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Summary record of the 2477th meeting

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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")¹⁰ 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 Declaration¹¹ 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.¹²

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.

¹⁰ 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).

¹¹ See 2475th meeting, footnote 22.

¹² 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.1,¹ 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.

¹ Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

4. The draft articles were based on the concept of the right to a nationality, which meant that human rights considerations were in a sense their foundation, as was demonstrated by the fact that the Universal Declaration of Human Rights² was cited in the preamble. While he entirely favoured that new approach, he nonetheless thought that a proper balance should be established between the rights and interests of individuals, on the one hand, and the legitimate interests and concerns of States, on the other. More stress was sometimes placed on the rights of individuals, as in article 16 (Other States), paragraph 2, in which very little attention was accorded to the legitimate concerns of States. In other cases, it was the interests of States that took precedence. That, for instance, was the idea that emerged from paragraph 12 of the introduction to the third report, in which it was stated that the draft articles related only to cases of succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

5. He had two comments to make in that regard. First, it was very difficult to determine whether a succession of States was lawful or unlawful, in accordance with international law or not in accordance therewith, particularly in cases of secession, which, at the current time, did not take place peaceably, as had been seen in the former Yugoslavia. Secondly, as the articles had been drafted from a human rights perspective, it was important to take account of unlawful forms of State succession, for it was in precisely such cases that it was essential to ensure the protection of individuals. Consequently, he considered that no explicit reference should be made to that limitation.

6. He was not sure what the corresponding obligation of States was with regard to the right to a nationality. Mention was made thereof in some articles, such as article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness), in which it was referred to specifically, and article 7 (The right of option), in which, however, it was stated that States concerned "should" give consideration to the will of a person concerned. In other articles, the obligation imposed on States was to negotiate with other States. Consequently, he asked whether one could really speak of a genuine right to a nationality for individuals if there was no clearly defined obligation for States in that regard.

7. As to the interaction between the "hard" rules of international law and rules without binding legal force, it could again be seen from article 16, paragraph 2, that failure to comply with "soft" law could have quite specific "hard" legal consequences, as that paragraph provided that, if a State disregarded the draft articles, other States could treat certain persons as though they were nationals of the said State if such treatment was in the interest of those persons. Furthermore, it was clearly stated in paragraph 10 of the introduction to the third report that while the principles in Part I cannot all be regarded as forming part of positive law (*lex lata*), the States concerned should be invited simply to observe them. He therefore wondered whether the amalgam of "hard" rules of international law and non-binding rules was not likely to have adverse

effects on the few "hard-law" norms that existed in respect of nationality.

8. Turning to the question of definitions, he noted that the term "State concerned" resulted in some awkward and confused formulations in some articles, and in particular in the first phrase of article 5 (Renunciation of the nationality of another State as a condition for granting nationality), and that the use of the term could be relaxed in such cases. He also considered that it would be better to have the definitions set out, not in a footnote, but in the main body of the text. The Special Rapporteur had been right to use the terms "should" and "shall" to distinguish between already established rules and the rules he was proposing.

9. Mr. Sreenivasa RAO said that he fully endorsed Mr. Simma's comments, particularly with regard to the inclusion of a saving clause on customary law. He suggested that the scope of application of that clause should be broadened to include already existing agreements so as to ensure the stability of relations between States. Furthermore, given the naturally debatable character of the presumption of nationality, he thought that it should be assigned a less significant role, which would certainly be possible with such a clause. In his view, in nationality matters the presumption perhaps had less importance than the simple application of established principles.

10. The CHAIRMAN invited the Special Rapporteur to take note of that suggestion. The question could be considered very rapidly in the Drafting Committee.

11. Mr. CRAWFORD said that he did not share Mr. Simma's view about article 16, paragraph 2. As to the substance, it was an essential provision which brought balance to the text. It was important to ensure that the interests of the State that disregarded the obligations imposed on it by the draft articles should not have priority over the interests of other States. The stress in that paragraph was thus not on the interest of the individual, although that was a condition for the application of the paragraph.

