Document:-

A/CN.4/SR.2489

Summary record of the 2489th 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:-

1997, vol. I

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 1 (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.

3. The CHAIRMAN said he thought the problems raised by Mr. Thiam related more to section 4 on separation of part of the territory than to the section currently under consideration, which dealt with the transfer of part of the territory.

4. Mr. ECONOMIDES, referring to article 17 from the standpoint of the relevant classical rules of international law, said that the first four lines codified a well-established—and even the soundest—customary rule on the succession of States through the transfer of part of the territory. The text rightly stated that rule in the form of an obligation, thereby helping to prevent statelessness and to guarantee the right to a nationality, whereas the rest of the text departed from traditional practice by extending the right of option to all persons concerned. He asked if it was logical that, if the end of the article gave the possibility of a choice to all persons concerned, the beginning should set out obligations. In historical terms, a transfer was often the result of a lengthy process set in motion by the determination of the vast majority of the population to achieve its national aspirations, and that made the right of option meaningless. In practice, that right thus existed only for a small portion of the population which had very strong links to the predecessor State and clearly did not want the nationality of the successor State. The right of option as provided for in the text should therefore be reduced to its proper proportions.

5. Mr. MIKULKA (Special Rapporteur) said he agreed that Mr. Economides' objection to the extension of the right of option to all persons having their habitual residence in the territory of a State was to some extent justified. Some delegations in the Sixth Committee had also criticized the Commission's "generosity" in that regard. He himself had been somewhat hesitant about stating that rule in the form of an obligation, but, all things considered, he had thought that, at the end of the twentieth century, the Commission could not take a position that was a step backwards from what the Harvard Law School had adopted back in 1929[4] on the basis of all the practice referred to by Mr. Economides. Of course, the Commission could refrain from making it an obligation for States to grant the right of option and could simply suggest that they should grant that right to certain categories of persons, which it would then have to list. It was also true that the transfer of a part of the territory of a State was the culmination of a historical process reflecting the will of the population. In practice, however, the population was often divided, sometimes 51 per cent to 49 per cent. It had even been the case that two successive referendums on the same territory had not yielded the same result. He had therefore considered that the only logical solution would be to leave it up to each person to decide.

6. Mr. Pambou-Tchivounda had proposed (2488th meeting) that the right of option should be extended to persons who, while not having their habitual residence in the territory of the State, had genuine links with that State. That possibility was provided for in article 4 (Granting of nationality to persons having their habitual residence in another State).

7. Mr. PAMBOU-TCHIVOUNDA explained that the comment he had made had been based on a concern for equity and could be very well illustrated by the following situation: when a family had its habitual residence in the transferred territory, why should the children of that family who were in the territory of another State or in that of the predecessor State not benefit from the same rights and advantages, whether those were the automatic acquisition of nationality (first part of article 17) or the right of option (second part of that article)? In such cases, a uniform rule must obviously be applied to both parents and children.

8. The CHAIRMAN said he thought that the problem raised by Mr. Pambou-Tchivounda could be solved by a provision such as that of provision 9 (*a*) of the Venice Declaration,[5] while provision 13 of the Declaration was relevant to Mr. Economides' objection. Since article 17 conveyed the same idea as provision 13 (*a*) of the Declaration, Mr. Economides' opposition to the solution proposed in article 17 could perhaps be explained by the fact that article 17 lacked the explanation provided in provision 14 of the Declaration.

9. Mr. ECONOMIDES said that, historically, the overwhelming majority of the population of a transferred territory wanted to acquire the nationality of the successor State and it would therefore be absurd or naive to impose the right of option on it. The problem raised by Mr. Pambou-Tchivounda did indeed correspond to provision 9 (*a*) of the Venice Declaration, under which genuine links could replace the residence criterion, but the successor State granted its nationality only "on an individual basis, to applicants". The same rule could be derived from article 4 of the draft under consideration, but was not stated as clearly therein as in the Declaration.

