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Summary record of the 2488th meeting

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

Extract from the Yearbook of the International Law Commission:-
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results, since each of the schools had its own way of looking at the problem.

40. Replying to the question asked by Mr. Dugard, he confirmed that the consideration of the proposed draft resolution would be one of the main objectives of discussion of the topic at the current session.

41. He was opposed to the exclusion of interpretative declarations from the study and believed, rather, that the problem must be looked at in greater depth, even if it was obvious that interpretative declarations were not reservations. He therefore intended to consider the legal regime for such declarations in the context of part II of the provisional general outline of the study.

42. As to whether 1999 was still a valid date for the completion of work on the topic, he confirmed that he intended to meet that deadline as long as he was able to cover parts II, III and IV of the provisional general outline of the study at the fiftieth session of the Commission. In reply to the question asked by Mr. Simma, he explained that he had always intended to submit parts II and III of the outline in a single report, but that the idea of devoting a separate report to part IV of the outline was based on considerations relating to the Commission's working methods and was intended to prevent the Commission from having to consider a very voluminous report all at once.

43. Referring back to the comment made by Mr. Sreenivasa Rao, he said he was convinced that the extensive background analyses that he was trying to carry out would enable the Commission to move forward more rapidly and be more consistent in its approach to the topic. He hoped that the discussion on chapter II of the second report would confirm that viewpoint.

The meeting rose at 11.55 a.m.

2488th MEETING

Thursday, 5 June 1997, at 10 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, 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. Rodríguez 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*)*

1. The CHAIRMAN announced that, since the Drafting Committee was progressing faster than expected in its work on the draft articles on nationality in relation to the succession of States, it had been decided to give priority to the consideration in plenary of the entire text, with a view to adoption on first reading before the end of the session. That decision would have no effect on work on the topic of reservations to treaties, which would not be neglected.

2. He invited the Commission to commence its consideration of Part II of the draft articles.

PART II (Principles applicable in specific situations of succession of States)

3. Mr. MIKULKA (Special Rapporteur), introducing Part II, said it comprised articles 17 to 25, setting out principles applicable in specific situations of succession of States, in contrast to the articles in Part I (General principles concerning nationality in relation to the succession of States), which applied generally to all cases of State succession. The specific cases envisaged were: transfer of part of the territory (sect. 1, art. 17); unification of States (sect. 2, art. 18); dissolution of a State (sect. 3, arts. 19 to 21); and separation of part of the territory (sect. 4, arts. 22 to 25). Only sections 3 and 4 incorporated articles dealing with the scope of application of those sections. That was purely for editorial reasons: the articles served as *chapeaux*, obviating the need for repetition of phrases and at the same time defining the context in which the terms "predecessor State" and "successor State" were used.

4. In most cases of States succession, the States concerned should negotiate in order to settle any problems that might arise, negotiations that would normally culminate in the conclusion of a treaty. In that regard, it should be emphasized that the principles set out in Part II were residual in character. States would not be bound to fully apply the principles, which would simply aid them in their negotiations, but in the event of no agreement being

* Resumed from the 2486th meeting.

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

reached, the principles were considered as a minimum standard to be respected.

5. The specific cases of State succession envisaged in Part II were based on the 1983 Vienna Convention. The only type that was missing was the case of newly independent States, for reasons already explained during his introduction of the report as a whole (2475th meeting).

6. Article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) was likewise based on extensive State practice and set out a very simple rule: when part of a territory was transferred by one State to another State, the successor State must grant its nationality to the persons concerned who had their habitual residence in the transferred territory and the predecessor State must withdraw its nationality, unless the persons concerned indicated otherwise by exercise of the right of option which all such persons must be granted. Accordingly, the principle was that, in cases of transfer of part of the territory, the persons concerned must have the right of option. Only as a residual rule was it presumed that, if the persons concerned did not avail themselves of that right, they acquired the nationality of the successor State and lost that of the predecessor State. That residual rule was in accordance with the general principle proposed by Mr. Brownlie (2476th meeting), namely that habitual residents should acquire the nationality of the successor State. However, that principle as proposed by Mr. Brownlie was based on the presumption that the rule operated from the very outset. Many cases could be cited, and were cited in the commentary to article 17, contained in the third report (A/CN.4/480 and Add.1), in which States had agreed that the principle operated from the time the succession of States took place. Yet in other cases, also to be found in the actual practice of States, States had decided to allow for an initial period during which the right of option could be exercised, and only upon expiry of that period did the presumption of automatic acquisition of nationality apply to persons who had not availed themselves of that right. For example, paragraph (5) of the commentary to article 17 referred to the 1848 Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America² and cited article VIII, which indicated that acquisition of the nationality of the successor State was deferred until the end of a period reserved for the exercise of the right of option.

7. Article 17 gave no indication about the timing for the acquisition of the nationality of the successor State but simply emphasized the right of option and set out a rule that was well grounded in practice: it was the nationality of the successor State that was granted to the persons concerned, unless they decided otherwise through the exercise of their right of option.

8. The CHAIRMAN, speaking as a member of the Commission, and referring to Part I as a whole, said one could consider, as did the Special Rapporteur, that the decolonization process was almost completed. Yet during

the discussion of Part I of the draft articles, a number of members had already opined that that was not sufficient reason for failing to address the problem of decolonization. He agreed with that viewpoint. It was true, as the Special Rapporteur had argued in the course of his first presentation, that the principles in Part I applied equally to situations of decolonization. But somewhere, perhaps in an introductory article in Part II, it should be made clear that Part I of the draft articles applied to all cases of succession of States, including decolonization. The absence of such an indication might cause perplexity in the mind of some readers.

