

Document:-  
**A/CN.4/SR.2492**

**Summary record of the 2492nd 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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68. In his view, the concept was perfectly clear and even clearer than that of habitual residence. The latter expression was used in international law, but not in the internal law of certain States, which preferred the term “domicile”; neither was it used in the Peace Treaty of Saint-Germain-en-Laye, where the term employed in articles 50, 64 and 70 was that of rights of citizenship (*pertinenza*), a concept based on birth to which the exercise of certain political rights in a specific territory was attached. He had no objection to replacing the expression “secondary nationality” by another, more appropriate one. He maintained, however, that the concept did exist, that it had been accepted and had appeared in practice and that it therefore could not be simply deleted and replaced by wording of a general nature.

69. The CHAIRMAN said that there was no question of completely dropping the reference to secondary nationality, but only of incorporating the concept in a more broadly worded formulation, which would be explained in the commentary.

70. Mr. SIMMA said that the concept of secondary nationality unquestionably existed and could play a role in the event of the dissolution of a State. It should therefore be mentioned directly in the text of article 20 and an attempt should be made to provide a definition. However, in order to avoid any misinterpretation, it might be best not to use the expression “secondary nationality”. The Drafting Committee could be entrusted with finding a more appropriate one.

71. Mr. BROWNLIE said that no one denied the existence of the concept of secondary nationality in practice. The question was whether it could be regarded as a general concept and whether the expression “secondary nationality” was recognized in international law. To his knowledge, it was not to be found anywhere. Clearly, the concept was specific to a small number of constitutional systems and the examples of the United Arab Republic and Singapore cited by the Special Rapporteur merely strengthened that impression. The utmost caution should therefore be exercised in connection with the use of the expression.

72. Mr. PAMBOU-TCHIVOUNDA said that the essential question was whether the concept was accepted in international law. The examples given by the Special Rapporteur were most interesting and it would be useful to hear in what relationship the two systems of nationality—federal and secondary—had operated in the cases in question. Further elucidation of that point would help the Commission to decide precisely how to handle the concept.

73. Mr. CRAWFORD repeated that a category of secondary nationality did not exist in international law and that the word “category” used in the English text of article 20, subparagraph (b) (ii), should be deleted or replaced by, for example, the word “system”. He had the impression that, in cases such as that of Czechoslovakia, where secondary nationality had been considered a relevant criterion, the secondary nationality system had already existed and that, in other contexts, it had simply been a matter of something like belonging to a local community. To propose establishing a new concept would therefore be dangerous. The best course would be to find a way of keeping the idea in the text that there were sys-

tems in which the concept in question, designated by one term or another, played a role and could be considered a relevant criterion for the attribution of nationality.

74. Mr. SIMMA said he thought that the text of article 20, subparagraph (b) (ii), did no more than recognize a concept which existed only in internal law and could be used only as a criterion for granting the nationality of the successor State “where the predecessor State was a State in which the category of secondary nationality of constituent entities existed”. He therefore saw no need to change the current wording of the article.

75. Mr. ROSENSTOCK said that it would be difficult not to take account of a concept which, while it did not exist in all countries, had played a considerable role in cases of State succession in Eastern Europe. Including a reference to the concept in the body of the article would simply mean recognizing that it was a possible solution to the problem of nationality in relation to the succession of States, without turning it into a general rule. The idea should therefore be retained, leaving it up to the Drafting Committee to amend the expression “secondary nationality”, which some members found unacceptable.

76. Mr. HAFNER said that the concept of *pertinenza* related not to nationality or, in other words, to the fact of belonging to a certain nation, but to belonging to a local community. It was therefore clear from the commentary that the Commission had to adopt a flexible approach towards the issue.

77. Mr. DUGARD, agreeing with Mr. Hafner, said that the commentary did not speak of nationality, but of citizenship, which was a concept in national or local law. In the South African Republic at the time of apartheid, for example, South African nationality had been granted to all persons residing in the country except those who had lived in the homelands. Those persons had had only the citizenship of the homeland in which they had resided and that type of citizenship had not been recognized by international law. He was therefore in favour of finding a solution to the problem raised by article 20 that would not give the concept of secondary nationality the status of a general principle.

*The meeting rose at 1 p.m.*

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## 2492nd MEETING

*Thursday, 12 June 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, 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.

**Nationality in relation to the succession of States (*continued*)** (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,<sup>1</sup> 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 3 (Dissolution of a State) (*concluded*)

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)

1. The CHAIRMAN invited members to continue their consideration of Part II (Principles applicable in specific situations of succession of States) contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1), with particular reference to the matter of secondary nationality, in article 20 (Granting of the nationality of the successor States), subparagraph (b) (ii).

2. Mr. THIAM said secondary nationality was not a widely known concept and, if it was to be used in the body of a draft article, it was essential for the Commission to try to define it in plenary, as was the custom with other concepts it employed. For his own part, he had to confess that it was the first time he had come across the expression. He noted, however, that all the instruments cited by the Special Rapporteur in that connection related to Central and Eastern Europe in the context of the dissolution of a State.

