

Document:-  
**A/CN.4/SR.2476**

**Summary record of the 2476th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**1997, vol. I**

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## 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.

islative efforts. They offered States concerned some "technical" solutions to the problems that arose, on which they could base their agreement. Nevertheless, in the course of their negotiations, States concerned might find more appropriate solutions that corresponded more closely to the needs of the specific situation and, by agreement, base their respective legislation thereon. If those solutions were in conformity with the principles of Part I, it would be difficult to object to them.

6. Paragraph 2, addressed the problem which arose when one of the States concerned refused to negotiate, or when negotiations between States concerned were abortive. Since nationality was principally a matter of internal law, international law's possibilities for reaction were fairly limited. Nevertheless, one observation came immediately to mind: it was not possible to treat the behaviour of two States concerned on an equal footing if the failure of the negotiations and the resulting problems for the individuals concerned were due, in principle, to only one of those States. Hence the wording adopted in paragraph 2.

7. The aim of the provision was to indicate that even the refusal of one party concerned to consult and negotiate did not confer complete freedom of action on the other party. In such a situation, compliance with the provisions of the draft articles meant avoiding a possible conflict with international law, although it was not intended to imply that all the provisions of the draft articles were strict legal obligations for States concerned.

#### ARTICLE 16 (Other States)<sup>3</sup>

8. Article 16, the last article of Part I, was concerned with the problem of the attitude of other States where a State concerned did not cooperate with the other State(s) concerned and where the effects of its legislation conflicted with the provisions of the draft articles.

9. As already recognized in article 1 of the 1930 Hague Convention, while it was for each State to determine under its own law who were its nationals, such law should be recognized by other States only insofar as it was consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.

10. Paragraph 1, the aim of which was to ensure compliance by States concerned with the rules of international law regarding restrictions on the delimitation of their competences, was based on one of the preliminary conclusions of the Working Group, that a third State should not have to give effect to the decisions of the predecessor or successor State regarding, respectively, the withdrawal of, or refusal to grant, its nationality in breach of the principles formulated by the Group. Paragraph 1 thus merely set out the principle of non-opposability vis-à-vis third States of nationality granted in disregard of the requirement of a genuine link, a principle whereby international law permitted a certain degree of control over unreasonable attributions by States of their nationality.

11. The problem of which criteria could be regarded as "genuine" would be discussed later. It was the subject of the recommendations appearing in Part II of the draft. The important thing regarding article 16 was that the discussion both in the Commission and in the Sixth Committee led to the conclusion that, even if the primary context for the application of the principle of effective nationality was the law of diplomatic protection, it also had some role to play in the determination of the principles applicable to the withdrawal or granting of nationality in situations of State succession.

12. A number of writers on the topic of State succession who were in favour of limiting the power of the successor State to grant its nationality to persons lacking a genuine link with the territory concerned based their argument on the decision of ICJ in the *Nottebohm* case, in which the Court had stated that

a State cannot claim that the rules [pertaining to the acquisition of its nationality] that it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.<sup>4</sup>

13. The Court had indicated some elements on which the genuine connection between the person concerned and the States whose nationality was involved could be based. As the Court had said:

Different factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.<sup>5</sup>

14. Such a link could have special characteristics in cases of State succession. In practice, different tests for determining the competence of the successor State to impose its nationality on certain persons had been considered or applied, such as domicile, residence or birth. Thus, for example, the peace treaties after the First World War, as well as other instruments, often used habitual residence as a basic criterion. But, as had often been pointed out, although habitual residence was the most satisfactory test for determining the competence of the successor State to impose its nationality on specified persons, it could not be stated with assurance to be the only test admitted in international law.

15. Paragraph 2, dealt with another problem that might confront third States in the case of a State succession: the problem resulting from a "negative" conflict between the legislation of the States concerned. The assumption in that instance was that the successor State refused to grant its nationality to certain persons normally entitled to acquire such nationality or the predecessor State withdraw its nationality from persons normally entitled to retain its nationality. Once again, international law could not correct the insufficiencies of the internal law of the States concerned, even if they resulted in statelessness. But that did not mean that third States were simply condemned to a passive role.

