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**Summary record of the 2497th meeting**

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

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DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>11</sup> (*continued*)

72. The CHAIRMAN invited the Commission to resume its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

PART I (*continued*)

ARTICLE 2 (Use of terms)

73. The CHAIRMAN recalled the decision (2495th meeting) that the adoption of article 2 would be without prejudice to the precise position of that article in the final draft. He also noted that it had been agreed to replace the word *individu* in the French version by the words *personne physique* and to amend the Spanish text accordingly.

*Article 2 was adopted.*

ARTICLE 3 (Prevention of statelessness)

74. The CHAIRMAN recalled that the words *personnes qui avaient* in the French text had been amended to read *personnes physiques qui possédaient*.

*Article 3 was adopted.*

ARTICLE 4 (Presumption of nationality)

75. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 4 (Presumption of nationality), had not been included in the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)<sup>12</sup> but had been drafted by the Drafting Committee in the light of comments made during the discussion, in particular by Mr. Brownlie (2476th meeting). The Committee had felt that the issue was of sufficient importance and generality to warrant a separate provision in Part I, on general principles. The new article reflected a trend in practice, namely, that in cases of State succession persons concerned who were habitual residents of the affected territory *usually* opted for the nationality of the successor State. It also provided a useful backdrop for some of the provisions of Part II, which addressed the issue in some measure.

76. It should be noted that the article provided only for a presumption and was further circumscribed by the opening clause reading: "Subject to the provisions of the present draft articles". In other words, the provision would operate on a residual basis where the need arose. The article was designed to serve as a reminder to successor States that persons concerned who were habitual residents of the affected territory should be deemed to have opted for their nationality and that due consideration

should be given to that issue in resolving questions of nationality. Accordingly, the article was without prejudice to the right of option to which such persons concerned were entitled. The opening clause clearly indicated that the effect of the article should be seen within the overall context of other articles dealing with the right of option and also, perhaps, the obligation to grant nationality in the case of transfer of territory.

77. Mr. THIAM said that, to his recollection, the title of Part I had been changed to "General provisions". If no decision on that point had been taken as yet, he would reserve his comments for later.

78. Mr. ROSENSTOCK said that he had no objection to article 4, on the understanding that the presumption in question was not only subject to the provisions of the current draft articles but was also rebuttable.

79. Mr. GOCO said that, reading article 4 in conjunction with article 5, he was concerned about the situation of persons concerned living in the predecessor State pending the enactment of the appropriate laws by the successor State. It was important to ensure that, in the intervening period, such persons would not be divested of the nationality of the predecessor State.

80. The CHAIRMAN pointed out that the problem mentioned by Mr. Goco was obviated by the fact that article 5 used the conditional "should" rather than the mandatory "shall".

81. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the presumption formulated in article 4 had not prevented and would not prevent persons having the nationality of the predecessor State from retaining that nationality. The presumption could not entail loss of nationality.

82. Mr. BROWNLIE said that the addition of article 4 had been motivated by two considerations, one being the need to limit the possibility of statelessness and the other being the wish to provide a sort of fall-back clause by way of residual protection in precisely the type of case envisaged by Mr. Goco.

*The meeting rose at 1 p.m.*

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**2497th MEETING**

*Friday, 20 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

<sup>11</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

<sup>12</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,

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]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>2</sup> (continued)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

PART I (continued)

ARTICLE 4 (Presumption of nationality) (concluded)

2. Mr. SIMMA said that the text of article 4 (Presumption of nationality) proposed by the Drafting Committee had overcome his problem with the principle of the presumption of nationality, since that presumption was rebuttable.

3. Mr. PAMBOU-TCHIVOUNDA said that the word “provisions” was used for the first time in the draft in article 4 and recalled that Mr. Lukashuk had proposed that Part I should be entitled “General provisions”. Secondly, he wondered whether the words “Subject to” referred to the *lex specialis* dealt with in Part II? If so, that could be made clear by amending the beginning of the article to read: “Subject to the provisions of Part II of the present draft articles”.

