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Summary record of the 2481st meeting

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

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argue that in the case of the dissolution of a State, the nationals of the predecessor State residing abroad would all become stateless. It would therefore be necessary to have an automatic transfer of nationality to everyone.

62. Principles must be set out in very general terms and specific provisions must be used to settle problems in detailed fashion. The question of nationality should be linked with the articles of Part II.

63. Mr. MIKULKA (Special Rapporteur) said that he endorsed the philosophy behind Mr. Brownlie's proposal. The problem raised by Mr. Rosenstock could readily be resolved, because Mr. Brownlie certainly intended to cover "persons concerned". However, the principle was to be applied without prejudice not only to the provisions of articles 7 and 8 (Granting and withdrawal of nationality upon option), but also of article 18 (Granting of the nationality of the successor State), which spoke of unification, where the presumption of continuity extended to the entire population of the two countries which united.

64. Regarding the transfer of territory, it was also not certain that the population always shifted its nationality with the territory. On the contrary, in the case of small territorial exchanges, the population had often retained the nationality of the predecessor State. At issue instead was the basic principle of the right to opt for one nationality or another. He had cited two exceptions: unification and transfer of territory. Must a general principle be set forth when it only concerned dissolution and separation and would not cover the persons concerned abroad?

The meeting rose at 1.05 p.m.

2481st MEETING

Thursday, 22 May 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

Present: Mr. Addo, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, 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. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez 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 informed the Commission that, the day before, the General Assembly had adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses by 103 votes to 3, with 27 abstentions.

2. He invited the Commission to continue its consideration of draft articles 1 to 3, including new draft article 2 *bis* proposed by Mr. Brownlie (2480th meeting).

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

ARTICLES 1 TO 3 (*concluded*)

3. Mr. GOCO said he wondered whether the presumption stated in the new draft article 2 *bis* related exclusively to the criterion of habitual residence or whether it covered all the individuals referred to in article 1 (Right to a nationality), paragraph 1, in other words, those entitled to acquire the nationality of the predecessor State in accordance with the provisions of the internal law of that State.

4. Mr. HE pointed out that the right to a nationality set forth in article 1 was based on article 15 of the Universal Declaration of Human Rights² and article 7 of the Convention on the Rights of the Child. In the context of State succession, that right could be regarded as the positive expression of a State's duty to prevent statelessness. From that standpoint, article 1 was closely linked to draft article 2 *bis* proposed by Mr. Brownlie, which set out the duty of States to grant nationality. However, article 1 was more specific, providing for the right to the nationality "of at least one of the States concerned" and, thus, when read in conjunction with article 7 (The right of option), paragraph 1, and article 8 (Granting and withdrawal of nationality upon option), paragraph 3, paving the way for the phenomenon of multiple nationality. Although that phenomenon was made inevitable by the functioning of the various internal laws on nationality, it obviously had more disadvantages than advantages for individuals, States and the relations between them. There was so far no legal rule providing for the right of individuals to more than one nationality. Even the European Convention on Nationality,³ which was fairly liberal in that regard, must be considered in conjunction with the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality. That Convention, like the many bilateral treaties between China and the other States of South-East Asia, for example, was based on the principle that the phenomenon of multiple nationality was generally undesirable and should be controlled to the greatest

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

² See 2475th meeting, footnote 8.

³ See 2477th meeting, footnote 7.

extent possible; all those instruments provided for the automatic loss of nationality in the event that another nationality was acquired. The internal law of many countries, such as that of China, contained similar provisions. In order to reduce the risks of conflict of nationalities—both the negative ones, such as statelessness, and the positive ones, such as multiple nationalities—it might be worthwhile to consider deleting the words “at least” in article 1, paragraphs 1 and 2, and to amend article 7, paragraph 1, and article 8, paragraph 3, accordingly.