3. More generally, most of those instruments confused the two quite distinct concepts of nationality and citizenship. The former referred to the link between an individual and a State under international law or defined an individual as belonging to a national community, whereas the latter denoted a status implying a set of rights and duties. Great care must thus be taken to clarify the terminology used in that connection. The term "secondary nationality" also had pejorative overtones which he found unacceptable and might convey the wrong impression to the uninitiated. In any event, the Commission should not evade its responsibilities by referring any and every problem to the Drafting Committee, when many of those problems could and should be settled in plenary.

4. The CHAIRMAN said that, while the expression might give rise to perplexity, it undoubtedly denoted a very real state of affairs.

5. Mr. LUKASHUK said it was well known that parallel or secondary nationality of the Republics had existed in the former Union of Soviet Socialist Republics (USSR). It had not played a major role in State succession, for the territorial principle was generally the one adopted. He wholly agreed with the Special Rapporteur's proposals. However, in view of many members' objections, he would like to ask the Special Rapporteur whether it would be possible to consolidate the text of article 20 into one general article, not going into details but simply determining that account must be taken of secondary nationality.

6. He did not think it possible to ask the Special Rapporteur to provide a definition of secondary nationality, as not even primary nationality had been defined. The best solution would be, not to define it, but simply to draw attention to the phenomenon.

7. The CHAIRMAN observed that such a solution could perhaps be adopted in the commentary, but hardly in the text of the draft article itself.

8. Summing up the debate thus far, he said, first, that it was clear that the concept of "secondary nationality", or at any rate the term, posed problems for a number of members, given that it was specific to a small number of States, albeit not exclusively Eastern European States.

9. Secondly, the expression was defined neither in the text nor even in the Special Rapporteur's report itself. If so specific an expression was used, it had to be defined somewhere. He personally did not agree with Mr. Lukashuk: nationality and secondary nationality were terms that posed very different problems, the former being an accepted concept in international law, whereas the latter was a concept specific to certain internal legal systems. If the draft referred to secondary nationality, it would be necessary either to specify that the term was used as understood in certain States' internal law, or to attempt a general definition.

10. Thirdly, some members thought that the problem could be solved if article 20, subparagraph (b), was defined more broadly so as to encompass secondary nationality, indicating that it was one element of the genuine link concept that would be incorporated in a more broadly drafted paragraph.

11. Fourthly, it would be possible to conserve the current division into subparagraphs (b) (i) and (b) (ii), but to come up with a looser wording that would not include the term "secondary nationality".

12. Lastly, some members considered that it was not possible, in a text of international law, to refer to a notion particular to certain internal legal systems, whereas others, such as Mr. Simma, saw no objection to such a procedure. In the latter case, however, it would be necessary to define somewhere a concept that was not generally accepted in international law. He invited the Special Rapporteur to indicate his own views on the matter.

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

13. Mr. MIKULKA (Special Rapporteur) said that, as the Chairman had rightly pointed out, it was not unusual for international law to make a renvoi to a concept of internal law. The 1983 Vienna Convention had avoided defining what was to be understood by State property, instead providing that it was for the internal law of the predecessor State to determine what was covered by that concept. A number of other examples of States referring to internal law to resolve matters of international law could be found in the commentaries to the draft articles on succession of States in respect of State property, archives and debts, of which the final text was adopted by the Commission at its thirty-third session.<sup>2</sup>

14. Some members claimed that the concept of secondary nationality—which, incidentally, was certainly not intended to have any pejorative connotation—was not universally accepted. However, the same could be said of the distinction drawn by many members between the concepts of nationality and citizenship. In many countries in Central and Eastern Europe, no distinction was drawn between the two concepts, and the idea that some nationals enjoyed full rights while others enjoyed only certain rights was alien to their legal systems. The presumption that there was a generally accepted distinction between nationality and citizenship was thus wrong.

15. Confusion also arose at the linguistic level: the connotations of “nationality” varied from one language to another. In Central and Eastern Europe the term “nationality” sometimes equated with the Western concept of “ethnic origin”, and conversely, the Western notion of “nationality” was covered by the concept of “citizenship”. In order to avoid confusion, the Commission had decided to work on the basis of the concept of “nationality”, taken in the sense of a fundamental link between the State and the individual that had international consequences. It should continue to adhere to that interpretation of the concept, bearing in mind, however, that some texts referred to the same concept by the term “citizenship”. He had been accused of being inconsistent in using those terms in his report. However, when quoting from laws that used the term “citizenship”, he had had no choice in the matter: he could hardly have falsified the text by substituting a different term. It was clear that the Commission was dealing with terminology that was still evolving. Having agreed on the basic meaning of the concept, it could surely tolerate occasional references in quotations to the term “citizenship” used with the same meaning.

