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Summary record of the 2498th meeting

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

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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.1,¹ A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE² (*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

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

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

meaning of the expression "appropriate connection" in paragraph 2 eluded him. It was not one normally found in connection with matters of nationality.

10. The CHAIRMAN said that observations on points of substance not already settled by the Commission were to be welcomed. Personally, he preferred the well-known legal term "genuine link".

11. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said Mr. Pambou-Tchivounda had raised an important point which had been thoroughly discussed in the Drafting Committee. It would be recalled that the expression originally proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)³ was "genuine link". Committee members, feeling that a somewhat broader formulation would be more suitable in the context of what was, after all, a purely residual case of the kind dealt with in Part II of the draft, had come to the unanimous decision that the expression "appropriate connection", which was reasonable and not arbitrary, should be employed. In his view, the expression was adequate, but the decision lay, of course, in the hands of the Commission.

12. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the wording originally proposed by the Special Rapporteur.

13. Mr. BENNOUNA said that he could understand the Drafting Committee's objection to the expression "genuine link" in that particular context. "Appropriate" had a specific meaning in other branches of law, such as the law of the sea, and something that was essentially subjective was being presented as objective. Would it not be possible to dispense with the qualifying adjective and say something like "... persons concerned whom the State considers as having a link with it . . ."? It was the State that would then take the decision.

14. Mr. ROSENSTOCK said that, though he had some sympathy for the remarks just made, he fully endorsed the statement by the Chairman of the Drafting Committee. To use a phrase like "genuine and effective links", taken from another context and generally used in a different sense, would not enhance the precision of the text and would merely confuse the issue. He would be open-minded towards any suggestion by Mr. Bennouna on wording to replace "appropriate connection", but thought it unlikely that any improvement on that phraseology could be found.

15. The CHAIRMAN said the problem raised by Mr. Bennouna might be resolved if the phrase "appropriate connection" was replaced by "connection that it deems appropriate".

16. Mr. SIMMA said he had no objection to that proposal, but could also accept the text as it stood. The most important consideration was that the phrase "genuine link" should be avoided, for the convincing reasons adduced by the Chairman of the Drafting Committee. The subjective element referred to by Mr. Bennouna was evident in the entire paragraph: States were to provide the

right of option if they considered that an appropriate connection existed.

17. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said the Chairman's suggestion would tip the balance slightly against the individual, for the State would be free not to consider that there was an appropriate connection between it and the individual. In the original wording, the discretionary power of the State was circumscribed and the power of the individual to seek nationality if he would otherwise be left stateless was enhanced. In paragraph 2, the right of option must be understood as meaning not that an individual had the right to choose between three or four nationalities, but that if a child born abroad to parents who were nationals of one of the States involved in State succession would otherwise be rendered stateless, he or she had the right to choose the nationality of one of those States. The *jus sanguinis* connection, of being born to parents who were nationals of a given State, was what was considered to be an appropriate connection.

18. Mr. BENNOUNA said he endorsed the comment just made concerning the Chairman's suggestion: it would tip the balance in favour of the power of the State. He would propose, conversely, that the phrase "who have appropriate connection" be replaced by "who are connected to it". That met the point made by the Chairman of the Drafting Committee and did not go into specifics about the nature of the connection.

19. Mr. GOCO suggested that the wording used in reference to citizenship should be employed and that the term "appropriate connection" should be replaced by "appropriate ties". It derived from the *vinculum juris* and covered both the *jus soli* and the *jus sanguinis* relationships.

20. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said the reason why "ties" could not be used was that it would reduce the relationship entirely to one of blood links. It would preclude the eventuality that, for the acquisition of nationality, positive discrimination was envisaged, in other words, that preference was to be given to certain categories of people. It would limit the connection to only one aspect of *jus sanguinis*, namely family ties. Perhaps the Special Rapporteur could provide examples of other appropriate connections, such as ethnic and religious connections.

21. On the other hand, deleting the word "appropriate" would make the scope of the provision too broad and render it less acceptable to States. It would be possible to define "appropriate" in the commentary, distinguishing it from the rigorous connection implied by the phrase "genuine link". An opportunity would be available to review the article on second reading.

22. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Pambou-Tchivounda's remarks and saw no reason, *pace* the Special Rapporteur, why the phrase "genuine link" could not be used. The commentary, which at the first reading stage must set out opposing views, should clearly reflect that situation and specify the scope of paragraph 2.

23. Mr. PAMBOU-TCHIVOUNDA said the underlying concept of paragraph 2 led him to wonder whether the

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

phrase “right of option” was being used in its usual sense. Normally, it meant the right to choose between several nationalities. But in paragraph 2, it seemed to refer, not to the right to choose, but to the right to have a nationality. If a person already had a nationality and did not choose the nationality offered by one of the successor States, how could that person become stateless? The entire first portion of the paragraph was conditioned by the final portion, namely “if those persons would otherwise become stateless . . .”.

24. The CHAIRMAN said those comments would be valid if the paragraph related only to cases of separation of States, but it likewise applied to instances in which a State disappeared following State succession, and in such cases there was indeed a danger of people becoming stateless.

25. Mr. MIKULKA (Special Rapporteur) said that he undertook to mention in the commentary the varying viewpoints on the term “appropriate connection”. For historical accuracy, however, it should be remembered that he had originally favoured the use of “genuine link”, but had bowed to the Commission’s express desire to find another formulation. He would like clarification as to whether, as he believed, paragraph 2 was to be given the widest possible interpretation, to give the broadest possible latitude for acquisition, through the right of option, of the nationality of the successor State by persons who would otherwise be in danger of becoming stateless. If the interpretation was more restrictive, some persons might well be excluded, and the number of people left stateless might rise. He asked whether members of the Commission were dissatisfied with the phrase “appropriate connection” simply because it was vague, or because it might give too many people the opportunity to acquire nationality.

26. The CHAIRMAN said that, personally, he remained unconvinced. In his opinion, what was being called “appropriate” should be termed “genuine”. The best course would be for the Special Rapporteur to prepare a commentary on the interpretation to be given to paragraph 2, on the understanding that members of the Commission would give their reactions in due course.

27. Mr. AL-BAHARNA said that, although he was convinced that the word “appropriate” was best suited to achieving a balance, the concerns expressed by Mr. Pambou-Tchivounda might be met if it was replaced by “legitimate”.

28. The CHAIRMAN asked whether there was any support for that proposal.

29. Mr. CRAWFORD pointed out that, in the English version, the word “an” should be inserted between “have” and “appropriate connection”.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, paragraph 2, with the amendment proposed by Mr. Crawford, on the understanding that the commentary would indicate that some members had expressed doubts about the use of the term “appropriate”, since they were of the view that there was no real distinction between the

meaning in which that term was used in the paragraph and what was commonly understood by “genuine link”.

It was so agreed.

31. Mr. LUKASHUK said that he wanted to ask the Drafting Committee to consider the possibility of amending paragraph 4 in such a way as to avoid the use of the expression “the State . . . shall withdraw its nationality from such persons” and replace it with a form of language such as “the State . . . shall recognize the loss of its nationality by such persons”. There were three very serious reasons for making that proposal. First, such wording was legally more correct and was more logical. Secondly, it implied an element of automaticity which was in keeping with actual practice. The Special Rapporteur himself spoke of “automatic acquisition of the nationality of the successor State” in paragraph (7) of the commentary to what had been article 8 as proposed in the third report. Last but not least, the wording as proposed by the Drafting Committee was bound to give rise to objections in the Sixth Committee because withdrawal of nationality was prohibited by the Constitutions of a number of States, including the Russian Federation. Thus, the article would either be amended in the Sixth Committee or, if maintained, would discourage a number of States from accepting the draft as a whole.

32. The CHAIRMAN said he supported that proposal and would suggest that the French version should read *constate la perte de la nationalité*.

33. Mr. FERRARI BRAVO said he, too, supported the proposal, which he understood to mean that the State whose nationality had been renounced would take note of the fact that the person concerned had exercised his or her right of option, thereby creating a new situation.