5. Mr. SIMMA pointed out that draft articles 1, 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness) and 3 (Legislation concerning nationality and other connected issues) gave concrete expression to the fairly general provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. In so doing, they helped to reinforce the law relating to human rights. In specific terms, they set forth the right of the individual to a nationality and the corresponding obligation of the States concerned. The right to a nationality could be immediately operational in some cases, whereas, in others, it had to be given effect by new rules that would be established either in the draft that the Commission was currently preparing or by States themselves in the context of treaties or their domestic legislation. The corresponding obligation imposed on States could take a variety of forms ranging from the strict obligation to grant a certain right to the simple duty to negotiate and consult with the other States concerned. The human rights consideration implicit in the articles was not so much continuity per se as prevention of statelessness. As Mr. Crawford had pointed out (2478th meeting), the rule laid down could not be regarded as forming part of *lex lata*, but it indisputably constituted a very desirable component of *lex ferenda*. In any event, the Special Rapporteur's concern to prevent statelessness was in no way an obsession and the wording of draft article 2 could even be made somewhat stronger.

6. Article 2 *bis* proposed by Mr. Brownlie was problematic in three respects. First, it raised the logical problem of the link between a principle of general international law—and hence, of customary law—and a presumption, although it was open to question whether a rule of customary law such as the one embodied in the proposal actually existed today. The second problem was that the principle applied solely to certain cases of succession of States and it therefore did not fit in with Part I (General principles concerning nationality in relation to the succession of States), which was devoted specifically to the principles applicable to all cases of State succession. If the Commission decided to retain the article, it would have to move it to Part II (Principles applicable in specific situations of succession of States) or divide it up among the various cases to which it applied. The third and most important problem was that that principle of continuity seemed to be based on a concern to protect human rights, but, when seen from a historical perspective, turned out to be the expression of the old rule of a link between population and territory. That philosophy of nationality in relation to the succession of States was highly debatable. The draft as submitted by the Special Rapporteur was based on premises that had far fewer historical connotations, since

it stressed free choice and set forth the right of the individual to a nationality and the obligation of States to prevent statelessness. There was a perfectly balanced set of principles underlying the entire draft, but that did not prevent reference to the principle in the proposed article 2 *bis* from being made in certain provisions—article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State), for example, in conjunction with the right of option. In fact, the basis should be not that principle per se, but the human rights concerns that inspired it and it must be asked whether the draft took account of those concerns, something about which there was, in his opinion, no doubt whatsoever.

7. With regard to the text of the first three articles of the draft, the phrase “irrespective of the mode of acquisition of that nationality” in no way unnecessarily encumbered article 1, paragraph 1. A situation could in fact arise when a successor State considered that the right to its nationality was valid only for those persons who had acquired the nationality of the predecessor State by a certain mode and not by another: usually by *jus soli* or *jus sanguinis*, but not by naturalization. Without a debate, the Commission could not delete that clause relating to non-discrimination on the basis of the mode of acquisition of the preceding nationality. He had already explained why the wording of article 2 could be strengthened somewhat. In article 3, the replacement of the word “should” by the word “must” strengthened the obligation and was therefore not simply a drafting question. It would be difficult to see how international agreements could be substituted for national legislation for the purposes of article 3.

8. Mr. ECONOMIDES explained that his comments on international agreements in the context of article 3 meant not that those agreements would serve in and of themselves as the instrument of internal law regulating matters of nationality, but, rather, that, before providing for an obligation to legislate at the internal level, it was necessary to establish an obligation to settle such matters at the level of international law, and that obligation went much further than the obligation to negotiate. Each State would subsequently, in conformity with its constitutional rules, adopt all the necessary measures to apply the international agreement in its internal legal system and to give full effect to the principle set forth in article 1.

