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Summary record of the 2486th meeting

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

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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.

did not deal with disputes. Its focus was rather on structural difficulties which could probably not be classified as international disputes but needed to be resolved. Article 15, paragraph 1, should therefore be retained as it stood.

4. Mr. ECONOMIDES said he understood Mr. Simma's point about the Venice Declaration but thought that the Declaration did not do what it should do. Clearly, States could settle any matter by agreement if they wished, but the current draft ought to encourage States to make progress in the development of international law. It should therefore contain a provision requiring them to settle by agreement questions of the nationality of natural persons. He would prefer a strong provision using "shall", but could accept the more flexible "should". The current wording represented a regression rather than a progressive development of international law.

5. Mr. GOCO said that the positions of Mr. Economides and Mr. Simma were not mutually exclusive. It might be possible to resolve the difficulty by adding "and endeavour to settle the issues" at the end of paragraph 1.

6. The CHAIRMAN said that the paragraph was already stronger because of the phrase "under the obligation to consult".

7. Mr. GALICKI confirmed that he was opposed to the inclusion of article 15, paragraph 2. The reason for the difficulties with paragraph 1 might be that in the other conventions on State succession the obligation to consult and negotiate was confined solely to the problem of dispute settlement. In the draft articles, in contrast, the aim was to cover a wider range of issues. A similar difficulty had arisen earlier in connection with article 3, but article 3 was concerned with the creation of certain legal conditions governing nationality rather than with the *ex post facto* settlement of problems. The Commission should keep the two matters separate. Article 3 should contain a "weak" provision along the lines of provision 4 of the Venice Declaration and article 19 of the European Convention on Nationality³ offering alternative means of solving problems, for example by applying domestic law. Article 15, paragraph 1, could then be limited to the usual issues covered by dispute settlement clauses.

8. Article 16 (Other States) dealt with two quite different problems. Paragraph 1 repeated an established principle confirmed in several international treaties. Paragraph 2, however, formulated a presumption of certain practical effects regarding the nationality of the person concerned when the State concerned did not grant its nationality. Despite the increasing role of international law in the regulation of nationality questions, the Commission itself nonetheless admitted in the preamble to the draft articles that nationality was essentially governed by internal law. International law could not assume the powers of a sovereign State against its will, even if that State disregarded the draft articles. In short, the presumption was not acceptable because it placed limitations on the sovereign rights of States. Of course, he understood the purpose of the provision—to protect individuals against statelessness—but it went too far.

9. A technical problem arose with the use in article 16, paragraph 1, of "genuine link", a concept which was not and should not be defined. It had already been suggested, with respect to article 7 (The right of option), paragraph 2, for example, that something like "appropriate connection" should be used instead. The point could be settled by the Drafting Committee. He also experienced some difficulty with the term "other States", as opposed to "third States", the term used by the Special Rapporteur in the commentary to article 16, contained in the third report (A/CN.4/480 and Add.1). If there was no reason for the differing usage, the terminology should be made consistent.

10. Mr. MIKULKA (Special Rapporteur) said that he had clearly explained in the commentary why he had used "other States" in article 16: the reference was to "other States" vis-à-vis one single State concerned. Why exclude the other States concerned by the State succession? For example, where a dissolution created States A and B and State A granted its nationality in an abusive manner, there was no reason why only third States alone should be entitled to take action on the basis of the *Nottebohm* case.⁴ State B might in some circumstances have a greater need to do so.

11. Mr. SIMMA said he, too, did not regard article 15, paragraph 1, as a dispute settlement clause. There would be no difficulty with placing the principle set out in article 15 immediately after article 3. In the Drafting Committee the Special Rapporteur had, in fact, said that the principle had appeared earlier but had then been moved to the end of Part I (General principles concerning nationality in relation to the succession of States).

12. As to the concept of "general link" he disagreed with Mr. Galicki that there should be uniformity between article 7, paragraph 2, and article 16, paragraph 1. The use of the term in the former served a different purpose. The Drafting Committee currently intended to use "appropriate connection" in article 7, paragraph 2. That was a correct move because the aim of that article was to provide persons who would otherwise be stateless with a nationality, whereas article 16, paragraph 1, dealt with the question whether other States or third States—the actual term was not important—had to recognize an abusive grant of nationality.

13. Mr. CRAWFORD said he did not agree with Mr. Galicki that article 16, paragraph 2, created a presumption; it merely reserved a right of States in special circumstances. Mr. Galicki regarded that as inconsistent with the sovereign right of States to determine who its nationals were. But there was not just one sovereignty involved, and to give priority to the sovereignty of the wrongdoing State over that of other States was completely unacceptable. Of course, the State granting nationality was in a special position, but had no special priority vis-à-vis other States concerned. Compared with some of the situations which had arisen, *Nottebohm* was not a strong case, since his naturalization was voluntary and complied with the law of Liechtenstein; but ICJ had ruled that the issue did not concern Liechtenstein alone. In contrast, the Commission was dealing with abuse of rights or violations of international law, and it was quite improper to give priority to a

³ See 2477th meeting, footnote 6.