12. Mr. HAFNER, referring to Mr. Simma's comment that the scope of application of the draft articles should implicitly be broadened to include the case of unlawful successions of States, asked whether it might not be possible to settle the question by including a general provision in the text like that of article 3 common to the Geneva Conventions of 12 August 1949, setting forth basic principles applicable to cases not referred to directly in the draft articles. It might also be possible to draw on article 3 of the 1978 and 1983 Vienna Conventions, which was applicable to all cases not dealt with in the Conventions themselves.

13. As to the distinction drawn between "hard" and "soft" law and between the words "shall" and "should", he would like to know on what criteria the Special Rapporteur had based his choices. In some cases he could envisage a certain justification for using "should" whereas in some others, such as in draft article 3 (Legislation concerning nationality and other connected issues), he preferred "shall" to the existing "should".

14. Mr. MIKULKA (Special Rapporteur) explained that, in cases where, in his view, the rule set forth was

² See 2475th meeting, footnote 8.

already part of customary law, he had used the word "shall". In cases where it had seemed to him that there was a legal vacuum in positive law, but that it was possible to propose that States should follow a certain policy in the area in question, he had opted for the word "should". For example, in article 3, paragraph 1, he had chosen to say that "each State concerned should enact laws concerning nationality [...] without undue delay" because, in his view, international law did not impose on the State concerned the obligation to enact laws, but the State was nevertheless obliged to ensure the exercise of its sovereign functions over its territory. On the other hand, when he said in article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 2, that a successor State shall not impose its nationality on persons who have their habitual residence in another State against the will of such persons, he was simply repeating a unanimous opinion of the doctrine, namely, that there was a rule of customary law prohibiting a State from taking such a course of action. Lastly, in some cases, such as article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), he had used the word "may" to indicate that the act in question fell essentially within the discretionary power of the State concerned and that the State could therefore decide to take a different course of action. Those, in substance, had been the criteria that had guided him in his choices.

15. Mr. BENNOUNA said that the expression "in conformity with international law" used in paragraph 12 of the introduction to the third report created a dilemma which the Commission would encounter again in the context of the topic of diplomatic protection, the core of which was to determine whether it was possible to invoke rules of law when one was oneself in breach of the law. In human rights matters, it could be justifiable to give priority to protecting the dignity of the human person rather than to the lawfulness of a situation, which could in any case always be contested. On the other hand, it might seem unacceptable to apply rules to a State that, to take one example cited by the Special Rapporteur, had just annexed another State. The solution was to be found neither in retaining the current wording nor in simply deleting it and the Commission must adopt an imaginative approach to the problem. It might, for example, refer, in the proposed saving clause, to customary international law, agreements already concluded and the general principles of international law: in other words, those peremptory norms violation of which would result in the unlawfulness of the situation.

16. Mr. ECONOMIDES said that he was astonished by the turn that the debate had taken. Whereas the 1978 and 1983 Vienna Conventions contained an express rule providing that they were not applicable unless the State succession was lawful, the text which the Commission would propose must a fortiori be even stricter because it dealt not with treaties or archives, but with human beings. The Charter of the United Nations placed an absolute prohibition on the use of force and it would therefore be outrageous for the Commission to agree, on the pretext of respect for human rights, that a State might acquire a territory by conquest and give its nationality ex officio to the population of that territory, thereby providing the aggressor State with a legal foundation. Moreover, it was erro-

neous to invoke human rights because, by definition, the population concerned did not want the occupation. In order to make explicit the intention to prohibit the use of force, he proposed that the provision contained in the 1978 and 1983 Vienna Conventions should be incorporated in the body of the draft articles or, at the very least, in the preamble.

17. The CHAIRMAN, speaking in his capacity as a member of the Commission, pointed out that the question raised by Mr. Simma is analogous to the one deriving from the fact that the violation of *jus ad bellum* did not prevent the existence of *jus in bello* and said that he wondered whether it was warranted, on the pretext that a succession of States had not taken place in conformity with the principles of international law, to deprive the inhabitants of the territory concerned of nationality while declining to establish rules applicable to them.