9. He would even go further: it was not because a phenomenon had run its course historically that the applicable law should be neglected. A parallel could be drawn with the law on acquisition of ownerless territories. Such territories no longer existed, yet problems relating to their acquisition and delimitation persisted, and to resolve them, the old rules had to be applied.

10. The same was true of nationality problems tied in with decolonization. In view of the quantitative and historical importance of the phenomenon, such problems continued to arise, both for the former colonial powers and for the States created through decolonization. To help States cope with such problems, the clearest possible guidelines should be established, and the general principles in Part I were not sufficient for that purpose. A fifth section should thus be incorporated in Part II. Aside from that, he had no objections to the structure of the draft and very few hesitations about the content of the articles in Part II.

11. Mr. LUKASHUK, responding to the concerns raised by the Chairman, said that the Commission should, to the extent possible, refrain from depicting the countries that had emerged through decolonization as a special case not covered by the basic principles of international law on State succession. In the modern world, international law must apply to all, excepting only certain cases, such as those involving the right to development, which deserved particular consideration. Mention might be made of decolonization in the commentary, but there was no justification for the introduction of a new article attributing to the developing countries a special or unique position.

12. Mr. KATEKA endorsed the Chairman's comments about including provisions on decolonization and hoped that that could be done. In connection with section 2, article 18 (Granting of the nationality of the successor State), he suggested that a good example of that process could be found in the United Republic of Tanzania, formed in 1964 through the unification of Zanzibar and Tanganyika. At the time of unification, issues of State succession, nationality and the relevant laws had arisen, and they could be fruitfully examined for the work on article 18.

13. Mr. THIAM welcomed the fact that the Chairman had again raised the issue of newly independent States. In the earlier discussion, when he himself had raised the matter, the Special Rapporteur had replied that decolonization was a general issue, not a special case, and could be addressed through the draft articles as currently drafted, without need for a special section. Personally, he did not agree that decolonization was not a separate case.

² *Treaties and Conventions concluded between the United States of America and Other Powers*, revised edition (Washington, Government Printing Office, 1873), p. 562. See also *The Consolidated Treaty Series* (Dobbs Ferry, New York, Oceana Publications, 1969), vol. 102, p. 29.

The relations between a colonized and colonizing State were so close as to raise issues unique to those relations, or to pose specific problems, for example in regard to the right of option. It was surprising that very little mention was made of that fact, either in the draft articles, or in the commentary. The 1978 and 1983 Vienna Conventions incorporated a section on newly independent States, and it would be strange for the future instrument on nationality in relation to the succession of States, where the issue arose in a particularly poignant manner, not to do so.

14. Mr. KABATSI said he endorsed the Chairman's comments on the absence of provisions relating to decolonization as a specific form of State succession. Admittedly, colonization was not a widespread problem nowadays, but the phenomenon was not dead. There were still some territories in the world under foreign domination and, when they were liberated, issues of State succession would arise. He agreed with Mr. Kateka that unification should be addressed, even though not many options were available in such cases. Lastly, he endorsed the text of article 17 currently before the Commission.

15. Mr. ELARABY said he was pleased that the Chairman had raised the issue of decolonization, for it was not just a passing phase in international relations. In view of the number of States that had gone through the decolonization process since the Second World War—perhaps half the members of the United Nations—there was no question that problems could still arise, and it was important to refer to them in the articles on nationality.

16. As to article 17, he hoped the phrase "persons . . . who have their habitual residence" was being used in the sense of persons who had nationality, for if it meant persons residing in a country without having its nationality, then such persons were being accorded more rights by the successor State than they had had under the predecessor State. If two of the Gulf States, for example, were to unite and all persons having habitual residence in one State became nationals of the new State, the demographic structure would be radically altered. It would create havoc and open a Pandora's box.

17. Mr. MELESCANU said that if decolonization issues were, in the Commission's opinion, so great as to continue to arise frequently in the future, then appropriate rules should be elaborated for inclusion in the draft. If, on the other hand, the remaining number of territories under colonial rule was deemed to be fairly limited, the Commission might wish simply to include in the commentary references to State practice in respect of decolonization. A choice should be made in that regard.

18. Mr. DUGARD said that, although the number of remaining colonies was small and major problems were unlikely to arise with them in future, as the debate had shown, the decolonization process had an important role in general international law and especially in connection with problems of State succession. He was not suggesting that the draft should include a large section on the subject, but some reference should certainly be made; otherwise, it would be construed as a very serious omission.

19. Mr. GALICKI said he supported the inclusion of a reference to the problem of decolonization in the draft articles. Though decolonization was mostly a problem of

the past, some territories were still affected by the decolonization process and the inclusion of rules that reflected State practice in such situations would be very useful. It had been rightly pointed out that lengthy sections on newly independent States were to be found in the 1978 and the 1983 Vienna Conventions. Omission of any reference to such States in the current draft articles might convey the wrong impression that even the general principles set out in the articles were not applicable to the process of decolonization and to its effects on nationality. It was not enough to incorporate a reference in the commentary, which sometimes went unread. The Commission should suggest that the Special Rapporteur give consideration to including a new section in Part II to supplement the set of specific situations already addressed in that portion of the draft.

20. Mr. ROSENSTOCK said that, on the whole, there seemed to be no demonstrable need for such a separate category. Nor had the experience been ignored as there was no paucity of examples of the decolonization process in the commentaries, though the Tanganyika/Zanzibar merger could perhaps have been covered in more detail. He was therefore a little puzzled by the call for a separate provision on the matter, unless it could be seen as a soothing gesture to nostalgia for the olden days.

