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**Summary record of the 2475th meeting**

Topic:  
**<multiple topics>**

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courses,<sup>5</sup> which he understood was to be adopted very soon as a convention, and the draft statute for an international criminal court,<sup>6</sup> and he believed there was a good chance that it too would become a draft convention by the end of the century. During the very productive forty-eighth session, it had adopted on second reading the draft Code of Crimes against the Peace and Security of Mankind.<sup>7</sup> In addition, the draft articles on State responsibility, a text of exceptional importance despite its imperfections, had been adopted by the Commission on first reading,<sup>8</sup> and the Commission was duty-bound to finalize it, regardless of the difficulties posed. There would be no detailed report on the subject at the current session, but opinions should be voiced on how to proceed with the second reading. Lastly, the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been the subject of a comprehensive report produced by the Working Group on the topic at the forty-eighth session of the Commission, in 1996.<sup>9</sup> The Commission might want to consider where to take the topic from there.

18. The two remaining topics formally on the agenda, namely nationality in relation to the succession of States and reservations to treaties, were not enough to keep the Commission busy for the entire session. However, two other projects lay close at hand. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further should examine the topics “Diplomatic protection” and “Unilateral acts of States” and indicate their scope and content. The Commission might wish to create a working group to that end. It would also need to consider whether to hold split sessions in the future.

*The meeting rose at 4.35 p.m.*

<sup>5</sup> See *Yearbook . . . 1994*, vol. II (Part Two), p. 88, para. 219.

<sup>6</sup> *Ibid.*, p. 26, para. 90.

<sup>7</sup> See footnote 1 above.

<sup>8</sup> See *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

<sup>9</sup> *Ibid.*, annex I.

## 2475th MEETING

*Tuesday, 13 May 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan,

Mr. Pambou-Tchivounda, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRMAN, reporting to the Commission on the proposals made by the Enlarged Bureau, said that, with regard to the topics “Nationality in relation to the succession of States” and “Reservations to treaties”, the Enlarged Bureau had unanimously agreed that high priority should be given to the consideration of the third report of the Special Rapporteur on nationality in relation to the succession of States (A/CN.4/480 and Add.1)<sup>1</sup> in order to adopt the part of the draft articles on first reading relating to the nationality of natural persons, if possible by the end of the current session. That meant that, for at least two weeks, all plenary meetings would be devoted to examining the text of the draft articles proposed by the Special Rapporteur and that the Drafting Committee would also be able to start work very soon. However, given the technical nature of the subject, it was proposed that, once the Commission had exhausted the discussion in plenary of the first part of the third report, namely, the preamble, the definitions and articles 1 to 16, it should defer its work on the topic and turn to the second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478)<sup>2</sup> under the chairmanship of one of the Vice-Chairmen. As the Enlarged Bureau was also of the view that the draft resolution annexed to the second report on reservations to treaties should also be referred to the Drafting Committee, it was suggested that the latter should take up the draft once it had completed its work on part I of the draft on nationality in relation to the succession of States. After spending some time on reservations to treaties, the Commission in plenary and the Drafting Committee might then go on to part II of the draft articles on nationality in relation to the succession of States.

2. As to the draft articles on State responsibility, the Enlarged Bureau proposed that a working group should be set up not to review the drafting of the text, but, pending reactions by States, to hold an exchange of views to determine the main areas of disagreement and possibly to seek ways and means of overcoming them, thereby facilitating the work of the Special Rapporteur, whom the Commission must appoint by the end of the session.

3. For the topics “Diplomatic protection” and “Unilateral acts of States”, the Enlarged Bureau also suggested the establishment of a working group which would, pursuant to paragraph 13 of General Assembly resolution 51/160, help indicate their scope and content, thereby enabling future special rapporteurs to set out on a well-marked path and would be in keeping with the spirit of the

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1996*, vol. II (Part One).

proposals made by the Commission on its working methods, of which the General Assembly had taken note with appreciation in the above-mentioned resolution.

4. On the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Enlarged Bureau had noted that only two States, namely, the United States of America, and Sweden on behalf of the Nordic countries, had sent the comments and observations referred to in paragraph 6 of General Assembly resolution 51/160. The Commission must decide by the end of the session on the manner in which it intended to reply to the Assembly's question on how it would proceed with its work on the topic, but, in the current circumstances, such a decision was premature. The Enlarged Bureau did not rule out the possibility of establishing a working group at a later stage.

5. For its part, the Planning Group had three tasks: the drafting of the Commission's long-term programme of work for the forthcoming quinquennium; the discussion of new topics for the future; and in accordance with paragraph 10 of General Assembly resolution 51/160, the consideration of whether to split the Commission's sessions in two. In keeping with past practice, the Planning Group would set up a working group on the long-term programme of work.

6. Mr. BENNOUNA, supported by Mr. ROSENSTOCK and Mr. CRAWFORD, said that, in connection with the topic of State responsibility, it was unusual for the Commission to establish a working group after having sent States a draft adopted on first reading in order to ask for their comments. The working group's terms of reference therefore had to be clearly defined. There was no problem if the working group was to be entrusted with a task of pure reflection in the strict framework of the Commission, but, if those reflections were to be meant for the General Assembly, an objection on methodological grounds would be in order.

7. The CHAIRMAN said that, in the view of a number of members of the Enlarged Bureau, the working group should proceed with the greatest caution and should not forward its reflections to the General Assembly. However, there was no fundamental disagreement on the principle of establishing the working group.

8. With regard to the arrangements for the establishment of the various working groups, he said that, as the Drafting Committee and the Planning Group were complementary, those members who did not sign up for the Drafting Committee automatically became part of the Planning Group. In view of the limited number of topics on the agenda of the Commission at its forty-ninth session, he suggested that the Commission should discontinue for the time being the recent practice of changing the composition of the Drafting Committee according to topic.

9. Working groups were established according to their own procedures, each member of the Commission being free either to participate in one or two of them or not to take part at all.

10. Replying to a question by Mr. Hafner, he said that, theoretically, the working groups were limited in size. In reply to Mr. Ferrari Bravo and Mr. Goco, he said that the sole purpose of the Drafting Committee was, as its name indicated, to draft; in principle, it was unnecessary for each of its members to be a specialist on the topic under consideration.

11. Replying to a question by Mr. Thiam, he said that the former chairmen of the Commission who were members of the Planning Group *ex officio* were not necessarily excluded from the Drafting Committee.

12. He said that, if he heard no objection, he would take it that the Commission approved the proposals of the Enlarged Bureau.