10. The intention behind provision 13 (*a*) of the Venice Declaration, which perhaps expressed it awkwardly, was to leave to the successor State the task of implementing the right of option, although that must be done in the light of provision 14, which made the exercise of the right conditional on the existence of effective links with the predecessor State, which meant that the right of option was an obligation only where effective links existed. The solution that had been adopted by the Venice Commission was certainly not ideal, but it corresponded to practice, and not only that dating back to the First World War: the 1947 Treaty of Peace with Italy, for example, limited the right of option solely to populations having very close links with the predecessor State. In point of fact, granting the right of option to all interested parties was not only contrary to practice, but also potentially dangerous.

11. Mr. MIKULKA (Special Rapporteur) said that, in his view, the comments made by Mr. Pambou-Tchivounda and Mr. Economides were not at all similar.

12. Mr. Pambou-Tchivounda had given the example of children whose family had its habitual residence in the territory that had been transferred, but who, at the time of the transfer, were outside that territory. That situation was not at all problematic. Such children were deemed to have their habitual residence in that territory and as such were

[4] See 2475th meeting, footnote 9.

[5] Ibid., footnote 22.

covered by article 17. Similarly, in the case of children born in the transferred territory who, at the time of transfer, no longer had their habitual residence there, he assumed that such children would have reached the age of legal majority and saw no reason why they should receive treatment different from that given to other habitual residents: they answered the description in the expression "persons concerned", which applied whether or not such persons had their habitual residence in the transferred territory. In addition, article 9 (Unity of families) of the draft sought to protect the unity of families by committing States to adopt all reasonable measures to allow the members of a family to remain together or to be reunited.

13. Mr. Economides had spoken of the case of persons "originating" from the territory concerned, as referred to in provision 9 (*a*) of the Venice Declaration. That provision, however, related not really to the right of option, but to the granting of nationality on an individual basis or, in other words, to the acquisition of nationality on request—which was a straightforward case of naturalization. Furthermore, the Declaration did not draw a clear distinction between the different cases of State succession, failing to differentiate between transfer and separation of territory when the solutions for the two were not equally valid.

14. He had sifted through all the cases of transfer of territory in search of an example that would militate in favour of the extension of the right of option provided for in article 17 to persons who originated from the transferred territory, but were not resident there. He had found but one: the transfer of Schleswig to Denmark by the defeated Germany after the First World War.[6] Persons born in the territory of Schleswig who had acquired German nationality under the German occupation had enjoyed the right to opt for Danish nationality. It was an atypical case, which had some bearing on the restitution of the territory. There was no other example that would warrant laying down a rule to provide in particular that the predecessor State should be required to grant the right of option to persons solely on the ground that they had been born in the transferred territory. The position was different in the case of separation of territory, which would be examined later.

15. So far as limits to the rule laid down in article 17 were concerned, he agreed with Mr. Economides that States had not always been so generous. He also agreed with him that, throughout history, there were examples of the right of option being granted to only a portion of the population, the habitual residents of the territory concerned, often on the basis of the criterion of ethnic origin, language or religion. All those criteria were part of a phenomenon that had emerged after the last two world wars and had been closely linked, almost without exception, to the obligation imposed on persons who had exercised their right of option on the basis of those criteria to transfer their habitual residence from the transferred territory to the territory of the State for whose nationality they had opted. It was one thing to state what the practice had been and to explain that the right of option had been accompanied by an obligation; it was another—and it was unnecessary—to separate two elements of a phenomenon.

[6] Treaty of Versailles, art. 112.

16. Mr. SIMMA said that Mr. Economides and Mr. Pambou-Tchivounda had raised different problems.

17. In the case of Mr. Pambou-Tchivounda's concern, provision 9 (*a*) of the Venice Declaration, which offered him only a pious hope on that score, and paragraph (37) of the commentary to article 17 were not sufficient from the human rights standpoint, in his view. He therefore reiterated his proposal that a paragraph 2, worded along the lines of provision 9 (*a*) of the Declaration, should be added to article 17.