21. Mr. SIMMA said that the Commission should not be guided by ideological or political considerations. The question was whether, in the context of State succession, the subject of decolonization could be adequately treated within the schema developed by the Special Rapporteur. If the conclusion was reached, on an empirical basis, that matters of nationality did not differ substantially in the context of decolonization from the other processes the Special Rapporteur had used as the basis for developing his system, then newly independent States should not be treated as a separate category. The manner in which those States had, however, been excluded, in paragraph 11 of the introduction to the Special Rapporteur's third report and the relevant footnote was a little tough and matters could perhaps be couched in more conciliatory terms.

22. Mr. KATEKA said that he failed to understand those who claimed that decolonization was a thing of the past. Nor did he understand the reference to nostalgia. Nobody had claimed in 1978, in the context of the 1978 Vienna Convention, that decolonization was a thing of the past, even though a large measure of decolonization had already taken place in the 1960s. That was because, at the time, States had been interested in keeping the topic alive. Now that they saw nothing in it for themselves they wanted to dismiss it. Some of the elements of the problem still endured, however, and it was therefore necessary to strike a balance in the draft.

23. Mr. BROWNLIE said that the Commission should avoid unhelpful references to Pandora's box, nostalgia and the like. If, as might indeed be the case, the Special Rapporteur had not taken sufficient account of the extensive experience relating to decolonization, then that was a sort of criticism and should be taken seriously. A great deal of literature was available. The footnotes in the third report, for instance, did not make much, if any, reference to the experience of decolonization. Purely as a matter of practicality, care should be taken not to exclude any

attention to a useful monograph on the decolonization of Tanganyika, by Seaton and Maliti.³

24. However, he was not at all certain what a separate rubric in the draft for decolonization would involve. From the historical standpoint, he saw no sharp distinctions between cases of decolonization and the dissolution of a federation. It was often a matter of political taste, or political abuse, as to whether a particular regime involved either colonization or some associated form of oppression: colonization as such was far too narrow a category. The historical experience of oppression included cases that involved very serious forms of oppression but, as a matter of historical convention, were not classified as colonization.

25. He did have some knowledge of the history of colonialism. The history and constitutional background, for example, of the three former British territories in East Africa were very varied and the historical backgrounds of the three principal States in the Maghreb—Algeria, Morocco and Tunisia—were also quite distinct.

26. The CHAIRMAN said that it was difficult to understand why Mr. Brownlie saw no difference between decolonization and the dissolution of a federation. The main difference, in terms of nationality, was that, as a general rule, the colonizers did not grant their nationality to the colonized. That was a basic problem which led him to think that it was not possible to assimilate decolonization to anything else.

27. Mr. THIAM said that nostalgia did not enter into the equation. Complicated problems stemming from decolonization still subsisted. In his own family, for instance, there were Senegalese who were also French and others who were not. They did not know to which rule of international law to turn. The Special Rapporteur's third report stated merely that the general rules laid down in the draft would apply equally in the case of decolonization, but that was not enough if one bore in mind that nationality affected the fibre of a person's very being. The matter called for special treatment and the Special Rapporteur should develop the subject in far more detail, and in such a way as to reveal the special issues involved; he should also explain the reasons for his own position.

28. Mr. CANDIOTI said he noted that the Commission with its previous membership had decided to leave aside the question of decolonization because, as explained in paragraph 11 of the introduction to the third report, the decolonization process had been completed. A number of cases of decolonization were, however, still before the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and, notwithstanding the historical fact that a large number of countries had been decolonized, there was no reason why the subject should not be studied further. In particular, he would ask the Special Rapporteur whether there was a legal case for creating in the draft a special category for decolonization or whether the various forms of decolo-

nization could be covered by the existing categories identified by the Special Rapporteur.

29. Mr. Sreenivasa RAO said that the views expressed on such an important issue called for careful consideration. Whether or not a separate chapter was needed was not important. The main thing was for the study on which the Special Rapporteur had embarked to be sufficiently broadly-based to cater for future cases. The many sensitive issues involved and the question of how best to deal with them could not be resolved in any quick debate. He therefore suggested that, for the time being, the matter should be flagged with a question mark and that the Special Rapporteur should be asked to reflect on the matter further. In particular, any possible lacunae should be identified to determine whether the problem should be dealt with by including a separate section or by enlarging or suitably amending the current draft.

30. Mr. ELARABY said that there were still some, if not many, cases of decolonization on every continent. He would, however, be no more specific than to say that it was a very sensitive issue. He agreed with Mr. Sreenivasa Rao that the Special Rapporteur should be asked to reflect on the matter and that the Commission should revert to it in due course.

31. Mr. MIKULKA (Special Rapporteur) said that, at the United Nations Conference on Succession of States in Respect of Treaties and the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,⁴ he had been very much in favour of provisions on newly independent States, and rightly so. He was therefore much concerned by the accusations levelled against him which implied he had something against including decolonization in the draft articles. In that connection, he would point out that the statement in paragraph 11 of the introduction to his third report referred to what the Commission had decided and not to what he, as Special Rapporteur, had done. He was all the more concerned because those who had initiated the debate had been members of the Commission in its previous composition when it had approved that decision. He had asked the Commission whether or not it wanted him to deal with the question of decolonization and the response had been in the negative. What justification, then, would he have had for proceeding to carry out a study on the subject when the Commission and General Assembly did not want him to?

32. There seemed to be some confusion about precisely what was involved. Newly independent States, of course, were not the only outcome of decolonization. Decolonization could also result, for instance, in unification with another State or simply in a transfer of territory. It was

³ E. E. Seaton and S. T. Maliti, *Tanzania Treaty Practice* (Nairobi, Oxford University Press, 1973).