4. The term “territory affected by the succession of States” was somewhat vague and it might be useful to specify what territory was meant. It could also be asked whether the presumption was not really a presumption of possession rather than a presumption of acquisition. If so, the words “are presumed to acquire” should be replaced by the words “are presumed to possess”.

5. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), referring to the first point raised by Mr. Pambou-Tchivounda, said that reference was being made not only to the provisions of Part II of the draft articles, but also to some provisions of Part I, such as those on the right of option. It would therefore be better to leave the text as it stood. On his second point, it would also be better not to

define what was meant by the “territory affected by the succession of States” in order to cover all cases of succession, including those affecting only a part of the territory of a State. As to the third comment on whether the word “possessed” should be used in preference to the word “acquire”, he said that, in English, the difference was minimal.

6. Mr. BROWNLIE said that “acquire” was the most appropriate word because it described the process of change that characterized the succession of States, whereas the word “possessed” meant something that already existed, and that was not the case.

7. Mr. MIKULKA (Special Rapporteur) said that Mr. Pambou-Tchivounda’s comment on the word “provisions” was entirely justified and should be taken into account during the consideration of the title of Part I of the draft articles. The expression “territory affected” referred, of course, to the territory described in article 2, subparagraph (a).

8. Mr. PAMBOU-TCHIVOUNDA pointed out that article 2 (Use of terms), subparagraph (a), did not define the words “affected territory”.

9. Mr. KABATSI said that he endorsed the comments made by Mr. Brownlie on the word “acquire”, which denoted a new situation and was therefore the appropriate term.

10. Mr. AL-BAHARNA said that, like Mr. Pambou-Tchivounda, he believed that the words “affected territory” should be defined in article 2. In addition, the words “are presumed to” should be replaced by the word “should”.

11. Mr. GALICKI said that the word “acquire” was entirely suitable because it described a situation that began with the succession of States. He also thought that the words “territory affected by the succession of States” must absolutely not be defined, so that article 4 would continue to be as flexible as possible. The only necessary definitions were those already contained in article 2.

12. Mr. GOCO said that he had expressed reservations about article 4, but could now accept it, since the presumption it provided for was rebuttable. The expression “territory affected” should be understood in the light of the definition of the words “persons concerned”.

13. Mr. ROSENSTOCK said that the “territory affected” was obviously the territory referred to in article 2, subparagraph (a).

14. Mr. AL-KHASAWNEH said that he did not understand how the presumption provided for in article 4 was rebuttable other than by virtue of the provisions of the draft articles. If that was the case, then its value might be questioned.

15. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the presumption was rebuttable solely by virtue of the words “Subject to the provisions of the present draft articles”.

16. Mr. ROSENSTOCK said that the text under consideration was to become a declaration and that States had to

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

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

be able to adapt its provisions. The will of the "persons concerned" also had to be taken into account. That was why the rebuttability of the presumption stated in article 4 must not be restricted to the provisions of the draft articles, but must also be based on other valid reasons.

17. Mr. BROWNLIE, replying to Mr. Al-Baharna, recalled that he had proposed using the word "should" in place of the words "are presumed to", but there had been no consensus on that proposal. The rule had therefore been stated in the form of a presumption.

18. The CHAIRMAN said that, having taken note of the reservations expressed and if he heard no objection, he would take it that the Commission wished to adopt article 4.

*Article 4 was adopted.*

19. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), introducing articles 5 (Legislation concerning nationality and other connected issues) and 6 (Effective date) adopted by the Drafting Committee, said that article 5 corresponded to article 3, paragraph 1, as proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1).<sup>3</sup> The Drafting Committee had considered it necessary to state explicitly that the legislation to be enacted by the States concerned should be "consistent with the present draft articles". That underscored the importance of respect for the principles set out in the draft articles, to which States were urged to give effect through their domestic legislation. A small drafting change had been introduced in the first sentence of the draft article: the phrase "without undue delay" now appeared after the word "should". The expression "necessary measures" had been replaced by the expression "appropriate measures", which better reflected the fact that the obligation envisaged was an obligation of conduct. The Drafting Committee had also felt that the word "effect" more accurately reflected the idea to be conveyed by the second sentence than the word "impact".

