where appropriate, the possibility of having a protocol to provide for recourse to the Committee on Human Rights could also be considered.

61. Mr. PAMBOU-TCHIVOUNDA said that the Working Group had submitted a practical report on an abstract question. It might, however, seem to be lacking in that common sense approach without which the end result of any law-making endeavour was bound to be no more than mere fiction. Such, at any rate, was the impression that the report might create. The question therefore was what purpose it served and how it could be evaluated in concrete terms. His answer to that question centred on three points.

62. First, while he agreed that the basic principle should be the obligation to negotiate, common sense dictated that the objective of that obligation should be spelt out. The obligation went a little further than the statement in paragraph 5 of the report, according to which States should have an obligation to consult "in order to determine whether this change had any undesirable consequences with respect to nationality". States were not, after all, going to engage in negotiations to determine whether State succession had undesirable consequences. Rather, States involved in a State succession should be required to do everything possible, and indeed they had an obligation to do so, to stabilize the territories concerned by providing safeguards for the population. He used the term "safeguards" because, in the present day and age, it was unthinkable that there were still peoples who eked out their lives in tents in the desert. That was the kind of obligation to be borne in mind when imposing on States an obligation to resolve a case of State succession which had implications for the fate of populations. It was not just a word—"nationality"—that was at issue but the fate of populations, and that should be made quite clear.

63. Secondly, the part of the report which dealt with the right of option could lead to misunderstanding. In the context of State succession, such a right had to be placed within certain limits. He did not dispute the suggestion that it was also a human right, but would point out that it was important not to reverse the roles: State succession was a matter for the State, and individuals were not

responsible for regulating it. It was for States to make sure that, in such cases, chaos was avoided. State succession was sufficiently problematic already; to allow individuals a right of option would simply be adding to the problems. The exercise of such a right should therefore be made subject to very strict conditions. Its beneficiaries would have to be determined and it would have to be circumscribed in time; in so advocating, he had in mind the question of dual nationality. Also, the report, curiously, introduced the concept of secondary nationality—a concept that should be dropped. Nationality either existed or it did not. Any other elements would be added on account of dual or multiple nationality, not of main or secondary nationality.

64. Thirdly, some thought should be given to such higher considerations as whether it was rules or guidelines that international law should place at the service of States. There was also the question of the relationship between human rights and sovereignty. If it were possible for the matter to be settled by individuals themselves, international law—the law made by States for States—would probably not assume responsibility for it. Another consideration concerned emotional and even material ties; and it was in that respect, it seemed to him, that the two questions, namely, State succession in the case of natural persons and State succession in the case of legal persons, converged. He also wondered whether the title of the topic should perhaps not refer to the “fate” of natural and legal persons. Moreover, the report should have raised the question of the nationality of companies’ directors, which would have helped to define the limits of the topic and, in particular, it should have indicated more clearly what the prospects were, bearing in mind, on the one hand, the different categories of State succession, and, on the other, State practice.

The meeting rose at 1.15 p.m.

2412th MEETING

Thursday, 6 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

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

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Mr. Oda, a Judge of the International Court of Justice for some 20 years and, prior to that, an outstanding scholar and professor and a negotiator at the United Nations Conferences on the Law of the Sea. Mr. Oda symbolized the great Asian tradition that combined intelligence, wisdom and discipline. He invited Mr. Oda to address the Commission.

2. Mr. ODA recalled that the last time that he had attended a meeting of the Commission had been in 1960, as the assistant of Mr. Yokota, Japanese member of the Commission.

3. He drew two conclusions from his experience as a judge of ICJ. The first was of a personal nature. Although the spirit of contradiction was not one of his personality traits, it was a fact that, in the discharge of his tasks as judge, he often found himself in the minority, and that had led him to draft many dissenting or separate opinions. The second concerned the general list of the Court, one of whose characteristics was that, when international disputes arose, it could not exercise its jurisdiction unless the matter had been brought before it. As it happened, States seemed to be increasingly inclined to refer cases to the Court because its general list, which had contained only one entry in 1976, was today very long.

4. On 30 June 1995, the Court had delivered a judgment in the *East Timor (Portugal v. Australia)* case.¹ On 30 October, it would open oral proceedings on the question of the *Legality of the threat or use of nuclear weapons* (request for advisory opinion),² which might well be time-consuming, because more than 40 States had submitted statements and many of them had indicated their intention to invite experts or witnesses to testify. The Court would then have to decide in which order it would examine the other cases ready for hearing.

5. The CHAIRMAN expressed his thanks to Mr. Oda for his remarks and congratulated him on his eminent contribution to the case-law of ICJ and to the development and dissemination of international law.

The law and practice relating to reservations to treaties (*continued*)* (A/CN.4/464/Add.2, sect. F, A/CN.4/470,³ A/CN.4/L.516)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

6. Mr. AL-BAHARNA said that he would like to make a number of general observations before considering the proposals of the Special Rapporteur.

¹ *I.C.J. Reports 1995*, p. 90.

² *Order of 1 February 1995, I.C.J. Reports 1995*, p. 3.

* Resumed from the 2407th meeting.

³ Reproduced in *Yearbook . . . 1995*, vol. II (Part One).