16. Mr. Pambou-Tchivounda had rightly asked for an explanation of how secondary nationality functioned. To begin with, it was not true to say that it had been a phenomenon confined to a small part of the globe. Once again, he was shocked at the attitude of some members, from States with a tradition of international law but whose doctrine often tended to ignore other parts of the world. Famous authors often cited endless precedents going back 200 years that had absolutely no relevance to contemporary international law, yet rejected a phenomenon that had existed in States occupying one sixth of the world’s surface, including the USSR, a State that had existed for some 70 years—clearly not long enough for some legal

doctrine to have taken note of what had been happening in that region. In federations such as the USSR, Yugoslavia and Czechoslovakia, citizenship or nationality had existed at federal level and also at the level of the component States. The link between the two had been so close that one could not exist without the other. To be a national of the federation, the person concerned had had to possess the nationality of one of the component States.

17. The technique for acquisition of that nationality had functioned in different ways at different stages. Sometimes legislation had stressed federal nationality; at other stages, secondary nationality had been considered more important at the level of internal law. For example, while declaring that all nationals of the component Republics had the nationality of the Federation, federal law referred all aspects of regulation of nationality to the level of the component Republics. Thus, the authorities of Croatia or Slovenia had determined the conditions for acquisition of their nationality, the automatic consequence of which was acquisition of the nationality of the Federation. Consequently, so-called “secondary” nationality had sometimes been very important. At other times, especially at the time of dissolution of those States, it had been devoid of any practical significance. For example, to exercise the right to vote, it was the criterion of habitual residence rather than secondary nationality that had been important. That was why he had decided to use habitual residence as his own basic criterion, and to use secondary nationality only as an additional criterion to cover cases of persons who had been outside the territory of the predecessor State or the State concerned at the time of the dissolution.

18. The CHAIRMAN said that the Special Rapporteur’s remarks constituted a defence of the article as currently worded, but took little account of the comments thereon. He invited members to propose specific solutions to the problem posed by article 20, subparagraph (b) (ii).

19. Mr. THIAM said he supported the approach taken by the Chairman, but unfortunately he had no specific proposals to make, except, perhaps, that instead of referring the text to the Drafting Committee in its current state, the Commission might establish a small working group to find a solution to the problem.

20. He did not wish to enter into a debate about the Special Rapporteur’s comments on the distinction between citizenship and nationality. The fact was, however, that a distinction existed in all countries of the world, even if it was not one formally acknowledged. Minors were nationals who did not enjoy all citizens’ rights, as were persons sentenced or deprived of their civil or political rights. The distinction was an essential and important one.

21. Mr. Sreenivasa RAO said that, if the provision was retained as it stood, certain problems would arise. Although the Special Rapporteur had only included the expression in a subordinate clause and limited it to a particular situation, he had incorporated it in a principal article on a par with nationality itself. The conditions under which secondary nationality were granted or recognized in a country were not clearly stated. One could cite the case of Egypt and Syria: when they had formed a confederation (and not a federation), earlier nationalities had been retained and not merged, but then for international

<sup>2</sup> *Yearbook . . . 1981*, vol. II (Part Two), pp. 20 et seq., chap. II, sect. D.

reasons their nationality had been superimposed, and therefore had existed to a certain extent. Malaysia and Singapore constituted a similar example.

22. In the various federal systems around the world, there were very active sub-groups, defined according to different criteria, that demanded different types of rights. If, in addition to the identification of sub-groups within a national entity, the higher value of nationality was also to be attached to them, it could only emphasize differences between groups, something which integration was seeking to avoid.

23. To invoke the example of his own country, there were a number of languages in India, and there were constant calls to have only one language at the national level to help with integration. But others did not want to lose their languages, which had existed for centuries, and thus continued to use them. States in the Indian federal system were organized on the basis of language, which was a very powerful identification factor that was similar to secondary nationality in other cases. Saying that someone had a particular nationality in his system could be a very sensitive matter. He did not question the system, but to set it out as a principle in the draft would be to send the wrong signals. There was a need to address the matter more closely, either in a small group or in the Drafting Committee, in a way that would not pose problems for different internal legal systems.

24. Mr. LUKASHUK said that, clearly, the plenary was not in a position to take a decision on the question at the current stage, because there was too much difference of opinion. He had gained the impression that the issue was not at all one of substance, but one of terminology. That, however, could be resolved.

25. The Special Rapporteur had referred to the experience in Eastern Europe. To cite an example closer to the Commission, Switzerland had secondary and even tertiary nationality—at the levels of the canton and the commune. Looking to the future, the European Union, pursuant to the Maastricht Treaty, made provision for its own nationality. That had little relation to nationality today, but who knew what form the question would take tomorrow? The Russian Federation had concluded a union agreement with Belarus, which had also given rise to a secondary or to a “supra-nationality”. He did not think it was necessary to address those questions further, but the Commission could not simply discard the Special Rapporteur’s proposal. Therefore, he supported Mr. Sreenivasa Rao’s suggestion to refer the question to the Drafting Committee, which should be instructed to prepare a draft text for the plenary.

26. The CHAIRMAN said that when the Special Rapporteur spoke of secondary nationality, he did not have in mind the nationality of federated States, such as “cantonal nationality”, but rather the very special institution found in certain States which was different from relations which persons had with the federated States to which they belonged.