18. Mr. LUKASHUK said that, notwithstanding the praiseworthy intentions which might have prompted some persons to advocate the deletion of the clause contained in paragraph 12 of the introduction to the third report, as jurists, the members of the Commission must bear in mind the reality of the situation, the construction proposed by the Special Rapporteur being very difficult and complex. He feared that extending the rules to poorly defined cases might make the draft less reliable.

19. Mr. MIKULKA (Special Rapporteur) said that that discussion had already taken place during the consideration of his first report.³ He had inserted such a clause in paragraph 12 of the introduction to the third report, at first avoiding its inclusion in the draft itself, for the sole purpose of indicating that the basic principle on which he had drawn was that the exercise which he had asked the Commission to carry out must serve situations in which State succession had occurred in conformity with international law. That did not mean that some much more general implementing provisions relating, for example, to the protection of individuals against abuses of State power were not applicable to situations in which territorial change had not taken place in conformity with international law. The main idea was, however, that the rules under consideration must not serve as an excuse for legalizing an unlawful state of affairs. There was no need to dwell on the problem; if necessary, the Commission might attempt to formulate a saving clause, but only at a much later stage of work.

20. Mr. GOCO said that the Commission was not called on to legislate and that, in the area under consideration, internal law, based on the constitution of each State, took precedence. While not minimizing the human rights which individuals affected by a State succession should enjoy, he stressed that the Commission could not disregard the right of the State to define the conditions to which it was prepared to subordinate the granting of its nationality.

21. Mr. ECONOMIDES, thanking the Special Rapporteur for his very thorough work and complete draft, said that he would refer to three aspects relating to the preamble, the definitions and the structure of the draft.

³ Ibid., footnote 4.

Beginning with the preamble, he endorsed the four paragraphs of the proposed text, but felt that the second paragraph might be worded in a more diplomatic way so as to stress the sovereignty of internal law while ensuring respect for international law and that, in the third paragraph, a more substantial content would have to be given to the concepts of the codification and progressive development of the law by referring, *inter alia*, to the wealth of nearly two centuries of practice. With regard to the last part of the preamble, he noted that, contrary to what was stated at the end of the third paragraph, the purpose of the text was not to promote respect for human rights in a general and overall manner, but to regulate the situation of persons concerned by successions of States. The Commission must therefore state, if necessary in a separate paragraph of the preamble, that it was anxious for the States concerned to respect the rights and interests of the persons affected in such cases. If the clause was deleted from paragraph 12 of the introduction to the third report, it might be incorporated in the preamble. In reply to a comment by the Chairman, he pointed out in that connection that, in accordance with the predominant modern-day opinion, the unlawful use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations could have no *de jure* effect. It would therefore be dangerous for the Commission to set out on a path which would be tantamount to granting *de jure* effects to an occupying or aggressor State.

22. The definitions did not belong in the commentary and it was in the Commission's interest to retain them in the body of the text for reasons of order and logic, the objective being to draft a declaration and not a treaty. The definitions themselves seemed acceptable, apart from minor drafting problems in subparagraphs (g) and (h).

23. As to the structure of the draft as a whole, he agreed with the Special Rapporteur's method of having one part to deal with general principles and one with the rules for specific application.

24. On the other hand, in respect of the structure of Part I (General principles concerning nationality in relation to the succession of States), he agreed with other members of the Commission that the text would need to be simplified and clarified further to make it more incisive, particularly by underscoring with greater clarity the three principles or objectives of the Commission's work.