⁴ See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, First Session, Vienna, 4 April-6 May 1977*, vol. 1, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), p. 172, 25th meeting of the Committee of the Whole, paras. 22-23; and *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1 March-8 April 1983*, vol. 1, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.6), p. 185, 29th meeting of the Committee of the Whole, paras. 10-11.

very difficult at the current time to find cases in which it was possible to talk of a typical category of decolonization in which a large dependent territory gained complete independence and became, in other words, a newly independent State. Members might therefore wish to ask themselves whether, in the light of the discussion, it was worthwhile to re-establish a category of newly independent States.

33. The Commission had decided not to undertake a study that would judge the past—it was not an international court or an arbitral tribunal—but rather to carry out a review that would assist States in resolving problems that had caused them harm. The draft articles provided sufficient basis for solving any existing or possible future problems relating to decolonization. Any attempt to launch into a study of the past and to draft a report on the situation of newly independent States would be a purely academic exercise.

34. The report was rich in references to examples of State practice. Anybody who had ever been engaged in similar work would know that to compile all the relevant materials in the time available to him was not easy. Obviously, he did not claim to have covered all situations and the omission of any reference to Tanganyika was a case in point. Members of the secretariat would, however, bear witness to his desperate, and unsuccessful, attempts to find something on Tanganyika. Moreover, all Governments had been invited on several occasions to make their legislation available to him. Members could see from the first and second reports⁵ which Governments had in fact replied to that invitation.

35. In short, he saw no point in inventing a specific category of newly independent States for inclusion in a draft that had been perceived as an instrument to help States to resolve problems of the future, not the past. He was sure that any remaining cases of decolonization could be adequately dealt with under the existing provisions of Part II and would again invite attention to the commentaries with their many references to the rich practice of States. If members felt that he had not paid enough attention to the practice of newly independent States, he could only disagree.

36. The CHAIRMAN said he was undoubtedly speaking for all members of the Commission in recognizing the quantitative and qualitative importance of the Special Rapporteur's work and his remarkable research effort. As a professor of law himself, with an interest in the third world in general, he knew all too well how difficult it was to find examples other than those from the same few States that systematically published their practice. If members of the Commission considered that certain examples were lacking, they should endeavour to assist the Special Rapporteur by bringing them to his attention.

37. He agreed that it would not be reasonable at the current stage to consider recasting the draft and adding an entire section on decolonization. While it was true that the Commission in its previous membership had given the Special Rapporteur its blessing regarding the absence of any such section, the Special Rapporteur would no doubt

acknowledge that those who had spoken in the debate that morning, including himself, had opposed that decision. The Special Rapporteur might, however, wish to proceed along the lines suggested by Mr. Simma—who had referred to the relevant statement in paragraph 11 of the introduction to the third report as “tough”, whereas he himself would perhaps have termed it hasty and cavalier. It was essential to explain to the uninitiated reader why the Commission, in its previous composition, had not considered it necessary to study the problem from that standpoint, rather than making do with an assertion according to which the Commission had come to that decision. It was all the more important in view of the fact that the various views expressed within the Commission would not appear in its report to the General Assembly. He therefore appealed to the Special Rapporteur to come up with a balanced text in the commentary, indicating that some members were firmly of the conviction that, juridically, something was missing; giving proper coverage to the differing viewpoints expressed; and stating where appropriate in the commentaries that the problem would, or might, also arise in cases of decolonization. If the Special Rapporteur agreed with that proposed solution and he heard no objection, he would at that time close the debate on the question.

38. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur's comments in response to the various speakers had put him in mind of two cases. In the first, that of Western Sahara, a problem of nationality in relation to the succession of States was certain to arise in the future, with Spain, Mauritania and Morocco—to name only three States—all involved in the territory's future. The second case was that of the enclave of Cabinda. A very large number of persons originating in that territory resided in Portugal but had not lost their links with Cabinda and Angola. If and when that problem was eventually resolved at some time in the future, possibly by the creation of a new State, problems of nationality in relation to the succession of States would also arise in that connection. On the basis of those two cases alone, it could not be asserted that the process of decolonization was already complete. He thus supported all those members who had spoken in favour of devoting a new section to the problem of decolonization.

39. The CHAIRMAN said he agreed with Mr. Pambou-Tchivounda, who, he supposed, was nonetheless not radically opposed to the solution he himself had just proposed.

40. Mr. KATEKA, referring again to the question of balance, said that there was almost no mention of African States in the commentaries. In the interests of striking a proper balance, more references to African examples should be included in the commentaries in view of the fact that almost 50 States had been created in Africa as a result of the process of decolonization.

41. As for the Special Rapporteur's comment that his third report had been delayed for two weeks while he had searched for information on Tanganyika and Zanzibar, Mr. Brownlie had already referred to a monograph on the treaty practice of the United Republic of Tanzania which contained the text of the Articles of Union between the

⁵ See 2475th meeting, footnote 4.

Republic of Tanganyika and the People's Republic of Zanzibar.⁶ Citizenship was one of the 11 matters mentioned in that Treaty and had also subsequently been dealt with by national legislation. He should have thought the Special Rapporteur would have tried to obtain some information on the question.

42. The CHAIRMAN said that Mr. Kateka might provide that information. He was sure the Special Rapporteur would be very pleased to include it in the commentaries to draft articles.

43. Mr. MIKULKA (Special Rapporteur) said that all members of the Commission had a moral obligation to draw a special rapporteur's attention to any examples of which they were aware that might be of relevance to him. The Commission was collectively responsible for the results of that work and should support him in his task. Thus far, members had cited almost exclusively the Venice Declaration⁷ and the European Convention on Nationality, as if no other examples existed. He would welcome with an open mind any examples drawn to his attention, whether they confirmed his proposed draft articles or pointed to the need for amendments.