⁴ See 2475th meeting, footnote 6.

State acting contrary to international law. Article 16, paragraph 2, provided a minimum means of reaction by the international community against States which denaturalized persons on ethnic grounds, for example, in situations where they would become stateless.

14. Mr. DUGARD said that, in a historical context, article 16, paragraph 2, would have addressed precisely the policy of the apartheid Government in South Africa which had denationalized 9 million South African nationals and granted them Bantustan nationality. The international community had refused to recognize such nationality. It was important to include the provision contained in paragraph 2 as a warning to States which might be considering embarking on such a course.

Mr. Kabatsi took the Chair.

15. Mr. SIMMA recalled that, at an earlier meeting, Mr. Hafner had asked a question about the enforcement of the rules on nationality. One answer was that article 16, paragraph 1, provided a classic means of enforcement. He had currently changed his mind about paragraph 2 because it supplemented that classic sanction in a way which strengthened the concept of an individual's right to a nationality. It dealt not just with a matter to be settled between two sovereignties but constituted an important pillar in the architecture of the draft articles. The phrase "owing to the disregard by that State of the present draft articles", in paragraph 2, could cause a problem, for it might convey the impression that what was a soft-law declaration could lead to hard-law consequences. The difficulty might be overcome by using a formulation such as "owing to the disregard by that State of the principles of international law reconfirmed in the present draft articles".

16. Mr. GOCO, speaking on a point of order, said that the point regarding article 15, paragraph 1, raised by Mr. Economides, as to whether States must be required to settle questions of the nationality of individuals, had been left in the air and should be resolved.

17. The CHAIRMAN said his impression had been that most members took the view that article 15 merely created an obligation to negotiate and did not obligate States to reach any specific conclusions.

18. Mr. Sreenivasa RAO said that the difficulty could perhaps be avoided if members addressed both article 15 and article 16 in their general statements and confined themselves to each article individually in the "mini-debate". In any case, the point raised would constitute a conclusion, which could be more freely reflected in the drafting.

19. Mr. CRAWFORD, speaking on a point of order, said it was his understanding that the Commission had provisionally decided to proceed with the draft articles on the assumption that they would take the form of a resolution, not of a convention. That assumption ruled out the possibility of including a dispute settlement provision, as a resolution could not contain such a provision. Once the draft articles were concluded and the Commission returned to the question of the form they should take, the issue of whether to include a dispute settlement provision

would again be in order. For the moment, however, it was not.

20. Mr. BROWNLIE, reinforcing the point made by Mr. Crawford, said that the absence of any reference to "legal disputes" in paragraph 1 of article 15 was obviously deliberate. That paragraph referred instead to the broad category of situations where difficulties arose which did not necessarily constitute a legal dispute. Article 15, paragraph 1, was not a dispute settlement clause.

21. Mr. ECONOMIDES said the debate was being distorted by a misunderstanding. No one in the Commission had proposed that the text should contain a dispute settlement clause. The question simply did not arise.

22. Mr. PAMBOU-TCHIVOUNDA said that the provision in question referred to the obligation for States to consult and negotiate with a view to avoiding the detrimental effects that might result from the succession of States with respect to nationality. That was the heart of the matter. The question of dispute settlement did not arise in the context of article 15.

23. Mr. GALICKI said he had not claimed that article 15 dealt with settlement of disputes. He had merely criticized the fact that it used certain terms which, in analogous conventions, were used only with reference to the settlement of disputes. Of course, article 15 addressed a broader range of situations. What was missing from article 15, paragraph 1, was a reference, of the sort contained in the Venice Declaration and in the European Convention on Nationality, to international agreements as a modality for achieving its objectives.

24. Mr. GOCO said that the debate missed the point. Paragraph 1 of article 15 did not envisage any dispute settlement mechanism, but merely obliged States to consult and negotiate. His own proposal had been that, in addition, the States concerned should endeavour to settle those problems. Unlike Mr. Simma, he thus supported Mr. Economides' view.

25. The CHAIRMAN said that the whole purpose of the provision was, naturally, to secure the settlement of problems through the consultations and negotiations envisaged. However, it did not go so far as to impose an obligation on States to resolve those problems.