9. Mr. CRAWFORD said that the origins of the rule set forth in draft article 2 *bis* proposed by Mr. Brownlie dated back to the time when the relationship between people and territory was seen in a more proprietorial way. Nonetheless, there was still a social reality in the link between people and territory, which meant that in general the new State had obligations towards a people who, for whatever reason, were resident on territory affected by State succession. Since the Commission was, in broad measure, in agreement as to the result that ought to be achieved, the matter should perhaps be referred to the Drafting Committee. If it looked, in particular, for wording that made a clear distinction between the process of acquiring nationality in the case of State succession and the process of acquiring it by naturalization, the Drafting Committee could, subject to certain other changes, find a solution that met Mr. Brownlie's concern. As to the question of international agreements and internal legislation in the context

of article 3, it was true that the former would be no substitute for the latter, but the Commission should not assume that the agreements would not be honoured. The ideal solution was an international agreement in advance of the succession and it should be presumed that such an agreement would have effect, directly or indirectly, in the internal legislation. Again, the Drafting Committee could resolve the problem by making sure that the wording of article 3 restated the obligation it set forth without making any assumption as to the way in which that obligation would actually be carried out.

10. Mr. HAFNER said that there was a question in his mind about respect for the free will of persons where nationality was granted automatically. Article 1, paragraph 1, seemed to preserve free will by setting forth a right, but not an obligation, but other provisions in the draft imposed a requirement on the successor State to grant its nationality so that individuals could be obliged to accept that nationality. He saw a certain inconsistency in this approach, which needed a harmonization in order to avoid any ambiguity on this basic concept.

11. Mr. LUKASHUK said that, in his view, Mr. Brownlie's proposed wording imposed too great an obligation on States. He therefore proposed that the words "The States concerned shall implement the principle of general international law . . ." should be replaced by the words "The States concerned, in accordance with the principles of general international law, . . .".

12. Mr. SIMMA, referring to Mr. Hafner's point, said that article 1 spelt out a principle—the right to a nationality—the scope and implementation of which was dealt with in further articles. The Special Rapporteur had dealt judiciously in the draft articles with the rights and obligations involved, as well as with the correlation between those rights and obligations, and had even adopted the principle of habitual residence, in particular in articles 17 and 21 (Granting of the right of option by the successor States).

13. Mr. MIKULKA (Special Rapporteur) said that Mr. Simma had fully grasped the idea he had sought to reflect in article 1.

14. Mr. BROWNLIE said he agreed with Mr. Simma that the essential principle laid down in his proposed article 2 *bis* was in fact a substratum for many of the draft articles submitted by the Special Rapporteur. Yet that principle did not appear in the preliminary articles, where it had its proper place. As to the wording of article 2 *bis*, he would have no objection to the deletion of the words "of general international law" in paragraph 1.

15. Mr. HERDOCIA SACASA said that articles 1 and 3 dealt with the fundamental problem of the continuity of nationality. It was therefore important to set forth a general rule, along with the right to nationality, laying down the principle of the continuity of nationality, which would complete the right of option and help solve the problem.

16. Moreover, the general rule of the continuity of obligations in respect of treaties in the case of State succession constituted a precedent in that it seemed to present a few analogies, *mutatis mutandis*, with the obligation of the successor State to ensure the continuity of nationality.

It was a question of avoiding any break in time in the nationality link, in other words, statelessness. He was therefore inclined to support draft article 2 *bis* proposed by Mr. Brownlie, which was based on two important assumptions: first, that there was an obligation to acquire the nationality of the successor State or at least a presumption to that effect; and, secondly, that continuity of nationality came into play from the actual date of the State succession, without prejudice to the right of option.

17. He also endorsed the idea of moving article 1, paragraph 2, which dealt with the specific case of the nationality of children and had no place in a rule of a general character. In that connection, he referred to the comments that, in that particular case, the nationality of the child should not be based on *jus soli* alone if the unity of the family and also the very notion of the acquisition of nationality were not to be jeopardized. The Pact of San José stipulated that "Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality" (art. 20, para. 2), while the European Convention on Nationality provided that each State party should provide in its internal law for its nationality to be acquired by children born on its territory who did not acquire at birth another nationality (art. 6, para. 2).

18. In article 3, the reference to "other connected issues" should, in his view, be retained, since nationality was also linked, in particular, to residence and to the protection of movable and immovable property.