44. Mr. THIAM said he agreed with the proposal made by Mr. Sreenivasa Rao. But the Commission should be very circumspect when stating that it had decided on any course of action, for only very rarely did it take an explicit formal decision. That was partly attributable to its working methods, for the Commission did not vote. Nor should the current Commission be bound by a report adopted by the Commission in a previous incarnation.

45. The CHAIRMAN said it was not true to suggest that the Commission did not vote, although admittedly it had not been the custom to do so very often in the past. He himself was a member who favoured voting where problems could be resolved by recourse to that procedure.

46. Mr. LUKASHUK said he was sure that legal problems relating to decolonization—even those acts of decolonization that had been completed in the past—would continue to arise for a long time to come. To say that colonialism was dead, and hence there would be no further problems in that regard, was wrong. There would continue to be problems in the future. However, in the current case the Commission was dealing with a special situation. The draft articles offered a very high level of protection of human rights and, in particular, of the right to a nationality. He feared that if the Commission included in the draft a special section on newly independent States, the result might be a lowering of that level of protection. He thus proposed that, as a practical solution, a small informal group should be set up, under the chairmanship of Mr. Pellet, the initiator of the idea, to prepare specific articles addressing the situation of newly independent States.

47. The CHAIRMAN said that Mr. Lukashuk's proposal was another possible solution, albeit not one that he personally endorsed.

48. Mr. GOCO said he supported the explanation given by the Special Rapporteur. The matter had been thoroughly discussed in the past and, as was pointed out in the footnote at the end of paragraph 11 of the introduction to the Special Rapporteur's third report, the Commission had decided to consider issues of nationality which arose during the process of decolonization, insofar as their consideration shed light on nationality issues common to all types of territorial changes. Both arguments were thus valid. He supported the proposal made by Mr. Sreenivasa Rao: the best solution would be to put the issue aside for the moment and return to it at a later date. He also supported Mr. Lukashuk's proposal concerning the setting up of a small informal group to discuss the matter further.

49. Mr. BROWNLIE said that it should be a relatively easy matter to improve the balance and coverage of the third report and its footnotes. The lectures given by Mohammed Bedjaoui at the Hague Academy⁸ constituted a classic text on the legal problems of decolonization. While the Special Rapporteur was doubtless familiar with them, no reference was made thereto in the third report.

50. The CHAIRMAN said that he felt rather as if he were in the position of some sorcerer's apprentice, for he had opened a complex debate that it was at the current time difficult to halt. He could not support Mr. Lukashuk's proposal. To begin with, he simply was not familiar with the subject. If he had raised the matter, it was because he was convinced that a genuine problem existed and was not being addressed. He had not personally insisted on the inclusion of a section [on decolonization] in the report. He would simply like to have a scientific assurance that the problem did not arise. In response to Mr. Brownlie, he had said that it seemed clear that the colonizer did not behave towards the colonized in the same way as it did towards its own nationals. They were not "true" nationals, and he was sure that that posed a problem different from the other cases. However, while he considered that the problem must be studied, he had no preconceived ideas as to the best way of resolving it. As he had already said, he shared Mr. Simma's opinion that the presentation of paragraph 11 of the introduction to the third report was too hasty and cavalier. He therefore asked the Special Rapporteur to prepare something as an introduction to the commentaries, clearly explaining why and to what extent the draft articles were or were not suitable for cases of decolonization. It was not enough simply to say that the Commission had decided to leave aside the category of newly independent States that had emerged from decolonization—reasons must be given. If the Special Rapporteur agreed and there was no objection, he would take it that the debate was closed. If there were strong objections, he would, with slight reluctance, call a vote—a procedure to which, unlike Mr. Thiam, he was not averse, should the need arise.

51. Mr. PAMBOU-TCHIVOUNDA said he was opposed to the procedure proposed by the Chairman. However, in view of the fact that the draft articles would at some stage have to go to a second reading, he would not insist on a vote.

⁶ E. E. Seaton and S. T. Maliti, *op. cit.* (footnote 3 above), appendix, p. 151.

⁷ See 2475th meeting, footnote 22.

⁸ M. Bedjaoui, "Problèmes récents de successions d'Etats dans les Etats nouveaux", *Collected Courses of the Hague Academy of International Law, 1970-II* (Leiden, Sijthoff, 1971), vol. 130, pp. 455-586.

52. The CHAIRMAN said that the only course open to the Commission at the current stage was thus to ask the Special Rapporteur to heed his appeal. He invited members to turn to the consideration of the individual articles of Part II.

SECTION I (Transfer of part of the territory)

ARTICLE 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

53. Mr. PAMBOU-TCHIVOUNDA, noting the key role assigned by article 17 to the concept of habitual residence, said that in his view its function was very restrictive and weakened the scope of the article. In the first place, from the standpoint of article 7 (The right of option), if the concept of habitual residence was the one retained, the right of option might be reserved solely to those deemed to have the nationality of the successor State. In accordance with the general principles set out in Part I, the persons concerned were not only the inhabitants of the successor State, but also included the inhabitants of the predecessor State.

54. Secondly, from the standpoint of article 9 (Unity of families), he feared that the concept of habitual residence could lead to the break-up of families. To say that only those who had their habitual residence in the transferred territory had the nationality of the successor State was to overlook the possibility that other close relations living elsewhere at the moment of State succession would not benefit from the provisions of article 17. That adverse effect could be overcome by adding, after the words “transferred territory”, the words “or can demonstrate a genuine link with it”. Persons resident in the territory of the predecessor State who were able to exercise the right of option in order to choose the nationality of the successor State would also benefit from such an amendment.