26. Mr. MIKULKA (Special Rapporteur) said that the discussion on Mr. Simma's comments appeared to have taken a wrong turning in the wake of Mr. Galicki's assertion that the other conventions on State succession established an obligation to negotiate only in relation to settlement of disputes. In point of fact, however, a number of other articles in the 1983 Vienna Convention referred to "agreements", presupposing that negotiations had already taken place between States. That was the message contained in article 15: it obliged States to negotiate. It did not go so far as to oblige them to conclude an agreement, because, as already explained by Mr. Simma and others, once States had realized in the course of negotiations that national legislation had resolved all the problems, there was no longer any need for an agreement. But paragraph 2 specified that if negotiations failed, States should at least unilaterally follow the draft articles, unless a treaty provided otherwise. Regardless of the wording used, the idea

of negotiation was implicit throughout the articles of the 1983 Vienna Convention.

27. Mr. PAMBOU-TCHIVOUNDA said he very much doubted that it was in the spirit of the recommendation made by the Working Group at the forty-eighth session⁵ to treat the obligation to negotiate set forth in article 15, paragraph 1, in the same way as that obligation was treated in the framework of the 1983 Vienna Convention, which established a norm in that regard and a derogation therefrom. Two very different questions were involved.

28. Mr. ELARABY said that, notwithstanding everything he had heard to the contrary at the current meeting, he was firmly of the view that an obligation to consult and negotiate was undoubtedly an aspect of dispute settlement.

29. Mr. Sreenivasa RAO said the basic point being stressed in article 15 was that when a succession of States occurred a broad spectrum of problems arose, particularly concerning the status and nationality of the individuals involved, and that in order to settle those problems amicably, prevent statelessness and protect the will of the persons concerned, States would be well advised to engage in consultations. However, States would differ as to the modalities for resolving those problems; consequently, negotiations would ensue. Whether, at that stage, a "dispute" could be said to have arisen between them was a moot point. While the Special Rapporteur's basic intention must be acknowledged, a more suitable wording would have to be found in the Drafting Committee, for it was clear that, in spite of the clear guidance provided by the Working Group, the drafting of paragraph 2 of article 15 fell short of its intentions.

30. The purpose of consultations and negotiations was twofold: to conclude agreements encompassing solutions to a broad spectrum of problems; and to prevent statelessness and back up the will of the persons concerned. Agreements that suppressed the will of the persons concerned or created statelessness would not achieve the purpose of the draft articles. States must thus be guided towards resolving their differences (rather than their "disputes") with due regard shown to those priority objectives. That point must in some way be built into the article. Guidelines for States could also be incorporated in the commentary.

31. As to paragraph 2, the view had been expressed that it gave the wrong impression by seeming to impose a sanction. He had no problem with the basic intention underlying the paragraph, but the form of language used was too strong, and the presumption enshrined therein was too pungently expressed. It would be remembered that an analogous situation had arisen in the negotiations on the law of the sea, where there had been a conflict between the "median line" and "equity" principles. In view of the technical and substantive problems to which it gave rise, he was inclined to support the proposal to delete paragraph 2, if consensus could be achieved by so doing. The basic purpose of the paragraph could be incorporated in paragraph 1 or elsewhere, in a suitable wording that elaborated on the objectives of the negotiations. There

again, other problems could be resolved in the commentary.

32. As for article 16, a "genuine link" was the benchmark for granting nationality under general international law, whereas in article 7, paragraph 2, the concept arose in the context of State succession and the prevention of statelessness. How those two situations could be reconciled was a matter the Drafting Committee would have to consider: perhaps, pace Mr. Simma, the problem could be solved by means of a cross-reference. Initially, he had thought he was in a position to propose a clear solution to the problem. Having listened to the debate, he was less clear about the issues himself.

33. Paragraph 2 of article 16 gave rise to even more complex arguments, and some members proposed that it should be deleted. He would support deletion if consensus could be achieved thereby. Failing that, the paragraph could be redrafted—an exercise which, however, was likely to prove very complicated.

34. Mr. BROWNLIE, responding to the comments by Mr. Sreenivasa Rao, said he had become somewhat shaken in his faith that article 15, paragraph 1, had a clear purpose. He was beginning to worry that it tried to do two jobs at once and that its clarity suffered in consequence. Initially, he had supposed it to be an attempt to cope with the broad range of problems that might arise when States dealt with one another in the absence of any legal dispute but in circumstances in which there were difficulties to be resolved—not least, so as to avoid disregard for the fate of the individuals involved. Clearly, there was no dispute settlement clause as such in the draft articles. Yet, as Mr. Elaraby had pointed out, in some sense article 15, paragraph 1, was a dispute settlement clause. It involved an obligation to negotiate—a form of settlement. Again, although it avoided the terminology of legal disputes or legal issues, the range of issues involved could undoubtedly include legal issues. Consequently, albeit perhaps only in a residual manner, it had points in common with a classic dispute settlement clause. In the world of dispute settlement, use was made of the expressions "legal disputes", "legal issues" and "legal controversies". In the current instance, however, the language used was deliberately fluid and general, precisely to encourage States to settle problems even if they could not be formulated as legal disputes.