19. It was also important to retain the words "irrespective of the mode of acquisition of that nationality" in article 1, paragraph 1, since all methods of acquiring nationality should be treated on an equal footing.

20. Mr. GALICKI said that, when the Drafting Committee had considered article 1 the previous day, it had discussed the definition of the term "person concerned". That definition was of crucial importance not only as a definition, but also as a matter of the scope *ratione personae* of the draft articles. The point was, would the principles to be adopted cover only "nationals" of the predecessor State or also other persons entitled to its nationality? If the second possibility were adopted, the scope of the draft articles would be substantially enlarged. At all events, like other members of the Commission, he feared that entitlement to the nationality of the predecessor State was very imprecise in the Special Rapporteur's proposed text, particularly as State practice in the matter varied. The Commission should therefore define whether it covered, for instance, a passive right and the conditions to be fulfilled in accordance with the law of the predecessor State.

21. Mr. OPERTTI BADAN said that the draft articles did not mean to treat *jus soli* more favourably than *jus sanguinis*, or conversely, but simply recognized that nationality could be based on either one or the other criterion. The solution proposed in paragraph 2 of the article was therefore a step in the right direction in that it ensured the continuity of nationality and was thus intended to prevent statelessness.

22. Draft article 2 *bis* proposed by Mr. Brownlie, which was along the same lines, was in keeping with articles 1

and 2 and supplemented them by introducing the concept of "presumption" of nationality. That presumption should, however, not be absolute, as a person could have acquired a nationality other than that of the State on whose territory he had his habitual residence from another source, for example, by *jus sanguinis*.

23. Several countries in Latin America allowed dual nationality and even multi-nationality. In his view, the draft articles should therefore be confined to guaranteeing continuity of nationality and should not interfere with the traditional methods of acquiring nationality.

24. Mr. GOCO, referring to the concept of "habitual residence" underlying draft article 2 *bis* proposed by Mr. Brownlie, said that the circumstances pertaining to the acquisition of nationality could vary. There were cases, as Mr. Galicki had pointed out, when a person was entitled to acquire the nationality of the predecessor State in accordance with its internal law; it was also possible for people to have their habitual residence in the predecessor State without being nationals of that State. The Commission should therefore indicate clearly whether the intention was to confine the presumption of nationality only to persons who had their habitual residence on the territory of the predecessor State at the effective date of the State succession or whether the intention was that all the nationals of the predecessor State should benefit from that presumption, even though they did not reside on its territory. It should also determine the situation of persons who might be entitled to acquire the nationality of the predecessor State, but who had not formally done so at the time of the State succession. Lastly, he supported the idea of continuity of nationality in the event of State succession.

25. Mr. BROWNLIE said that the precise object of the exercise was to determine the obligations of the successor State, which assumed in the broad sense responsibility for the territory transferred to it, in the matter of nationality and to help it to manage the problems of nationality without compromising its stability in any way.

26. With regard to Mr. Simma's initial comments on the feudal or humanist approach to be applied to the concept of population, he considered that, in that particular case, the Commission should deal with the problem from the angle of legal security and not just from that of respect for human rights—although the former guaranteed the latter.

27. His proposal retained the general economy and wording of the draft articles. The concept of continuity meant not the continuity of the nationality of the predecessor State, but a presumption as to the duty of the successor State to maintain stability and grant nationality to the population of the predecessor State. The link between territory and population was usefully reflected in the concept of "habitual residence".

28. Mr. Sreenivasa RAO said he supposed that the purpose of draft article 2 *bis* proposed by Mr. Brownlie was to fill a gap, in that the right to a nationality as set forth in article 1 was not automatic and should be formally set forth. But it would be possible, instead of including it in the proposed article 2 *bis*, simply to provide in article 1 that any natural person who on the date of the succession of States had possessed the nationality of the predecessor

State would continue to possess the nationality of at least one of the States concerned.