20. Paragraph 2 of article 3 proposed by the Special Rapporteur, as amended, now constituted a separate provision, namely, article 6. Indeed, the Drafting Committee had considered that the principle prohibiting retroactive effect of nationality applied not only to the acquisition of nationality by law, but also to the acquisition of nationality under the terms of a treaty. Because the reach of the principle was broader than article 5, which dealt only with national legislation, the Committee had felt it merited inclusion as a separate provision and had couched it in more general terms. Moreover, the first sentence had now been expressed in terms of an obligation, by the use of the word "shall" rather than the word "should", which was more consistent with the obligation of States to prevent statelessness under article 3 (Prevention of statelessness).

21. The Drafting Committee had considered that it was preferable to use the term "attribution", rather than a term such as "granting", to refer to the act by which a State accorded its nationality to an individual. It had been felt, in particular, that the term "attribution" best conveyed the point that the acquisition of nationality upon the succes-

sion of States was distinct from the process of acquisition of nationality by naturalization. The Committee had also decided to use the term "acquire" when reference was made to the voluntary act of an individual involving the exercise of the right of option. Article 6 was the first article in which those terminological distinctions were drawn and they were used consistently later throughout the text. Accordingly, whenever those terms occurred in the text, they should be understood in the same sense as they were in article 6.

ARTICLE 5 (Legislation concerning nationality and other connected issues)

22. Mr. FERRARI BRAVO said that the text of article 5 proposed by the Drafting Committee was extremely welcome. He nevertheless wondered about the use of the conditional tense, "should", in the two sentences composing the article. The first sentence established a fairly important rule aimed at States and there was no real reason to weaken it by the use of the conditional tense. The text should read: "Each State concerned shall . . . enact".

23. The second sentence should have been made into a separate paragraph. Since it dealt with the measures that States were supposed to take to provide information to persons concerned by a succession of States and since those measures were technical ones deriving from internal law, the conditional tense could be used: "It should take all . . . measures".

24. Mr. PAMBOU-TCHIVOUNDA said he noted that the term "connected issues" appeared in the title. Obviously it referred to issues that would be dealt with later in the article. But would it not be useful to define it in article 2?

25. The problem raised by Mr. Ferrari Bravo was very real and it derived from the scope of the instrument the Commission was in the process of drafting, in other words from its binding nature. As it had been decided to have a declaration, the text did not, strictly speaking, have legal force. In the circumstances, it would be better to couch the first sentence in mandatory terms, namely, "Each State concerned shall . . . enact". The same problem arose in the case of the word *corresponde* in the French text, since it was doubtful that States would be mandatorily required to bring their laws into line "with the present draft articles".

26. Contrary to what Mr. Ferrari Bravo had said, however, the second sentence should likewise be couched in mandatory terms for reasons of logic: if under the terms of the first sentence, States "shall" enact a particular law, then a fortiori they would be required to take further measures to implement that law. Once again, therefore, the mandatory form was required.

27. Accordingly, he proposed that article 5 should be worded to read:

"Each State concerned shall, within a reasonable time period, enact laws concerning nationality in relation to the succession of States and shall take the relevant measures that apply with respect to the persons concerned, for the purpose in particular of apprising

<sup>3</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

them of the right of option provided for under the said laws.”

28. Mr. THIAM, reminding members that it had been decided to avoid the conditional tense, said that there seemed no point in reverting to the matter. He endorsed Mr. Pambou-Tchivounda's idea that the article should be drafted to form a single sentence.

29. Mr. AL-BAHARNA said he shared Mr. Pambou-Tchivounda's concern about the term “connected issues”, which appeared in the title and which had no place there unless it was explained earlier. The title should read simply: “Legislation concerning nationality”, if only because the article itself was silent as to “connected issues”.

30. He endorsed Mr. Pambou-Tchivounda's views on the use of the words “shall” and “should”. For reasons of style, he would prefer the term “reasonable time” to the term “reasonable time period”, which now appeared in the second sentence.

31. Mr. ROSENSTOCK said he considered that the term “connected issues” should be retained as it covered a wide variety of situations, such as retirement pensions, military obligations and social benefits, which had a far-reaching effect on the lives of persons concerned by State succession. It was, however, a very difficult term to define and he therefore proposed that the necessary explanation should be given in the commentary. He shared Mr. Ferrari Bravo's view about the use of the words “shall” and “should”.