<sup>4</sup> *Nottebohm* case (see 2475th meeting, footnote 6), p. 23.

<sup>5</sup> *Ibid.*, p. 22.

<sup>3</sup> *Ibid.*

16. Whenever persons who would otherwise have been entitled to acquire or to retain the nationality of a State concerned became stateless as a result of the succession of States because of disregard by that State of the basic principles contained in the draft articles, other States should not be precluded from treating such persons as if they were nationals of the said State. That seemed to him also to accord with the idea put forward by some members that the Commission should try to formulate some “presumptions” as to the nationality of persons concerned, an idea also followed by the Working Group. Hence the wording adopted in paragraph 2.

17. As the intention was to alleviate, not to further complicate, the fate of those stateless persons, the possibility of such a “presumption of nationality” by third States was subject to the requirement that such treatment should be in the interest, and not to the detriment, of those persons. In practical terms, that meant that a third State might extend to those persons favourable treatment reserved, for example, under a treaty, to nationals of the State in question. On the other hand, it could not, for instance, deport to that State persons who were not in fact nationals of the said State, or, in other words, who were only “presumed” nationals under the terms of paragraph 2.

18. The CHAIRMAN invited members to comment on the general structure of the draft articles, the definitions, and the preamble.

19. Mr. BROWNLIE expressed warm appreciation for the careful work done by the Special Rapporteur over the previous two years. He was in substantial agreement with many of the specific solutions proposed. Nevertheless, the existing draft had certain drawbacks which could almost certainly be remedied without a significant change in the existing structure.

20. First, the draft appeared to ignore the rule of customary law whereby the population followed the change of sovereignty in matters of nationality. That silence could create the unfortunate impression that the Commission did not accept the existence, or denied the importance, of that source of legal stability.

21. Secondly, the form of the draft made it appear that, in the absence of internal legislation, the population of the territory concerned had no clear status after a change of sovereignty. That was clear from the provisions of article 3, article 16, paragraph 2, and also from articles 17 to 24 as a whole.

22. The key to those questions was to be found in the first sentence of article 3, which stated that “Each State concerned should enact laws concerning nationality [...] without undue delay”. Yet suppose there was no legislation or that, as would be very probable in the circumstances, legislation was delayed? A policy problem then emerged: the draft sought to avoid statelessness, but its approach might actually increase the incidence of statelessness and of uncertainty as to status.

23. The proper role of internal law must be appreciated if the draft articles were to have firm foundations. At the current time, they assumed the paramount role of internal law—the Special Rapporteur had said as much at the previous meeting, and article 3 made the matter clear. More-

over, the Working Group had decided that there was no presumption of a change of nationality. What, then, was the proper role of internal law? It was not a question of paramountcy, but one of determining its appropriate role.

24. In his submission, the analytical position should be the following: the case of the territorial sea of coastal States provided a paradigm. Only the coastal State could establish a territorial sea. But the conditions for establishing it were set by general international law. It was a widely recognized constitutional division of powers reflected, for example, by ICJ in the *Fisheries* case (*United Kingdom v. Norway*).<sup>6</sup> That analytical position also applied in the case of nationality, as the Court had recognized in the *Nottebohm* case.

25. The draft articles adopted a position, not of monism, or even of dualism, but a sort of super-dualism: the role of international law was reduced to a set of duties of the State to enact legislation and to grant nationality. And yet the sources did not support the position that internal law was paramount. In the footnote to the first sentence of paragraph (1) of the commentary to article 3, contained in his third report (A/CN.4/480 and Add.1), the Special Rapporteur cited *Oppenheim's International Law*.<sup>7</sup> However, that passage in *Oppenheim's International Law* had been carefully qualified; editors through the 1930s had then dislodged an extreme, unqualified statement from the qualification that had originally followed it. Oppenheim's view had never been as dogmatic as it had subsequently been made to appear.

