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Summary record of the 2485th meeting

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

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affected by State succession and who later wished to return to that area when their nationality might have changed but would not necessarily have done so. The question of their right of return—no matter how much one wished to ensure it—was different from the question addressed in the draft articles. His particular concern was that the Commission should not be seen to go beyond the scope of State succession with respect to nationality, and risk rejection on that ground, thereby giving rise to a *contrario* interpretations of the broader issues concerned. There would be opposition—and not necessarily well-intentioned opposition—if the Commission enacted what amounted to an international covenant on the civil, political, social, economic and cultural rights of persons whose nationality might have been affected by State succession.

43. He was very sympathetic to the principle of non-discrimination (art. 12) which, accurately formulated, was essential, for persons should not be discriminated against on account of the fact that they had acquired or lost the nationality of a State in the context of State succession. The prohibition of arbitrary decisions concerning nationality issues (art. 13) was equally appropriate. In the context, however, articles 9 (Unity of families), 10 and 11 (Guarantees of the human rights of persons concerned) went too far and he spoke as one who supported all the substantive values reflected in them.

44. On a point of terminology, some of the problems in the draft articles might be solved if a slightly more general formulation were adopted. In particular, he would propose that the word “acquired” should be replaced throughout the draft by the word “obtained”. Also, the words “the acquisition or loss of” in article 9—which, again, raised a question of principle as to how far the provision could properly go—were not really necessary.

45. Rather than engaging in a lengthy debate on a difficult point, it might be better to refer the matter to the Drafting Committee and to request it to distinguish those issues that were sufficiently directly related to nationality and succession to justify inclusion in the draft.

46. The CHAIRMAN said his personal view was that articles 9 and 11 were general provisions that had no place in a precise draft on State succession.

47. Mr. FERRARI BRAVO said that article 9 raised the interesting problem of the unity of members of the family who might have different nationalities. In that connection, he was concerned to note that at no point in the draft was there any indication of the precise nature and extent of the family. The only reference appeared to be in paragraph (28) of the commentary to article 9, which suggested that members of the family should be able to live at the same place. That, however, could have a major effect on emigration laws and he therefore wished to underline the need to spell out the nature of the family either in the article or in the definitions.

48. Mr. BROWNLIE said he agreed with Mr. Crawford that, in analytical terms, articles 9 to 13 went beyond the problem of succession of States but he did not himself have any problem with the general economy of the draft articles. That was because the articles in question were highly relevant to the whole problem of succession and—to borrow a term of the common law—could be said to form part of the *res gestae*.

49. Mr. DUGARD said he too found it difficult to see how articles 9 to 13 could belong in a declaration or convention of the kind contemplated. Essentially, they were designed to protect the basic rights of individuals who did not qualify for nationality and the Special Rapporteur clearly wished to ensure that their human rights were protected. In the case of article 9, however, it was not clear how members of the family could be reunited or allowed to remain together if they were not given the nationality of the State in question. That article seemed more in the nature of a plea to the State to treat the members of the family decently and allow them to live together. The same applied to article 11: the States concerned were enjoined to allow persons concerned habitually resident in their territory to exercise their human rights. Obviously, they would be unable to exercise all of those rights since some of them would be attached to nationality, such as franchise, which would be granted only to those persons who enjoyed the nationality of the State.

50. In the circumstances, it might be better to contemplate a general provision acknowledging that the basic rights of persons who did not qualify for nationality in the process of State succession were not in any respect to be undermined.

51. The CHAIRMAN said that Mr. Crawford had raised a fundamental point on which he would invite comments at the next meeting.

The meeting rose at 11.35 a.m.

2485th MEETING

Thursday, 29 May 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, 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)

ARTICLES 9 TO 14 (concluded)

1. The CHAIRMAN invited the members of the Commission to give their views on Mr. Crawford's proposal that articles 9 to 14 should be deleted, as they set forth very general principles and, in his view, had no place in the draft articles on nationality in relation to the succession of States.

2. Mr. SIMMA said he thought that articles 9 to 14 did indeed have a place in the text, as they were consistent with the approach based on protection of human rights adopted by the Special Rapporteur and responded to the human rights concerns raised by the succession of States. The right to a nationality was not simply the right to a passport, but also the right to continue living at home, whatever was understood by that expression. He therefore thought that all the provisions of articles 9 to 14 were related to the question of the succession of States.