34. Mr. GALICKI said the proposal would have the effect of according all decision-making powers to the individual. He believed, however, that caution should be exercised before virtually eliminating the role of the State in withdrawing nationality. While he was sympathetic to the idea, he feared that its time had not yet come, and that its practical application could create problems. The views that States would express on that provision would in all likelihood be a cause for concern.

35. Mr. SIMMA said he endorsed those comments. Despite the growing emphasis on human rights and the right to a nationality, the fact remained that nationality was something that was attributed by States and withdrawn as an *actus contrarius*. He did not see the procedure as being the automatic acquisition by an individual of a nationality through the exercise of the right of option, but rather, as one entailing an obligation upon a State to attribute nationality. If, conversely, an individual opted out of a nationality, the State was obligated under the draft article to withdraw that nationality. Under current international law, individuals could not opt in and opt out: there always had to be a constitutive act on the part of the State concerned.

36. Mr. LUKASHUK said his proposal would not in reality modify the legal content or practical application of the provision. As the article now stood, the State did not make a decision, it merely fulfilled an obligation to with-

draw its nationality. The difference between the original and proposed versions was purely one of drafting. The world was now living in the era of human rights and, with all due respect to States, it was something that had to be acknowledged. If the emphasis was to be on the will of individuals, then that had to be reflected in the text, which in its current form gave absolute control to the State.

37. Mr. MIKULKA (Special Rapporteur) said the article dealt precisely with respect for the will of the persons concerned and with the need for States to give effect to the expression of that will. He asked whether there was anything in it that ran counter to human rights. The Universal Declaration of Human Rights⁴ referred not only to the right to a nationality, but also to the right to change a nationality. How could a person change nationality if it was impossible to renounce nationality?

38. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said the danger was that multiple nationality could be the result of Mr. Lukashuk's proposal. If a State recognized the loss of its nationality by a person who had initially held it, that did not necessarily mean the State withdrew that nationality. The original version of the text, although perhaps somewhat forceful, seemed to him to put across the right message more clearly than did Mr. Lukashuk's proposal.

39. The CHAIRMAN said that there seemed to be little support for the proposal. He said that, if he heard no objection, he would take it that the Commission agreed that the paragraph should be left unchanged and that a reference to Mr. Lukashuk's proposal, with the reasons, should be inserted in the commentary.

It was so agreed.

40. Mr. GOCO said he was concerned, not about the wording, but about the practical application of paragraph 4. When a person opted for the nationality of another State, he should not be entitled to retain the nationality he had thereby renounced. Under the right of option provided for in paragraph 4, a State whose nationality had been renounced needed to postpone giving effect to that renunciation by withdrawing its nationality, in the interests of preventing statelessness. He agreed that the individual should have the right of option, but believed that once the nationality of a given State had been selected, the State whose nationality had been renounced had no business with the person concerned.

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, as a whole, as amended.

42. The CHAIRMAN reminded members of the Commission that paragraphs 1 and 2 of article 8 as proposed by the Special Rapporteur appeared as paragraphs 3 and 4 of article 10. Paragraph 3 of article 8 had been deleted.

Article 10, as amended, was adopted.

ARTICLE 11 (Unity of a family)

43. Mr. HE said he continued to wonder whether article 11 had a place in the draft, mainly because the concept of family differed from one country to another. It had been suggested that the word "family" should be used to denote only a husband and wife and their children, as in the European Convention on Nationality.⁵ But the provisions of that Convention were not suitable for many Asian, African and Arab countries where the notion of family was much wider. In any event, the subject of the article was more a matter for private and internal law and did not really fall within the scope of State succession. He therefore proposed that the article should be deleted.

44. The CHAIRMAN appealed to members not to repeat what they had already said during the first round of discussions on Part I of the draft, but rather to state simply that they maintained any reservations they had expressed on that occasion.

45. Mr. SIMMA said that he wished to voice a heartfelt plea to retain the article, particularly since State succession would inevitably take place in a specific geographical or regional context where the countries concerned would have comparable, if not identical, concepts of the family.

46. Mr. FERRARI BRAVO said that he maintained the reservations he had already expressed during the first round of discussions and reserved the right to revert to the matter when the Commission came to take up the commentary to the article.