29. Mr. BROWNLIE repeated that he had proposed article 2 *bis* because the draft articles contained no provision that absolutely guaranteed the achievement of one of the Special Rapporteur's main objectives, namely, to prevent statelessness. It was an additional general principle which, taken in conjunction with the provisions of articles 1 and 2, would enable that objective to be achieved.

30. Mr. PELLET said that he remained opposed, albeit less categorically than before, to the principle embodied in article 2 *bis*. That principle appeared not to be applicable in all situations, and it was, for example, incompatible with article 18 (Granting of the nationality of the successor State) of Part II, whereas the exceptions for which it provided related only to articles 7 and 8. If the Commission retained it, either by combining it with article 1, as suggested by Mr. Sreenivasa Rao, or by making it a separate article, it would have to proceed with caution and provide for the existence of a principle of continuity linked to habitual residence, subject to the other rules that might be set forth in the draft articles. The fact remained that the proposed article complicated matters and he wondered whether it was really necessary to establish a general principle which had immediately to be qualified by providing for exceptions to its application. However, he had no objection to referring article 2 *bis* to the Drafting Committee.

31. Mr. BROWNLIE again stressed that the general principle he was proposing underlay a number, if not all, of the provisions of the draft articles applicable to specific cases and that some of them derogated from the general principle. He would see no disadvantage in specifying that article 2 *bis* was applicable subject to other provisions of the draft articles, including the provision concerning the right of option. It would be for the Drafting Committee to find a suitable formulation to that effect.

32. Mr. ECONOMIDES said he thought that draft article 2 *bis* proposed by Mr. Brownlie was correct with regard to State practice, in that the granting of the nationality of the successor State was generally automatic. However, as problems sometimes arose, it would be better to say that, where no specific solution was provided for, States must apply the rule whereby nationality was granted automatically. However, he did not think that the criterion of habitual residence should be the only one applied, as was the case in paragraph 1 of article 2 *bis*. It was essential that the persons concerned should not only have the nationality of the predecessor State, but should also reside in the territory which is the subject of the succession. Those were the two relevant criteria in that connection. That being said, article 2 *bis* nonetheless brought something new to the draft articles and thus served a very useful purpose.

33. Mr. MIKULKA (Special Rapporteur), speaking as a member of the Commission, said he was less and less convinced of the pertinence of draft article 2 *bis* proposed by Mr. Brownlie. The principle formulated therein was valid only in certain exceptional circumstances, for example, in the case of a unification of States. In other special cases,

such as the transfer of a portion of territory or the dissolution of a State, the rule was that the persons concerned exercised a right of option. It thus seemed that the principle was applicable in only two of the four special cases dealt with in Part II of the draft articles and that, consequently, it had no place in Part I, which established general principles applicable in all situations, including decolonization. It was clear that, in the latter case, which was not dealt with in Part II of the draft, the presumption established in article 2 *bis* would be impossible to defend. It would be unthinkable to automatically grant the nationality of the territory that had become independent to the nationals of the country that had formerly administered the territory in question who had habitual residence on that territory.

34. There was, moreover, no continuity in matters of nationality. Like sovereignty, nationality was always original. Succession in relation to nationality arose only in cases where a person kept the nationality of the predecessor State, if that State still existed. The term "continuity" perhaps covered the idea of prevention of statelessness, even as a temporary phenomenon, but article 2 dealt with precisely that concern.

35. What would become of the presumption of nationality if the persons concerned were able to exercise a right of option within a two-year period? There would inevitably be a conflict between two situations which were both perfectly legitimate. Account must also be taken of the fact that, when States legislated, as they were invited to do in article 3, they did not necessarily do so immediately and that that legislation could establish different rules, which would also bring about a conflict with the presumption referred to in article 2 *bis*. The problem of the validity of the presumption also arose when that legislation, for one of the States concerned at least, was already in force at the moment of independence. That was what had happened in Slovakia, where the law on Slovak nationality had been adopted before the date of the dissolution of the Federation and independence, and had provided that all persons who had formerly held Slovak "secondary" nationality, including the half million Slovaks residing in the territory of the Czech Republic, were Slovaks. If the Czech Republic had not promulgated its own legislation on nationality at the moment of independence, on the basis of the presumption established in article 2 *bis*, those Slovaks could have had Czech nationality conferred on them automatically.