55. The CHAIRMAN invited members to comment on Mr. Pambou-Tchivounda’s proposal.

56. Mr. GOCO said he thought the Commission might go even further in amending article 17 and cover persons entitled to acquire the nationality of the transferred territory, not simply persons habitually resident there. On article 17 generally, he felt there was a need to define precisely the terms “habitual residence” and “genuine link”.

57. Mr. RODRÍGUEZ CEDEÑO said he, too, thought that use of habitual residence as the sole criterion in article 17 was likely to have an adverse effect on the exercise of the right of option and the principle of the unity of the family. He thus supported Mr. Pambou-Tchivounda’s proposal in principle.

58. Mr. ECONOMIDES said that the normal practice in cases of transfer of part of a territory was for the successor State to be required automatically to grant its nationality to all persons who had been nationals of the predecessor State and who had been permanent residents in the transferred territory. But that in itself was not enough, for some persons “originating”—the term was admittedly vague—in that territory had their habitual residence elsewhere at

the time of the State succession but wished to maintain their links with that territory. In such cases, it was the practice, where the predecessor State continued to exist, to give those persons the right, on an individual and voluntary basis, to opt for the new nationality if they so wished. That was the solution envisaged in the Venice Declaration. Mr. Pambou-Tchivounda’s proposal extended the scope of the article, but perhaps it should be extended still further, to confer a special right of option on all persons who originated in the territory.

59. The CHAIRMAN said that the concept of a genuine link seemed to him to cover the case of persons “originating” in the territory.

60. Mr. ECONOMIDES said that, if that was the case, he would object that it was not possible to impose automatically the nationality of the successor State on persons holding the nationality of the predecessor State who might wish to retain that nationality, whereas no problem would arise if such persons were granted the right of option on a voluntary basis.

61. The CHAIRMAN invited Mr. Economides to formulate a specific wording for his proposal, which could then be considered by the Drafting Committee.

62. Mr. MELESCANU said he fully endorsed the views expressed by Mr. Economides and the solution he had proposed. Article 17 addressed a very specific case, and the problem raised by Mr. Pambou-Tchivounda was best dealt with in the context of the right of option. He favoured recourse to the broader concept of a “genuine link”, which could perhaps be defined.

63. Mr. ROSENSTOCK said he agreed that the problem should be viewed in terms of the right of option. In the case to which Mr. Pambou-Tchivounda had referred it might perhaps be preferable to use the word “should”, rather than impose an obligation on the successor State through use of “shall”. That question could be considered by the Drafting Committee.

64. Mr. KABATSI, thanking Mr. Pambou-Tchivounda for his proposal, said that the issue was one of the option to remain with the predecessor State or to move to the successor State, but article 17 in its current form meant that that option was available only to persons who had habitual residence in the transferred territory and did not extend to the category of persons Mr. Pambou-Tchivounda had in mind. It was a matter of real concern, as it was not unusual for the cause of the transfer to be ethnic or racial. Even if a person did not live in the territory, but originated there and belonged to a particular race, tribe or ethnic group, he or she should have the option either to move with it or to stay in the predecessor State. As it stood, the option was restricted to persons with habitual residence in that transferred territory.

65. Mr. HAFNER said that he appreciated the spirit behind Mr. Pambou-Tchivounda’s proposal and the comments made by Mr. Economides. But he agreed with Mr. Kabatsi, for it was necessary to distinguish between two different kinds of nationality, namely *ex lege* and by option. As he took it, article 17 provided for acquisition of nationality automatically, that is to say an *ex lege* obligation imposed on the successor State. As to broadening the

category of persons covered by the obligation to grant a right of option, he shared the views expressed by Mr. Economides. However, the matter seemed to have already been dealt with in a preceding provision. Article 7, paragraph 2, as drawn up in the Drafting Committee, currently covered the case under discussion because the paragraph had been altered to say that each State concerned had an obligation to provide a right of option to all persons who had an appropriate connection with that State. If read in the context of article 17, it signified that the successor State was already under an obligation to grant the right of option to any person who had such a link to that State. The problem would thus be solved.

66. Regarding Mr. Pambou-Tchivounda's point about habitual residence, a definition was indeed needed, either in the draft or in the commentary. The European Convention on Nationality, for example, contained a reference to habitual residence, whereas the Venice Declaration spoke of permanent residence. He asked which term would be used, since there was quite a difference between them. Perhaps the Special Rapporteur could indicate what he had in mind, for sometimes the text used "residence" and sometimes "habitual residence". He asked if a distinction was being made.

67. Mr. GALICKI said that he saw the rationale behind Mr. Pambou-Tchivounda's proposal, but experienced some difficulties with it. As Mr. Hafner had rightly pointed out, under article 17 there was a kind of obligation on the successor State, an obligation based on habitual residence, which was an objective criterion that was very easy to verify. On the other hand, to speak of effective links with the territory might create a problem. He asked what kind of links they would be, and on which criteria they were based? He asked if that would cover origin, economic links and family links. If it was to be an *ex lege* obligation, the criteria should be as clear as possible. If adopted, the provision might even be abused in certain instances. The rule already set out in article 7 was a general rule that might apply to the situation involved and he would be very wary about including an effective link as a criterion for *ex lege* acquisition of the nationality of the successor State.

68. Furthermore, one should be very careful about including any formal definitions of the terms "habitual residence" and "effective link". As already pointed out, different documents used different wordings. A final definition of habitual residence should be left to the internal law of each State, which would decide what the formal and substantive conditions were for habitual residence or "lawful" residence, to use the term employed in the European Convention on Nationality. If the Commission tried to create such a definition, much time would be spent unproductively. The same applied to genuine or effective link, since elements included in that concept also differed in different situations. However, the commentary could provide some guidance simply for the purposes of interpretation.