*It was so decided.*

**Nationality in relation to the succession of States (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,<sup>3</sup> A/CN.4/L.535 and Corr.1 and Add.1)**

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

13. Mr. MIKULKA (Special Rapporteur) said that, on the basis of his first and second reports on State succession and its impact on the nationality of natural and legal persons,<sup>4</sup> the Commission had completed a preliminary study of the question and had set out to undertake a substantive study of the topic. To do so, it had separated the question of the nationality of natural persons from that of the nationality of legal persons and given priority to consideration of the former question. It had also proposed modalities concerning the form of the results of its work and the timetable for examining the redefined topic. In particular, it had considered that draft articles with commentaries should be prepared, without prejudice to the final decision, in the form of a declaration to be adopted by the General Assembly and that they should be completed on first reading at the forty-ninth or, at the latest, fiftieth session of the Commission.

14. Those choices of the Commission, which the General Assembly had approved in its resolution 51/160, had had direct consequences for the content and dimensions of his third report (A/CN.4/480 and Add.1). For example, the need to complete the first reading at the current session had meant that he had had to submit to the Commission all the requisite elements, namely, a complete set of 25 draft articles and a draft preamble covering the entire question of the nationality of natural persons in relation to the succession of States, which read:

<sup>3</sup> See footnote 1 above.

<sup>4</sup> First report: *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/467; second report: *Yearbook* . . . 1996, vol. II (Part One), document A/CN.4/474.

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

*Article 3. Legislation concerning nationality  
and other connected issues*

*Considering* that, in connection with recent cases of succession of States, problems concerning nationality have again become a matter of concern to the international community,

*Emphasizing* that, while nationality is essentially governed by internal law, international law imposes certain restrictions on the freedom of action of States in this field,

*Convinced* of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security in international relations and strengthening respect for human rights,

*Recalling* that the Universal Declaration of Human Rights proclaimed the right of every person to a nationality,

(. . .)

PART I

GENERAL PRINCIPLES CONCERNING NATIONALITY IN  
RELATION TO THE SUCCESSION OF STATES

*Article 1. Right to a nationality*

1. Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, has the right to the nationality of at least one of the States concerned.

2. If a child born after the date of the succession of States whose parent is a person mentioned in paragraph 1 of this article has not acquired the nationality of at least one of the States concerned, or that of a third State, such child has the right to acquire the nationality of the State concerned on whose territory or otherwise under whose jurisdiction (hereafter "on the territory") he or she was born.

*Article 2. Obligation of States concerned to take all reasonable measures to avoid statelessness*

The States concerned are under the obligation to take all reasonable measures to avoid persons who, on the date of the succession of States, had the nationality of the predecessor State becoming stateless as a result of the said succession of States.

\* For the purposes of the present draft articles:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "Third State" means any State other than the predecessor State or the successor State;

(f) "Nationality" means nationality of natural persons;

(g) "State concerned" means the predecessor State(s) or the successor State(s), as the case may be;

(h) "Person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, and whose nationality or the right thereto may be affected by the succession of States.

1. Each State concerned should enact laws concerning nationality and other connected issues arising in relation to the succession of States without undue delay. It should take all necessary measures to ensure that persons concerned will be apprised, within a reasonable time period, of the impact of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

2. When providing for the *ex lege* acquisition of nationality in relation to the succession of States, the legislation of the States concerned should provide that such acquisition of nationality takes effect on the date of the succession of States. The same would apply for the acquisition of nationality following the exercise of an option, if the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

*Article 4. Granting of nationality to persons having their habitual residence in another State*

1. A successor State does not have the obligation to grant its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that State.

2. A successor State shall not impose its nationality on persons who have their habitual residence in another State against the will of such persons, unless they would otherwise become stateless.

*Article 5. Renunciation of the nationality of another State as a condition for granting nationality*

When the person concerned entitled to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the acquisition of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

*Article 6. Loss of nationality upon the voluntary acquisition of the nationality of another State*

1. The predecessor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. Each successor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession of States or the entitlement thereto.

*Article 7. The right of option*

1. Without prejudice to their policy in the matter of multiple nationality, the States concerned should give consideration to the will of a person concerned whenever that person is equally qualified, either in whole or in part, to acquire the nationality of two or several States concerned.

2. Any treaty between States concerned or, as the case may be, the legislation of a State concerned should provide for the right of option for the nationality of that State by any person concerned who has a genuine link with that State if the person would otherwise become stateless as a consequence of the succession of States.

3. There should be a reasonable time limit for the exercise of any right of option.

*Article 8. Granting and withdrawal of nationality upon option*

1. When persons entitled to the right of option have exercised such right, the State whose nationality such persons have opted for shall grant them its nationality.

2. When persons entitled to the right of option in accordance with these draft articles have exercised such right, the State whose nationality such persons have renounced shall withdraw its nationality from them, unless they would thereby become stateless.

3. Without prejudice to any obligation deriving from a treaty in force between States concerned, the State concerned other than the State whose nationality the persons concerned have opted for does not have the obligation to withdraw its nationality from them on the basis of the mere fact that they have opted for the nationality of the latter State, unless those persons have clearly expressed their will to renounce its nationality. This State may, nevertheless, withdraw its nationality from such persons when their acquiescence to the loss of its nationality may be presumed in the light of legislation in force on the date of the option.

*Article 9. Unity of families*

Where the application of their internal law or of treaty provisions concerning the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, the States concerned shall adopt all reasonable measures to allow that family to remain together or to be reunited.

*Article 10. Right of residence*

1. Each State concerned shall take all necessary measures to ensure that the right of residence in its territory of persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on the territory of such State, is not affected as a result of such absence. That State shall take all necessary measures to allow such persons to return to their habitual residence.

2. Without prejudice to the provisions of paragraph 3, the successor State shall preserve the right of residence in its territory of all persons concerned who, prior to the date of the succession of States, were habitually resident in the territory which became the territory of the successor State and who have not acquired its nationality.

3. Where the law of a State concerned attaches to the voluntary loss of its nationality or to the renunciation of the entitlement to acquire its nationality by persons acquiring or retaining the nationality of another State concerned the obligation that such persons transfer their residence out of its territory, a reasonable time limit for compliance with that obligation shall be granted.

*Article 11. Guarantees of the human rights of persons concerned*

Each State concerned shall take all necessary measures to ensure that the human rights and fundamental freedoms of persons concerned who, after the date of the succession of States, have their habitual residence in its territory are not adversely affected as a result of the succession of States irrespective of whether they have the nationality of that State.

*Article 12. Non-discrimination*

When withdrawing or granting their nationality, or when providing for the right of option, the States concerned shall not apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain or acquire a nationality or would deny those persons their right of option, to which such persons would otherwise be entitled.

*Article 13. Prohibition of arbitrary decisions concerning nationality issues*

1. No persons shall be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, which they were entitled to retain or acquire in relation to the succession of States in accordance with the provisions of any law or treaty applicable to them.

2. Persons concerned shall not be arbitrarily deprived of their right of option to which they might be entitled in accordance with such provisions.