26. The outcome was that the draft articles appeared to give an exclusive role to internal law, subject to duties to grant nationality; the evidence for the existence of a principle of customary law on change of nationality was ignored. Paradoxically, the draft provided for a right to a nationality in article 1, but the modalities of the provisions that followed provided no substance for that right. Thus, article 2 was stated in programmatic form, and represented an obligation of means and not one of result.

27. Such were his first impressions of the Special Rapporteur's third report. He had not been very positive. He was not yet prepared—and might not be required—to offer specific proposals. His own modest objective would be to have at least some saving clause relating to existing principles of customary law concerning succession in that area, so as to remove an apparent vacuum in the draft articles.

28. Mr. BENNOUNA said that Mr. Brownlie's comments had thrown light on some of his own concerns regarding the draft articles. Like Mr. Brownlie, he trusted that the decision to discuss only the general framework of the draft articles at the current stage did not rule out the possibility of referring to the substance of individual articles within that general context.

29. In paragraph (4) of the commentary to article 16, the Special Rapporteur stated that the theory of effective nationality was intended to

<sup>6</sup> *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116.

<sup>7</sup> R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1, *Peace* (London, Longman, 1992), p. 852.

draw a distinction between a nationality link that was to be *opposable vis-à-vis* other sovereign States and one that was not, notwithstanding its validity within the sphere of jurisdiction of the State concerned.<sup>8</sup>

That posed an important problem, which also to some extent affected the topic of diplomatic protection. In that regard, Mr. Brownlie's citing of the *Fisheries case (United Kingdom v. Norway)* was very pertinent. It must be made clear that the right to grant nationality was the exclusive prerogative of a specific State—a right that no one disputed, and one which could not be tampered with, as was sometimes the case in the draft articles.

30. What might be the effect of such competence at the international level? The Special Rapporteur had said certain States might consider a person to be a national of a given State even if that State did not grant him nationality. That might be quite dangerous. The theory of opposability must be taken in a negative sense: it meant refusing to regard someone as a national. But it could not then be said that certain States could consider someone to be a national even if he met certain criteria and it was in his interest to preclude his becoming stateless, as the Special Rapporteur maintained in article 16. He did not know what that idea was based upon, whether monism or dualism. The Convention on the Rights of the Child contained provisions aimed at protecting a child's nationality as part of his or her identity. If a country did not meet that commitment, its international responsibility was incurred, because it breached the Convention. When the State had the right to do something, but failed to do so, no one else was entitled to act in its stead. If the State did effectively do something, it must do so in conformity with international law. Yet the theory of effectiveness was not a given: it must be taken with great caution. Probably in the framework of a single nationality, the theory of effectiveness was not accepted in international law. It could perhaps be accepted in a plurality of protections and a plurality of nationalities.

31. Mr. MELESCANU said that Mr. Brownlie had raised a fundamental point, namely the role of internal law in the succession of States and the effects on nationality. The Special Rapporteur was correct in saying that States had a sovereign right to establish conditions for nationality. But when dealing with a change in nationality in connection with State succession, the problem was somewhat different. The analogy with coastal waters was a good one. Principles of international law were required in cases where nationality was related to State succession, though needless to say, internal law must retain the possibility to act. States had sovereignty over nationality in normal cases, such as when an individual applied for the nationality of another State, but when changes in nationality were due to State succession, clear rules must be established under international law whereby each State could decide its own procedures and principles.

32. Mr. MIKULKA (Special Rapporteur) said that the problem being raised was not that of a State having a right to grant nationality, but that of a State being competent to do so. International law imposed restrictions on that competence. A State could not exercise its competence to such

an extent that it interfered with the competence of other States. It was international law which defined where the competence of one State ended and another's began. If a State issued a decree on nationality, that decree could not be rendered invalid by international law, the sole basis for nationality being internal law. International law could not offer a legal basis for nationality; for example, it could not find that a given person was a Czech citizen, but only that, in a given framework, the Czech State had the right to say who its nationals were.