36. He therefore thought that the principle set forth in draft article 2 *bis* proposed by Mr. Brownlie created far more problems than it solved, particularly for persons who would have their habitual residence in a third State, since no presumption would exist in their case, further complicating their situation. In his view, that principle could be adopted as a working hypothesis, but certainly not as a general principle formally set forth in Part I of the draft.

37. Mr. MELESCANU said it was his understanding that the purpose of draft article 2 *bis* proposed by Mr. Brownlie was to establish a principle more general than the one set forth in article 1, paragraph 1, to serve as a sort of safety net to prevent statelessness. If that was the case, the provision should be redrafted so as to specify, for

example, that that presumption would be applicable only if no other solution had been provided for either in the draft articles themselves or in national legislation. It would thus serve as a working hypothesis whose ultimate aim would be to prevent statelessness, with the fundamental principle remaining that every individual had the right to a nationality.

38. Mr. SIMMA said he took it that draft article 2 *bis* proposed by Mr. Brownlie had essentially been intended to reconcile two apparently conflicting ideas set forth in the draft articles, namely, that, on the one hand, individuals had the right to a nationality, but that, on the other, States were free to grant or not to grant their nationality, with the resultant risk of statelessness if they did not grant it. However, the principle formulated in article 2 *bis* was applicable to only two of the four special cases of succession of States dealt with in Part II of the draft. Consequently, perhaps it would be better not to set it forth formally in Part I, but simply to refer to it in Part II, in the specific cases in which it was applicable. He would like to know the Special Rapporteur's opinion on that point.

39. Mr. ROSENSTOCK said that, in view of Mr. Simma's last comment, he wondered whether the question of what happened when a State did not do what it was supposed to do was not in fact dealt with in article 16 (Other States). In his opinion, draft article 2 *bis* proposed by Mr. Brownlie insisted too much on the generally acceptable idea that States must respect certain principles of international law which could not be amended by the legislation they were required to adopt in accordance with article 3. Perhaps some way should be found of expressing that idea in the draft articles without making it a formal principle.

Mr. Pellet took the Chair.

40. Mr. SEPÚLVEDA said he thought that a balance should be struck between the right of individuals to a nationality and the obligations of States in respect of nationality. Those obligations were not clearly established in the draft articles and he thus welcomed draft article 2 *bis* proposed by Mr. Brownlie, which established a general principle concerning the matter. In any case, it had to be admitted that the presumption established could not be absolute and must always be relative.

41. Article 2 was too restrictive in that it dealt only with the obligation of the "States concerned"; it should refer to the obligation "of all States and in particular the States concerned" to take all reasonable measures to avoid statelessness. He also noted that the article imposed on States the "negative" obligation to avoid statelessness and that it would be better to impose on them the "positive" obligation of granting a nationality to the persons affected by a succession of States, corresponding to those persons' right to a nationality.

42. The idea set forth in article 3, paragraph 1, that each State concerned should enact laws concerning nationality and other connected issues without undue delay was expressed too vaguely. It should thus be redrafted with more precision so as to impart more legal rigour not only to that provision, but also to the draft articles as a whole.

43. Mr. MIKULKA (Special Rapporteur), focusing on the points raised by Mr. Simma with regard to article 1, said that the provision contained in paragraph 1 of that article could not be applied in isolation. In some cases, the person concerned might have a subjective right to a nationality, whereas, in others, that notion of a right to a nationality could be understood only as the introduction of a process which presupposed the application of other provisions of the draft articles. As to the question whether it was necessary to mention the mode of acquisition of nationality in that article, he noted that the mode of acquisition of nationality might give rise to a problem of treatment for certain persons. The Commission must adopt a position on the question and clearly indicate that the mode of acquisition must not serve as a pretext for treating nationals of the predecessor State differently at the time of the granting of the nationality of the successor State. The example given by Mr. Simma in that regard was quite explicit.