*Article 14. Procedures relating to nationality issues*

Each State concerned shall ensure that applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States are processed without undue delay and that relevant decisions, including those concerning the refusal to issue a certificate of nationality, shall be issued in writing and shall be open to administrative or judicial review.

*Article 15. Obligation of States concerned to consult and negotiate*

1. The States concerned are under the obligation to consult in order to identify any detrimental effects that may result from the succession of States with respect to the nationality of individuals and other related issues concerning their status and, as the case may be, to seek a solution of those problems through negotiations.

2. If one of the States concerned refuses to negotiate, or negotiations between the States concerned are abortive, the State concerned the internal law of which is consistent with the present draft articles is deemed to have fully complied with its international obligations relating to nationality in the event of a succession of States, subject to any treaty providing otherwise.

*Article 16. Other States*

1. Without prejudice to any treaty obligation, where persons having no genuine link with a State concerned have been granted that State's nationality following the succession of States, other States do not have the obligation to treat those persons as if they were nationals of the said State, unless this would result in treating those persons as if they were de facto stateless.

2. Where persons who would otherwise be entitled to acquire or to retain the nationality of a State concerned become stateless as a result of the succession of States owing to the disregard by that State of the present draft articles, other States are not precluded from treating such persons as if they were nationals of the said State if such treatment is in the interest of those persons.

## PART II

PRINCIPLES APPLICABLE IN SPECIFIC SITUATIONS  
OF SUCCESSION OF STATES

## SECTION I

## TRANSFER OF PART OF THE TERRITORY

*Article 17. Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State*

When part of the territory of a State is transferred by that State to another State, the successor State shall grant its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the

exercise of the right of option which all such persons shall be granted.

#### SECTION 2

##### UNIFICATION OF STATES

###### *Article 18. Granting of the nationality of the successor State*

Without prejudice to the provisions of article 4, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have merged, the successor State shall grant its nationality to all persons who, on the date of the succession of States, had the nationality of at least one of the predecessor States.

#### SECTION 3

##### DISSOLUTION OF A STATE

###### *Article 19. Scope of application*

The articles of this section apply when a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States.

###### *Article 20. Granting of the nationality of the successor States*

Subject to the provisions of article 21, each of the successor States shall grant its nationality to the following categories of persons concerned:

- (a) Persons having their habitual residence in its territory; and
- (b) Without prejudice to the provisions of article 4:
  - (i) Persons having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last permanent residence in what has become the territory of that particular successor State; or
  - (ii) Where the predecessor State was a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

###### *Article 21. Granting of the right of option by the successor States*

1. The successor States shall grant a right of option to all persons concerned covered by the provisions of article 20 who would be entitled to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right of option to persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 20, paragraph (b), irrespective of the mode of acquisition of the nationality of the predecessor State.

#### SECTION 4

##### SEPARATION OF PART OF THE TERRITORY

###### *Article 22. Scope of application*

The articles of this section apply when part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist.

###### *Article 23. Granting of the nationality of the successor State*

Subject to the provisions of article 25, the successor State shall grant its nationality to the following categories of persons concerned:

- (a) Persons having their habitual residence in its territory; and
- (b) Without prejudice to the provisions of article 4, where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

###### *Article 24. Withdrawal of the nationality of the predecessor State*

1. Subject to the provisions of article 25, the predecessor State shall not withdraw its nationality from:

- (a) Persons having their habitual residence either in its territory or in a third State; and
- (b) Where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

2. The predecessor State shall withdraw its nationality from the categories of persons entitled to acquire the nationality of the successor State in accordance with article 23. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State, unless they have the nationality of a third State.

###### *Article 25. Granting of the right of option by the predecessor and the successor States*

The predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 23 and 24, paragraph 1, who would be entitled to have the nationality of both the predecessor and successor States or of two or more successor States.

15. The content of the third report had also been determined by the Commission's latest decisions on its working methods, including the role of special rapporteurs and their reports. That was one of the reasons why all the draft articles had commentaries. The draft articles also incorporated the conclusions of the Working Group on State succession and its impact on the nationality of natural and legal persons, which had met during the past two sessions,<sup>5</sup> relating to the main principles or rules which constituted the subject of the draft articles and the overall structure. The draft articles were divided into two parts. Part I (General principles concerning nationality in relation to the succession of States) dealt with the general principles which applied to all cases of State succession and Part II (Principles applicable in specific situations of succession of States) dealt with the principles governing specific cases of State succession: transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory.

16. He recalled that, two years previously, the Commission had decided to follow, in that respect, the approach in the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter

<sup>5</sup> See *Yearbook* 1995, vol. II (Part Two), annex; and *Yearbook* 1996, vol. II (Part Two), paras. 78 to 87.

referred to as the “1983 Vienna Convention”) rather than that in the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the “1978 Vienna Convention”) and, in view of the current requirements of the international community and the completion of the decolonization process, to leave aside the category of newly independent States that had emerged from decolonization. On no account did the latter point mean that the abundant practice of newly independent States in the area of nationality would be ignored. On the contrary, it was of great importance for the formulation of general principles in that field, so much so that such practice had served as a source of inspiration, and as practical examples, in the articles of Part I and Part II.

#### GENERAL PRESENTATION OF THE DRAFT ARTICLES, PREAMBLE AND DEFINITIONS

17. Before referring to the articles of Part I (draft articles 1 to 16), he pointed out that the four paragraphs of the preamble were designed simply to make a number of points which had emerged from the Commission’s discussions of the topic in the past two years, but did not lend themselves to the formulation of a rule or principle in the strict sense. The question of definitions was more complex, not so much in terms of their content in most instances, for which the wording of article 2 of the 1978 and 1983 Vienna Conventions ensured uniformity, but rather in terms of form, namely, the declaratory nature of the instruments being drafted. Special rapporteurs often began their work by drafting definitions, but their objective was to produce a draft convention, whereas, in the case of a draft declaration, definitions were rarely the subject of a separate article. Given that, in any event, working definitions were needed for future work to avoid any misunderstanding about the meaning of the terms used, he had eventually decided to include those definitions as a footnote to the title of the draft, on the understanding that it would be for the Commission to decide whether it was desirable to include them in the draft articles and how to go about doing so.

18. In the footnote to the title of the draft articles, the definitions in subparagraphs (a) to (e) were identical to those contained in article 2 of the 1978 and 1983 Vienna Conventions, whereas those contained in subparagraphs (f) to (h), which dealt with the expressions “nationality”, “State concerned” and “person concerned”, had been prepared for the purposes of the draft articles under consideration.