27. Mr. KABATSI noted that a number of members had argued against the inclusion of the notion of secondary nationality, entirely or mainly because its application at national level was so rare and therefore had no place in the

draft. He would normally concur with them. Some had even pointed out that in certain jurisdictions the notion would be unacceptable. On the other hand, no one had seriously challenged the existence of the notion of secondary nationality as such. In his view, if it did in fact exist, albeit in special circumstances and in few areas of the world, secondary nationality should still be addressed in the context of the Commission’s exercise. There was a discernible move throughout the world towards integration through the building of economic regions and groups, and it was conceivable that that notion might in the future become more prevalent than had been the case so far. Looking even further ahead, occasions might arise in which it was necessary, as a result of a State succession, to deal with the situation of a number of persons that might otherwise not be covered. That was what the Special Rapporteur, for whom such a situation was not alien, had tried to do. But such a situation could also occur in other parts of the world, and he did not think it should be left aside. He would even go farther than Mr. Sreenivasa Rao and suggest that the provision should be sent to the Drafting Committee, which could, if it was unable to sort out the matter, say so. The notion did exist, was applied in some parts of the world and might some day be applied even more widely. For that reason, he was opposed to deleting the notion.

28. Mr. PAMBOU-TCHIVOUNDA said that Mr. Kabatsi had been right to urge the Commission to look to the future. But then the problem should be included in section 2, on unification of States, where the considerations Mr. Kabatsi had in mind could be most usefully turned to account.

29. After listening to the Special Rapporteur’s reply to his question from the previous day, he would point out that two different matters were involved: the term “secondary nationality”, which was found nowhere in international law, and the thing itself, which was an internal fact in State confederations and federations. The thing itself could be characterized juridically as a fact of internal law, even though, needless to say, it was for the federation or confederation to decide how that fact was perceived. When a dissolution of a State occurred, followed by fragmentation, he wondered whether that fragmentation could not be reflected, once again, in the genuine link concept. The matter should not be sent to the Drafting Committee; rather, the plenary itself should take a decision on the question by drawing upon the “Crawford-Pellet axis”.

30. Mr. DUGARD said it was common knowledge that many internal statutes did not distinguish clearly between citizenship and nationality, and indeed many treaties which had been referred to by the Special Rapporteur in the commentary contained in his third report likewise failed to do so. At the current time, members must contend with another area of confusion, the concept of secondary nationality. If the Commission did recognize it as it appeared in the draft articles, it would approve the concept of secondary nationality, something that should not be encouraged, because it would simply add another area of confusion to the whole field of nationality in international law. In his view, the Special Rapporteur should explain in the commentary that international law was concerned with nationality but that the competing terms, citizenship and nationality, existed.

31. As to article 20, subparagraph (b) (ii), he suggested retaining the principle, which was an important one, although it might be largely of regional relevance, but the situation should be described without giving approval to the concept of secondary nationality. That could be done in the Drafting Committee, for example by saying that where the predecessor State was a federal or confederal State in which the category of federal or confederal citizenship or secondary nationality was known, steps of the kind suggested by the Special Rapporteur should be taken. In other words, it could be resolved in the Drafting Committee if there was agreement that clear approval should not be given to the concept of secondary nationality.

32. Mr. SIMMA said he was somewhat surprised that some members of the Commission, for reasons which had until the current time remained unstated, felt that the concept of secondary nationality had a separatist or centrifugal connotation. That might be the case in some countries, but it was not so in his own. The concept did exist, as the Special Rapporteur had proved beyond a doubt. He did not see how taking account of the concept in the way it was done in article 20 signified that the Commission approved it. If a concept existed in certain States, it was not for the Commission either to approve it or disapprove of it.

33. With reference to a point made by Mr. Sreenivasa Rao, it was one thing to attach to a concept the higher value of nationality, but it was another simply to take it into account without any value judgement in cases where it existed. Unquestionably in cases of dissolution of States, the fact that there had been an attachment to a sub-unit, be it a State or a community, had to be taken into consideration when deciding how to divide, as it were, the populations among the various successor States. He could live with what had been called the "Crawford-Pellet axis". If, for instance, the word "category" was deleted, he would not object; something might also be added to secondary nationality, along the lines of "attachment to local sub-units". But he was in favour of keeping a reference to it in the draft article and not relegating it to the commentary.

34. The CHAIRMAN said that, as he saw it, there were three possible solutions: to refer the text as it stood to the Drafting Committee, which would be instructed to improve the wording while retaining the term "secondary nationality"; to retain the idea of secondary nationality but attempt to find another term for it; to instruct the Drafting Committee to merge article 20, subparagraphs (b) (i) and (b) (ii), and ask the Special Rapporteur to include the notion of secondary nationality in the commentary together with the explanation which he had just given the Commission.

*The Commission decided to instruct the Drafting Committee to merge article 20, subparagraphs (b) (i) and (b) (ii).*

35. Mr. MIKULKA (Special Rapporteur) said he regretted the Commission's decision. In all likelihood the text would not be acceptable to States created as the result of recent dissolutions, because it would completely ignore the problems that gave rise to their legislation.