69. Mr. BROWNLIE said he appreciated the good intentions behind Mr. Pambou-Tchivounda's proposal, but preferred to take the path proposed by Mr. Rosenstock and Mr. Galicki and rely on the provisions of article 7. However, there was another aspect of the proposal that

gave cause for concern. The concept of habitual residence was the connecting factor which formed an important part of the entire structure of the draft and, if members of the Commission had had that kind of conception in the previous quinquennium, they really should have introduced it earlier. There was a danger of confusing the specific issue of nationality with the general civil status of persons present on the territory concerned after a State succession. If the Commission moved in that direction and tried to define genuine or effective link, States simply would not accept the draft.

70. Mr. LUKASHUK said he fully endorsed Mr. Galicki's comments. He was uneasy about the phrase "withdrawal of nationality" and suggested changing the title of article 17 to read "loss", rather than "withdrawal", of the nationality of the predecessor State and replacing the phrase "and the predecessor State shall withdraw its nationality from such persons" in the body of the article by "and such persons shall lose the nationality of the predecessor State".

71. Mr. SIMMA said that he understood the desire of Mr. Pambou-Tchivounda, Mr. Economides and others to accommodate persons who had some kind of connection with the predecessor State's territory that was involved in the succession but who did not have habitual residence in that territory. He did not think that article 7 took care of the issue. The Drafting Committee's new version of article 7 stipulated in mandatory terms, "shall provide for the right of option" only if the person would otherwise become stateless. That was not the case under article 17: if they were not granted the right of option, the persons would remain nationals of the predecessor State. He agreed entirely with Mr. Economides that in State practice the very strict terms of article 7 could not apply to the case under discussion to such persons. The successor State must be afforded the opportunity to exercise discretion in deciding whether the connection with the territory was enough. A second paragraph could be formulated to cover the problem. Paragraph 1 should be expressed in the mandatory "shall" form in favour of those persons who had habitual residence, and a new paragraph 2 should be drafted in looser, discretionary terms to address the problem of persons who had an appropriate connection with their territory, as stated in the Drafting Committee's new version of article 7, and it would be for the State to decide whether the connection was appropriate.

72. Mr. ECONOMIDES said he fully agreed with Mr. Simma. The crucial weakness of the draft was that it did not itself provide for a right of option, but rather a possible right of option conditional on internal legislation: States could introduce a right of option if they wanted, and to the extent they saw fit. For example, persons originating in the transferred territory might not have a right of option under article 7, because States could provide for a right of option for other cases with other criteria. Again, the expression used from the outset, namely "genuine link", was not defined, and it was left to States to say how they wished to interpret it, or even to refuse to grant a right of option. Thus, the right of option, a fundamental feature of State succession, was not ensured in the draft. For each concrete kind of State succession—in the current instance transfer of a part of the territory—it was necessary to examine whether, in addition to the *ex lege* attribution of

nationality, there was reason to grant a right of option and, if so, a provision must be included in the article concerned. In the end, it would be seen whether the general provision of article 7 was useful and to what degree.

73. Mr. DUGARD said that many of the treaties referred to in the commentary used the test of domicile, while some employed that of ordinary residence or habitual residence. It was a matter worth considering, because the test of domicile was wider than that of habitual residence, which suggested that it should only include those who resided in a territory at a particular time, whereas domicile emphasized intention, which might be closer to the effective link concept. In his view, attention needed to be paid to the connecting factor in the light of State practice included in the report, which was essentially what Mr. Pambou-Tchivounda had suggested by raising the question of effective link.

74. The CHAIRMAN said that it was not certain that countries with a common law tradition had the same understanding of the notion of domicile as did countries with a civil law tradition.

75. Mr. Sreenivasa RAO said that many of the issues were drafting problems. As had been rightly pointed out, article 17 must be seen in the context of article 7 for certain categories of persons who had to be covered. To a certain extent, there was an inherent link between Part I and Part II that must be borne in mind if the draft was to be understood correctly. The real issue, however, was that persons who at the time of succession had the nationality of the predecessor State—either they were on the territory and moved with the territory or they were abroad, but were not nationals of any other State—continued to be the nationals of that particular State. They might, for example, live and work as permanent residents in the United States and wish to return to India after 20 years for whatever reason. At that stage, they did not have habitual residence in India. In his view, if a person continued to be a national of a State and lived abroad, he would be entitled under article 17 either to acquire the nationality of the successor State if he so chose or, if he wished, to retain the nationality of the predecessor State. The habitual residence and genuine link criteria did not apply to persons whose nationality was clear. How to cover the category of persons in question was another matter. He was not certain whether the last part of article 17 applied only to the option to obtain the nationality of the successor State or also to the option to retain the nationality of the predecessor State. In his opinion, both options should be available, but that was not clear from the text.

76. Mr. PAMBOU-TCHIVOUNDA said that, as the many comments showed, the problem was a real one. It was in the name of equal treatment of persons seeking to acquire a given nationality that he thought it necessary to take account of persons who, at the time of the State succession, were not on the transferred territory but had good reason to claim that nationality. Once a genuine link had been established, there was no obstacle to having an *ex lege* obligation apply to persons who demonstrated that they had such a link with the territory in question. His proposal should be read in conjunction with article 5 (Renunciation of the nationality of another State as a condition for granting nationality). He would have no objection if

the Commission could find a better wording, perhaps for a second paragraph. But the problem was real, and the Commission must deal with it.