3. Article 9 (Unity of families) in particular should certainly be included in the draft, as it obliged States, not to grant their nationality to the members of a family, but simply to adopt all reasonable measures to allow that family to remain together. Admittedly, the concept of "family" was ambiguous, but it would be perfectly reasonable for a State to specify, indeed restrict, its meaning.

4. With regard to article 10 (Right of residence), paragraph 3, the Special Rapporteur had been right not to go as far as the European Convention on Nationality² and the Venice Declaration.³ He had adopted a neutral position, confining himself to indicating that, if the laws of the State concerned provided that persons who had not opted for its nationality must leave its territory, a reasonable time limit must be granted them by which to do so. However, the conditions of the transfer of residence should perhaps be spelt out and, consequently, a clause added safeguarding human rights, particularly the economic and social rights that were stressed in the European Convention on Nationality.

5. The text of article 11 (Guarantees of the human rights of persons concerned), which was of too general a character, should also be redrafted. It could, for example, be specified that the human rights and fundamental freedoms referred to were those internationally recognized.

6. Article 12 (Non-discrimination) was satisfactorily worded, as it did not rule out the possibility of a State

applying some of the criteria mentioned to extend to new categories of persons the right to acquire or retain its nationality or a right of option. However, it did not seem necessary to indicate that explicitly at the current stage.

7. Mr. ECONOMIDES said that he supported Mr. Crawford's suggestion if it referred essentially to article 10, paragraphs 1 and 2. Those two paragraphs would be very difficult to implement in some cases and they also set forth a right of residence that did not exist in a number of countries. It might thus be asked whether they really had a place in a set of draft articles dealing with nationality in relation to the succession of States and whether it would not be better to delete them. Article 10, paragraph 3, on the other hand, called for more detailed consideration.

8. Mr. BROWNLIE said he thought that the problem was one of the distinction between the precise consequences of the succession of States in matters of nationality and the general question of the granting or withdrawal of nationality. In the event, it did not seem necessary to establish that distinction. In his view, there were good practical reasons for dealing with those questions, which were clearly interrelated, in the draft articles.

9. Mr. GOCO said he wondered whether it might not be possible simply to combine the provisions of articles 9 to 13 in a single article, as they all dealt with the obligation of States to adopt reasonable measures to guarantee the unity of families and the right of residence, to protect human rights and to avoid discrimination.

10. The CHAIRMAN, speaking as a member of the Commission, said that he supported both Mr. Crawford's and Mr. Goco's suggestions. All the articles being considered, and in particular articles 9 and 11, had a very broad scope of application, and did not apply solely to cases of succession of States. The best solution would perhaps be, as Mr. Goco had suggested, to combine them in a single article, indicating that the succession of States must never lead to violations of human rights.

11. Mr. HAFNER said that he shared Mr. Crawford's view concerning article 11 as currently worded. But, as it set forth an important principle, it might perhaps be retained and redrafted, as Mr. Simma had suggested. As for the other articles, he did not think they could be replaced by a single article, as Mr. Goco had proposed, for they dealt with particular situations linked to the succession of States and to the effects of that succession on nationality. The principle of non-discrimination, for instance, was essential and had been particularly stressed by some delegations in the Sixth Committee. It was thus necessary to retain a provision on that question in the draft articles. As for article 10, he thought that paragraphs 1 and 2 were perhaps not indispensable, but that paragraph 3 posed a problem to which he would like to return subsequently.

12. Mr. SIMMA said that, unlike the Chairman, he was convinced that the problem of the unity of families, dealt with in article 9, was closely linked to the question of the succession of States.

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

² See 2477th meeting, footnote 6.

³ See 2475th meeting, footnote 22.

13. The CHAIRMAN said that that article could be applicable in the case of succession of States, but it did not deal specifically with that situation.

14. Mr. MELESCANU said that he shared Mr. Simma's opinion. Practice showed that succession of States almost always had consequences for families and it was thus essential to deal with the question of unity of families, in one form or another, in the draft articles.

15. Mr. HE said that, in his view, article 9 gave rise to a problem because the concepts of a family and of members of the family were not clearly defined and varied from country to country. Furthermore, it was not unusual for members of a family to have different nationalities. He also noted that neither the Venice Declaration nor the European Convention on Nationality contained any provisions on unity of families and he therefore wondered whether article 9 really had a place in the draft articles.