19. The definition of the term “nationality” gave rise to a substantive problem which the Commission had already identified and which he had taken up in his first report, namely, that the function and, hence, the definition of nationality differed depending on whether the problem was approached from the perspective of internal or international law. All the aspects of that problem had been summarized in the commentary to that definition contained in the third report of the Special Rapporteur, but it should be pointed out that the numerous definitions of nationality given in writings, while intellectually stimulating, were of limited significance for the purpose of the draft articles. As an example, when ICJ defined national-

ity in the *Nottebohm* case,<sup>6</sup> it appeared to focus more on the sociological aspect than the strictly legal aspect of the concept and in fact to define an effective nationality rather than nationality as such. Clearly, it would not be easy to provide an entirely satisfactory definition of nationality; that was perhaps not necessary in the current case, especially since even conventions regulating questions of nationality or statelessness did not always define the term. However, if it was deemed necessary, such a definition should probably specify that the problems of nationality dealt with in the draft articles were those relating to natural persons and not to legal persons, the point being to avoid any confusion to which the original wording of the topic might give rise. That was the purpose of the definition contained in subparagraph (f).

20. The term “State concerned” (subparagraph (g)) meant the States which, depending on the type of the territorial change, would be involved in a particular case of “succession of States”, that is to say, the predecessor State and the successor State in the case of a transfer of part of the territory; the successor State alone in the case of a unification of States; two or more successor States in the case of a dissolution of States; and the predecessor State and one or more successor States in the case of a separation of part of the territory. In all the cases in question, the term “State concerned” had nothing to do with the concern that any other State might have about the outcome of a succession of States in which its own territory was not involved.

21. The term “person concerned” was more difficult to define. The definition in subparagraph (h) encompassed all individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality might, accordingly, be affected by that succession. It meant all individuals who might lose the nationality of the predecessor State or, conversely, might acquire the nationality of the successor State. The uncertainty noted by O’Connell<sup>7</sup> as to which categories of persons were susceptible of having their nationality affected in that way was largely attributable to the fact that the question was often posed *in abstracto*, as if there could exist a unique and simple response which would apply to all types of territorial change. One thing was certain: the term “person concerned” included neither nationals of third States nor stateless persons who were present on the territory of any of the “States concerned” unless they fell into the category of persons who, on the date of the succession, were entitled to acquire the nationality of the predecessor State, in accordance with its legislation (and of course persons having two nationalities when one of them was the nationality of the predecessor State).

22. To some extent, the definitions also determined implicitly the scope of the draft articles. The terms “State concerned” and “person concerned” delimited the scope *ratione personae*, but the latter term also determined the scope *ratione materiae*. Accordingly, the draft articles dealt both with the loss and acquisition of nationality and with the right of option between the nationalities of the States involved in the succession, although exclusively in

<sup>6</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at page 23.

<sup>7</sup> D. P. O’Connell, *The Law of State Succession* (Cambridge, United Kingdom, Cambridge University Press, 1956), p. 245.

relation to a succession of States. In that latter respect, the definition also determined the scope of the draft articles *ratione temporis*.

## PART I (General principles concerning nationality in relation to the succession of States)

### ARTICLE 1 (Right to a nationality)

23. Article 1 was a key provision of the draft articles and concerned the right to a nationality in the exclusive context of State succession. Paragraph 1 conferred on every person concerned the right to the nationality of at least one of the States concerned. However, the text did not use the term “person concerned”, but its *in extenso* definition, which must therefore be reproduced word for word in the French version. The technical term was used in all the other relevant articles. The other element which was stated expressly only in article 1, although it was implicit in all the other articles in which reference was made to “persons concerned”, was that the mode of acquisition of the predecessor State’s nationality had no effect on the scope of the rights of the persons concerned: they might have acquired such nationality at birth by *jus soli* or *jus sanguinis* or by naturalization or even as a result of a previous succession of States.

24. Nevertheless, the crucial element of paragraph 1 was the assertion of the right of the person concerned to the nationality of at least one of the States concerned. It was accordingly the very foundation of the draft articles or, in other words, the principle from which other rules would logically and inevitably be derived. The principle was not a new one. The Working Group had already concluded at the Commission’s forty-seventh session that in situations resulting from State succession every person whose nationality might be affected by the change of international status had the right to acquire the nationality of at least one of the States concerned. And that idea had found broad support both in the Commission and in the Sixth Committee of the General Assembly.

25. The use of the phrase “at least one of the States concerned” meant that the principle did not operate independently, except in the case of a unification of States—that is to say, the formation of a single successor State—when the subjective right of a person concerned could be derived directly from the unification, since the State on which such an obligation fell could be directly identified. In other cases of territorial change, the principle could not have an immediate effect on the persons concerned. It could operate satisfactorily only in conjunction with the obligation of the States concerned to take all reasonable measures to avoid statelessness, an obligation which itself gave rise to an even more specific obligation of the States concerned, namely, the obligation to negotiate so that the persons concerned could actually acquire a nationality. Such an obligation was envisaged later, in article 15 (Obligation of States concerned to consult and negotiate).

26. In substance, paragraph 1 applied to the particular case of the succession of States the general concept of the “right to a nationality” contained in article 15 of the Universal Declaration of Human Rights,<sup>8</sup> a provision whose

positive character was nevertheless widely disputed in the doctrine. Even the members of the Commission, in their discussion of the topic to date, had not all interpreted the provision in the same way. One of the objections, without doubt the major objection against the recognition of the positive character (*lex lata*) of the “right to a nationality”, was that it was not possible to identify the State from which such nationality should be requested, that is to say, the addressee of the obligation corresponding to such a right.

27. It was certainly possible to identify that State in the case of a succession of States. A “person concerned” could either acquire the nationality of the successor State, or of one of the successor States if there were several, or retain the nationality of the predecessor State if it survived the territorial changes. Of course the “right to a nationality”, stated very generally in paragraph 1, must be spelt out even more concretely. In order to identify from among the “States concerned” the one which was required to grant its nationality, it was thus also necessary to take into consideration the type of succession in question as well as the nature of the links which the person concerned might have with one or more of the States concerned.

28. That approach was in harmony with the position of some members of the Commission, who felt that, for a right to a nationality to be recognized, there was a need to identify an effective link between the person concerned and the State obligated to recognize that person as one of its nationals. In other words, the best way of determining within the context of State succession whether a person could claim the nationality of one of the States was to apply the criterion of an effective link.

29. It should also be noted that, in most cases of a succession of States, individuals had links with only one of the States concerned. That was precisely the consideration motivating those who pointed out that the successor State was under an obligation to grant its nationality to a core body of its population. For example, when there was a dissolution, separation or transfer of territory, most of the inhabitants of the territory concerned in the succession of States were both residents and natives of that territory, to which they were also bound by many other links, including family ties and profession. It was thus possible to counter the main argument against the “right to a nationality” in the narrow sense, that is to say, the argument that it was not possible to identify the State which was the addressee of the corollary obligation to grant its nationality. There was no reason to deny the right to a nationality to most of the persons concerned just because for some others the identification of the State upon which such obligation fell was difficult, especially on the pretext that some categories of person could have links with two or more States. Moreover, even in that particular case, it would—in principle—be perfectly conceivable to recognize the right to several nationalities of a person falling in this category, while leaving to the States concerned their discretionary power to impose on the person the obligation to choose only one of the nationalities.