33. Of course, international law provided responses in certain cases. He agreed with Mr. Brownlie that there were certain effects that stemmed directly from international law, but they were mainly negative. Thus when a State had ceased to exist, international law had stopped recognizing its citizenship. Positive effects, on the contrary, such as determining who were the nationals of a successor State, fell within the competence of internal law, whereas international law made sure that States did not exceed that competence. When they did so, international law was powerless to alter the effects of such acts in the internal legal order of a State. International law had no influence over that matter at the internal level, but it could give other States the possibility to react. When a State took a decision which exceeded its national competence, under international law other States were not compelled to respect that decision.

34. Mr. SIMMA said that he supported the Special Rapporteur's view with regard to the division of labour between internal and international law in matters of nationality. As he saw it, the objective of the Special Rapporteur's draft was to use international legal principles to fill the gap in cases in which domestic order disappeared following State succession.

35. Mr. CRAWFORD said that the debate on the relation between internal and international law had been dogged by abstractions. It would be wrong to place excessive reliance on pre- or post-war doctrine to confront problems of nationality today. Under normal circumstances, everyone accepted that the State had a cardinal role. But it could not be categorically asserted that, for example, international law had never attributed nationality to a person, contrary to the law of a State. Only recently, international law had found that certain persons were South Africans, thereby overriding South African law. That had helped in resolving the conflict in question, rather than interfering with its settlement. At a time when internal law was becoming more open to international law, it was important to avoid a priori dogma.

36. Mr. Sreenivasa RAO said that Mr. Brownlie's point was well-taken. There was merit in stating simple incontrovertible principles at the outset. To deal with the problems associated with the subject, modern concepts were needed. First, the ground rules must be clearly restated, but not refashioned.

37. Mr. ECONOMIDES said Mr. Brownlie was quite right to say that there was a basic customary law pursuant to which every State succession, to the extent that it involved territorial change, also inevitably affected the nationality of populations. That rule had been applied for centuries. He had examined all the cases of State succes-

<sup>8</sup> J. F. Rezek, "Le droit international de la nationalité", *Collected Courses of The Hague Academy of International Law, 1986-III* (Dordrecht, Martinus Nijhoff, 1987), vol. 198, p. 357.

sion in his country, and in every instance they had entailed specific treaty rules; the role of internal law had been complementary and involved implementing international obligations, notably treaty obligations. Thus, in cases of State succession, the role of international law was paramount. The sole exception related to questions which were settled entirely by internal law.

38. Mr. FERRARI BRAVO said he agreed that it was a matter for internal law to take positive decisions on who had nationality and who did not. But he had reservations about the phrase in article 16, paragraph 2, that stated "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". That appeared to be postulating a nationality that did not exist. While he understood the desire to avoid statelessness, he did not think the Special Rapporteur's approach was borne out in international law.

39. Mr. PAMBOU-TCHIVOUNDA applauded Mr. Brownlie's wise and timely resurrection of the rule of customary law, which the report apparently had failed to take into account. It must also be borne in mind, however, that that rule had certain limits: every example of State succession was different, and it was necessary to examine each particular case to see whether the rule of customary law applied.

40. Mr. HE said it was generally recognized that identification of a State's nationals was a matter for internal law. In his view, that also included cases of State succession. Article 1 of the 1930 Hague Convention, as well as other treaties, made reference to customary law. The restrictions on the freedom of a State to grant nationality were limited. In that regard, he endorsed the relevant paragraphs of the preamble to the draft articles.

41. Mr. THIAM reminded members that the respective roles of international law and internal law had been the subject of long debate during the discussion of the Special Rapporteur's first report<sup>9</sup> and virtually the same two tendencies had emerged as had today. It was at the current time up to the Commission to move ahead and try to find a response. He did not think that either the competence of international law or of internal law could be ruled out entirely; it depended on the case.