16. Mr. LUKASHUK said that all the articles being considered were of importance in settling the problem of nationality in relation to the succession of States. Only paragraph 3 of article 10 was unacceptable, as it in a sense legitimized the expulsion of persons who would voluntarily have opted for the nationality of a State other than the successor State. Furthermore, that was contrary to the principles of international human rights law and to the rules of *lex lata*; in particular, it conflicted with article 20 of the European Convention on Nationality, which provided for the right of those persons to remain in the territory of the successor State. Lastly, that provision seemed totally illogical having regard to the provisions of paragraph 2 of the same article. He was thus opposed to retaining paragraph 3.

17. Mr. ECONOMIDES said it appeared from article 10, paragraph 3, that a State could expel a person who had not opted for its nationality. That principle belonged to the past and no longer reflected established international human rights standards. Consequently, as currently worded, the paragraph was unacceptable and should be deleted. There should, however, be a provision regulating the situation of persons who had voluntarily acquired the nationality of a State other than the successor State, expressly indicating, as was specified in the Venice Declaration, that their choice must have no prejudicial consequences with regard to their right to residence in the territory of the successor State and their property located therein.

18. Mr. CRAWFORD said that international law did not currently require States to grant the right of residence in their territory to persons opting for a nationality other than their own. When persons opted for a given nationality, they in effect accepted the consequences that might result from their choice, such as the obligation to leave the territory of the State whose nationality they had not acquired. The best way of settling the problem would be to insert a general clause indicating that measures must be taken to ensure that those persons were not subjected to arbitrary treatment, particularly in certain contexts.

19. The CHAIRMAN said that he personally would go further than that and make the provision more explicit, as recommended by Mr. Economides, because it was incon-

ceivable in 1997 to allow for the expulsion of persons in the event of the "wrong choice".

20. Mr. GALICKI noted that articles 1 to 8 embodied the most important principles on nationality in relation to the succession of States. Articles 9 to 14 covered a number of possible secondary effects of the succession of States, but they still had their full value and should be retained in the draft because they dealt with questions raised in many international instruments.

21. Article 9 in particular was of great importance. As the Special Rapporteur pointed out in the commentary to that article, contained in his third report (A/CN.4/480 and Add.1), in practice there were many examples of provisions whose purpose was to preserve the unity of families. That was the idea which emerged from the European Convention on Nationality. The problem was how to define the word "family", which was interpreted differently depending on the country. It might therefore be useful to use the same terminology as in the Convention, where the word "family" meant husband and wife and their children, which limited its scope. However, it should be pointed out that article 9 dealt with the need for the States concerned to give the members of a same family the possibility of living together, not to grant them all the same nationality. That was a more cautious solution which might be useful in cases of mixed marriages.

22. He shared Mr. Lukashuk's views on article 10. The specific problem of residence arose in virtually all cases of State succession and it was therefore essential to protect and preserve the right of residence. Yet article 10, paragraph 3, related to the obligation for persons who had not opted for the nationality of the successor State to leave that State's territory, which negated the right of residence set forth in paragraphs 1 and 2 of that article, although it was precisely the concern for human rights which helped ensure growing recognition of that right. He was therefore in favour of deleting paragraph 3 and also thought that paragraph 2 should be recast to make it applicable to all cases of the loss or non-acquisition of nationality, even when voluntary.

23. As to article 11, the Commission must bear in mind the practical importance of such a provision for interpreting certain rules because, in the event of doubt, guaranteeing human rights should take precedence. The Commission might also consider the possibility of giving the article a more practical content, for example, by drawing on article 20 of the European Convention on Nationality, which introduced the principle of the equal treatment of nationals and non-nationals in respect of social and economic rights.

24. Lastly, he was in favour of retaining the principle of non-discrimination stated in article 12, but regretted that the list of criteria was rather short compared to those in other conventions, particularly the European Convention on Nationality. The Commission might discuss that matter.

25. Mr. THIAM said that it might not be necessary to focus on specific problems in the draft articles because the setting out of general principles sufficed to cover them. Thus, guarantees for human rights, non-discrimination and the prohibition of arbitrary decisions must necessarily

be included in the draft, unlike the unity of families, which came under private law and therefore had a different scope under the law of each State and was also a notion which did not relate only to the problem of nationality. Likewise, the notion of residence did not automatically have the same content in each State. Also, citing specific cases which could not be applied in a uniform manner entailed a risk of omission. The more the Commission went into detail, the more difficult it would be for it to solve the problems. He proposed therefore that articles 9 and 10 should be deleted and that articles 11, 12 and 13 (Prohibition of arbitrary decisions concerning nationality issues), which genuinely enunciated general principles relating to respect for human rights, should be retained.