32. Mr. MIKULKA (Special Rapporteur) explained that the Commission had decided not to use the present indicative, but to make a distinction between “shall” and “should” depending on whether a customary rule or a recommendation was involved. In the version of article 5 proposed in the third report, as article 3, paragraph 1, the word “should” had been used systematically. There was no firm doctrine on whether a State really had an obligation to enact laws and, what was more, to do so “without undue delay”, as stated in the article. It had therefore seemed to him that wording which was more in the nature of a recommendation would be preferable in that case.

33. Mr. PAMBOU-TCHIVOUNDA said that, in his view, the State was being treated with sufficient consideration if it was allowed a “reasonable period” both to enact laws and to take the necessary measures to inform the persons concerned. It was important, from the population's standpoint, for the article to provide the persons concerned with the possibility of acquiring a nationality.

34. Mr. THIAM, endorsing the previous speaker's views, said that there was no need to treat States with excessive circumspection. After all, the Commission was merely making proposals and any States that did not subscribe to those proposals were at liberty not to adopt them.

35. Mr. HAFNER said that the Special Rapporteur had quite rightly reminded the Commission that, when he had raised the question of the use of the indicative rather than the conditional, particularly with regard to former article 3—now article 5—the majority of the members had been in favour of keeping the conditional. However, without denying the merit of Mr. Mikulka's arguments

concerning the advisability of using the indicative tense for customary rules and the conditional tense for recommendations, it seemed to him that arguments could also be found, in international law, in favour of using the indicative in the current case.

36. Mr. SIMMA said he too believed that the use of the indicative was justified in the current case, as the matter was one of urgent necessity. The replacement of the word “should” by the word “shall” did not necessarily mean that one was necessarily in the realm of codification.

37. Mr. MIKULKA (Special Rapporteur) pointed out that, if the word “shall” was used instead of the word “should” at the beginning of article 5, it would result in States having an obligation to enact “without undue delay” laws concerning not only nationality, but also connected issues. Was that what the Commission really wanted?

38. Mr. GALICKI said that he shared the Special Rapporteur's viewpoint. Another argument in favour of “flexible” wording was that enacting a law was not necessarily the only way of settling the nationality question, so that an obligation to enact legislation, particularly in the case of “connected issues”, could not be imposed on the State.

39. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), speaking as a member of the Commission, said that it might be asking too much of States if they were obliged to enact laws not only on nationality, but also on connected issues, since issues as varied and complex as, say, taxation and education could require lengthy negotiation. One way of getting over the difficulty would perhaps be to add the words “connected issues” to the second sentence, which would remain in the conditional. There would then be no reason why the first sentence could not be couched in the indicative tense.

40. The CHAIRMAN, taking due note of Mr. Sreenivasa Rao's suggestion, said he wondered whether the problem was not already settled by the words “without undue delay” in the first sentence. Obviously, the period of time for taking action which the State was allowed was proportional to the difficulty of the issues to be resolved and that applied in particular to connected issues.

41. Mr. KABATSI said that he too would prefer to retain the conditional tense. A wide variety of situations could arise depending in particular on the size of the territory transferred. If the territory was small and the number of persons concerned very limited, it might even not be necessary for the State concerned to enact laws. There was therefore no need to make it an absolute obligation. Furthermore, States could run into problems in enacting laws within a brief period of time, a fact that should be borne in mind. If the majority of the members of the Commission favoured the use of the indicative tense, however, he would raise no objection.

42. Mr. THIAM said that, since there appeared to be such a majority, it would be better to adopt the indicative tense and, to state in the commentary the reasons why some members had not been in favour of it.

43. Mr. HE, endorsing Mr. Kabatsi's view, said that he would like the Special Rapporteur's recommended solution to be adopted, with the indicative being used for customary rules and the conditional for recommendations. In the case under discussion, the rule in question should remain flexible.

44. The CHAIRMAN, having invited the members to voice their opinion by an indicative vote and having noted that a majority of members had expressed their support for retaining the conditional, he said he would take it that the Commission wished to keep the word "should" in the first sentence of article 5.