30. Paragraph 2 dealt with children born to persons referred to in paragraph 1 after the date of State succession, but before the nationality of their parents had been established. The first question to be answered was why

<sup>8</sup> General Assembly resolution 217 A (III).



such a provision should be included in the draft articles. From a purely theoretical standpoint, the answer was that it should not. The Commission was required to study the question of nationality solely in relation to State succession. It should exclude from its deliberations all matters connected with the acquisition or loss of nationality after the date of the succession of States unless such acquisition or loss was directly connected with the succession of States.

31. But, as was often the case in practice, the reality conflicted with the theory. It was not always easy to establish the precise date of a succession of States. Furthermore, the successor States took time to adopt their laws on nationality; in the interim, human life continued. There might therefore be problems concerning nationality which, although they did not result directly from the change of sovereignty as such, nevertheless deserved the Commission's attention. That was the *raison d'être* of paragraph 2.

32. The Working Group had already recognized the need for an exception from the rigid criterion *ratione temporis* contained in the draft articles, in order to cover those children born shortly after the State succession, during the interim period when the personal status of their parents had not yet been determined. Given the fact that, in laws on nationality, the nationality of children often depended on that of their parents, the fact that their parents' nationality remained uncertain for some time could have a direct impact on the nationality of children born during that period, for example if a parent died in the meantime.

33. It had been noted at the Commission's forty-seventh session that international law, as established in international instruments, seemed more inclined to recognize a right to a nationality in the case of a child than in the case of an adult and that element must be kept in mind.

34. He was aware that the examples cited in the commentary to paragraph 2, for example article 9 of the Draft Convention on Nationality prepared by the Harvard Law School<sup>9</sup> or article 20 of the American Convention on Human Rights (hereinafter referred to as the "Pact of San José"), were not very convincing, since they emanated from States whose legislation was based on the principle of *jus soli*. But paragraph 2 was also supported by other instruments such as the Declaration of the Rights of the Child<sup>10</sup> (principle 3) and the International Covenant on Civil and Political Rights (art. 24, para. 3), as well as by the Convention on the Rights of the Child, in particular article 7, paragraph 1, which, when read in conjunction with article 2, paragraph 1, of the Convention, allowed the conclusion that a child had the right to the nationality of the State in whose territory it had been born, unless it had acquired the nationality of another State.

35. Paragraph 2 drew its inspiration from the above-mentioned instruments, but it covered only children born in the territory of one of the States concerned and not children born in a third State, for such cases were beyond the scope of the draft articles, which should deal solely with

the problems arising when there was a legal relation between a person concerned and a State concerned.

#### ARTICLE 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness)

36. Article 2 imposed on the States concerned the obligation to take all reasonable measures to prevent persons having the nationality of the predecessor State on the date of the succession of States from becoming stateless as a result of the succession. That obligation was a corollary of the right of the persons concerned to a nationality. It applied only to the "persons concerned", that is to say, the persons who, on the date of the succession of States, had been nationals of the predecessor State, and it excluded persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State certainly had a discretionary power to grant its nationality to such stateless persons. But the problem would be qualitatively different if it were envisaged that the State had an obligation to do so.

37. In his first report,<sup>11</sup> he had stated that, in view of the recent development of human rights standards, including a number of obligations regarding nationality, it was no longer possible to maintain without any reservation the traditional opinion expressed by O'Connell that

Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality.<sup>12</sup>

That conclusion, which had contradicted an author for whom he had much respect and admiration, had received immediate support in several circles, including the Council of Europe<sup>13</sup> and UNHCR.<sup>13</sup>

38. Whatever the merit of O'Connell's evaluation of *lex lata* at the time, he had already been stressing the urgent need for codification in that field, in particular because "it is undesirable that, as a result of change of sovereignty, persons should be rendered stateless against their wills".<sup>15</sup>

39. In 1930, the Hague Codification Conference had adopted a number of provisions aimed at reducing the possibility of statelessness and had unanimously recommended that, in regulating questions of nationality, States should make every effort to reduce insofar as possible cases of statelessness. Among the multilateral treaties relating to that problem, mention should be made of the Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter referred to as the "1930 Hague Convention"), its Protocol relating to a Certain Case of Statelessness, and its Special Protocol concerning Statelessness, as well as the Convention relating to the

<sup>11</sup> See footnote 4 above.

<sup>12</sup> D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. 1 (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 503.

<sup>13</sup> *Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation* (Council of Europe, Strasbourg, 2 April 1996), para. 25.

<sup>14</sup> *The Czech and Slovak Citizenship Laws and the Problem of Statelessness* (UNHCR, Regional Bureau for Europe Division of International Protection, European Series, vol. 2, No. 4, September 1996).

<sup>15</sup> O'Connell, *op. cit.* (footnote 7 above), p. 258.

<sup>9</sup> Harvard Law School, *Research in International Law*, I. Nationality (Cambridge, Mass., Harvard Law School, 1929), p. 13.

<sup>10</sup> General Assembly resolution 1386 (XIV)

Status of Stateless Persons and the Convention on the Reduction of Statelessness. It was true that only very few provisions of those Conventions directly addressed the issue of nationality in the context of State succession, but they provided useful guidance to the States concerned by offering solutions which could *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change.

40. There was a growing awareness among States of the compelling need to fight the plight of statelessness in general, and more particularly in the case of State succession. One of the techniques used by successor States had been to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. That had been the case in Burma, the Czech Republic, Slovakia and even Yugoslavia, as indicated in the commentary to the article. The most effective measure the States concerned could take was to conclude an agreement by virtue of which the occurrence of statelessness would be precluded, as provided for in article 10 of the Convention on the Reduction of Statelessness.

41. The seriousness of the problem of statelessness in situations of State succession had generally been recognized by the Commission, which had considered that the solution to that problem should take priority over the consideration of other problems of conflicts of nationality. The assumption that the States concerned should be under the obligation to prevent statelessness was one of the basic premises on which the Working Group had based its deliberations. It had received clear support in the Commission.

42. In the commentary to article 2, the Special Rapporteur had drawn a parallel between a territory and its population, both of which were constituent elements of statehood. There was no precedent of a succession of States in which even a small part of the territory of the predecessor State was left as *terra nullius* by the States concerned. In such circumstances, why should those States be allowed to leave some persons concerned stateless as a result of a succession?