25. The first principle had to do with the need to grant everyone the right to a nationality. That universally accepted rule of international law did not admit of any exception and allowed the Commission, on the basis of both conventions and case law, to establish a categorical rule containing an obligation of result. That was the point of article 1 (Right to a nationality), paragraph 1. However, he did not agree that, following a statement of that very forceful principle, a paragraph 2 should be included to cover the specific and extreme case of a child born after a particular date, which most often could be settled by referring to the internal law of the State concerned. If the Commission insisted on providing for the case of children, it should give consideration to a more general clause covering, for example, the possibility of parents exercising their right of option differently. It would be wiser, however, not to provide for anything in the text and to

leave the question to the internal law of the States concerned.

26. The second principle, which also enjoyed general support, referred to the need to avoid cases of statelessness as much as possible. As to whether it should be stated in the form of an obligation of result or an obligation of conduct he thought that the flexibility shown by the Special Rapporteur was the wisest approach because, even if States took the most comprehensive measures, statelessness often resulted from the inertia of the persons concerned. Such an obligation of conduct was set forth very well in draft article 2. The first and second principles thus were closely linked.

27. The third principle, although also fundamental, nevertheless constituted an exception to the first principle in that it required upon the successor State to grant a right of option to persons who, manifestly and for reasons of their own, did not want to take its nationality and preferred either to retain the nationality of the predecessor State or to acquire the nationality of another successor State. That principle, which raised the most difficult question in the draft, was based on a very old practice which could be traced back more than 150 years. Historically, the right of option had been accorded above all to members of national minorities in the three meanings of the term, namely, ethnic, linguistic or religious minorities. The Greek practice offered several examples of the creation of such a right of option. For instance, following the transfer of sovereignty over the Dodecanese in 1947, a right of option had been granted to the Italian-speaking minority of these islands, that is to say, persons who had become Greek following the transfer of sovereignty. The right of option was generally subject to respect for a "reasonable time limit" of about one or sometimes even two years.

28. The Venice Commission had followed the same principle on that question, that is to say, it had provided for a general right of option, but had made the exercise of that right conditional on the existence of effective links, in particular ethnic, linguistic and religious, as well as allowance for the former citizenship of the person concerned. The draft which the Commission had set out to produce must therefore be clearer on the question of granting the right of option. In general, the three above-mentioned fundamental principles must be given a sharper focus in the draft.

29. As to the mechanisms of State succession, the rule in all cases of State practice in that area was that of a virtually automatic attribution of the nationality of the successor State. That rule was part of customary law, but it was necessarily residual in nature in the sense that States could always decide otherwise and it allowed two exceptions: States, regardless of their decision, must respect the human rights of the persons concerned and there was an obligation to grant the right of option, which gave rise to the problem of the consequences of the exercise of that right. However, current practice in that regard was still very strict because persons who opted for the nationality of the predecessor State or that of another successor State were very often told to leave the territory of the successor State in which they were resident and even had to forfeit their property. The Venice Commission had sought to

temper that very severe practice by stipulating that the exercise of the right of option should have no prejudicial consequences,⁴ but that provision unquestionably went well beyond the current state of international law. The Special Rapporteur had therefore been well advised to approach that question from the viewpoint of a recommendation and not of an obligation.

30. Mr. HERDOCIA SACASA said that the right of option really was a fundamental element of the protection of human rights and was even connected to the protection of the right to a nationality. The need to ensure respect for human rights therefore meant doing everything possible to prevent the right of option from being voided of its content by the threat of harmful consequences.

31. Mr. Sreenivasa RAO, referring to the problem of the applicability of the rules governing the situation of foreigners in general when the exercise of the right of option rendered the person concerned a foreigner, said that the imperatives of action to combat statelessness and to promote human rights, valid though they were, should not lead to total disregard of the specific circumstances of the exercise of the right of option.

32. Mr. DUGARD said that it was necessary to spell out exactly what was meant by the right to a nationality. In some countries, nationality corresponded to full citizenship, while, in others, it amounted to no more than a right to diplomatic protection. It could therefore happen that a person having full citizenship in the predecessor State "inherited" a nationality with a much more limited content in the successor State, which meant that the right to a nationality lost some of its content. The text should therefore state clearly whether the right in question was simply the right not to be stateless, or something more. Perhaps it would be useful to supplement articles 11 (Guarantees of the human rights of persons concerned) and 12 (Non-discrimination) with a provision prohibiting discrimination based on the sole fact that the person had been "imposed" on the successor State as a national. That would of course mean moving beyond the sphere of codification as such, but perhaps international law had already moved on, under the influence of human rights law, from the traditional view of nationality limited to diplomatic protection.