26. Mr. MIKULKA (Special Rapporteur), replying to the questions that had been asked and referring to article 9, drew attention to the conclusions of the Working Group on State succession and its impact on the nationality of natural and legal persons,⁴ confirmed by the Commission, to make provision for such a principle in the draft articles. A number of delegations in the Sixth Committee had spoken out along the same lines and none had expressed opposition. Having acted accordingly, he was surprised to hear some members say that the article did not belong in the draft. The idea that that problem was not specific to the succession of States was contradicted by practice. It was rare for the question of the unity of families to be invoked before the courts in relation to a simple problem of nationality, whereas it was very often raised at the time of a State succession when the members of a family sometimes acquired different nationalities. The practical problems which arose might then require a special solution.

27. The argument that there was no such provision in the Venice Declaration and the European Convention on Nationality was hardly convincing because all treaties on the question of nationality, even if they did not go so far as to include an article on unity of families, showed a concern, through the inclusion of certain provisions, for maintaining that unity. The members of the Commission might refer to the many examples cited in the commentary to article 9.

28. He considered the variable nature of the concept of family to be irrelevant because, whether account was taken of the union or the division of a country at the time of succession of States, it was likely that the States concerned, being situated in the same part of the world, would have the same, or a similar, conception of the family.

29. As to the right of residence referred to in article 10, he was very surprised to hear that certain members considered paragraphs 1 and 2 to be unnecessary. With regard to paragraph 1, the example of refugees from the former Yugoslavia had nevertheless shown the true practical problem that arose when persons were forced by events linked to a State succession to leave their habitual residence. More generally, if the Commission adopted the premise on which Mr. Brownlie's proposal was based and which was that the nationality of the successor State flowed from the right of residence, the deletion of para-

graph 1 would, in most cases, eliminate any basis for linking the criterion of habitual residence with consequences from the point of view of nationality.

30. The principle stated in paragraph 2 corresponded to a similar provision contained in the European Convention on Nationality and, in the case of an *ex lege* change of nationality, he did not see what could possibly be wrong with saying that the persons concerned retained the right of residence. That provision constituted a step forward of sorts because positive international law had perhaps not yet really arrived at that point and, in his view, a declaration on the subject might help develop international law in that direction.

31. Criticism of article 10, paragraph 3, had been particularly strong, despite the fact that he had merely stated the current situation in international law, which recognized that a State was usually justified in inviting foreigners, and thus also persons who voluntarily acquired a foreign nationality, to leave its territory. In that context, a draft declaration, unlike a convention, could not lay down a rule contrary to international law and could thus only urge States to act in a reasonable manner from the point of view of the time limit or perhaps stipulate other conditions relating to human rights. Daily experience showed that free choice of place of residence was not a principle of positive law; a fortiori, and contrary to the opinion of some members of the Commission who spoke of the fundamental right of the individual, it is not a question of the rule of *jus cogens*.

32. He acknowledged that the wording of article 11 was vague and he was therefore astonished by certain proposals that all the other articles should be deleted and replaced by a sole article whose wording would be just as vague as that of article 11.

33. In respect of article 12, he referred to his misgivings and those of the Commission about the desirability of inserting a clause providing that the application of criteria for the purposes of increasing the number of persons entitled to acquire the nationality of the successor State should not be interpreted as discrimination. At the forty-eighth session, he had nevertheless attempted to draft a provision along those lines on the basis of the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*.⁵ After some discussion, the Commission had instructed him to delete that provision, and he had done so. At the current session, it was therefore up to the Commission to take a position on the contention of a number of members that treaties usually recognized the application of the criteria of ethnic, linguistic, religious or cultural identity to justify the right of option. As to the brevity of the list of criteria, he was unaware of any other relevant instrument which laid down a further criterion.

34. Articles 13 and 14 (Procedures relating to nationality issues) contained provisions on nationality which were not specific to State succession; hence, they were the only

⁴ *Ibid.*, footnote 5.

⁵ Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4. See also *International Law Reports* (Cambridge), vol. 79 (1989), p. 283.

ones which might perhaps be deleted, subject to reactions in the Sixth Committee.