44. Replying to a question by Mr. Galicki, he said that it was advisable to take account of the case not only of persons who had had the nationality of the predecessor State, but also of those who might be entitled to acquire that nationality. It might happen that persons were entitled to do so in accordance with an option. In that connection, he cited the Treaty of Versailles, which provided, in the context of the restoration of certain persons' French nationality, that

The legal representative of a minor may exercise, on behalf of that minor, the right to claim French nationality; and if that right has not been exercised, the minor may claim French nationality within the year following his majority,⁴

in other words, as many as 20 years after the conclusion of the Treaty. In the context of a State succession, it was conceivable that persons might thus find themselves in the same situation as those who had actually had the nationality of the predecessor State. He would have no objection if the paragraph was reworded to make it clear what was meant by persons entitled to the nationality of the predecessor State and thus to make it easier to understand.

45. With regard to article 1, paragraph 2, he had had certain doubts about whether it should be included in the draft, but had acted in keeping with the wishes of the previous Commission, which had taken the view that the situation of a child, even born after the date of the State succession, required some attention. The text did not specifically provide for any limitations on the application of that paragraph, but some limitations were, implicitly necessary. He cited the example of the child of a person covered by paragraph 1 who had been born in the territory of the successor State and whose nationality could not be established because the legislation of the successor State, based on the principle of *jus sanguinis*, was not applicable owing to the fact that the parents did not have any nationality as a result of the State succession. In addition to that limitation relating to the category of children who might be concerned, there was a limitation in time because the problem existed only as long as the nationality of the parents had not been established. Once the nationality of the parents had been determined, with retroactive effect, in conformity with the proposed articles, the nationality of

the child could be established. However, if that was never done, the draft proposed the application of *jus soli*, a solution which States had already retained in the Convention on the Rights of the Child. He also pointed out that, in the French version of the paragraph the word *concerné* had been inadvertently omitted after the word *l'État* in the last part of the paragraph; the draft was obviously not meant to establish obligations for third States, something that would go beyond the Commission's mandate.

46. There appeared to be a virtual consensus on the content of article 2, subject to certain drafting changes.

47. The question of the place of treaties had been asked in connection with article 3. Treaties were in fact implicitly covered by article 15 (Obligation of States concerned to consult and negotiate), the very purpose of the negotiation being to determine whether problems of nationality could be settled by means of the respective internal legislation or whether an agreement had to be concluded. The notion of an agreement was also contained in article 16 and underlay all the draft articles, including those in Part II. Article 3, which dealt with the problem of internal legislation, thus could not be interpreted *a contrario* as ruling out the possibility for the States concerned of also settling the question by means of an agreement.

48. The CHAIRMAN invited the members of the Commission to give their reactions to the Special Rapporteur's summing up so that clear guidelines could be transmitted to the Drafting Committee.

49. Mr. ECONOMIDES said that a source of confusion lay in the fact that the Special Rapporteur had seemed to say that the child referred to in article 1, paragraph 2, was a child whose parents were stateless, whereas the text of the paragraph referred to "a child . . . whose parent is a person mentioned in paragraph 1", that is to say an individual who had the right to at least one nationality and had never been stateless. He also pointed out that some of the questions asked during the debate had not been answered. That was the case of the rather sensitive substantive question raised by the absence of any condition for residence in article 1, paragraph 1, the consequence of which was that, in all cases in which the predecessor State continued to exist, all persons who had had the nationality of that predecessor State and resided on its territory retained that nationality and, consequently, there was no problem of nationality with regard to them. He nevertheless thought that it was up to the Drafting Committee to look into those problems, taking into account all the proposals that had been made. He intended to formulate his own in writing.