36. Mr. HAFNER said he had problems with article 21 (Granting of the right of option by the successor States), both paragraphs of which referred to the right of option, but from differing standpoints. In paragraph 1, the right of option was to be used for selecting one of the nationalities to which a person was already entitled. It therefore pertained solely to the right to select, not to the entitlement to nationality. In paragraph 2, however, the right of option seemed to cover both the entitlement to nationality and the right to select from among a number of nationalities. It therefore pertained both to the acquisition of nationality and to the right to select.

37. It could also be argued, however, that paragraph 2, could be read as signifying that the prerequisite for entitlement to nationality was the right to acquire nationality under the internal law of the State concerned. In that regard, the provision would again be reduced to the right to select among nationalities which would be offered on a different legal basis, namely on that of internal law. Though he did not agree with that interpretation, it was one possible way of looking at article 21, paragraph 2. He requested the Special Rapporteur to explain which interpretation of article 21, paragraph 2 was correct.

38. Mr. MIKULKA (Special Rapporteur) said paragraph 1 was perfectly clear: when a person was entitled to acquire the nationality of two or more successor States, that person had the right of option. When a person was not covered by paragraph 1, paragraph 2 came into play, that person had the right to acquire, by virtue of a declaration, the nationality of at least one of the successor States.

39. Mr. CRAWFORD said that, in summarizing the debate on section 3 (Dissolution of a State), the Special Rapporteur had made the point that Part II, dealing with specific situations, was intended primarily to give guidance, whereas Part I (General principles concerning nationality in relation to the succession of States) laid down fundamental rules. Unfortunately, that distinction was not clear from the actual wording. In the normative part of the draft, care was taken to employ properly the mandatory "shall" and the conditional "should". Yet in the non-normative part, they were used less carefully. For example, the obligation under article 20, subparagraph (a), and the situation outlined in article 20, subparagraph (b), were different, yet both were prefaced by "shall". There was a discrepancy between the "shall" applied to the right of option in article 21 and the "should" applied to the same right in article 7 (The right of option). The Drafting Committee must give serious consideration to the drafting technique, for it was not a good idea to use the mandatory "shall" in Part II, if that Part was to continue to reflect only policy prescriptions.

40. Mr. RODRÍGUEZ CEDEÑO said that article 20, subparagraph (a), established the obligation on the part of the successor State to grant nationality by the criterion of habitual residence. Article 20, subparagraph (b), sought to cover other cases—persons who did not have their habitual residence in the territory of the successor State—and obligated that State to grant nationality to such persons unless they had their habitual residence in another State and also had the nationality of that State, in line with article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1. Under

article 20, subparagraph (b) (i), the granting of nationality was based on strictly territorial criteria: persons residing in a third State, who were not born in the predecessor State but were the children of a national of the predecessor State, would not be covered. Article 21, paragraph 2, on the other hand, might cover such persons, giving them the right of option. Perhaps part of the wording of that article, reflecting the criterion of *jus sanguinis*, could be incorporated in article 20, subparagraph (b) (i). Alternatively, the commentary could explain that article 20, subparagraph (b) (i), must be read in conjunction with article 21, paragraph 2. He requested clarification from the Special Rapporteur on those points.

41. Mr. MIKULKA (Special Rapporteur) said Mr. Rodríguez Cedeño was correct in his interpretation. Article 21, paragraph 2, was aimed at persons who had acquired the nationality of the predecessor State by virtue of *jus sanguinis* and were not covered by any of the provisions of article 20. He saw no alternative other than to provide for the right of option for such persons as a way of enabling them to become nationals of one of the successor States. Mr. Rodríguez Cedeño's proposed modification of the text could be acceptable for States whose nationality legislation was based on *jus sanguinis*, but it was difficult to presume that it would be accepted by countries whose nationality regime operated on the basis of *jus soli*. He therefore thought it inadvisable to incorporate part of article 21, paragraph 2, in article 20, subparagraph (b) (i).

42. As to the reference in article 20, subparagraph (b) (i), to place of birth, that criterion was generally accepted in both *jus soli* and *jus sanguinis* regimes as a way of enabling persons residing in foreign countries to acquire the nationality of a successor State.

43. The CHAIRMAN noted that, in accordance with the decision just adopted, article 20, subparagraph (b) (i), and article 21, paragraph 2, would need to be brought into alignment. The decision would not do away with the idea of secondary nationality. It would no longer appear in the text of section 3, but that did not mean the commentary could not refer to that category of nationality. On the contrary, it would be unfortunate if the commentary was impoverished by the removal of any mention of secondary nationality.

44. He noted that the Commission had concluded the discussion on section 3 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 articles 19, 20 and 21, to the Drafting Committee.

*It was so agreed.*

#### SECTION 4 (Separation of part of the territory)

##### ARTICLE 22 (Scope of application)

##### ARTICLE 23 (Granting of the nationality of the successor State)

##### ARTICLE 24 (Withdrawal of the nationality of the predecessor State) and

##### ARTICLE 25 (Granting of the right of option by the predecessor and the successor States)

45. Mr. MIKULKA (Special Rapporteur), introducing section 4 (Separation of part of the territory), said article 22 (Scope of application) served as a *chapeau*, mainly to obviate the need for repetition of the definition of separation of part of the territory, and to explain the sense in which the terms "successor State" and "predecessor State" were used in that section.