35. The difficulty with paragraph 2 was that—leaving aside its internal problems, such as the awkward use of the presumption—it rather confirmed the view that paragraph 1 was indeed heavily concerned with legal disputes. Paragraph 1 was partly a *sub rosa* dispute settlement clause, although intended to deal with structural problems affecting the fate of individuals which could not properly be classified as legal disputes between the States concerned.

36. Mr. SIMMA said that, although he largely agreed with Mr. Brownlie's comments, he was still in favour of retaining article 15, paragraph 1, in view of the fact that it embodied an important principle.

37. Mr. ROSENSTOCK said he had no problem with article 15, paragraph 1, which, despite appearances, was not a dispute settlement clause, but that he had some ques-

⁵ See 2475th meeting, footnote 5.

tions with regard to paragraph 2 of the article. Paragraph 1 should be perceived largely as an exchange-of-information requirement, and it did not presuppose the existence of a dispute.

38. His concern regarding paragraph 2 was whether, if one of the States concerned did not refuse to negotiate, that paragraph was still valid. Was the *a contrario* implication of the phrase “if one of the States concerned refuses to negotiate” a legitimate area of concern? The rest of the paragraph was clearly valid, whether or not a State had refused to negotiate—unless paragraph 1 was in fact, in some sense, a dispute settlement provision. He would welcome some clarification of that point by the Special Rapporteur.

39. Mr. MIKULKA (Special Rapporteur), referring to article 15, paragraph 1, said that, in his view, the rule was perfectly clear. States were under an obligation to consult and, if necessary, proceed to negotiate. They must first consult to ascertain whether there were populations which might be affected, for example on the territory transferred and then to find out what the legislators’ intentions were. If the legislators were in agreement from the outset to apply the same rules, why must States be required to conclude an agreement? If successor States A and B consulted on legislative texts and decided that they were virtually identical or overlapped and respected the possibility of persons to choose, why say that that was not sufficient and require the conclusion of an agreement? Surely, if the States consulted and established that the question could be resolved without a formal agreement, that was enough. Even the Venice Declaration said less, because it provided that States might conclude an agreement but not that they must consult or negotiate. Article 15, paragraph 1, required States to consult and, if they saw that there were questions to be resolved, to negotiate. Solutions might be by way of internal law or an international treaty.

40. Article 15, paragraph 2 should be understood as creating a link between Part I and Part II (Principles applicable in specific situations of succession of States). If it was deleted, how could Part II be interpreted? Something would be missing. It would then be necessary to instruct the Drafting Committee to specify what the link between a treaty and the articles was. He asked members to imagine that there was no paragraph 2 and that States concluded an agreement which was fully consistent with Part I, but which chose criteria other than those set out in Part II. If it was simply found that the behaviour of States should be in conformity with those articles, did the Commission mean to say that the agreement between the States was not valid and contradicted international law? International law could still be changed, unless *jus cogens* norms were involved, but the Commission was not in the process of formulating *jus cogens*. Consideration must therefore be given to how to make it clear that Part II was purely residual. In other words, it was telling States that, if they embarked upon negotiations, but did not know where to start, they could take the provisions of Part II as a basis, and that if they found a better solution for their particular case, it was assumed that they would adhere to the principles of Part I on the prevention of statelessness, non-discrimination, respect for the person’s will in certain situations, and so on. As far as specific criteria were con-

cerned, States were of course free to reach other conclusions. If, however, there was no agreement and negotiations aborted, did the Commission mean to say to those States that everything contained in Part II was merely for use during negotiations but, where negotiations failed, it was no longer of any value? Or did the Commission want to tell them that, even if negotiations were unsuccessful, it afforded States at least a guarantee, namely, States which did adhere to the rules set out in Part II had an assurance that no one could accuse them that their legislation was improper or excessive and that their granting of nationality exceeded the genuine link. No one would be able to assert that those States had acted against the will of the persons concerned, because Part II included provisions on situations where the will of the persons concerned should be respected.

41. He was open to suggestions, but it must be clearly indicated somewhere in Part I that Part II was residual in character, that States could of course conclude an agreement which provided otherwise and that, in the absence of an agreement, they should as a minimum, act in conformity with the content of Part II. That was why paragraph 2 was useful. It might not be absolutely essential, but the Commission must find a way to tell States how it wanted them to proceed with the principle behind Part II.

42. Mr. ECONOMIDES said he must correct the mistaken impression that he had suggested that an international treaty had to be concluded at all costs. What he had meant was that States must deal with the question of the nationality of natural persons and find solutions to the problems in question. Solutions could be reached through international agreement—which was the most common way—or otherwise. States might find that their internal legislation was fully consistent and that an international agreement was unnecessary. In any case, it should be expected that States must themselves deal with those questions and find appropriate solutions.