*It was so agreed.*

45. Mr. GOCO said that it might be better to delete the second sentence of article 5. The sentence was not very clear and did not indicate whether States were required to meet the obligation to apprise persons concerned through preliminary ratification or whether the arrangements for apprising persons concerned should be determined by the law itself, or else whether the sentence was simply a recommendation for a posteriori appraisal by means deemed appropriate by the State concerned. The obligation established by the first sentence seemed to him to be more than sufficient.

46. The CHAIRMAN, explaining that he had to leave the meeting, said that the title of article 6 of the French text should read *Date d'effet* instead of *Date effective*.

*Mr. Baena Soares took the Chair.*

47. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), replying to Mr. Goco, said that he did not see any real problem with the second sentence of article 5. The emphasis on the effect of legislation clearly showed that the sentence referred to a posteriori measures. Once the legislation had been enacted, it was natural that the State concerned should inform persons concerned of all the consequences that legislation would have so that they might be able to exercise their right of option in full knowledge of the situation. The sentence was simply a recommendation addressed to States.

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 5 as proposed by the Drafting Committee.

*Article 5 was adopted.*

#### ARTICLE 6 (Effective date)

49. Mr. LUKASHUK pointed out that the Drafting Committee used the expression "attribution of nationality" in the first sentence and the expression "acquisition of nationality" in the second. He thought the wording should be harmonized, especially in view of the wording of article 4, which referred to "acquiring" a nationality. In Russian, at any rate, the word for "acquisition" would be perfectly suitable whereas "attribution" would give rise to some problems.

50. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the idea of continuity which the regime being established was designed to ensure was

more clearly conveyed by the expression "attribution of nationality". To speak of "acquisition" as in article 4 would imply the exercise of the right of option, as provided for elsewhere in the draft. Mr. Lukashuk's comment would be taken into consideration by the Drafting Committee when it finalized the text.

51. Mr. GOCO thought that the difference was purely terminological. In his view, "attribution" had a more general meaning and, in the particular case of the exercise of the right of option, it was better to speak of "acquisition". It was thus perfectly appropriate to use the term "attribution" in the first sentence of the article and "acquisition" in the second.

52. Mr. THIAM said that, in his view, "acquisition" was better than "attribution" in the article under consideration. It was more logical to speak of the acquisition of the nationality taking effect on the date of the succession of States. The drafters should adopt the point of view of the person concerned at the time of the acquisition of nationality in question.

53. Mr. MIKULKA (Special Rapporteur), supported by Mr. ROSENSTOCK and Mr. AL-BAHARNA, said that the problem could be considered either from the point of view of the State, in which case "attribution" was the appropriate term, or from the point of view of the person concerned, in which case "acquisition" was appropriate. They were two aspects of the same thing.

54. Mr. GALICKI said that he shared that view, but recalled that the term "attribution" had originally been proposed by Mr. Crawford to replace the word "grant" which implied that the State enjoyed a certain privilege in that regard.

55. Mr. LUKASHUK said that, having consulted all the examples given by the Special Rapporteur in his third report illustrating the practice of States in that area, he had found that the term generally used was "grant" and that the word "attribution" never appeared at all. He hoped that the Drafting Committee would eventually take that usage into consideration.

56. The CHAIRMAN, speaking as a member of the Commission, said that he could understand that the acquisition of nationality could be considered either from the point of view of the State or from that of the person concerned, but had difficulty in seeing why the use of the term "attribution" meant adopting the point of view of the State.

57. Mr. THIAM said that the use of the term "attribution" was incorrect because the person concerned obtained the nationality not through an act of the State which granted that nationality, but through the fact of the succession of States.

58. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 6 as it stood, taking into account the amendment of the French text of the title.