33. Mr. ROSENSTOCK said that the topic which the Commission had to deal with was not nationality, but the succession of States in its effects on nationality. He wondered whether Mr. Dugard's suggestion was not well covered in the two following propositions: there should not be any discrimination based on the preceding nationality; and when a territory in which nationality had been accompanied by a number of civil rights was transferred to a State in which nationality was accompanied by fewer rights, there should not be any loss of rights for the former nationals of the transferred territory.

34. Mr. DUGARD replied that the first proposition was true, but that it would be difficult to say the same of the second.

35. Mr. GALICKI said that the lack of a clear definition of nationality made it even more difficult to understand

the right to a nationality. What was more, there was a shift between paragraph 1 and paragraph 2 of article 1 from the right to a nationality to the right to acquire a nationality. The practice of States, for its part, contained the notions of nationality, citizenship and even allegiance. It was thus impossible to evade the task of producing a definition, one dealing at least with the distinction between the right to a nationality and the right to acquire a nationality.

36. Mr. BROWNLIE said he agreed that, while the draft articles had implications for human rights, they did not address human rights as such. What could logically be deduced from Mr. Dugard's argument was that the right to a nationality was very difficult to formulate in terms which could invest it with practical effects. Article 1, which stated the right, depended in its practical application on articles 2 and 3, and article 2 represented the most which could be done in the matter, that is to say, to provide States with a somewhat programmatic rule to avoid statelessness.

37. Mr. ECONOMIDES said he agreed with Mr. Rosenstock that nationality was not the topic under consideration. Any attempt to produce a definition of nationality would inevitably become bogged down and fail. It would be better to adhere to the specific objective of ensuring that the persons concerned could acquire the nationality of the successor State. The principle of non-discrimination must operate first among all the persons who must be able to acquire the nationality of the successor State and then among all those persons and the State's existing nationals. The Venice Declaration stipulated that the two categories must be treated on an absolutely equal footing,⁵ but that rule had not really been followed in recent practice. The Commission had a duty to reflect upon the issue.

38. Mr. THIAM said that he agreed with the members of the Commission who wished to avoid drafting a definition of nationality. He also thought that it would be better not to use the terms "citizenship" and "nationality" indiscriminately, for they were not identical.

39. Mr. GOCO said that, if the successor State was accorded the right to grant its nationality, whatever the causes of the succession of States, the problem would be simplified in the sense that the Commission would have no need to provide such detailed provisions as, for example, article 4, paragraph 1. In other words, the right of the persons concerned would not be automatic.

40. On the other hand, if the purpose was to induce the successor State to grant its nationality to the persons concerned of the predecessor State, that should be made an obligation, regardless of the causes of the succession of States. He agreed with Mr. Dugard that in such a case the persons concerned in the State which had been absorbed by the successor State must not be subjected to any discrimination.

41. There was indeed a distinction between nationality and citizenship and it had consequences, for instance on the right to vote and the right to be freely elected. In some countries, only native-born citizens could hold the post of president or of senator or deputy, for example.

⁴ See Venice Declaration (*ibid.*, footnote 22), provision 16.

⁵ *Ibid.*, provision 8 (c).

42. The CHAIRMAN pointed out that the modalities for exercise of the obligation for States to grant a nationality were set out in greater detail in Part II of the draft articles (Principles applicable in specific situations of succession of States).

43. Mr. MELESCANU said that the definition of "nationality" given in the draft articles did not entirely satisfy him and that the very interesting discussion of the point should be continued.