43. Paragraph 2 was unacceptable and even dangerous. If it was really necessary to have several elements in connection with Part II, they must be found by using an approach other than the one employed in article 15, paragraph 2, which contained the seed of a perpetual conflict. Who would decide whether a State’s legislation was in conformity with the draft? Each State would pass judgement on the other, something that would violate the fundamental principle of equality between States. He agreed with Mr. Galicki and was categorically opposed to paragraph 2.

44. Mr. PAMBOU-TCHIVOUNDA pointed out that the purpose of the obligation to negotiate was not to conclude an international agreement, but to get the States concerned, as the Special Rapporteur had rightly said, to ascertain that there was a convergence of views in their legislation and that there was at least agreement on ways to settle the question: that was already one of the objectives of the obligation to negotiate, which served as a safety valve for the populations concerned by State succession. At no point was it stipulated that States which had embarked upon a process of mutual consultation must reach an agreement. Reassuring the Special Rapporteur that there was no contradiction with what Mr. Economides and Mr. Sreenivasa Rao had said, he fully endorsed

the latter's position on article 15, paragraphs 1 and 2, which tied in with the formal opposition voiced by Mr. Economides.

45. Mr. GOCO said that paragraph 1 did not contemplate dispute settlement. Parties were merely obligated to identify any detrimental effects of the State succession with regard to the nationality of individuals, as well as other related issues concerning their status, and to seek solutions to those problems. The difficulty had arisen because Mr. Economides had raised the point that parties might go as far as to try to work out a settlement. If the word "settlement" was problematical, perhaps paragraph 1 could be redrafted to say "... to seek a solution to those problems through negotiation and to endeavour to work out their differences".

46. Mr. LUKASHUK said that paragraphs 1 and 2 were both well-founded. Two provisions were involved, the first being the general principle that States were obligated to consult. It was difficult to see how anyone could object to that. The second provision encouraged States to bring their internal legislation into line with the provisions of the draft. Some members had asked who would determine whether or not internal legislation was consistent with the draft. Were they able to cite any other rule of international law in respect of which the same sort of question could not be posed? He supported the arguments very convincingly adduced by the Special Rapporteur and Mr. Rosenstock for retaining both provisions.

47. Mr. Sreenivasa RAO said the problem was that, if the Commission decided to delete article 15, how did it intend to save the substance and make it clear to States that there must be a requirement to draft internal legislation in conformity with the principles contained in Part II? That question could be readily answered by referring to article 3. Article 3 already provided guidance to States on legislating and, if such legislation was drafted in conformity with the principles contained in the draft articles, it would achieve its purpose. Article 15, paragraph 1, would stipulate that States must consult with a view to identifying problems arising out of State succession and arriving at solutions to the extent possible. Failing a solution, the requirement existed to provide for appropriate legislation under internal law in accordance with article 3. Accordingly, any State with such legislation would benefit *ipso facto* from the presumption that, as long as the basic principles in the draft articles, and especially those in Part II were generally accepted, there should be less difficulty.

48. Mr. SIMMA asked whether the Special Rapporteur had any views on Mr. Rosenstock's concern as to the undesirability of an *a contrario* argument.

49. Mr. MIKULKA (Special Rapporteur) said that he had no objection to Mr. Rosenstock's proposal to delete the first words of article 15, paragraph 2, and to retain the rest of the provision, which addressed an aspect not covered entirely in article 3.

50. Mr. ELARABY, referring to Mr. Rosenstock's comment that the obligation to which reference was made in paragraph 1 concerned the exchange of information, proposed that the words "to exchange information and" should be inserted before "to consult", so as to make it clear what was meant by that obligation.

51. Mr. ADDO said that paragraph 1 required consultations to prevent, by mutual agreement, any harmful effects of the State succession with respect to nationality. He did not see how there could be any objection to that. He was in favour of retaining paragraph 1 as it stood and endorsed Mr. Rosenstock's comment on the exchange of information.

52. Mr. HAFNER said that he had no problem with the objective of article 15 and shared Mr. Brownlie's view that the article served a dual purpose. It was a consequence of article 1 and provided that the States concerned were under an obligation to consult in order to see whether there were any detrimental effects of the succession. Consequently, they must consult in any case. A provision on devices to settle difficulties might then come as a next step, for if there were any detrimental effects owing to disparities in legislation, States should try to settle the matter through negotiations.

53. The Commission should not exclude other means. It was not necessary to speak explicitly of reaching an agreement, but such a possibility should not be ruled out either. Again, other solutions which did not require negotiation were conceivable and could also help settle problems. It might be useful, for example, to add the words "or by other lawful means" at the end of the paragraph.