*Article 6 was adopted.*

59. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), introducing articles 7 to 11, said that

article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), which corresponded to article 4 proposed by the Special Rapporteur, was related to article 1 in that it provided a limit to the obligation of States under that article. Although the content of paragraph 1 was implied in other articles, the Drafting Committee had agreed with the Special Rapporteur on the usefulness of maintaining the article in order to avoid any ambiguity in the interpretation of the articles under consideration. Three changes had been made in the article. First, the new opening phrase "Subject to the provisions of article 10" had been inserted in order to make it abundantly clear that the provisions of article 10 were exceptions to paragraph 1 of article 7. Secondly, the Drafting Committee had added the words "any other State" at the end of the paragraph because the provision was concerned with the situation of a person having the nationality of any State other than the predecessor State. Thirdly, in the interests of terminological consistency, the word "grant" had been replaced by the word "attribute", without prejudice, however, to the final decision that would be taken in that regard. Paragraph 2 remained unchanged except for the replacement of the words "such persons" by the words "persons concerned". The title of the article had been modified to correspond to changes made in paragraph 1.

60. Article 8 (Renunciation of the nationality of another State as a condition for attribution of nationality), corresponded to article 5 proposed by the Special Rapporteur, which had been generally supported by the Commission. The only change, which was of a drafting nature, consisted in the replacement of the words "granting" in the title and "acquisition" in the text of the article by the word "attribution".

61. Article 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State), corresponded to article 6 proposed by the Special Rapporteur. The Drafting Committee had deleted the words "in its legislation" from both paragraphs 1 and 2, considering them to be superfluous. In paragraph 2, it had also deleted the words "or the entitlement thereto" because it felt that, where the loss of nationality could not be precluded, then, a fortiori, the loss of the right thereto could not be precluded. Furthermore, where the entitlement referred to in the article was that of the nationality of the predecessor State *before* the succession of States, that was a matter which might, as already explained, be dealt with in a separate provision.

62. Article 10 (Respect for the will of persons concerned), resulted from the merging of articles 7 and 8 proposed by the Special Rapporteur. Article 7, which had received the support of the Commission, had dealt with the right of option and article 8 had dealt, in three paragraphs, with the consequences of choices made under article 7. Article 8, paragraph 1, had dealt with what a State had to do when a person opted for its nationality, namely, grant or attribute its nationality to that person. Paragraph 2 indicated what a State had to do when a person renounced its nationality, namely, withdraw its nationality unless the person would become stateless as a result of such withdrawal. Paragraph 3 had been concerned with preventing any possible abuse of paragraph 2 by stipulating that the person concerned should have

clearly expressed his wish to renounce the nationality or should at least have manifestly acquiesced in the loss of nationality by his conduct. It had also provided that national legislation spelling out clearly the consequences of opting for the nationality of another State was sufficient to satisfy the test of consent on the part of the individual in question. The Drafting Committee had decided to retain paragraphs 1 and 2 of article 8, but not paragraph 3. While recognizing the importance of that paragraph, it had felt that the ideas it expressed were either covered by other articles or were too complex to be stated clearly in one paragraph. The Drafting Committee had therefore decided to delete the paragraph with the expectation that the commentary would cover the ideas involved, including their human rights aspects.

63. Article 10 as finally approved by the Drafting Committee was composed of five paragraphs. Paragraph 1 corresponded to paragraph 1 of article 7 proposed by the Special Rapporteur. The introductory phrase "Without prejudice to their policy in the matter of multiple nationality" had been deleted to avoid explicit endorsement of that policy in relation to State succession. The commentary would, however, make it clear that article 10 was neutral with respect to internal policy on multiple nationality, which was left entirely to the discretion of States concerned. The Drafting Committee had also replaced the word "should" by the word "shall", thus imposing a stricter obligation on States concerned to take account of the will of persons concerned. A further simplification in paragraph 1 had consisted in replacing the phrase "is equally qualified, either in whole or in part" by the words "is qualified". The commentary would explain that States concerned should grant a right of option for their nationality under that paragraph even if, in a particular case, the person concerned fulfilled only some and not all of the conditions for acquisition. The Drafting Committee had also, for stylistic reasons, replaced the word "several" by the word "more". It should also be noted that the plural form had been employed in the whole of paragraph 10 to avoid using "he" or "she".