42. Mr. OPERTTI BADAN said that, obviously, each State was competent to decide who its nationals were. The point was to agree on how far international law could go in determining that State obligation. In his view, article 3 offered the right solution, which was compatible with the other principles. The Commission must decide whether the obligation of States to approve laws on nationality was something upon which international law could impose standards.

43. Mr. HERDOCIA SACASA said it might be better for the Commission not to argue whether international law or internal law was to be paramount but instead to take the view that the two were complementary.

44. The CHAIRMAN said that the discussion on Mr. Brownlie's comments seemed to have shed light on

two basic problems, on the one hand, the respective role of internal law and of international law, an issue that lay at the core of the topic, and on the other, whether or not the draft should be preceded by a reference to certain general principles of customary law.

45. Mr. HAFNER said that several years previously, when the 1978 and 1983 Vienna Conventions had been drafted, it had been assumed that there would be no urgent need for those instruments. Recent history had shown that assumption to be false, and there was currently an overwhelming number of cases involving State succession. For the moment he wished to single out two general issues of the regulation of the effect of State succession.

46. The third report illustrated that the topic could be approached from two different perspectives resulting from the different character of the relations governed by the rules: nationality could be dealt with either as a matter of relations among States or of relations between individuals and the relevant State or States. How far then were the Special Rapporteur's rules conceived as human rights rules and could they be described in such a way as to leave no doubt about their nature? Article 1, paragraph 2, could be identified as a rule of such a kind.

47. The two different perspectives also had different impacts on the issue of reaction to non-compliance with the rules and the mechanism for enforcing them. The question was relevant even though the draft articles were formulated as a pre-normative or "soft-law" instrument, for a distinction must be drawn between the legal nature of the instrument and the content of the rules. The more concrete the provisions, the more authoritative the instrument would be.

48. He asked how one State could react to non-compliance by another. The State responsibility approach would not work, and even the sanction envisaged in article 16 could have only a negative effect of non-recognition of a nationality and perhaps never the positive effect of recognition of a nationality which another State had not granted. Even a mandatory international jurisdiction would not help. The human rights approach needed, of course, a mechanism whereby an individual or another State could ensure compliance.

49. Although nationality could normally be acquired only by virtue of national law, some devices were needed to enable individuals to invoke rules of international law: use of an international organ, for example, or the right to invoke such rules before national authorities. He asked if it would be advisable to insert in the draft articles a provision obliging States to provide adequate judicial instruments to which individuals could resort. Article 14 seemed to go in that direction. Individuals must be able to invoke such rules directly before national courts. Therefore, he asked if the text could or should state the self-executing nature of some of the rules or should the rules be so formulated as to leave no doubt about their direct applicability. Unless that was done, article 14 would be of only limited effect.

50. He was also concerned about the language employed in the draft articles, which sometimes used the mandatory "shall" and sometimes the weaker "should". There was no need to keep the softer option, and in some

<sup>9</sup> See 2475th meeting, footnote 4.

cases "should" could easily be replaced by "shall". Perhaps the Special Rapporteur could explain the reason for the differing usage.

51. It was unusual for the Commission to furnish the General Assembly with a preamble to a set of draft articles. He could concur with that approach, but thought that the second paragraph raised more problems than it solved. However, there was no need to discuss the point at the current time.

52. The Commission would have to return to the question of definitions at the end of its consideration of the draft articles, but it was already apparent that the failure to provide a definition of "genuine link", as used in article 16, might give rise to problems. He asked if there was any specific reason for the omission or would an attempt be made to define the term at a later stage.

53. Mr. GOCO said that the main purpose of the draft articles appeared to be to prevent statelessness arising as a result of State succession. However, there were many other causes of statelessness. He asked if the Commission intended to produce solutions for such other cases. It should also be noted that the question of a person's true allegiance might be more important than his formal nationality.