43. In the Sixth Committee, statelessness had also been generally recognized as a serious problem deserving the primary attention of the Commission. No delegation to the Committee had challenged the Working Group's premise regarding the obligation not to create statelessness as a result of State succession. Other international bodies had also placed the problem of statelessness at the top of the list of ills to be combated in connection with a State succession: he had in mind the Council of Europe and UNHCR.

44. The text of article 2 laid down an obligation not of result, but of conduct. Obviously, nobody could consider each particular State concerned to be responsible for all cases of statelessness resulting from the State succession. A State could be asked only to take measures within the scope of its competence, as delimited by international law. Accordingly, not every State concerned had the obligation to grant its nationality to every single person concerned. That obligation ceased at the point where the limits to the competence of the State lay. The draft articles thus pro-

vided for a number of means, including the conclusion of agreements between the States concerned to eliminate statelessness.

#### ARTICLE 3 (Legislation concerning nationality and other connected issues)

45. Article 3 presupposed that nationality was essentially an institution of the internal laws of States and, accordingly, the international application of the notion of nationality in any particular case had to be based on the internal law of the State in question. That principle had been confirmed in article 1 of the 1930 Hague Convention, article 13 of the Code of Private International Law (Code Bustamante), contained in the Convention on Private International Law, PCIJ in its advisory opinion concerning the *Nationality Decrees Issued in Tunis and Morocco*<sup>16</sup> and in its advisory opinion on the question concerning the *Acquisition of Polish Nationality*,<sup>17</sup> and it had been reiterated by ICJ in the *Nottebohm* case<sup>18</sup> and by several writers.

46. The main focus of article 3 was on one special problem, the moment when internal legislation was adopted. In some cases, the legislation concerning nationality was enacted at the time of the succession of States or even before it; but in other cases it was enacted after the date of succession, sometimes even much later. Naturally, it would not be realistic to request the States concerned to enact the relevant legislation at the time of succession. In that particular case, it was merely a matter of requiring States to enact laws concerning nationality and other connected issues arising in relation to State succession "without undue delay". That was the purpose of paragraph 1. It might seem, at first sight, to be self-evident, but in fact it was not, given State practice.

47. The main concern the Working Group had in mind when discussing the problem was that the persons concerned should be apprised, within a reasonable time, of the effect of a State's legislation on their nationality, of any choices they might have under such legislation, as well as of the consequences that the exercise of such choices would have on their status. That idea was reflected in the last sentence of paragraph 1.

48. Paragraph 2 addressed another problem. During the discussion of the first report, some members of the Commission had suggested that the possibility of creating a set of "presumptions" should be studied, one presumption being that the acquisition of nationality upon succession was deemed to take effect from the date of such succession. The Working Group had hesitated to go that far, but had decided it would be useful to recommend that the States concerned should provide in the legislation concerning the *ex lege* acquisition of nationality in relation to the succession of States that such acquisition took effect on the date of the succession. That idea was set out in paragraph 2, although that provision went further by extending that requirement to the exercise of an option in circumstances where the persons concerned would other-

<sup>16</sup> *Advisory Opinion, 1923, P.C.I.J., Series B. No. 4.* pp. 23-24.

<sup>17</sup> *Ibid., No. 7,* p. 16.

<sup>18</sup> See footnote 6 above.

wise have been stateless during the period between the date of succession and the date of the option.

ARTICLE 4 (Granting of nationality to persons having their habitual residence in another State)

49. Articles 4 and 5 were to be seen as an exception to the basic premise concerning the granting of nationality. The exceptions concerned were well established in international practice and recognized in the legal literature.

50. Paragraph 1 of article 4 placed clear limits on any obligation on the part of the successor State to grant its nationality. Paragraph 2, which dealt with another aspect of the matter, stipulated that a successor State could not impose its nationality on persons who had their habitual residence in another State against the will of such persons, unless they would otherwise become stateless.

51. Traditional doctrine dealt with the question of granting nationality to persons having their residence in another State mainly as a problem of the potentially improper exercise of the legislative powers of the State granting the nationality, whereas the discussion on the obligation of the successor State to grant its nationality to certain categories of people was based on a relatively new idea. It was therefore not surprising that there were doctrinal views as to possible limits to such an obligation to grant nationality. Some limits were necessary a fortiori. The draft articles, which declared the right of the persons concerned to a nationality (in connection with a succession of States) was bound to indicate the limits to an obligation that was the corollary of such a right. That was the very object of paragraph 1.

52. Paragraph 2 of article 4 had a different aim: it indicated the limits of the competence of the successor State and thus constituted a guarantee against the improper exercise of the competence of the successor State in the matter of nationality. It also reflected a traditional view, one that was well established in practice, while introducing a new element at the end which implied that, where there was a risk that the person concerned might become stateless, the power of the State to grant its nationality to that person, even if he or she did not consent, was subject to no limit. The prevention of statelessness thus took precedence over the need to respect the wishes of the person concerned.

53. In its report to the Commission at the forty-seventh session, the Working Group had concluded, in connection with unification and dissolution, that a successor State did not have the obligation to grant its nationality to the persons concerned who had their habitual residence in a third State and who also had the nationality of a third State, but that the State concerned could do so with the consent of those persons. In the case of other types of succession of States, such as a transfer of a part of territory or separation, the Working Group had concluded that that category of persons should retain the nationality of the predecessor State. The main difference between the existing draft of article 4 and the wording used by the Working Group consisted in the replacement of the expression "third State" by the expression "another State", for there was no reason not to apply that rule in the same way regardless of whether the person had his habitual residence in a "third

State" or in another "State concerned". Also, the categories of persons covered by paragraphs 1 and 2 were not the same: paragraph 2 related to persons, apart from the persons referred to in paragraph 1, who resided in a State other than in the successor State and who possessed the nationality of a third State.

ARTICLE 5 (Renunciation of the nationality of another State as a condition for granting nationality)

54. Article 5 dealt with a "classical" problem of the right to nationality, the scope of which went beyond State succession. While it was not for the Commission to suggest which policy States should pursue in the matter of dual/multiple nationality, its concern should be the risk of statelessness related to the requirement of prior renunciation by the person concerned of his or her current nationality as a condition for the granting of the nationality of the successor State. That was also the opinion of the Experts of the Council of Europe.<sup>19</sup> Accordingly, in article 5, the "classical" rule was combined with a new element, namely, that renunciation of nationality could not, however, be required if it made the person concerned stateless, even if only temporarily. Article 5, it should be noted, related only to State succession. That was why it referred only to the legislation of a successor State. Similarly, it referred only to renunciation of the nationality of another State concerned.