64. Paragraph 2 corresponded to paragraph 2 of article 7 proposed by the Special Rapporteur, simplified by the deletion of the explicit reference to agreements between States concerned and to national legislation. The commentary would explain that the right of option would be provided for under national legislation or an agreement between States concerned. The commentary would also explain that the term "option" was not limited to the more traditional notion of a choice *between* nationalities, but was used in a broad sense which also covered the option for two or more nationalities; moreover, it covered both making a positive choice ("opting in") and renouncing an automatically acquired nationality ("opting out"). The Drafting Committee had also felt that the right of option should be couched in terms of an obligation for the State, by changing "should" to "shall", in line with the obligation to prevent statelessness under article 3. Lastly, the notion of a "genuine link", referred to in paragraph 2 of article 7 as a criterion warranting the right of option, had been omitted because of its specific connotations; the Drafting Committee had found it preferable to use the more neutral expression "appropriate connection". As Part II of the draft articles spelled out in detail what con-

stituted an "appropriate connection" in a particular case, it had been deemed unnecessary to define the expression at the current stage.

65. Paragraph 3 corresponded to the first half of paragraph 2 of article 8 proposed by the Special Rapporteur and hence provided for the obligation of a State concerned to attribute its nationality to persons concerned who had opted for it. The changes were purely editorial.

66. Paragraph 4, which corresponded to the second half of paragraph 2 of article 8, provided for the obligation of a State concerned to withdraw its nationality from persons concerned who had renounced it unless such withdrawal would make them stateless. The Drafting Committee had made only minor stylistic adjustments to the paragraph, deleting the phrase "in accordance with these draft articles", which was deemed to be superfluous.

67. Paragraph 5 corresponded to paragraph 3 of article 7 proposed by the Special Rapporteur. Aside from purely editorial changes, the Drafting Committee had replaced the last phrase "any rights of option" by "the rights provided in paragraphs 1 and 2" in order to emphasize the broad scope of the word "option", which included both opting in and opting out. The commentary would elaborate on the meaning of a "reasonable time limit", which was a time limit that should ensure the effective exercise of the right of option. The idea of providing a time limit for the exercise of the right of option had been discussed, but it had been decided to leave its definition to the States concerned. The change of title from "The right of option" to "Respect for the will of persons concerned" was intended to reflect the broader understanding of the term "option".

68. Article 11 (Unity of a family), which corresponded to article 9 proposed by the Special Rapporteur, required States concerned to adopt all reasonable measures to maintain the unity of a family that might be impaired as a result of the acquisition or loss of nationality in the succession of States. The only material change made by the Drafting Committee consisted in deleting the phrase "the application of their internal law or treaty provisions concerning", which did not affect the substance. The English version of the title of article 11 had been changed from "Unity of families". The French version remained unchanged.

#### ARTICLE 7 (Attribution of nationality to persons concerned having their habitual residence in another State)

69. Mr. LUKASHUK asked the Chairman of the Drafting Committee whether he would consider replacing the verb "impose" in article 7, paragraph 2, by a less blunt term such as "grant", particularly in the light of article 10, which stipulated that consideration should be given to the will of persons concerned.

70. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that that suggestion had already been made during the discussion in plenary. The Drafting Group had therefore actually looked into the possibility of changing the term. But as the purpose of the paragraph was to place a restriction on the successor State and to protect persons against the granting of a nationality

against their will, the Committee had taken the view that, from the standpoint of the persons concerned, it really was a matter of ensuring that the nationality was not "imposed" on them. He therefore considered that the term was appropriate.

71. Mr. ROSENSTOCK said that the more the term was softened, the broader the restriction, which was exactly the opposite effect to that intended. It would therefore be better to keep the verb "impose".

72. Mr. THIAM said that he failed to understand the meaning of the draft article, which should be explained and then reworded.

73. Mr. ROSENSTOCK said that, after the United States of America had become independent, Great Britain had continued to treat American citizens as British nationals, particularly for service in the British navy. That was just one historical example of a State "imposing" its nationality on persons against their will.

74. Mr. KABATSI acknowledged that the verb "impose" was blunt, but it was justified by the fact that the State was acting "against the will" of the persons concerned.