46. Article 23 (Granting of the nationality of the successor State), subparagraph (a), set forth habitual residence as the primary criterion for identifying persons who should acquire the nationality of the successor State. Subparagraph (b) indicated that, if the predecessor State had been organized as a federation, the principle of secondary nationality would apply. If the predecessor State was Yugoslavia, for example, upon the secession of Croatia or Slovenia, the nationality of persons who had been entitled to acquire either Croat or Slovene nationality could be determined by application of the secondary nationality criterion. It should be recalled that such persons could not have held the nationality of the federal State unless they had had Slovene or Croat nationality, and upon losing Slovene or Croat nationality, they had automatically lost the nationality of the federal State. The conditions for acquisition of the nationality of the federal State had not been the subject of regulations under federal law, except in general terms. The precise conditions had been worked out in the legislation of the republics that had made up the federation.

47. In article 24 (Withdrawal of the nationality of the predecessor State), paragraph 2 set out the counterpart of the obligation under article 23 for the successor State to grant its nationality to certain categories of persons. It stipulated the obligation on the predecessor State to withdraw its nationality from those categories of persons entitled to acquire the nationality of the successor State. Paragraph 1 might seem superfluous, and the Drafting Committee might wish to delete it, but he had included it with a view to avoiding any possible misinterpretation.

48. Article 25 (Granting of the right of option by the predecessor State and the successor States) provided for the right of option for persons who would be entitled to acquire two or more nationalities. The situation was distinct from the one envisaged in the context of dissolution of the State in article 21, paragraph 2: all other persons except those covered by the provisions of article 23 would conserve the nationality of the predecessor State.

49. Preserving the criterion of secondary nationality—the concept and not necessarily the term itself—was more important in section 4 than it was in section 3. He gave the example of Singapore uniting with the Federation of Malaysia but very shortly thereafter deciding to leave that federation: it was desirable for Singapore to retain the same population profile after leaving as before entering the federation. Though doctrine did not speak explicitly of secondary nationality, it was frequently inspired by the concept and applied the rules of *uti possidetis* in the preservation of borders between the States of a federation that was undergoing disintegration. It would be illogical to accord great weight to the rules of internal law for the

definition of borders between the States of a federation, yet completely overlook the rules for nationality or citizenship of persons from such entities.

50. In the interests of unifying its codification efforts, the Commission should also be mindful of its work on succession of States in respect of State property, archives and debts, in which it had defined local debts as continuing to bind the entities that had been autonomous in the context of a composite State. The Commission had thus drawn a distinction between localized debts, meaning debts of a State at the international level, and local debt, meaning debts contracted by the units of a federation or composite State.

51. The CHAIRMAN invited members of the Commission to make comments on section 4 in general.

52. Mr. ECONOMIDES said he had no comments to make on article 22. Article 23, subparagraph (a), set out a fundamental rule and he endorsed the substance of subparagraph (b). In the current context, the category of secondary nationality was absolutely indispensable, but it could be titled differently if the Commission so desired—for example, “nationality for domestic purposes”—with a corresponding explanation of the term. He would also have liked to have seen an additional subparagraph in article 23, aligned with article 20, subparagraph (b) (i), specifying that persons having their habitual residence in a third State could choose the nationality of the territory of the State concerned. Those persons obviously originated in, or had genuine links with, the State concerned, and were resident abroad when the State acceded to independence. Such persons must have the possibility of choosing the nationality of the new State that currently possessed the territory with which they had links. The acquisition of nationality would in such instances be on an individual basis and voluntary.

53. Article 24, paragraph 1 (a), referred to persons who had their habitual residence in the predecessor State—that is to say, residents of that State, in fact its nationals—but they were not “persons concerned” within the meaning of the footnote on definitions. The definition was thus defective, or at least incomplete. The full definition of “persons concerned” would be individuals who had the nationality of the predecessor State and had their habitual residence in the transferred territory. In the case of State succession, therefore, the two elements of nationality and residence were present and inseparable. When a predecessor State ceased to exist, however, the circle of “persons concerned” was broadened to comprise individuals who had the nationality of the predecessor State but had their habitual residence abroad; such persons lost their nationality when the predecessor State ceased to exist. Hence a problem of definition arose, since the nationals of the predecessor State, which continued to exist, who resided on its territory and those who were residents abroad would not lose their nationality and therefore did not fall into the category of “persons concerned”.