35. Mr. ROSENSTOCK, referring to article 9, said that, in view of the nature of the obligation, any imprecision in the notion of family was not a problem because in the context in question, the concept of extended family might be applicable. Moreover, as pointed out by the Special Rapporteur, it was unlikely that succession would take place between two States which had totally different conceptions of the family. Given that that article was directly relevant in the framework of a State succession, it would be very regrettable for the Commission to decide to delete it. Article 9 was also of great practical interest in relation to article 10, paragraph 3.

36. Mr. KATEKA, thanking the Special Rapporteur for his work, said that, in respect of article 9, he shared the concerns that had been expressed about different conceptions of the family. In connection with article 10, he had been surprised to hear it said that the Commission was working to draft a declaration and not an instrument of another kind; as he understood it, that question had not yet been decided. On the substance, he endorsed the idea that international law allowed States to expel non-nationals and was of the opinion that it was up to the State concerned to decide what the reasonable time limit was in that connection. The European conventions referred to in the commentary were of great interest for the European continent, but the Commission must not necessarily consider itself bound to be guided by those instruments. Lastly, he was in favour either of deleting article 10, paragraph 3, or of reducing the entire article and combining articles 9 and 10 to form a single article.

37. The CHAIRMAN again read out paragraph 88 of the report of the Commission on the work of its forty-eighth session⁶ in order to avoid any ambiguity about the form to be taken by the instrument currently being drafted.

38. Mr. FERRARI BRAVO said that, in principle, he endorsed articles 9 to 14, but he thought that the Drafting Committee should review their sequence. Articles 11, 12 and 13 should probably come before articles 9 and 10, the two latter articles being specific applications of the general principles embodied in the three former articles. Article 9 was particularly important because the proximity of States and the speed of international communications meant that different civilizations were currently very close. The main drawback of article 10, was that it was too long and too detailed. It could be shortened into a single sentence that would say essentially that the succession of States had no effect on the right of residence of persons who had their habitual residence in the territory of the State concerned, unless exceptional circumstances necessitated a derogation from that principle. In view of the abuses to which the question of residence had given rise during recent successions of States, it was important to enunciate the principle and to make it the obligation of a State that wished to derogate from it to provide proof of exceptional circumstances.

39. Mr. HAFNER said that he saw article 9 as a useful reminder to States whose wording had been toned down enough to remove any doubts about the need to retain that provision. Article 10, paragraphs 1 and 2, were also useful, but paragraph 3 remained problematic. Although the right of the successor State to oblige persons who had made the "wrong choice" to leave its territory was provided for in some treaties signed in the period between the two World Wars, the development of human rights law and the task of developing international law which had been assigned to the Commission meant that it was not a good idea to refer to that practice. Mr. Ferrari Bravo's proposal could solve the problem as long as no mention was made of "exceptional circumstances". The article should deal solely with the right to nationality, leaving the question of exceptional circumstances to be dealt with in the context of the right to residence. A distinction must, moreover, be made between the fact that no one had the right to take up residence wherever he wished and the fact that a State would have the right to expel persons who were already in its territory and under its jurisdiction. In the second case, which was comparable to that of State succession, there was no discretionary right of a State.

40. As it stood, article 11 was constitutive in nature, whereas it should be declaratory. The starting point must be the principle that human rights were applicable not only to nationals of the State concerned, but also to any person under its jurisdiction. The wording of article 12 raised the issue of the relationship between the criteria it laid down (ethnic, linguistic, religious or cultural considerations) and the genuine link introduced in article 7, paragraph 2. There was no problem with article 13. Article 14 could become critical to the possibility of the full implementation of the rights provided for in the entire draft, if the subject was approached from the standpoint of human rights. As the Commission seemed to be tending towards an intergovernmental approach to the right to nationality, the significance of that article might be diminished, but the possibility could not be ruled out that States should actually have an obligation to provide the persons concerned with the administrative and judicial means of asserting the right to a particular nationality in accordance with the draft articles.

41. Mr. BROWNLIE said article 10, paragraph 1, was of major importance within the entire structure of the draft in that it guaranteed that the succession of States did not jeopardize the status of the persons concerned in relation to their habitual residence. Since article 10 dealt with human rights, it might be appropriate, for tactical reasons, to provide for that guarantee in a separate article, distinguishing it from the other aspects of article 10. The guarantee was, however, somewhat vague because it came under the heading "Right of residence", whereas it was intended to protect the status that was derived from habitual residence, and because it dealt with "events connected with the succession of States", whereas it would be better to speak of "events such as wars or other public emergencies or events involving personal duress to the persons concerned". If the paragraph, or new article, were reformulated in that way, the desired goal could be more easily achieved.