44. He agreed with Mr. Thiam that in many countries "nationality" and "citizenship" did not cover exactly the same notion. In his own country, Romania, for example, the distinction between the two terms was very clear: nationality merely indicated the ethnic or cultural origin (for example, German, Ukrainian) of Romanians and it existed in parallel with Romanian citizenship.

45. If the Commission tried to define "nationality" precisely, it would inevitably fall into a trap from which it would be almost impossible to escape. Accordingly, the definition proposed by the Special Rapporteur, although imperfect, was useful in that it would help the Commission to overcome the difficulty. In establishing the scope of application of the draft articles, it was sufficiently flexible to allow States the possibility of applying and interpreting the concept in question. In short, as many members had emphasized, the Commission's mandate was to consider only questions of nationality in relation to the succession of States; it did not have to define "nationality".

46. The CHAIRMAN said that he wondered whether the definition given for "nationality" was properly speaking a definition of that term or rather a definition of the scope of the draft articles, more specifically of Part I.

47. Mr. Sreenivasa RAO said that the question raised by Mr. Dugard concerning the granting of nationality in relation to the succession of States gave rise, in various countries, to many practical problems affecting large population groups, either religious or racial minorities or persons who suffered discrimination by reason of their association with the predecessor State and who, having acquired the citizenship of a State, did not enjoy that status in full. It was just as much a human problem as a problem connected with the elimination of statelessness itself, which must be settled, in one forum or another.

48. Like other members of the Commission, he believed that the scope of the issue under discussion must be restricted, for otherwise its consideration would be unduly prolonged.

49. Mr. PAMBOU-TCHIVOUNDA said that he wished first of all to associate himself with the tribute paid to the Special Rapporteur for the quality and comprehensiveness of his work. The Special Rapporteur had certainly worked diligently, and not without reason. The need to equip the international community with a regulatory framework concerning such vital matters as the status of populations in the event of a succession of States—or rather the law concerning the status of natural persons in relation to the succession of States, as the topic ought to be titled—was a reminder that States, whatever their size,

were giants with feet of clay. The current situation of upheaval in Africa was a perfect illustration of the point.

50. It was the events in Eastern Europe which had prompted the Commission to include the topic in its agenda. At the current time, it was the possible implosion of Zaire which haunted people's minds. In Zaire, quite apart from the interests at stake, it was the status of the people which should be seen as a vital requirement in the configuration of the new entities which would emerge from the situation. The timeliness of the exercise undertaken by the Commission constituted a kind of signal or message, which had not escaped the Special Rapporteur's attention.

51. At the current stage, he would limit himself to a few general comments about the scheme of the draft articles and the preamble. To begin with, the division of the draft articles into two parts was somewhat artificial and seemed to lack a common thread. It gave the impression that the report dealt with two different questions. Might the Special Rapporteur have been influenced by the 1983 Vienna Convention? While Part I certainly stated general principles, Part II was concerned instead with rules—which had nothing to do with those principles—except when it was dealing with other principles. In the circumstances, there was every reason to wonder whether the topic had been dealt with only in Part I. If so, what would then be the purpose of Part II? The option proposed by the Special Rapporteur, that is to say a declaration of principles, might explain that approach. But he was not convinced, for the possibility of going further must not be ruled out.

52. Because of that option, the draft articles had been wholly lacking in precision and had been reduced to the level of a means for simply preventing statelessness or of an instrument for combating statelessness. In his view, the Commission had not received a mandate to that effect. The obsession with avoiding statelessness prevented the draft articles from taking account of other matters such as the actual background to State succession, which could vary and could give rise to problems relating, for instance, to the security and even the survival of the populations concerned. Yet the role of international law in looking after and managing victims of State succession, which created more unhappy than happy people, did not seem to be without links with nationality. Similarly, a succession of States could confront the parties with the obligation to respond to consequences that could come about because of the conduct of a particular population group. Did that kind of obligation not presuppose an obligation of prior identification? Would it hide the idea of nationality? There were thus, so to speak, subtle, indirect and arcane relationships between State succession and State responsibility.