54. As for article 25, it, too, created confusion, for despite its title, it did not actually deal with right of option. The right of option applied to a choice between two nationalities, but in the cases envisaged in article 25 the nationalities of two or more States were available for

the persons concerned to choose from. It was not clear who had the right to take the nationality of the predecessor State or of the successor State, or of two or more successor States, since that depended on the internal law of the States concerned. The idea of acquiring a number of nationalities made him a little uneasy. States had always endeavoured, in the event of State succession, to avoid statelessness as well as dual and multiple nationality. Yet article 25 actually seemed to encourage the phenomenon of multi-nationality when the real objective was that every person should have one nationality. If, following a State succession, certain persons happened to acquire several nationalities, that was a matter for internal law. The draft article should certainly not provide for it as a desirable possibility. Also, article 25 was silent as to the modalities and criteria for the exercise of the right of option. On both points, greater clarity was required.

55. He would remind the Commission of the four classic rules of international law in the matter of State succession. First, all nationals of the predecessor State resident on the transferred territory automatically acquired the nationality of the successor State. Secondly, the successor State must recognize the right of option of the nationality of that State of not all those persons but only those who had evident and unquestionably genuine links with the predecessor State. Thirdly, nationals of the predecessor State resident abroad also automatically acquired the nationality of the successor State if they lost their own nationality on account of State succession, for instance, where the predecessor State disappeared following unification or dissolution. Fourthly—and it was a rule required not so much by international law as by current human rights standards—nationals of the predecessor State resident abroad who had evident and genuine links with the transferred territory must have the opportunity, even though they retained the nationality of the predecessor State, of acquiring, on an individual and voluntary basis, the nationality of the successor State. In such cases, the predecessor State could, of course, withdraw its own nationality.

56. The international law content of the articles under consideration must be strengthened to make sure that the text finally adopted formed the basis for a genuine instrument for the codification and progressive development of international law. At the moment, it seemed at times to be more in the nature of a model for a uniform law.

57. The CHAIRMAN, pointing out that the subject for discussion was separation of part of the territory of a State, said that the third rule referred to by Mr. Economides applied solely to the case of unification or dissolution of a territory. He would therefore ask members not to comment on it at that stage. Moreover, he was not sure whether the fourth rule referred to by Mr. Economides was relevant to the discussion, since it too concerned not separation of part of the territory but transfer of the territory.

58. Mr. LUKASHUK, agreeing with the Chairman, said that the articles under discussion had his full support, with the possible exception of article 24. There seemed to be some contradiction between the title of that article, which referred to the “withdrawal” of nationality, and its content which dealt with the retention of nationality. Possibly,



therefore, the article could be entitled "Retention of the nationality of the predecessor State" and the first sentence of paragraph 2 could be placed at the end of the article, as an exception.

59. The CHAIRMAN said that due note had been taken of that suggestion.

60. Mr. BROWNLIE said that, unless there was some substantial policy difference in the matter, he would be a little uneasy about the lack of symmetry between sections 1 and 4 of Part II of the draft, and specifically between the content of articles 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) and 23.

61. The CHAIRMAN said that, to his mind, there was a fundamental difference in that, in the case of separation of part of the territory, a new State was created, whereas transfer of part of the territory took place between States that already existed.

62. Mr. BROWNLIE said he accepted that the history of the two situations was different but still wondered whether the same was true of policy. As far as he could see, the policy would be the same, namely, to maintain stability in legal relations and to protect the status of the population in the particular area of territory concerned. It was, however, not immediately apparent how a difference in political mechanics could dictate a difference between the rules laid down in article 17, on the one hand, and articles 23 and 24, on the other. If there was such a difference, he would like to know the reason for it.

63. Mr. MIKULKA (Special Rapporteur) said that transfer of part of the territory could be agreed between two States for purely technical reasons, for instance, for the purpose of building a dam or a motorway, in which event the population's attitude would be entirely neutral since its ethnic, religious or other origins would not be involved. In such cases, the principle that all persons concerned on the territory should have the right of option was perfectly acceptable. Separation of part of the territory, on the other hand, which involved the creation of a new State, was a revolutionary occurrence and the population involved would be highly motivated. In such cases, it was absurd to argue that everybody could opt for the nationality of the predecessor State. If so, what would be the point of creating a new State which might well end up with no population at all? That highly logical argument militated in favour of a distinction between the two situations.

64. There would, of course, be individual instances when other elements could be taken into consideration, as where transfer of part of the population might be caused by the need to solve, say, ethnic difficulties. That did not, however, mean that any distinction whatsoever between transfer of part of the territory, on the one hand, and separation of part of the territory, on the other, should be eliminated. If that line of thinking were followed to its logical conclusion, the upshot would be that matters would eventually be regarded as too complicated for any principle to be laid down. Indeed, that seemed to be the position taken by Mr. Brownlie, who, in his writings, had concluded that it was not possible to draw any distinction. The crux of the matter was that no one had had the courage to face up to the problem and find a distinction. In

dealing with section 4, the Commission was not engaged in the codification of international law but in formulating certain recommendations for the guidance of States. That, at any rate, was the approach he had adopted to the whole of Part II, and it had received the blessing of the Commission with its previous membership. It was not for the Commission in its new composition to reproach him on that score.

65. The CHAIRMAN said that it was absolutely essential to have some indication of the scope of Part II right at the beginning, for otherwise the same problems would arise outside the Commission.