42. Mr. ECONOMIDES said that article 9 was acceptable, all the more so as the Special Rapporteur had drafted

⁶ See 2479th meeting, footnote 6.

it in fairly flexible terms. Concerning article 10, he considered paragraphs 1 and 2, on the right of residence, as not belonging in a draft devoted to the nationality of persons. The wording proposed by Mr. Ferrari Bravo might well constitute a solution. The major defect of article 10, paragraph 3, was its implication that the successor State had the right to expel persons who opted for the nationality of another State. As the year 2000 drew near, the Commission could not validate that practice or afford not to formulate a more humane rule. It would therefore be better to make article 10, paragraph 3, an article 8 *bis* (to follow article 8 on the right of option) and to use as a recommendation the wording of the provision 16 of the Venice Declaration, which read:

The exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein.

43. Article 11 was concerned with guaranteeing the rights and interests of persons affected by the succession of States, not with guaranteeing all the human rights of such persons. Perhaps that provision belonged in the preamble. In article 12, a distinction must first be made between the right to grant or withdraw nationality, an area in which discrimination must be prohibited, and the right of option, which, by its very nature, entailed discrimination, although positive discrimination, in favour of certain groups. Secondly, the concept of non-discrimination should be expanded by providing for complete equality between new nationals and former nationals. Article 13 did not give rise to problems other than those of a drafting nature. Article 14 was a fundamental provision which should be given greater weight by developing further the idea of an effective remedy currently being used in the human rights context.

44. Mr. SIMMA said he could not accept the statement that article 10, paragraph 3, went against the spirit and the letter of human rights. As the Special Rapporteur had pointed out, there were both logical and general policy reasons for taking account of the case covered by paragraph 3. If, after having been duly informed of the choices available to them and the ensuing consequences, individuals voluntarily renounced the nationality of the successor State, nothing in human rights law prohibited that State from requesting such individuals to leave its territory, as long as the modalities under which they left that territory were in conformity with human rights.

45. Mr. LUKASHUK pointed out that articles 11 and 12, which had been rightly described as too general, dealt with general ideas and principles. He therefore proposed that the Drafting Committee should be requested to consider the possibility of placing those articles immediately after article 1.

46. The CHAIRMAN said that the beginning of paragraph 2 and paragraph 3 went too far. Paragraph 2 should not be characterized as being "Without prejudice to the provisions of paragraph 3", which was too ambiguous and based on case law dating from the period between the two World Wars. By retaining that paragraph, the Commission would not be promoting the development of international law. The fact that the draft articles would take the form of

a declaration did not mean that that declaration must be confined solely to positive law.

47. Mr. Sreenivasa RAO said that articles 9 to 14 fitted well into the overall structure of the draft articles and were especially relevant because of their link to the right of option and their function of explaining how that right was to be applied. Article 9 was useful because it stated the general principle of the unity of families, while leaving it up to the States concerned to define what that meant. More restrictive wording would have given rise to problems in view of the differing approaches to the family and the evolution of those approaches as a result of economic change. Perhaps the Special Rapporteur could simply specify the limits implied by the words "unjustified demands" in paragraph (28) of the commentary to article 9.

48. Article 10, paragraph 1, should be retained because it established the important principle of the right of return for those who had been forced by war, an emergency situation, and the like, to leave a territory. Paragraph 2 could be recast in order better to reflect the distinction drawn by the Special Rapporteur in paragraph (19) of the commentary to article 10, should the Commission decide to retain that distinction. As other members of the Commission had pointed out, paragraph 3 contained material for the progressive development of international law. If properly worded, it could help to reconcile States with the idea of habitual residence. Retaining one's habitual residence was a legitimate demand and did not mean that a State was being forced to accept a new principle under which it would be obliged to take in foreigners against its will. However, it was not necessary to go as far as complete equality between new nationals and former nationals. If a minority had not been granted certain rights before succession, the succession would not necessarily change that state of affairs.

49. Lastly, articles 13 and 14 were in their proper place within the draft articles and were especially useful in explaining the procedures relating to the right of option.