18. Mr. PAMBOU-TCHIVOUNDA said that it was the notion of "origin", with all it encompassed, that had prompted him to quote a typical example (2488th meeting) and to recommend using the notion of "genuine connection", which sufficed to convey the idea intended, as universally understood in public international law. There was nothing either fanciful or unreal about his proposal given the arrangements concluded between Germany, France and Great Britain at the end of the Second World War that had affected the peoples of some African countries.

19. It was unfortunate that the substance of the topic was to be found more in the commentaries than in the proposed articles, which did not provide a positive answer to the problems. States would, however, dwell on the articles, not the commentaries. The Commission and the Drafting Committee should therefore endeavour to transfer to the actual articles the ideas that had been clearly expressed in the commentaries.

20. Mr. ECONOMIDES, noting that the Venice Declaration was a model of clarity and simplicity, said it stipulated that, in all cases of State succession, the successor State should grant its nationality and clearly distinguish the cases where the predecessor State continued to exist and that where it had ceased to exist and settle in all those cases the question of the right of option according to international law.

21. As to the example of Schleswig quoted by the Special Rapporteur, he could think of at least three cases in Greek practice when the State had allowed persons originating from the territory concerned or who had connections with but did not reside in that territory to acquire its nationality through naturalization: that was the case provided for in provision 9 (*a*) of the Venice Declaration, and it was very prevalent.

22. It was not a question of making the right of option general. It would suffice to provide, where necessary, that the successor State must not impose its nationality by force and that it must grant the right of option. It would be foolish and naive to try, in the case of succession, to organize a referendum on the question of nationality.

23. Mr. ROSENSTOCK said that provision 9 (*a*) of the Venice Declaration was not very clear, in his view. In the first place, it stated that "It is desirable that successor States ". Secondly, he said it was not clear who were the persons "originating" in the territory that was the subject of the succession: whether they were persons who had for instance been born there or who had at some point in time had their habitual residence there.

24. At any rate, it would be most unfortunate to envisage depriving the people of a transferred territory of the right to opt for the nationality of the predecessor State, quite apart from any consideration as to the legitimacy of the transfer. Care should also be taken to avoid adopting an extreme stance on the right of the State for whose nationality the person concerned had not opted to take certain action.

25. Nonetheless, article 17 struck an appropriate balance. A second paragraph could however be added to it to provide that the successor State would have the possibility—not the obligation—of granting its nationality to persons originating from the transferred territory, since that was in no way excluded in the commentary. He had no very strong feelings on the matter, particularly since the case it would cover would rarely occur, bearing in mind the provisions of the other draft articles, including those relating to unity of families.

26. Mr. MIKULKA (Special Rapporteur) said that Mr. Economides could also have referred to provision 13 (*a*) of the Venice Declaration, which imposed an obligation on the successor State to grant the right of option and which was entirely in keeping with the terms of the second part of article 17, instead of merely quoting another provision from the Declaration which dealt not with the right of option, but with naturalization. The question of naturalization, however, went far beyond the scope of the draft articles.

27. The Venice Declaration, it had to be recognized, was not clear. For instance, the right of option the successor State granted could be the right not to acquire its nationality. But it was not for the successor State to decide whether the persons referred to could or could not retain the nationality of the predecessor State. Moreover, provision 14 made the exercise of the right of option subject to the condition that those who exercised it had genuine links—and in particular ethnic, linguistic or religious links—with the predecessor State or a successor State: that sounded like discrimination. At all events, he was prepared to explain point by point why he had not adopted the provisions of the Venice Declaration.

28. As to Mr. Simma's proposal, he wondered whether it was really advisable to encourage States to go down that path when they had themselves said that the exercise of the right of option should not be enlarged unduly and the only example he had found in practice was that of Schleswig. A well-established rule should not be called into question: in the case of a transfer of territory, it was perfectly normal to presume that, save for the people in the transferred territory, the status of the other peoples did not undergo any change.

29. Lastly, he would remind the members that, at its forty-seventh session, the Commission as a whole had severely criticized the emphasis the Working Group had placed on the *jus soli* element. How could it currently favour that element, when that was certainly not justified by State practice?