66. Mr. MIKULKA (Special Rapporteur), agreeing with the Chairman, said that he had already mentioned on a number of occasions that Part II would need an introductory provision or article to explain clearly what was involved. If the emphasis continued to be on the codification of international law, however, Part II might well disappear.

67. Mr. SIMMA said Mr. Brownlie's question, as he understood it, was that, since the situation contemplated in article 23, subparagraph (b), could arise within the context of the situation covered in article 17, should there not be greater symmetry between those two provisions?

68. Mr. GALICKI said he would like to know whether it was correct to assume that the principles set forth in very general terms in article 17 with regard to territorial transfer could apply equally in the situations dealt with in section 4, concerning separation of territory. If so, the relevant provisions should perhaps be harmonized or recast.

69. Mr. BROWNLIE said that it would help if the Special Rapporteur could accept that, when he spoke, he was not attacking him. Had he wanted to attack the draft, he would have said that, in historical terms, the distinction between transfer of a territory and separation of a territory was probably not very substantial. When the Austro-Hungarian Empire had broken up, for example, what had happened was that the allied and associated powers had made dispossessions: whether or not that involved a transfer or a separation of territory seemed to him to be a wholly academic matter.

70. That, however, was not his actual position. If he had played ball, it was partly because he had come on the scene more recently, though that was not necessarily a disadvantage. He agreed, however, that, as a matter of presentation, it was perfectly acceptable to keep the distinction in question and he was not suggesting that there should be any general rearrangement. Mr. Simma had understood him correctly: he had been raising a simple question as to the symmetry and content of article 17 and the counterpart articles under discussion.

71. The CHAIRMAN said that article 17 must be read and understood in the light of the discussion in plenary. If that was borne in mind, the article would probably not emerge unscathed from the Drafting Committee.

72. Mr. MIKULKA (Special Rapporteur) said that, as he had already explained in connection with article 17, habitual residents of the transferred territory acquired the nationality of the successor State but did not do so

immediately. The rule to that effect was thus residual, the main rule proposed for article 17 being that the entire population had a right of option for two years from the moment of the transfer of the territory. Until that period had expired, it was deemed to continue to be the population of the predecessor State. The position was entirely different in the case of separation of part of the territory, since the purpose of separation was precisely to create another State with a population from the moment of its creation. Such a State was in no way obliged to grant a right of option to the whole population and could, moreover, reasonably expect to have at least a certain population from the outset. Consequently, despite a certain similarity between the two rules, there was in fact a significant difference between the situations to which they applied.

*The meeting rose at 12.40 p.m.*

## 2493rd MEETING

*Friday, 13 June 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, 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. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, 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,<sup>1</sup> 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 4 (Separation of part of the territory) (*continued*)

#### ARTICLE 22 (Scope of application)

#### ARTICLE 23 (Granting of the nationality of the successor State)

#### ARTICLE 24 (Withdrawal of the nationality of the predecessor State) and

#### ARTICLE 25 (Granting of the right of option by the predecessor and the successor States)

1. The CHAIRMAN invited the members of the Commission to state their views on the question of the relationship between article 23 (Granting of the nationality of the successor State) of section 4 (Separation of part of the territory) and article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) of section 1 (Transfer of part of the territory) of Part II (Principles applicable in specific situations of succession of States) of the draft articles on nationality in relation to the succession of States contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1).

2. Mr. PAMBOU-TCHIVOUNDA said that there were also similarities on a number of points between section 3 (Dissolution of a State) and section 4. He wondered whether dissolution, which formed the subject of section 3, might not simply be one of the aspects of the separation of States within the framework of the succession of States. If so, some of the questions arising from article 20 (Granting of the nationality of the successor States) of section 3, as well as from articles 23 and 25 (Granting of the right of option by the predecessor and the successor States), would perhaps find a solution.

3. Mr. CRAWFORD said he presumed that, so far as secondary nationality was concerned, the Commission would adopt the same solution for section 4 as for section 3.

4. Mr. MIKULKA (Special Rapporteur), reverting to the comments made by Mr. Economides (2492nd meeting), explained that the expression "persons concerned" did not appear in article 24 (Withdrawal of the nationality of the predecessor State), paragraph 1, because that provision did not relate specifically to "persons concerned" or, in other words, to persons who, on the date of the succession of States, had had the nationality of the predecessor State and whose nationality might be affected by the succession. It related to persons whose nationality would not be affected and who would quite simply retain the nationality of the predecessor State. In paragraph 2 of the same article, the use of the word "concerned" would be redundant because that paragraph referred back to article 23, which spoke expressly of "persons concerned".

5. Replying to another question by Mr. Economides, he drew attention to the possibility of duplication of nationalities entailing the granting of the right of option to the persons concerned, for example, in cases where a person habitually resident in the territory of the predecessor State or of one of the successor States had, at the same time, the secondary nationality of one of the successor States. That person would then be entitled to acquire the nationality both of the predecessor State and of the successor State. The right of option, which formed the subject of article 25, eliminated that risk. If, as Mr. Economides had proposed, the criterion of the origin of persons in the territory concerned were added to the two criteria already

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).