54. The commentary said that the effects should be detrimental to the individual. Might it not be useful to have an example of such effects in order to give an indication of what was meant, other than the wish to prevent statelessness? As to Mr. Sreenivasa Rao's example concerning the solution reached on the delimitation of the continental shelf and the reference to the "equity group" and the "median-line" group, he was not convinced that the situation was comparable in all respects.

55. Article 15, paragraph 2, was redundant. It would only serve a purpose in cases where the obligation to consult was considered a prerequisite for enacting internal legislation. States were already under an obligation under the terms of article 3. It was, however, necessary to retain the last part of paragraph 2, namely the reference to treaties, for States might come to an agreement which differed from the rules set out in the draft.

56. He had anticipated Mr. Simma's comment that article 16 should be regarded as an answer to his question about how the instrument was to be enforced. Yet article 16 raised a number of problems. Paragraph 1 was likely to touch upon the question of State responsibility in the large sense and the act of State doctrine, of which national acts certainly constituted an example. The question was whether one State could pass judgement on the acts of another. Various solutions had been found in practice, and the point was whether the paragraph was in conformity with the general rules. But surely the possible impact of those rules embodied in paragraph 1 in the field of State responsibility was more important since, in its actual wording, it laid down the legal consequences of non-compliance with the draft articles. It was generally held that, if a State acted contrary to its obligations, it committed a delict. There was, however, one major difference: article 16, paragraph 1, allowed for non-recognition of acts which constituted delicts in international law, a

possibility not found in the draft articles on State responsibility,⁶ where non-recognition of illegal acts was allowed only in cases of crimes, although, admittedly, that had not yet gained widespread acceptance. Article 16, paragraph 1, thus departed from the general rule on State responsibility. He wondered whether the Commission intended to create what ICJ called a self-contained regime. In other words, should article 16 be understood as a sanction for acts of non-compliance with the draft articles? In the literature and in past decisions, the rule—which was currently enshrined in article 16, paragraph 1—had been more or less firmly established that, if a State granted nationality contrary to international law, such nationality need not be recognized by other States. But it was important to be clear that that rule departed from the general rules on State responsibility.

57. Apart from those basic principles and ideas, there were a number of problems with the wording of the paragraph. Reference had already been made to the question of a genuine link, and he agreed fully with those who had pointed out that article 16 differed from article 7, paragraph 2, in that regard. Nevertheless, the draft articles contained no general rule limiting the granting of nationality to the existence of a genuine link. It could be inferred that the whole of the draft was only an elaboration of the question of such a link, which must be interpreted in the context of the draft and had no independent meaning. Again, paragraph 1 seemed to establish primary and secondary rules. The primary rule would then be that States must not grant nationality without a genuine link, and the secondary rule would be the reaction to non-compliance with the primary rule. He would be grateful for the Special Rapporteur's comments on how the primary rule was to be understood in that regard.

58. As to the period of applicability of the principle set out in paragraph 1, the current formulation indicated only the starting point of the obligation. Was it deemed to apply for an unlimited period after succession, since the provision simply stated "following the succession of States"? Furthermore, did article 16, paragraph 1, relate only to the attribution of nationality by a successor State or did it also cover the retention of the nationality of the predecessor State, contrary to the draft articles? To cite an example, article 24 (Withdrawal of the nationality of the predecessor State), paragraph 2, set forth the obligation of the predecessor State to withdraw its nationality. Was the principle in article 16, paragraph 1, also valid for cases in which the predecessor State did not withdraw nationality, contrary to article 24?

59. He had serious doubts that article 16, paragraph 2, would find broad acceptance in the international community and the Commission was duty-bound to take that consideration into account.

60. Lastly, on a practical point, there was a presumption that nationality was granted by another State and then by the national State. Who issued the passports for that purpose?

⁶ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

61. Mr. MIKULKA (Special Rapporteur), referring first to a comment made by Mr. Elaraby, said that he agreed in principle with Mr. Rosenstock's interpretation. In large measure the obligation to consult involved an obligation to exchange information whereby States would inform each other of their intentions in regard, for instance, to national legislation. The obligation to consult could also broaden into an obligation to seek a solution through negotiation, as was apparent from the last phrase of paragraph 1 of article 15. It was, of course, implicitly understood that, wherever possible, States would arrive at agreement but, if that was not possible, they were presumed at least to follow the requirements laid down in the article. At all events, there was certainly no case of *pactum de contrahendo*. On the whole, it seemed to him that a consensus on paragraph 1 of article 15 was emerging in the Commission.

62. He had been asked to give examples of detrimental effects. The prime example, of course, was statelessness, which could have such effects for both the persons and the States concerned. Another example was that of the effects on mixed nationality marriages. From the moment of the dissolution or separation of a State two regimes governing nationality could subsist within the same family, with all the attendant difficulties in terms of visas and work permits for some of its members. There was thus a whole set of problems which, while going beyond the question of nationality, was nonetheless directly related to it. The point could perhaps be elaborated in the commentary.