30. The CHAIRMAN said that the problem raised by Mr. Pambou-Tchivounda had more to do with *jus sanguinis*.

31. Mr. HAFNER said that, in his view, the right of option as referred to in the last part of article 17, which would, incidentally, be improved if it were redrafted, should be read in the light of the draft articles as a whole.

32. He agreed that the answer to the problem raised by Mr. Pambou-Tchivounda could lie in the principle of unity of families laid down in article 9. He also agreed with Mr. Simma that the problem was connected with the way in which paragraph (37) of the commentary was worded. It should be made clear that the draft articles did not exclude the right of States to grant the right of option. But that right stemmed from the sovereignty of the State, as referred to in the second paragraph of the preamble, on which there were no restrictions other than those laid down in articles 4 and 5 (Renunciation of the nationality of another State as a condition for granting nationality).

33. As to the recommendation that States should grant the right of option to persons residing outside the territory concerned, it should be conditional on the existence of certain links. It would also be necessary to envisage all of its consequences and, in particular, to ascertain whether it corresponded to the leitmotif of the draft articles, namely, that the will of the persons concerned must be respected and both statelessness and multiple nationality must be avoided.

34. Mr. GOCO said that article 17, as drafted, referred to the case of a State transferring part of its territory to another State. In such circumstances, it was normal that the successor State should grant its nationality to the persons concerned who had their habitual residence in the transferred territory and that the predecessor State should withdraw its nationality from such persons, subject, of course, to the exercise of the right of option. He wondered why, in view of the definition of the term "person concerned", the Special Rapporteur had introduced the criterion of "habitual residence". He asked if it represented a further condition that had to be met. Supposing that the "person concerned" did not have his habitual residence in the transferred territory, he asked if his situation would be changed as a result. There were cases where nationality had been granted to all nationals of the State concerned.

35. There were also cases where a person considered to be a national of the State whose territory had been transferred did not reside in that territory. In that connection, he referred to the distinction between "domicile" and "residence" drawn by Mr. Dugard. The word "domicile" did not necessarily mean "physical residence"; it could happen that persons were domiciled in a given place while having their habitual residence elsewhere. Some clarification of that point by the Special Rapporteur would help the Drafting Committee in its work. In conclusion, he said that he endorsed the spirit and letter of article 17.

36. Mr. MIKULKA (Special Rapporteur), replying to Mr. Goco, said that the criterion of habitual residence for the granting of the nationality of the successor State was essential in the case of a State transferring part of its territory to another State, as the only persons concerned were those who habitually resided in that portion of territory and not all nationals of the State which had ceded that territory. For example, in the 1960s, Czechoslovakia and Austria had exchanged part of their respective territories

because of the construction by Czechoslovakia of a dam on the Moldau River. Only persons who might have resided in those territories would have been concerned by the effects of the mutual cession of territories on their nationality. There had been no question of changing the nationality of nationals of either State who resided in other parts of the territory of the two States.

37. The CHAIRMAN, summing up the discussion on article 17, noted that the first part of the article was not challenged; two problems arose, however, following the proposal made by Mr. Pambou-Tchivounda. The first was whether the obligation to grant nationality should not be extended to persons having a genuine link with the territory concerned or originating from that territory; the other was whether the right of option offered in the second part of the sentence ("unless otherwise indicated by the exercise of the right of option which all such persons shall be granted") was not too extensive. One solution might be, as Mr. Simma had suggested, to add a paragraph 2 modelled on the wording of provision 9 (*a*) of the Venice Declaration.

38. He noted that the Commission had concluded the discussion on section 1 of Part II of the draft and said that if he heard no objection, he would take it that the Commission wished to refer that section, comprising article 17, to the Drafting Committee.

It was so agreed.