ARTICLE 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State)

55. Article 6 dealt with another "classic" problem, namely, loss of nationality upon the voluntary acquisition of the nationality of another State, transposing it into the context of a succession of States. The commentary to the article contained some references to State practices illustrative of the application of that policy, though not all of them derived from the field of State succession. The Working Group had nevertheless deemed it useful to indicate clearly that States could have recourse to that condition so as to grant their nationality both in ordinary situations and when resolving nationality questions in relation to the succession of States. Its main concern had been to specify clearly that the withdrawal of nationality as a consequence of a voluntary acquisition of nationality must be clearly established by the nationality law at the time when the voluntary act had taken place. The formulation of that rule in two separate paragraphs made it easier to encompass the elements of the withdrawal of nationality and of the refusal to grant nationality, in the case of the predecessor State and the successor State, respectively.

ARTICLE 7 (The right of option) and

ARTICLE 8 (Granting and withdrawal of nationality upon option)

56. Article 7 established the general framework of the right of option and article 8 set forth the consequences of

<sup>19</sup> *Report of the Experts* . . . (footnote 13 above), para. 56.

the exercise of that right. The function which contemporary international law attributed to the will of individuals in the resolution of problems concerning nationality in cases of State succession was among the issues on which views diverged considerably. For that reason, the Commission had considered that the role of the will of individuals in matters of nationality and, in particular, the concept of the right of option in contemporary international law in cases of State succession should be studied in greater depth, having regard to the practice of States. Articles 7 and 8 were based on a number of treaties regulating nationality questions in relation to the succession of States, as well as on national laws that had provided for the right of option or an analogous procedure, but they were drafted without prejudice to the policy of the States concerned in matters of dual nationality, as the only way in which the Commission could usefully tackle that problem.

57. It was in that spirit that paragraph 1 of article 7 had been drafted: its wording reflected the conclusion of the Working Group, which first envisaged the resolution of a "positive" conflict of nationality by means of option. Paragraph 2 emphasized that the granting of the right of option was one of the ways of eliminating the risk of statelessness in cases of succession of States. Paragraph 3 provided that there should be a reasonable time limit for the exercise of any right of option, whether that right was provided for in a treaty between the States concerned or in the legislation of one of those States. The "reasonable" character of the time limit could depend on the circumstances of the succession of States, but also on the categories of individuals concerned; international practice varied considerably in that regard.

58. As the Working Group had indicated in its report, the term "right of option" was used in a broad sense, covering both the possibility of "opting in", that is to say, making a positive choice, and the possibility of "opting out", that is to say, renouncing a nationality acquired automatically.

59. Article 8 spelt out the consequences of the exercise of the right of option and its provisions, particularly paragraphs 1 and 2, were largely self-explanatory. Paragraph 3 emphasized the autonomy of the legislation of the two States concerned, as it provided that the optional acquisition of the nationality of one State by a person concerned did not inevitably imply the obligation of the other to withdraw its nationality therefrom. Such obligation existed only if it was based on a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounced the nationality of the other in accordance with the provisions of the latter's legislation.

#### ARTICLE 9 (Unity of families)

60. The problem dealt with in article 9 was not confined to the context of State succession, and also arose in relation to questions of nationality generally. It had long been thought that the solution to the problem consisted in granting the same nationality to all members of the family. A number of treaties provided that women and children acquired the same nationality as their husbands and

fathers, respectively. The main deficiency of the treaties or national legislation providing for that solution was the fact that they placed the woman in a position of subordination. Article 4 of the Resolutions adopted by the Institute of International Law on 29 September 1896<sup>20</sup> had attempted to overcome that problem by providing for the right of the wife to recover her former nationality by a simple declaration and the right of option of the children for their former nationality, at majority or on their emancipation. Moreover, neither the draft European Convention on Nationality<sup>21</sup> nor the Declaration on the consequences of State succession for the nationality of natural persons (hereinafter referred to as "the Venice Declaration")<sup>22</sup> contained any specific provision concerning the preservation of a family's unity in the event of a succession of States. However, the right to family unity was the subject of a wealth of case law in the European Court of Human Rights. In its report to the Commission at the forty-eighth session, the Working Group had considered that one of the fundamental principles to be observed by the States concerned was the obligation to adopt all reasonable measures to enable a family to remain together or to be reunited.<sup>23</sup> That was the salient idea of article 9, which imposed an obligation of a very general nature: the States concerned were not obliged to enable all members of a family to acquire the same nationality, but, so as not to impair the unity of a family, they must make it possible for the families of persons concerned to live together and, consequently, must eliminate the legislative obstacles that might prevent them from doing so. The words "reasonable measures" were intended to exclude unjustified demands.

#### ARTICLE 10 (Right of residence)

61. Problems relating to the right of residence of the persons concerned, namely, persons whose nationality might change as a consequence of the succession of States, were among the most serious problems posed by territorial changes. Voluntary changes in nationality had often had direct consequences on the right of residence of persons concerned. In the past, treaties between States concerned or national legislation had quite often provided that persons concerned were under the obligation to transfer their residence out of the territory of the State concerned whose nationality they had voluntarily renounced. That had been the case with, *inter alia*, the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) and the Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye), as well as the treaties concluded with a number of successor States after the First World War, the Treaty of Peace between the Allied and Associated Powers and Bulgaria (Peace Treaty of Neuilly-sur-

<sup>20</sup> J. B. Scott, ed., *Resolutions of the Institute of International Law. Dealing with the Law of Nations*, Carnegie Endowment for International Peace, Division of International Law (New York, Oxford University Press, 1916), p. 133.

<sup>21</sup> Council of Europe, Parliamentary Assembly, working papers, vol. IX (Strasbourg, 1996), doc. 7665, appendix.

<sup>22</sup> Adopted by the European Commission for Democracy through Law, Venice, 13-14 September 1996 (Council of Europe, Strasbourg, 10 February 1997, document CDL-INF (97) 1, pp. 3-6).

<sup>23</sup> See *Yearbook . . . 1996*, vol. II (Part Two), para. 86 (j).

Seine), the Treaty of Peace (Treaty of Lausanne), of 1923, and the Treaty of Peace with Italy, of 1947. However, other treaties, such as the Treaty of Peace between Finland and the Soviet Government of Russia (Treaty of Tartu), of 1920, did not make transfer of residence an obligation, but simply a possibility, or, like the Treaty of cession of the territory of the Free Town of Chandernagore of 1951 between India and France,<sup>24</sup> were silent on the matter. Similarly, during the successions of States that had recently taken place in Central and Eastern Europe, national legislation had not required the transfer of residence of individuals who had voluntarily acquired the nationality of another successor State.

62. In practice, however, the persons concerned had often had to leave their place of habitual residence long before they had been able to express themselves on the question of the choice of a nationality following the succession of States. The place of habitual residence was often a determining factor in the resolution of problems of nationality. It was sometimes even a fundamental criterion in the granting of nationality, as would be seen from Part II of the draft articles. That was why the problem was referred to at the outset in article 10, paragraph 1, the purpose of which was to safeguard the right of residence of persons who at some point had been forced to leave a territory because of events relating to the succession of States.