63. The "genuine link" concept certainly had a place in article 16, paragraph 1 of which set forth the principle recognized by ICJ in the *Nottebohm* case. So far as paragraph 2 of the article was concerned, he presumed that it more or less satisfied the genuine link requirement and trusted that it would not be rejected by States. If the Commission felt that any exercise in which it was engaged would not be acceptable to States, however, it should say so and the provision in question should be deleted. Personally, he believed that the "presumption" in paragraph 2 would be accepted by States because they had acted in a similar fashion on a number of occasions. In that connection, he would again remind the Commission of the case of the German Jews who had been denationalized after the Second World War under decrees enacted by the Allied Governments and who had been regarded as being of German nationality for the purposes of their treatment by third States.⁷

64. Paragraph 2 of article 16 did not go so far as to impose any requirement that stateless persons should be given passports. The citizens of the former Union of Soviet Socialist Republics (USSR) and the former Czechoslovakia had travelled all over the world for at least two or three years with Soviet or Czech passports without difficulty. In other words, the nationals of the predecessor State had been treated as though they already had the nationality of one or other of the successor States, even if that was not apparent from their papers.

65. The question of time limits was somewhat academic because the obligation in fact existed until the problem

⁷ See 2478th meeting, footnote 6.

had been resolved. In other words, as long as a portion of the population remained stateless, every effort would be made to find a solution to that problem until it was resolved. To that extent, therefore, there could be no time limit. Indeed, if such a limit were to be established, it would divest the draft of its meaning, since the aim was to suggest that the problem was so urgent that it could not be suspended in time.

66. Mr. CRAWFORD said it seemed to him that Mr. Hafner had confused the issue of State responsibility with the quite different issue of opposability of the action of the particular State in respect of nationality. It was true that there were obligations of non-recognition arising from State crimes but there might be obligations of non-recognition in other situations as well. Article 16, paragraph 2, was, however, concerned with a different question in that it recognized that States were not obliged to recognize the legal effects of the unlawful conduct of a State in failing in some respect under the draft articles. The analogy with State responsibility was therefore beside the point.

67. It had rightly been said that paragraph 2 of article 16 could raise questions of acceptability and he agreed that it should be explained that States needed such a power in some situations, including situations of great importance to a majority of States, and should not preclude themselves from using it. In any event, it was not the Commission's function to anticipate adverse verdicts from States in respect of provisions it regarded as necessary, and he would argue that paragraph 2 was necessary.

68. On the question of passports, no third States had issued passports to the persons affected by the Bantustan policy. Nonetheless, those persons had been treated as continuing to be South African. An analogous situation had obtained in some of the cases of denaturalization in Germany and Eastern Europe in the context of the anti-Jewish decrees.

69. The problem of time limits applied with respect to all rules of international law and there was no reason to treat the current situation any differently from the way in which other situations were treated.

70. He was a little concerned about the reference in article 16, paragraph 1, to *de facto* statelessness which seemed to raise a distinction between *de facto* and *de jure* status that might be problematic. He would prefer it, therefore, if the last part of the paragraph could be amended to read: "and this would result in treating them as stateless", or words to that effect.

71. Mr. Sreenivasa RAO, responding to Mr. Hafner's remarks, said that, in referring to the equity group and the median-line group, he had not been trying to draw any strict analogy. Possibly, however, it could be suggested that, in the absence of agreement, any national legislation in conformity with the general principles of the draft declaration could be deemed valid for application in the mutual relationships between States.

72. The problems relating to article 16, and specifically the genuine link concept and the obligation of States to recognize or not to recognize the nationality of certain

persons, could perhaps be resolved if a different approach to the problem could be found.

73. Mr. SIMMA said that, as he understood it, Mr. Hafner had not been drawing any analogy but rather regarded the problem in article 16 as one of State responsibility. If that understanding was correct, he strongly disagreed with it. Article 16, in his view, fell entirely within the ambit of primary rules and if he had used the words "sanction" and "enforcing" he had done so colloquially and not to intimate any move into the realm of secondary rules on State responsibility. The issue was not one of a self-contained regime in the sense of a separate chapter within the secondary rules as such, but rather of a self-contained regime in the sense of a specific primary rule pertaining to State behaviour. To his mind, there was nothing strange about that.

74. Mr. ECONOMIDES said that he wished to clarify an earlier point he had made about *pactum de contrahendo*. His view was that States concerned had an obligation to settle a question of nationality by treaty or by any other means. If they did not do so by any other means, then they must do so by treaty.