SECTION 2 (Unification of States)

ARTICLE 18 (Granting of the nationality of the successor State)

39. Mr. MIKULKA (Special Rapporteur), introducing article 18 (Granting of the nationality of the successor State), said that it contained what was, in a sense, a definition of the term "unification of States". The term covered two situations: the merging of two States into a single new State and the absorption of a State by another in conformity with international law, annexation by force being of course precluded. The second part of the article dealt with the effects of such unification on the nationality of the persons concerned. All persons who, on the date of the succession of States, had had the nationality of one of the predecessor States, regardless of the manner in which that nationality had been acquired, were to be granted the nationality of the successor State. In the case of persons having their residence in a third State or having the nationality of a third State, the applicable provisions were those of Part I (General principles concerning nationality in relation to the succession of States) of the draft articles.

40. Mr. LUKASHUK said that he generally supported the contents of article 18, but was concerned about the words "irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have merged", which were not explained in the commentary and not borne out by practice. He would like some clarifications about the intended meaning of the word "personality". In his view, the question of granting nationality arose only when the unification of two States entailed the disappearance of those two States and the creation of a new one. The example of the United Arab Republic, which was cited in paragraph (3) of the commentary to article 18,[7] was very clear in that respect. The creation of that new State had been confirmed by the adoption of the Provisional Constitution of the United Arab Republic[8] which provided for a new nationality for the nationals of the two predecessor States.[9] He therefore thought that it would be best to delete the words in question, which gave rise to legal problems.

41. Mr. HAFNER said that the question raised by Mr. Lukashuk was extremely delicate and should be considered in the light of European experience in the past few years. In practice, the problem had already arisen as to whether the 1978 and 1983 Vienna Conventions were applicable to those cases. Inasmuch as those two Conventions were not very explicit on the point at issue, it would seem useful to maintain the wording proposed by the Special Rapporteur, which could cover all the cases of unification which had given rise to difficulties in Europe. It remained to be seen whether the wording should be retained in the text of article 18 itself or simply be inserted in the commentary. It was, however, preferable that the wording should clearly indicate to what cases article 18 was applicable.

42. Mr. GALICKI said that he shared the concerns expressed by Mr. Lukashuk. The situations covered by article 18, namely, the unification of two States resulting in the creation of a new State and the absorption of a State by another State, were slightly different from one another and the term "personality" was confusing since it could imply that the predecessor State, which might have kept its identity, but would become the successor State, would be required to grant its nationality again to persons who already had it. That seemed completely illogical and, if that were the case, he would have difficulty in accepting the wording as it stood. Some clarification was called for.

43. Mr. ROSENSTOCK said that he saw no point in dealing with the two situations separately. That would be an unnecessary complication because, in both cases, the result for the persons concerned would be the same. The matter could perhaps be settled by using a word other than "grant", which was a little clumsy. The problem was essentially one of form and could easily be solved by the Drafting Committee.

44. Mr. MIKULKA (Special Rapporteur) said he also thought that different wording should be found in order to avoid any absurd or illogical interpretation of the word "grant". There was obviously no question of a State granting its nationality again to its own nationals. With regard to the question raised by Mr. Lukashuk, he referred to paragraph (4) of the commentary to article 18, which cited Singapore as having acceded to independence through a transient merger with the already independent Federation of Malaya, which had continued to exist after the merger. Singaporean nationals had thus acquired Federal citizen-

[7] E. Cotran, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly* (London), vol. 8 (1959), p. 346.

[8] Ibid., p. 374.

[9] Nationality Law of the United Arab Republic, No. 82 of 1958, ibid., p. 380.

ship in addition to Singaporean citizenship, while Malaysian nationals had kept their Malaysian nationality.[10] The case of the two Germanies was largely the same. It did not seem necessary to provide for each of the two situations in a separate article because the result was the same in both cases. What mattered was that the persons concerned should ultimately have the nationality of the successor State. There were no grounds for interpreting the 1978 and 1983 Vienna Conventions as applying solely to the case of a merger of two States resulting in the disappearance of both those States and the creation of a new one. Even if not expressly stated, it was obvious, as many commentaries attested, that the drafters of those instruments had had both of those situations in mind and that they could therefore be treated together.

45. Mr. GOCO said he thought that the passage explaining what was meant by "successor State" merely made the text of article 18 more confusing and that it should therefore be deleted.