54. The CHAIRMAN pointed out that the title of the topic made it clear that the Commission was concerned only with nationality in relation to State succession.

55. Mr. LUKASHUK said that the Special Rapporteur had done well to support each part of his text by references to actual practice. The structure of the draft was fully justified at the current stage and formed a good basis for the Commission's work. It might, of course, have to be changed later in the light of that work. He endorsed Mr. Hafner's comments regarding the second paragraph of the preamble. While he understood the Special Rapporteur's purpose, the paragraph was nonetheless unacceptable in its current wording.

56. Some members considered that the Special Rapporteur had departed from the accepted rules of the relationship between national and international law. He did not agree. Like Mr. He, he thought that the relationship was sufficiently reflected in the draft. Rather, he would reprove the Special Rapporteur for not paying sufficient attention to the progressive development of international law. He was also troubled that insufficient attention had been paid to the changes resulting from the assertion and consolidation of human rights. In the case of the basic principle of the right to a nationality, for example, a person could only take advantage of what was granted by the State. The principle must be presented more firmly, perhaps by saying that, in all cases, the wishes of the person concerned must be taken into account. That might be followed by a provision to the effect that, without the agreement of the person concerned, a State was not entitled to impose its nationality on him. It must also be made clear that a State was not entitled arbitrarily to deprive a person of his nationality. Indeed, to revert to the question of the structure of the draft, articles 11 and 13, which were of fundamental importance, could be placed immediately after article 1, thereby strengthening the provisions on the right to a nationality.

57. Mr. BENNOUNA said that the discussion initiated by Mr. Brownlie had brought out more clearly the structure and aims of the draft articles, and the Commission must establish those points before proceeding further. What was lacking in the text was a few simple principles; there were in fact too many articles. Such principles should include the notion of simple presumption. A succession of States entailed a number of presumed consequences, in particular that further to a change of sovereignty over a territory its inhabitants were presumed to have the nationality of the new sovereign. The notion of presumption had already been applied in international law, for example with respect to problems of decolonization, but subject, of course, to a right of option. The Special Rapporteur should reflect more fully on Mr. Brownlie's criticisms, for by seeking to avoid statelessness he created statelessness and uncertainty pending adoption of detailed legislation following a succession of States. That could be avoided by a simple principle of presumption.

58. The Special Rapporteur distinguished between principles of general and specific application. The commentary to Part I began by stating that the principles formulated therein were "general" and added that the adjective "general" was without prejudice to the question as to which of those principles might be considered as forming part of general international law. The Special Rapporteur had also referred to "common rules of international law", and reference had been made in the Commission to "customary rules of international law". All those rules must be spelled out in the draft. The Chairman had, in fact, said that it might be useful initially to identify some of the relevant general rules of international law.

59. In his commentary to the footnote to the title of the articles referring to the definition of nationality, the Special Rapporteur said that the term "nationality" might be defined in widely different ways depending on whether the problem was approached from the perspective of internal or international law. As he had stated earlier, he disagreed with that position: there could not be two different definitions. Nor could he accept the distinction made by the Special Rapporteur between right and competence. The right existed in itself, and competence meant personal competence, as opposed to territorial competence, and consisted of the link of allegiance, that is to say, the link of nationality invested a State with competence to intervene by virtue of that link.

60. With regard to the right to a nationality the Special Rapporteur put forward the hypothesis of a person's already having one or more nationalities. But a distinction must be made between the case in which the person concerned had the nationality of one of the States concerned and the case of a conflicting nationality of a third State.

61. Reference had been made to the principle of a "genuine link", but other relevant principles, such as the right of peoples to self-determination, also came into play. At the current time, "genuine link" was a question of opposability in some cases but not a question of the definition of nationality.

62. The CHAIRMAN pointed out that he had not said certain relevant general rules should be identified but

merely that that was one of the points the Commission had questioned.