75. Mr. BENNOUNA, referring to Mr. Rosenstock's example, said that comparable contemporary situations were sometimes regulated by international agreements. He thought, however, that the wording of article 7, paragraph 2, was clumsy and that, in particular, the combination of the verb "impose" with the words "against their will" was tautological. The paragraph should perhaps be reworded on the basis of the idea that, when persons concerned had their habitual residence in a particular State, they could renounce the nationality imposed on them by another State. In any case, given that the act was always unilateral, since it was a matter of a country's legislation, it was self evident that the persons concerned were not consulted.

76. Mr. MIKULKA (Special Rapporteur), supported by Mr. Sreenivasa RAO (Chairman of the Drafting Committee), proposed as a solution that the word "impose" should be changed to the word "attribute".

77. Mr. BENNOUNA said that such an amendment was fine in linguistic terms but did not solve the problem inasmuch as the text would lend itself to the contrary interpretation that nationality could be attributed only with the consent of the person concerned.

78. Mr. MIKULKA (Special Rapporteur) said that such a contrary interpretation was not possible and that the wording had been drawn from such eminent authors as O'Connell.<sup>4</sup>

79. Mr. THIAM said that the text as proposed was not comprehensible to everybody and should therefore be referred back to the Drafting Committee.

80. Mr. ROSENSTOCK expressed surprise that the question of lack of clarity had not been raised in plenary before article 7 was referred to the Drafting Committee.

<sup>4</sup> See 2475th meeting, para. 37.



The English version of paragraph 2 was clear; if there was a problem in one of the languages, it would suffice to bring it to the notice of the secretariat.

81. The CHAIRMAN proposed that the discussion should be continued at the following meeting.

*The meeting rose at 1.10 p.m.*

## 2498th MEETING

*Tuesday, 24 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma.

**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]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>2</sup> (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1). He recalled that the Chairman of the Drafting Committee had introduced articles 7 to 11 at the previous meeting.

2. Noting that the Commission was making relatively slow progress on the topic under consideration, he appealed to members not to take the floor unless they had a serious objection to the Drafting Committee's text and to refrain from reopening issues already covered in the general debate. Members who had not been present during the consideration of certain articles were advised to consult the relevant summary records, which were already

available. Members who felt compelled to comment were enjoined to do so in a constructive spirit and to propose alternative solutions rather than merely criticize the text proposed by the Drafting Committee.

3. Mr. GOCO said that he fully endorsed the Chairman's comments. The Commission should eschew trivialities and confine itself to points of substance. An inordinate amount of time had been spent at the previous meeting on discussing the difference between "shall" and "should" and between "attribution" and "acquisition".

4. The CHAIRMAN said that he could not agree that the distinction between "shall" and "should" was a triviality. What he was asking members to do was to refrain from reverting to points which had already been discussed and decided upon in plenary, and he would not hesitate to interrupt speakers who ignored that request.

PART I (*continued*)

ARTICLE 7 (Attribution of nationality to persons concerned having their habitual residence in another State) (*concluded*)

5. Further to a comment by Mr. BENNOUNA, Mr. MIKULKA (Special Rapporteur) recalled that, at the previous meeting, some members had taken the view that it was tautological to say "impose its nationality on persons concerned" and "against the will of the persons concerned", in paragraph 2. He proposed that the words "impose . . . on" should be replaced by "attribute . . . to".

6. Mr. ROSENSTOCK said that, to his recollection, that suggestion had already been generally accepted and only the lateness of the hour had prevented the Commission from adopting article 7 thus amended.

7. Mr. BENNOUNA said he wished to place on record that he failed to see the point of the words "unless they would otherwise become stateless" at the end of paragraph 2. Quite apart from the clumsy drafting, did it mean that someone could choose to be stateless? However, he would not press the matter.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 7 with the proposed amendment to paragraph 2.

*Article 7, as amended, was adopted.*

ARTICLE 8 (Renunciation of the nationality of another State as a condition for attribution of nationality)

*Article 8 was adopted.*

ARTICLE 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State)

*Article 9 was adopted.*

ARTICLE 10 (Respect for the will of persons concerned)

9. Mr. PAMBOU-TCHIVOUNDA said that, while hesitating to take the floor in view of the Chairman's strictures, he felt obliged to confess that the substance and

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

<sup>2</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.