75. Paragraph 1 of article 16 typified the kind of provision that, in his opinion, was to be avoided in an international instrument. Nationality was, of course, a matter for internal law, albeit within the limits imposed by international law. Moreover, the paramount principle of equality between States had to be borne in mind. Accordingly, he did not see how one State, acting unilaterally, could judge another, condemn it and immediately impose sanctions, by not recognizing the nationality given to certain persons. Such a provision could only pave the way for pressure tactics or even disputes, which would be undesirable. If the Commission really wanted to keep the provision, then it would also have to incorporate provisions on the settlement of disputes that would arise out of the interpretation and application of the instrument and even a provision for the mandatory intervention, if need be, of ICJ. For all those reasons, paragraph 1 of article 16 should be deleted.

76. He better understood the idea underlying article 16, paragraph 2, but thought that the provision had the same defects as paragraph 1 and that it would therefore be inapplicable in practice.

77. Mr. DUGARD said he was surprised to hear the Special Rapporteur state that article 16, paragraph 2, contained a presumption, since both paragraphs of the article restated primary rules. The only problem was that the words "are not precluded from treating", in paragraph 2, were perhaps a little weak. He suggested that they should be replaced by the words "shall treat" to make it quite clear that a primary rule was involved.

78. Mr. MIKULKA (Special Rapporteur) said that in his own mind he had placed the word "presumption" between inverted commas and indeed, at the time of speaking, had so indicated by the appropriate gesture.

79. Mr. PAMBOU-TCHIVOUNDA, referring first to paragraph 1 of article 16, said that there was considerable misunderstanding about the validity of nationality, on the

one hand, and the international opposability of nationality, on the other. As far as the question of validity was concerned, a State attributed its nationality, by law, to whomsoever requested it, and the conditions could not be fixed in advance. That being so, how could a third State be expected to have control over the conditions in which the nationality of another State was attributed? International opposability, on the other hand, and more specifically as it applied to the criterion of genuine link, was an issue that arose only in relationships or disputes between two or more States. In the context of opposability, the scope of the genuine link requirement should perhaps therefore not be exaggerated. The words in paragraph 1 “other States do not have the obligation to treat persons as if they were nationals of the said State” raised the question of the possibility of interference of third States in the internal affairs of another State or, even, of a violation of the principle of the sovereign equality of States.

80. The construction of paragraph 1 of the article was good, but the whole effect was destroyed by the last phrase “unless this would result in treating those persons as if they were de facto stateless” because once persons had acquired the nationality of a State the question of genuine link mattered little. What did matter was the State that granted nationality and was in a position to specify on what conditions it did so. Care should be taken not to strip those in search of a new nationality from the security they currently enjoyed. Above all, third States should not be vested with the power to destroy what another State could do on behalf of “victims”.

81. He was struck by one passage in particular in paragraph 2, which read: “owing to the disregard by that State of the present draft articles”. But was the Commission drafting recommendations that States were free to apply or not, or was it elaborating a convention that would be subject to acceptance by States? The phrase “are not precluded from treating such persons as if they were nationals” also raised a question in his mind. Since when was a State prepared to treat as nationals of another State persons who could not prove they were in fact nationals of that State? The Commission should be very clear as to what it was elaborating and how it proposed to proceed.

82. The CHAIRMAN, noting that the Commission had concluded its debate on Part I of the draft articles on nationality in relation to the succession of States, said that, if he heard no objection, he would take it that the Commission wished to refer articles 15 and 16 to the Drafting Committee.

It was so agreed.

The meeting rose at 1.15 p.m.

2487th MEETING

Tuesday, 3 June 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478,¹ A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPporteur

1. The CHAIRMAN invited the Commission to begin its consideration of the topic “Reservations to treaties”, on the basis of the Special Rapporteur’s second report (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) reminded the Commission that he had introduced his second report at its forty-eighth session together with a draft resolution,² which, owing to lack of time, the Commission had been unable to examine in detail; it had deferred the debate on both until the current session.³ Since the Commission’s composition had just undergone a significant change, however, he proposed, for information purposes, to make an overall presentation of the topic—recalling the broad lines of the first report⁴, the discussion to which it had given rise and the decisions taken by both the Commission and the Sixth Committee—and of chapter I of the second report. He would, however, defer the introduction of chapter II to later in the session. The members of the Commission had the right to react, of course, should they deem it useful, though it was to be hoped that the decisions already taken would not be called into question at the current stage.

3. As he had explained when introducing his first report, the topic of reservations to treaties was far from being *terra incognita* in international law: there was a wealth of doctrine in the matter and the Commission itself had considered the question on a number of occasions, taking a very definite stand which had had a major influence on

¹ See *Yearbook . . . 1996*, vol. II (Part One).

² See *Yearbook . . . 1996*, vol. II (Part Two), para. 136 and footnote 238.

³ *Ibid.*, para. 137.

⁴ *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/470.