63. Paragraphs 2 and 3 dealt with the problem of the possible consequences of the change of nationality with regard to the right of residence. Paragraph 2 covered the situation where a person concerned acquired a nationality other than that of the State of his or her habitual residence *ipso facto*, merely by virtue of a treaty or the legislation of the States concerned. In such cases, the right of that person to maintain his or her habitual residence must be protected. That was how the draft European Convention on Nationality regulated the problem.

64. The question was more problematic if the change of nationality was the result of a voluntary act of the person concerned. In the *Acquisition of Polish nationality* case,<sup>25</sup> the Arbitrator had held that the successor State normally had the right to require the emigration of such persons as had opted against the nationality of the successor State. On the other hand, provision 16 of the Venice Declaration provided that

The exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State . . .<sup>26</sup>

He had preferred to confine himself to the principle, sanctioned by international practice, whereby States were permitted to require that persons who had voluntarily acquired the nationality of another State should transfer their residence to that State. That was the idea expressed in paragraph 3, which did, however, offer a guarantee of fair treatment by obliging the State of residence to allow a reasonable time limit for the persons concerned to comply with their obligation. That obligation must of course exist by virtue of the legislation of the State concerned or

of the treaty concluded between the States concerned and the persons concerned must be aware of it.

#### ARTICLE 11 (Guarantees of the human rights of persons concerned)

65. Article 11 was based on the conclusions of the Working Group, but he had broadened its scope, shifting its focus from the problem of the rights of persons concerned during the period before their nationality was determined to the more general problem of respect for the human rights and fundamental freedoms of all persons concerned who, after the date of the succession of States, had retained their habitual residence in the territory of the State concerned. The broadening of its scope of application was in conformity with the practice of a number of multilateral treaties, such as the Treaty between the Principal Allied and Associated Powers and Czechoslovakia, the Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, the Treaty between the Principal Allied and Associated Powers and Roumania and the Treaty between the Principal Allied and Associated Powers and Poland. It was obvious that, once a person concerned became a national of a State concerned other than that of his or her habitual residence, such person enjoyed in the latter those rights to which aliens were entitled, but not all the rights reserved to nationals. The principle set forth in article 11 did not call into question the legitimacy of that kind of distinction.

#### ARTICLE 12 (Non-discrimination)

66. The principle of non-discrimination set forth in article 12 did not call for a long commentary. It was obvious that States concerned must not, when withdrawing or granting their nationality or when providing for the right of option, apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain, acquire or choose a nationality. But the forms of discrimination might vary considerably. Some examples drawn from practice and studied in relation to recent successions were given in the commentary to article 12.

#### ARTICLE 13 (Prohibition of arbitrary decisions concerning nationality issues)

67. The principle of prohibition of arbitrary decisions concerning nationality issues had first been included in article 15, paragraph 2, of the Universal Declaration of Human Rights and had been reaffirmed in several other instruments, such as the Convention on the Rights of the Child and the draft European Convention on Nationality. The Working Group had considered that the prohibition of arbitrary decisions concerning the acquisition and withdrawal of nationality or the exercise of the right of option should be included among the general principles applicable in all cases of State succession. Several texts on which those provisions were based were cited in the commentary.

<sup>24</sup> United Nations, *Treaty Series*, vol. 203, p. 155.

<sup>25</sup> See footnote 17 above.

<sup>26</sup> See footnote 22 above.

## ARTICLE 14 (Procedures relating to nationality issues)

68. Article 14 required States concerned to process applications relating to the acquisition, retention, renunciation or the exercise of the right of option of nationality without undue delay and to issue decisions taken in that regard, including those concerning the refusal to issue a certificate of nationality, in writing; it also provided that such decisions must be open to administrative or judicial review. Similar rules were set forth in chapter IV of the draft European Convention on Nationality. Article 14 followed the Working Group's recommendation on that subject, which had been approved by the Sixth Committee.

*The meeting rose at 12.55 p.m.*

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## 2476th MEETING

*Wednesday, 14 May 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.*

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### Nationality in relation to the succession of States (*continued*) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,<sup>1</sup> A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

#### PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

#### ARTICLE 15 (Obligation of States concerned to consult and negotiate)<sup>2</sup>

1. Mr. MIKULKA (Special Rapporteur) said that the first conclusion reached by the Working Group on State

succession and its impact on the nationality of natural and legal persons, when it had tried to formulate the consequences to be drawn from the existence of the right to a nationality in the context of State succession, was that States concerned should have the obligation to consult in order to determine whether State succession had had any undesirable consequences with respect to nationality, and, if so, that they should have the obligation to negotiate in order to resolve such problems by agreement. The Commission and the Sixth Committee had expressed satisfaction with the Working Group's position, *inter alia*, because negotiations should be aimed, in particular, at the prevention of statelessness.

2. Paragraph 1 set forth that principle in the most general terms, without indicating the precise scope of the questions which were to be the subject of consultations and negotiations between States concerned. Nevertheless, the aim was to provide for the obligation to consult and seek a solution, through negotiations, of a broader spectrum of problems, not only statelessness. The Working Group's suggestion to extend the scope of the negotiations to such questions as dual nationality, the separation of families, military obligations, pensions and other social security benefits, and the right of residence, had generally met with the approval of members of the Commission.

3. One of the main issues discussed in relation to that paragraph had been the legal nature of the obligation to negotiate. It had been recalled that that obligation had been considered to be a corollary of the right of every individual to a nationality or of the obligation of States concerned to prevent statelessness. But it had also been argued that such obligation could be based upon the principles of the law of State succession, including those embodied in the 1983 Vienna Convention which provided for the settlement of certain questions relating to succession by agreement between States concerned. Another view had been that, however desirable the obligation to negotiate might be, it was not incumbent upon States concerned under positive general international law.

4. The debate was no doubt extremely useful in clarifying the current state of international law in that area. But whatever the outcome, it should not alter the decision to include in the draft articles a provision requiring States concerned to consult and negotiate on the issue of nationality and related questions. In any case, if such an obligation did not yet exist in positive law, the Commission should study appropriate ways of promoting the development of international law in that direction.

5. Another, qualitatively different, question was whether the simple obligation to negotiate, particularly when it did not entail the legal duty to reach an agreement, would be sufficient to ensure that the relevant problems would actually be resolved. Clearly, that was not the case. But the Working Group had not confined itself to highlighting the obligation of States concerned to negotiate; it had also formulated a number of principles to be retained as guidelines for the negotiations. They were the subject of Part II of the draft and related to the questions of the withdrawal and granting of nationality, the right of option and the criteria applicable in various types of State succession. The chief aim of those principles was to facilitate negotiations or to inspire the States concerned in their leg-

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> For the text, see 2475th meeting, para. 14.