63. Mr. THIAM said he was not sure the Special Rapporteur had been right to exclude questions of decolonization from the scope of the draft. Decolonization did give rise to questions of the succession of States. Perhaps the Special Rapporteur could explain the reasons for his decision.

64. Mr. MIKULKA (Special Rapporteur) said he had divided the draft articles into two parts: Part I (General principles concerning nationality in relation to the succession of States) which laid down certain general principles and could be used to deal with all types of State succession, and Part II (Principles applicable in specific situations of succession of States), which dealt with certain types only. Part I could, however, also be used to clarify nationality problems that had originated at the time of decolonization. The purpose of Part II, which was concerned with the future, was not to codify or develop international law or impose obligations but rather to offer States confronted with problems of nationality certain criteria, or standard rules, by which they might wish to be guided in their future negotiations. The Commission earlier agreed that since the process of decolonization is practically over, there is no need for the inclusion of the category of "newly independent States". He would also urge members to read in particular the commentary to the draft articles on separation of part of the territory, in which connection he had referred much more to decolonization than to some few examples of separation in Europe and elsewhere.

65. Mr. FERRARI BRAVO said that, despite the Special Rapporteur's explanation, his doubts regarding the question of decolonization remained. He trusted that the matter would be further clarified by the Drafting Committee or the Commission itself.

66. In the modern day and age he also doubted the wisdom of seeking to avoid statelessness at all costs, as the draft seemed to do. Article 1, paragraph 2, for instance, stated that a "child has the right to acquire the nationality of the State ... on whose territory ... he or she was born". But a child's place of birth might often be a matter of pure chance, for instance, where a segment of the population migrated upon a succession of States.

67. Again, he wondered whether it was really necessary to include article 9 and the notion of unity of families in the draft. The concepts of the family in Western society and, for example, in Islamic countries differed. He asked whether article 9 was meant to apply to all such concepts.

68. Mr. KABATSI said that, while a presumption of transfer of nationality following a territorial change could be useful, it should be made clear that the right to nationality had to be balanced against the right of the successor State. Care should be taken to avoid imposing more obligations on the successor State than on the predecessor State.

69. Mr. PAMBOU-TCHIVOUNDA said that, on the whole, he endorsed Mr. Bennouna's points, particularly about the need to rearrange the articles and prune those provisions that were unduly long. For example, a more

concise form of wording could be found for article 1; and the terms of its paragraph 2 could perhaps be incorporated in the commentary or a footnote.

70. He agreed that the presumption of transfer of nationality must be subject to the right of option and that it was necessary to draw a distinction between definition and opposability. Also, as Mr. Bennouna had rightly observed, the notion of effectiveness had manifold functions.

71. Mr. MIKULKA (Special Rapporteur) said that the omission in the French text of the word "concerned" from the expression "State concerned" perhaps went some way to explaining Mr. Ferrari Bravo's difficulty in regard to paragraph 2 of article 1. As the commentary made quite clear, there had been no intention of suggesting that third States could be involved in any way. The rule in question had in fact been taken from the corresponding provision in the Convention on the Rights of the Child. As he had already explained, moreover, the correct translation into French of the word "genuine", as used in the English term "genuine link" was *effectif*. There were a number of other errors in the French translation which had slipped through owing to lack of time to check all the texts in detail.

72. He planned to issue a corrigendum at least to the draft articles. In the meantime, he would appeal to members for a little patience.

73. Mr. HAFNER said that he would be grateful for Mr. Bennouna's clarification on two points. First, he asked if there already existed a body of practice which gave rise to a presumption as to a principle of nationality in the event of a succession of States. Secondly, while such a principle would have effect for third States, he asked if it would also have effect for individuals. In other words, could an individual invoke a presumption of nationality?