50. Mr. MIKULKA (Special Rapporteur), replying to the first comment by Mr. Economides, said that the misunderstanding had come about because the right to the nationality of at least one of the States concerned in some cases constituted the right to retain the nationality of the predecessor State, in others the right to acquire the nationality of the successor State and, in a third category of cases, the right to exercise an option between two or more nationalities which the person concerned might be entitled to acquire—a right which might not be realized, for example, due to the death of the parents prior to the expiration of the time limitation for this option. With regard to the second comment, he did not quite understand how Mr. Economides intended to link the element of habitual residence with the concept of a right to nationality. If the point

⁴ Part III, sect. V, annex, para. 2, subpara. (6).

was simply to add a condition of habitual residence to the possession of the nationality of the predecessor State, half the draft articles would no longer serve any purpose. First of all, that would be tantamount to excluding the consideration of persons who had had the nationality of the predecessor State, but who at the moment of dissolution had had their habitual residence in another State and, secondly, if the point was that those persons had a right to the nationality of the State on whose territory they had their habitual residence, the other articles were unnecessary because all the problems were resolved from the outset.

51. Mr. PAMBOU-TCHIVOUNDA said that he was puzzled about the very general nature of the scope of article 1, paragraph 1, because he remained convinced that a distinction should be drawn, which would not encumber the provisions of Part II, depending on whether the predecessor State had or had not ceased to exist. In his view, the Special Rapporteur seemed to be limiting himself to the hypothesis that, as the predecessor State continued to exist, the categories of natural persons claiming its nationality retained it, although the opposite hypothesis should also be borne in mind, namely, that of persons who lost the nationality of the predecessor State precisely because it had ceased to exist. As to procedure, he requested the Chairman to confirm that members of the Commission who were not members of the Drafting Committee could submit draft articles or amendments in writing to the Committee.

52. The CHAIRMAN confirmed that that was possible. He also requested the members of the Commission to take as clear a decision as possible both on the principle of referring articles 1, 2 and 3 to the Drafting Committee and on the Drafting Committee's specific mandate. Apart from putting the finishing touches on the draft, the Drafting Committee should consider draft article 2 *bis* proposed by Mr. Brownlie, the proposals made by Mr. Economides and the desirability of inserting in the text a number of general principles which had been the subject of lengthy discussion, such as the principle that State succession could not have any effect on the prior nationality of a third State or the idea that the rules set forth were of a residual nature.

53. Mr. MIKULKA (Special Rapporteur) said that it would be better for the Drafting Committee to consider certain specific proposals and not vague ideas put forward anonymously. As to the residual nature of the instrument being drafted, that idea had its place in a paragraph of the preamble and not in the body of the text itself. Likewise, he did not regard it as essential to state the principle that the succession of States had no impact on the nationality of a third State which a person concerned possessed, since it was obvious and rather banal. The Vienna Convention on the Law of Treaties contained no analogous provision preserving the integrity of the treaties between third States.

54. In conclusion, he said that the draft articles already contained the main points; any member who thought that a particular provision should be added should submit a proposal in writing.

55. The CHAIRMAN proposed that the members of the Commission should refer draft articles 1, 2 and 3 to the

Drafting Committee, requesting it to give particular consideration to the formal proposal for a new draft article 2 *bis* submitted by Mr. Brownlie and to the proposals made in the Commission in the framework of both the general discussion and the debate on articles 1, 2 and 3. He joined the Special Rapporteur in urging the members of the Commission to formulate their proposals in writing and give them to the Special Rapporteur or the Drafting Committee. For the further consideration of the draft, he invited the members to submit their proposed articles or additional paragraphs if possible in the course of the debate.

56. He said that, if he heard no objections, he would take it that the Commission decided to refer articles 1, 2 and 3 to the Drafting Committee and that it approved the proposed procedure.

It was so decided.

The meeting rose at 1 p.m.

2482nd MEETING

Friday, 23 May 1997, at 10.35 a.m.

Chairman: Mr. Alain PELLET

later: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez 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*)

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

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