53. The restrictive effect of the obsession with preventing or combating statelessness limited the scope of the draft articles itself; and, curiously and paradoxically, that restriction was reflected in the strung-out and scattered distribution of the provisions relating to the scope of application. That was true of Part II in which those provisions were proposed in the event of certain cases of State succession.

54. He also wondered whether the method adopted by the Special Rapporteur was appropriate, for example, whether a preamble was necessary. Would it not have been better to provide, at the beginning of the draft articles, for a few general provisions relating, among other things, to the scope of application not only *ratione personae*, but also *ratione loci* and *ratione temporis*? It was perhaps just a question of style, but such general clauses would probably have the advantage of incorporating important elements such as the proposed definitions in the body of the draft articles, thereby restoring their full operative value, rather than relegating them to a footnote.

55. He doubted whether the preamble was advisable or of interest. So far as the substantive problems it raised were concerned, the first paragraph would have to be rewritten to make it more general in scope, to take account not only of recent cases of State succession, but also of cases likely to occur in the near future. The scope *ratione loci* of the draft articles would have to be expanded, even though he did not go along with the Special Rapporteur, who considered, in paragraph (1) of the commentary to the preamble, contained in the third report, that the elements to be included should, where appropriate, be the corollary of the substantive problems dealt with in the draft articles. The second paragraph of the preamble could be a source of misunderstanding about the respective roles of internal law and international law in respect of nationality. As the question had been debated at length at the preceding meeting, he would simply underline the essential role of the consent of the State in international law, both according to the theory of dualism and according to that of monism. In the first place, the limitations international law imposed on the State in the exercise of its competence, albeit general, in the matter of the award or loss of its nationality, were valid only because the State had consented thereto. Secondly, contrary to the Special Rapporteur's statement in paragraph (6) of the commentary to the preamble, international law did not, in the matter of nationality, delimit the competence of the predecessor State or, moreover, of the successor State. That competence was inherent in the State by virtue of the territorial situation of the populations concerned. The claim by the State, whether predecessor or successor, that certain categories of individuals were its nationals fell squarely within the framework of its territorial competence. And, under international law, those categories could be restricted, even in peacetime, only with the consent of the State and then only to the extent that the rules of international law were compatible with its legislation. In that connection, he referred to the famous arbitral award handed down by Judge Max Huber in the *Island of Palmas* case.⁶ With regard to that question, therefore, since the population was a constituent element of the State, all the powers that the State exercised over its population belonged to it as of right: there was a consubstantial link between State and population and, hence, between State and nationality.

56. Lastly, the law on the status of natural persons in relation to the succession of States could not be codified

by disregarding the fundamental principles of international law.

57. Mr. KABATSI said that Mr. Pambou-Tchivounda's comments concerning the situation in Zaire were pure speculation even if there was no doubt that the problems in that country were certainly serious.

58. Mr. Sreenivasa RAO said that he shared Mr. Pambou-Tchivounda's doubts about the suitability of the preamble and certainly about its existing wording.

59. Mr. MIKULKA (Special Rapporteur) said that he would refer the members of the Commission to the preambles to the 1978 and 1983 Vienna Conventions.

60. If there was indeed an obsession with avoiding statelessness, it was one shared by the Commission and many other international bodies which regarded statelessness as the main problem in the case of State succession. He would ask those who were concerned about that obsession whether a succession of States could be allowed to give rise to statelessness or, in other words, whether the nationals of the predecessor State should become stateless in the successor State. If so, the Commission should not dodge the issue.

61. The CHAIRMAN, referring to a comment made by Mr. Pambou-Tchivounda, pointed out that the 1978 and 1983 Vienna Conventions had the same structure as the proposed draft articles with, on the one hand, general provisions and, on the other, provisions applicable to each case of State succession.

62. Mr. GALICKI said that it was his pleasure, as Vice-Chairman of the Committee of experts on nationality of the Council of Europe, to announce that the European Convention on Nationality had just been adopted⁷ and would soon be open for signature. He proposed that the secretariat should be asked to circulate copies of it to the Commission.