77. Mr. MIKULKA (Special Rapporteur) regretted that members had not expressed their views on paragraph (37) of the commentary to article 17, which dealt with the question and contained the answer he was able to give on the subject. The paragraph stated that the nationality of all other nationals of the predecessor State, residing in the predecessor State as well as in third States, remained unchanged. It was for the successor State to decide whether some of them should be allowed to acquire its nationality on an optional basis. The problem raised by Mr. Pambou-Tchivounda did exist, but it was already resolved by the provisions the Commission had already adopted. As Mr. Rosenstock had rightly pointed out, there was a difference between the obligation to grant the right of option and the power of the successor State to grant the right of option. The obligation to grant the right of option was already addressed in article 17, for both the predecessor State and the successor State. That right of option must be reserved for all persons concerned who had their habitual residence in the territory which was the subject of a succession. Where were all the other persons concerned to whom the successor State might attribute its nationality? They were either in the predecessor State or in a third State. The Drafting Committee had already agreed on a revised wording of article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1, which said that the “successor State does not have the obligation to extend its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State”. The State naturally had the power to attribute its nationality to those persons, but it was limited by paragraph 2: it could not impose its nationality on persons against their will. That was all resolved in article 4.

78. In his opinion, it would be unwise to introduce another provision, but here was also another reason not to do so. The articles of Part II were purely residual in character. They took effect only when States had not agreed, in a treaty, on a specific solution. If, in a treaty, the States changed the criteria set forth in article 17, they could indeed do so. They could very well extend the right of option to everyone who had an ethnic, cultural or other link. There were any number of treaties in which States granted the right of option to persons who had nothing to do with the territory concerned, simply to cover the problem of a given minority or for other reasons. Yet article 17 must apply even in cases in which States were unable to reach agreement by means of a treaty. The article would then be interpreted by third States. For example, in article 16 (Other States), States were asked to work on certain assumptions: if certain rights were not granted to a person pursuant to the present articles, a State could assume that that person should be considered a national of that country. Under the current terms of article 17, they did not have the problem of determining the criterion of habitual residence or defining which persons had the right to choose. If the element proposed by Mr. Pambou-Tchivounda was included, States would not know how to apply the article. He asked how third States could be expected to investigate criteria over and above those enu-

merated. Why introduce an element of uncertainty? Nothing prevented States from resolving the problem through a treaty, but if the Commission wanted a residual rule, it could not go beyond what was stated in article 17. It was no accident that the Draft Convention on Nationality prepared by the Harvard Law School had already arrived at the same solution as long ago as 1929.⁹

79. Mr. SIMMA said that it might be difficult for members not in the Drafting Committee to follow the discussion, because the text of article 4 as formulated in the report did not cover the kind of case that a number of members of the Commission had had in mind. The Drafting Committee's new version did.

80. It was one thing to say, as did the most recent version of article 4, that a successor State "does not have the obligation to extend its nationality" to such persons and—something that was closer to the Commission's concerns—another thing to say that the State "may" grant a right of option to the persons concerned. Such a provision would not be contrary to the spirit of the draft, would not create a problem in the light of article 16 because it gave discretion to the successor State and would be more in conformity with the human rights thrust of the entire draft.

81. The CHAIRMAN noted that the Special Rapporteur defended the current wording by stressing on the one hand that the draft was residual and, on the other, that Part II complemented Part I. However, that was not stated anywhere, other than in the commentary, and he feared that anyone who read the articles without the commentary might be lost. Perhaps the Special Rapporteur could introduce something appropriate to that effect in the text, either in an introductory or final article.

The meeting rose at 1.05 p.m.

⁹ See 2475th meeting, footnote 9.

2489th MEETING

Friday, 6 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, 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. Rodríguez 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 II (Principles applicable in specific situations of succession of States) (*continued*)

SECTION I (Transfer of part of the territory) (*concluded*)

ARTICLE 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

1. Mr. THIAM, referring to the debate to which the relationship between succession of States and decolonization had given rise at the preceding meeting, pointed out that independence could be the result either of negotiation or of a breakdown in relations. In the first case, the granting of the nationality of the successor State to persons having their habitual residence in the transferred territory was perfectly feasible and was generally provided for in the devolution agreement. However, when independence had to be won from a colonial power, he asked how it could be imagined that the successor State would grant its nationality to residents originating from that power. The same was true of the withdrawal of the nationality of the predecessor State, since the colonial power could hardly withdraw its nationality from its own subjects residing in the successor State. He asked where the right of option fit in between the obligation for the successor State to grant its nationality and the obligation for the predecessor State to withdraw its nationality. Article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) as it stood did not seem applicable to colonial-type situations and required clarification as to the situations to which it did apply.

2. Mr. MIKULKA (Special Rapporteur) said that decolonization was not confined to situations where a new independent State was created. The two treaties on the cession to India of the territories of the French Establishments in India, mentioned in paragraphs (24) and (25) of the commentary to article 17,² and the treaty on Spain's retrocession to Morocco of the territory of Ifni, mentioned in paragraph (27) of the commentary,³ demonstrated how article 17 could perfectly well apply to colonial-type situations and the right of option was an integral part of that article.

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

² Treaty of cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France (New Delhi, 28 May 1956), United Nations, Legislative Series, *Materials on succession of States in respect of matters other than treaties* (Sales No. E/F.77.V.9), p. 86; and Treaty of cession of the territory of the Free Town of Chandernagore of 1951 between India and France (see 2475th meeting, footnote 24).

³ Tratado por el que el Estado Español retrocede al Reino de Marruecos el territorio de Ifni (Fez, 4 January 1969), *Repertorio Cronológico de Legislación* (Pamplona, Editorial Aranzadi, 1969), pp. 1008-1011 and 1041.