46. He also wondered why article 4 was mentioned at the beginning of the text, since it had given rise to some objections because it dealt mainly with persons who were not nationals of the predecessor State, resided in a third State and had the nationality of that third State. It was clear that, in such a case, the successor State had absolutely no obligation to grant its nationality to such persons and should not impose it on them. He therefore thought that the words "Without prejudice to the provisions of article 4" should likewise be deleted. Thus amended, the text of article 18 would be much clearer and more readily understandable.

47. Mr. HAFNER said that the question of the applicability of the 1978 and 1983 Vienna Conventions to situations which had recently occurred in Europe had arisen in diplomatic practice. He therefore considered that the qualifier should be retained.

48. Mr. GALICKI said that he was not in favour of creating two sets of provisions relating respectively to each type of unification, but he felt that the Commission should specify and limit the obligation of the successor State by adding the words "which ceased to exist" at the end of the article. Otherwise, the article would imply, for example, that the Federal Republic of Germany should have "granted" its nationality to its own nationals after reunification.

49. Mr. Sreenivasa RAO, viewing the problem as basically an editorial one and deriving not so much from the word "grant" as from the whole of the last phrase, proposed that the words "at least" should be deleted and that the words "or the nationality of the State absorbed, as the case may be" should be added at the end of the article.

50. Mr. SIMMA pointed out that, at least according to the official position of the German Government, article 18 would have very limited application in the case of Germany because the Federal Republic of Germany had always treated nationals of the German Democratic Republic as Germans within the meaning of its Basic Law. Article 18 would be applicable only in the case of certain foreigners, such as Greeks, who had become citizens of the German Democratic Republic prior to reunification and who had not been recognized by the German courts as having German citizenship for the purposes of the Basic Law.

51. Mr. MIKULKA (Special Rapporteur) said that it was difficult for the international community to accept the official position of the Federal Republic of Germany because of its assumption that the German Democratic Republic had never existed. The issue would arise when the Commission came to discuss article 24 (Withdrawal of the nationality of the predecessor State), the commentary to which made special mention of that historic case. With regard to article 18, he agreed that the problems could be solved by rewording the last phrase. He was nevertheless pleased to note that there was general agreement on the basic rule.

52. The CHAIRMAN noted that the Commission had concluded the discussion on section 2 of Part II of the draft and said that if he heard no objection, he would take it that the Commission wished to refer that section, comprising article 18, to the Drafting Committee.

It was so agreed.

SECTION 3 (Dissolution of a State)

ARTICLE 19 (Scope of application)

ARTICLE 20 (Granting of the nationality of the successor States) and

ARTICLE 21 (Granting of the right of option by the successor States)

53. Mr. MIKULKA (Special Rapporteur) said that article 19 (Scope of application) was a preliminary clause whose purpose was exclusively of a drafting nature, namely, to avoid having to repeat in articles 20 (Granting of the nationality of the successor States) and 21 (Granting of the right of option by the successor States) what type of territorial change was being envisaged. It was based on a very simple hypothesis and was fully in conformity with the 1978 and 1983 Vienna Conventions.

54. Articles 20 and 21, which dealt respectively with granting of the nationality of the successor States and granting of the right of option by the successor States, did not rule out the possibility of some overlapping between the categories they covered. Article 20 referred to the granting of nationality either through the application of legislation or a treaty, and hence occurring automatically, or through the exercise of a right of option. That accounted for the safeguard clause at the beginning of article 20. Under article 20, the nationality of the successor State was granted to two categories of persons. Subparagraph (*a*) concerning persons having their habitual residence in the territory of the successor State would, he felt sure, secure broad agreement in the Commission.

[10] See Singapore, *State of Singapore Government Gazette, Subsidiary Legislation Supplement*, No. 1 (Singapore, September 1963); the Constitution of Malaysia, 1963 and the Malaysia Act (United Nations, Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 89 and 91). See also the Republic of Singapore Independence Act, 1965, reproduced in *Republic of Singapore Government Gazette, Acts Supplement*, No. 2 (Singapore, December 1965).