74. Mr. BENNOUNA, referring first to the points raised about decolonization, said he noted from the second footnote to paragraph 11 of the introduction to the third report that the Commission had decided to consider issues of nationality which arose during the process of decolonization, insofar as their consideration sheds light on nationality issues common to all types of territorial changes. Yet the Special Rapporteur had just explained that a large part of his draft could apply to decolonization. The matter required further consideration, particularly since it was not only countries that could be decolonized but also parts of countries or enclaves. There were many throughout the world. Indeed, Morocco had two Spanish enclaves which might possibly revert to Morocco one day, when a problem of succession in the matter of nationality would arise.

75. As to the points raised by Mr. Hafner, the principle of presumption was one of those best known to international law. What a State wanted to reject in such instances was any element that did not fit into the homogeneous whole, such as minorities. It seemed to him that the principle of presumption actually provided most protection for minorities and that they must therefore receive attention in the context of succession of States.

76. Mr. ECONOMIDES said that practice, both past and present, favoured automatic acquisition of the nationality of the successor State, but there were two exceptions. On the one hand, the States concerned, within the defini-



tion laid down by the Special Rapporteur, could decide by treaty to adopt some other solution and, on the other, the right of option could be exercised by groups not wishing to acquire the nationality of the successor State. In such instances human rights dictated that the nationality of that State could not be imposed on those who did not want it.

77. There was also the important question of the consequences for those who exercised the right of option in favour of a predecessor State or of a successor State other than one on whose territory the person concerned was living. In such cases the persons involved were obliged to liquidate their assets and leave the country. Indeed, the Treaty of Peace with Italy, of 1947, had been based on that solution. Such a practice was no longer in keeping with the standards of human rights. That was why the European Commission for Democracy through Law (hereinafter referred to as "the Venice Commission")<sup>10</sup> had proposed a recommendation to the effect that States must not act to the detriment of persons who opted for the nationality of the predecessor State or another successor State. The Venice Declaration<sup>11</sup> might prove a useful working tool and he would therefore ask the secretariat to circulate copies of it to members, together with the explanatory report thereto.<sup>12</sup>

78. Mr. ROSENSTOCK said that he agreed with the Special Rapporteur regarding the question of decolonization and would suggest it be borne in mind that the taxonomy of the topic had been agreed, in particular by the General Assembly. It would be unwise to revert to the matter in an attempt to raise the question of decolonization as a subset meriting special attention.

### Composition of the Drafting Committee

79. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that, following consultations, the Drafting Committee would be composed of the following members: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Melescanu, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada, Mr. Galicki as Rapporteur and Mr. Mikulka as Special Rapporteur.

*The meeting rose at 1.05 p.m.*

<sup>10</sup> See Council of Europe, Directorate of Legal Affairs, *Information bulletin on legal activities within the Council of Europe and in member States*, No. 31 (January 1991).

<sup>11</sup> See 2475th meeting, footnote 22.

<sup>12</sup> Explanatory report on the Declaration on the consequences of State succession for the nationality of natural persons (*ibid.*), pp. 7-13.

## 2477th MEETING

*Thursday, 15 May 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

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

### 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*)

1. The CHAIRMAN invited the members of the Commission to continue the debate on the Special Rapporteur's third report (A/CN.4/480 and Add.1), in particular, on the structure or general presentation of the draft articles, the preamble and the definitions.

#### GENERAL PRESENTATION OF THE DRAFT ARTICLES, PREAMBLE AND DEFINITIONS (*continued*)\*

2. Mr. SIMMA congratulated Mr. Mikulka on his excellent third report, which clearly showed that the right choice of special rapporteurs on specific topics could yield very good results.

3. While broadly endorsing both the form and the substance of the draft articles, he considered that it would be useful if they included references to other relevant principles, such as those mentioned by Mr. Bennouna (2476th meeting). In his view, those principles should be formulated as such, rather than in the form of a presumption, which might always be contested by a State. Perhaps the simplest course would be to add a paragraph to the preamble in which reference would be made to customary law on the matter and to other principles governing nationality and the succession of States, to constitute a sort of saving clause.

\* Resumed from the 2475th meeting.

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