Organization of work of the session (continued)*

[Agenda item 1]

63. Mr. BAENA SOARES (Chairman of the Planning Group) informed the Commission that the informal working group appointed to consider the question of the division of the split session would be composed of Mr. Mikulka, Mr. Operti Badan, Mr. Pellet and Mr. Sreenivasa Rao. The working group would, of course, be open-ended.

64. The CHAIRMAN announced that membership of the Working Group on diplomatic protection had been settled. Its members would be: Mr. Bennouna, Mr. Brownlie, Mr. Crawford, Mr. Goco, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Sepúlveda and Mr. Simma and, of course, the Rapporteur of the Commission,

* Resumed from the 2475th meeting.

⁶ United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829 (arbitral award of 4 April 1928).

⁷ Council of Europe, Committee of Ministers, 592nd meeting of the Ministers' Deputies, decision 592/10.2, appendix 17 (May 1997).

as an ex officio member. He proposed that the Working Group should be chaired by Mr. Bennouna, who had shown considerable interest in the question. The task of the Working Group on diplomatic protection had been clearly defined by the Sixth Committee.

65. Mr. BENNOUNA said that the task of the Working Group on diplomatic protection would be to define the scope and content of the subject. It would thus be one of genuine codification and it would therefore be useful if he could have more information about what had been said in that connection in the Sixth Committee. The only observations from Governments that were currently available came from the United States of America, which supported the idea of codification. All proposals and suggestions on the subject would be welcome and he would himself submit a working document. He invited members to forward to him any observations and information they might have on the question.

66. The CHAIRMAN announced that the Working Group on unilateral acts of States, whose task had also been well defined by the General Assembly, would be composed of the following: Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño and Mr. Sepúlveda. Mr. Galicki would be an ex officio member and Mr. Candioti would be Chairman.

67. He also announced that the Working Group on State responsibility was composed of the following: Mr. Brownlie, Mr. Dugard, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Melescanu, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Yamada and Mr. Galicki would be an ex officio member and Mr. Crawford would be Chairman.

68. He took the opportunity of the presence of the Under-Secretary-General for Legal Affairs, the Legal Counsel, whom he welcomed, to express his dissatisfaction at the fact that the secretariat had refused to provide him with a French-keyboard computer, as he had requested, in the office made available to him as Chairman of the Commission, on the pretext that the United Nations had only English keyboards. He strongly protested against such an outrageous situation, which was, in his view, evidence of the domination the Anglo-Saxons exercised in the United Nations. He asked for his comments to be reflected in the summary record of the meeting.

69. Mr. PAMBOU-TCHIVOUNDA said that he joined in the Chairman's protest.

70. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that he had taken due note of the Chairman's comments.

The meeting rose at 1.05 p.m.

2478th MEETING

Friday, 16 May 1997, at 10 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. Operti Badan, 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.1,¹ A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. GALICKI said that he endorsed the Special Rapporteur's approach in dividing the draft principles pertaining to nationality in relation to the succession of States into two main groups. It should be borne in mind that the outcome of the Commission's work would be a declaration, setting forth draft articles, which would be submitted to the General Assembly for adoption. A declaration had undoubted advantages over a treaty, and for one thing provided more freedom of action, but it created certain doubts as to the need for and form of definitions. For the sake of clarity, it would be useful to have a set of definitions from the outset, even in a declaration, and they should preferably be incorporated in a separate article rather than a footnote.

2. A comparison between the draft articles and the recently adopted European Convention on Nationality,² in which he had had a hand, was enlightening. Chapter VI of that Convention laid down certain principles on States succession and nationality which underlined the need for the States parties concerned to endeavour to regulate matters relating to nationality by agreement among themselves. The proposed draft articles, however, simply emphasized the need for enactment of internal laws and did not pay sufficient attention to the importance of direct

¹ Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

² See 2477th meeting, footnote 7.