Subparagraph (*b*), on the other hand, referred to persons having their habitual residence outside the successor State, subject to a general reservation concerning the exceptions listed in article 4. Subparagraph (*b*) was subdivided into two parts. Subparagraph (*b*) (i) related to persons who had been born in what had become the territory of the successor State or who had had their last permanent residence there before leaving it. Subparagraph (*b*) (ii) referred specifically to the case of a dissolved State which had been structured as a federation and where there were secondary nationalities that became criteria for the granting of nationality.

55. Article 21 applied the general provisions governing the right of option set forth in Part I to the specific case of the dissolution of a State. Paragraph 1 mentioned only successor States on the assumption that the predecessor State had disappeared. It would apply when, for example, a person who had his habitual residence in the territory of State A but possessed secondary nationality of State B was entitled, pursuant to article 20, to acquire the nationality of those two States. The only solution was to allow the person concerned to choose between the two nationalities, as had occurred in several recent cases of dissolution of federal States in eastern Europe. Paragraph 2 dealt with the case of persons who, since they were not covered by article 20 and were therefore in danger of finding themselves without any nationality, should be entitled to acquire the nationality of the successor State by exercising an option based on voluntary choice. The paragraph was designed first and foremost to prevent cases of statelessness, but also to enable each individual concerned to exercise the right to a nationality provided for in article 1. The aim was to bridge all gaps that might remain following the application of the preceding provisions.

56. Mr. PAMBOU-TCHIVOUNDA said that a harmonious approach should be adopted in dealing with the different categories of State succession, either by inserting a preliminary article before article 17, along the lines of article 19, indicating what was understood by the "transfer of part of a territory" or by deleting article 19 and article 22 (Scope of application). Moreover, referring to article 20, subparagraph (*b*) (ii), he said that he was convinced of the need to use the same reasoning, in the event of a transfer of territory in accordance with article 17, to examine the situation of persons born in the territory, but residing elsewhere. The debate on article 17 had shown that the problem existed and should be taken into consideration as in the case of the dissolution of a State.

57. Mr. HAFNER asked whether the definition in article 19 also covered the case of the dissolution of a State whose constituent parts did not form two or more successor States, but became an integral part of already existing States. He noted that, when the Commission had considered the draft 1978 and 1983 Vienna Conventions, there had been a discussion on whether dissolution should be distinguished from separation, but no distinction had been made. He asked the Special Rapporteur for clarification since the point had not been mentioned in the commentary to article 19.

58. Mr. MIKULKA (Special Rapporteur) said he would comment later on Mr. Pambou-Tchivounda's observations. In reply to Mr. Hafner's question, he said that the Commission had refrained from making a distinction between dissolution and separation only in the 1978 Vienna Convention and had dealt with the two situations under the general concept of separation.[11] In drafting the 1983 Vienna Convention, however, the Commission had fully recognized that it was impossible to follow the same procedure as in the case of treaties and had made a distinction between dissolution and separation.[12] The main reason for the lack of a reference in the commentary to article 19 was that the Special Rapporteur had referred, in paragraph 11 of the introduction to the third report (A/CN.4/480 and Add.1), to the Commission's decision to adopt the types of succession referred to in the 1983 Vienna Convention.

59. Mr. ECONOMIDES asked the Special Rapporteur whether, given the distinction in article 18 between new successor States and successor States that were continuators of an existing international personality, article 19 was to be viewed as referring exclusively to two new successor States or whether one of the two could be the continuator of the legal personality of the dissolved State.

60. Mr. MIKULKA (Special Rapporteur) confirmed that article 19 must be interpreted as excluding the latter possibility, which was covered by article 22.

The meeting rose at 1 p.m.

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[11] See *Yearbook . . . 1972*, vol. II, document A/8710/Rev.1, articles 27 and 28, pp. 292 and 295.

[12] See *Yearbook . . . 1981*, vol. II (Part Two), paragraphs (1) to (3) of the commentary to articles 16 and 17, pp. 44-45.

2490th MEETING

Tuesday, 10 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.