50. Mr. MIKULKA (Special Rapporteur), providing the clarification requested by Mr. Sreenivasa Rao about the words "unjustified demands" in paragraph (28) of the commentary to article 9, said that they were intended to refer to a situation where all members of the same family claimed the nationality of a State on the grounds that the grandmother had opted for that nationality, even if they had acquired another nationality under the relevant legislation and nothing prevented them from residing in the State concerned, remaining there together, continuing to work there and, in a word, living there together under the same conditions as those prevailing before the succession of States. Preserving the unity of families meant preventing a change of nationality as a result of the succession of States from having any repercussions on family life.

51. Mr. ROSENSTOCK said that he would draw the attention of members of the Commission to the word "voluntary" in article 10, paragraph 3. That word meant not that the State could not allow a person, in the circumstances referred to, the choice of living in its territory, but that, if it did not wish to allow him that choice, it must act in a humane and reasonable manner. Paragraph 3 gave rise

to no problem and it did not seem either necessary or desirable to delete it, still less to include in the draft a provision requiring States not to have such a rule.

52. Mr. BROWNLIE said he wished to explain, for the information of Mr. Sreenivasa Rao, that his point was that article 10, paragraph 1, established an uneasy relationship between the right of residence—an intrinsic human right—and habitual residence—a concept which, though not involving human rights, was a fundamental element in the draft and should be retained. It should therefore form the subject of an independent provision, to avoid any confusion between the two elements.

53. Mr. RODRÍGUEZ CEDEÑO said that, in general, articles 9 to 14 embodied important norms and principles which had a place in the draft whether or not the articles were retained.

54. The concept of unity of families bore a direct relationship to the matter under discussion even though it could be the subject of different interpretations depending on social, cultural and even legal criteria, which it was for the States concerned to appraise. In that connection, the wording of article 9 proposed by the Special Rapporteur could be simplified if only the last part was retained, which provided that the States concerned should adopt all reasonable measures to allow the family to remain together or to be reunited.

55. Article 10 also provided for an important right and article 11 related to a fundamental question, but there was no need for a separate article: it would be better to move to the preamble the principles and norms to which it referred. Article 12 should be retained, for the reasons given by the Special Rapporteur in his commentary to the article. Lastly, article 13 dealt with the prohibition of arbitrary decisions concerning nationality issues, a matter which, by its very nature, fell within the competence of States and should not be made into a specific rule in a separate article. It would be better to refer to it in other provisions.

56. The CHAIRMAN, summing up the conclusions of the discussion on articles 9 to 14, said that many members had raised questions about the advisability of retaining separate articles on the various questions covered and had suggested that they should be combined in one or two provisions, others had questioned the justification for retaining a particular provision, especially article 11, in the body of the draft articles, and one member had questioned the place of articles 13 and 14. The Commission as a whole appeared to consider that the articles under consideration had a place in the draft and should be referred to the Drafting Committee with the request that it should simplify and circumscribe the wording and avoid unduly general provisions.

57. He said that, if he heard no objection, he would take it that the Commission agreed to refer articles 9 to 14 to the Drafting Committee.

It was so decided.

ARTICLES 15 AND 16

58. The CHAIRMAN invited the members of the Commission to comment on articles 15 and 16.

59. Mr. CRAWFORD suggested that article 15 (Obligation of States concerned to consult and negotiate), paragraph 2, should be deleted altogether. It added nothing, as it was based solely on a presumption, as reflected by the words "is deemed", namely, the presumption that a State, in a particular case, had fully complied with its international obligations relating to nationality in the event of a succession of States. The codification and progressive development of international law in the matter, however, called for appropriate norms, not for "deeming" provisions.

60. Article 16 (Other States), paragraph 2, was important and its deletion would give rise to fundamental questions in that State practice in the area existed and should be recognized.

61. The CHAIRMAN said that the words "is deemed" appeared in certain treaties.

62. Mr. PAMBOU-TCHIVOUNDA said that he shared Mr. Crawford's reservation about the relevance of article 15, paragraph 2. The Commission could not lay down the assumption that States would necessarily bring their internal law into line with international law, since nationality fell within the competence of States. Paragraph 1 of article 15 should be the subject of a single article and, in the general structure of the proposed draft, should come immediately after article 1. He reserved the right to revert to article 15 later and also to speak on article 16.

63. Mr. FERRARI BRAVO said that, in his view, article 15, paragraph 1, did not give rise to any major difficulty, although it could be improved by the Drafting Committee. Paragraph 2, on the other hand, established a substantive rule. If the future instrument took the form of a declaration, as contemplated by the Special Rapporteur, that rule should be referred to in the commentary and not in the body of the text itself, unless the General Assembly were to gain the impression that the Commission was trying to lay down substantive rules by way of a declaration.

64. Mr. MIKULKA (Special Rapporteur) said that he had no definite position on article 15, paragraph 2, which he had actually decided to include at the very last moment. He was, however, surprised to note that Mr. Pambou-Tchivounda currently apparently considered that questions of nationality were a matter for internal law when, at the beginning of the session, he had given the opposite impression.

65. Mr. Sreenivasa RAO said that he agreed with Mr. Crawford's views on article 15, paragraph 2, and all the more so as the instrument under consideration was supposed to be a declaration designed as a guide for States in their negotiations. It was important not to presume that the State refused to negotiate, as the reasons for such refusal could vary.

66. Mr. GALICKI said he too considered that article 15, paragraph 2, was entirely unnecessary. In the first place, paragraph 1 created a kind of obligation for States to consult and negotiate, whereas paragraph 2 related to the evaluation of the effects of such consultations and negotiations. Secondly, it would sometimes be difficult to determine the internal law that was consistent with the

articles under consideration. There was no body for evaluating the laws of States, as each one could say that it was following the future instrument. Paragraph 2 created more problems than it solved.

67. Mr. GOCO said he also considered that there was no need for article 15, paragraph 2, since it referred to a very hypothetical case. Paragraph 1 sufficed.

68. Mr. ELARABY, agreeing with Mr. Galicki and Mr. Goco, said that, if the problem referred to in article 15, paragraph 2, were to arise, it would be enough to refer to Chapter VI of the Charter of the United Nations (Pacific settlement of disputes).

69. Mr. SIMMA said that he also took the view that article 15, paragraph 2, could be deleted without compromising the general structure of the draft articles.

70. Mr. ECONOMIDES said that he likewise favoured the deletion of article 15, paragraph 2, for the reasons stated. Moreover, that paragraph gave the impression that States could, in that context, refuse to negotiate—something that he would dispute from the standpoint of the rules of international law.

71. Mr. MIKULKA (Special Rapporteur) said he would reiterate that he had no definite position on article 15, paragraph 2. There were reasons, as were explained in the commentary, for keeping the paragraph and there were reasons for deleting it. The intent behind the provision was, however, in no way to encourage States not to negotiate, but simply to provide that, in the event of failure of negotiations—as would be illustrated by the absence of any treaty—a State which had complied with international law, in other words, with the future instrument, would not be held responsible for the cases of statelessness that would arise.

72. Mr. LUKASHUK said that, like the Special Rapporteur, he considered that it would be a good idea not to take any hasty decision and to revert to the matter at the following meeting.

The meeting rose at 1.05 p.m.

2486th MEETING

Friday, 30 May 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

later: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner,

Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, 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) (*concluded*)

ARTICLES 15 AND 16 (*concluded*)

1. Mr. ECONOMIDES said the simple obligation for the States concerned to consult and negotiate, set out in article 15 (Obligation of States concerned to consult and negotiate), paragraph 1, was not sufficient in itself and needed to be supplemented by the relevant rules of international law. State succession was, after all, a question of international law and it must be made clear that the obligation to negotiate applied automatically to all matters falling within the scope of international law, including international disputes of a legal nature. It was essential to go further. In the Drafting Committee he had made a proposal along those lines in the context of article 3 (Legislation concerning nationality and other connected issues). Article 15, paragraph 1, should also say that the States concerned “shall settle”—it was an obligation, almost a *pactum de contrahendo*—questions of the nationality of individuals involved in a State succession, notably by agreement. In addition, the article should be placed at the beginning of the draft, for it was wrong to refer first to national legislation in a topic that was one of international law par excellence.

2. Mr. SIMMA said that he did not agree with Mr. Economides. He could not see anywhere an obligation on States to conclude agreements on nationality questions; there was only the duty to consult and negotiate as provided for in article 15. Provision 4 of the Venice Declaration² said that, in the event of State succession, the States involved “may”, by agreement, settle the question of nationality. Obviously, if two States managed to settle nationality questions relating to a succession of States by means of their national legislation, which was in conformity with international law, then they were under no further obligation.

3. Mr. BROWNLIE pointed out that the draft articles did not contain a standard dispute settlement clause because they were not intended to take the form of a multilateral convention. Article 15, paragraph 1, was certainly not designed to be a dispute settlement clause, for it

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

² See 2475th meeting, footnote 22.