47. Mr. BENNOUNA said that the article reflected soft law in the full sense of the term, since it did not lay down any legal obligation but merely expressed a pious wish. It was not clear whether the words "shall take all appropriate measures to allow that family to remain together" meant that the members of the family should be granted a nationality or whether they should just be issued with a residence permit while retaining their status as aliens. He was not at all satisfied with the article from the legal and technical standpoint, but had no firm proposal to make.

48. The CHAIRMAN, speaking as a member of the Commission, said that he too maintained his earlier reservations and for reasons similar to those expressed by Mr. Bennouna. Unity of a family was not a question of nationality and he failed to see what the article was doing in the draft.

49. Mr. SIMMA said that he failed to see how a provision which started with the words "Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family" could be seen as not having anything to do with nationality.

50. Mr. MIKULKA (Special Rapporteur) reminded members that the Commission had decided to deal with the question of nationality in relation to the succession of States and also with related matters. Consequently, the question of the unity of a family did have a place in the draft.

⁴ See 2475th meeting, footnote 8.

⁵ See 2477th meeting, footnote 7.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 11 on the understanding that the various points of disagreement would be reflected in the commentary to the article.

Article 11 was adopted.

52. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 12 to 18.

53. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 12 (Child born after the succession of States) corresponded to paragraph 2 of article 1 as proposed by the Special Rapporteur. It dealt with the very special situation of the children of persons concerned who were born after the date of succession and remained without a nationality because their parents had not, for one reason or another, exercised their right of option. A primary concern of the draft articles was, of course, to prevent statelessness in a case of State succession. Exceptional situations could nonetheless arise, for example, where a person concerned who had had a child after the date of the succession died before exercising his or her right of option and, as a result, the child could remain stateless. In the interests of clarity, the Drafting Committee had reworded the provision to stipulate that a child who had remained stateless in those circumstances had the right to the nationality of the State on whose territory he or she was born. However, that right was granted only where the child was not covered by any other nationality. The purpose and rationale of the article would be explained in the commentary.

54. Members would recall that the Special Rapporteur had proposed an article 11 on guarantees of the human rights of persons concerned. In that connection, the Drafting Committee had agreed with the suggestion put forward in plenary that, in view of its general nature, the article should be incorporated in the preamble. The Committee had considered that the purpose of human rights laws and instruments was to safeguard certain fundamental rights for individual human beings, regardless of where they were located. It had also considered that the placement of article 11 as proposed by the Special Rapporteur could result in an *a contrario* interpretation. Accordingly, the Drafting Committee had reworded that article as a paragraph to be placed in the preamble. The proposed text was set forth in a footnote.⁶

55. Article 13 (Status of habitual residents), which corresponded to article 10 as proposed by the Special Rapporteur, had been the subject of lengthy discussion in the Drafting Committee. The Drafting Committee had taken the view that the article should, in addition to elaborating the human rights aspect of the question, clearly state, above all, the basic rule that the status of habitual residents as such was not affected by State succession. As elsewhere in the draft, habitual residence was a very important criterion in determining rights to nationality in the event of State succession. It was therefore important to provide that a person concerned who was a habitual resident of a territory on the date of the succession would continue to have such status, in particular in order to

determine his or her nationality. That was the purpose of paragraph 1, which, in view of the scope of the draft articles, dealt only with persons concerned.

56. Paragraph 2 consisted of paragraph 1 of article 10 as proposed by the Special Rapporteur, save that the two sentences had been consolidated in one so as to simplify the text. The question of the status of a person concerned as a habitual resident, addressed in paragraph 1, differed, of course, from the question whether such person might or might not retain the right of habitual residence depending on the nationality attributed following the succession.

57. There had been general agreement in the Drafting Committee on the principle, set forth in paragraph 2 of article 10 as proposed by the Special Rapporteur, that a successor State had the obligation to preserve the right of habitual residence in its territory of persons concerned who did not acquire its nationality *ex lege*. Views in plenary had, however, differed considerably on the question whether the same should apply in respect of persons concerned who had lost such nationality voluntarily. Some members had pointed out that, under current international law, a State could require the latter category of persons to transfer their habitual residence outside its territory, but they believed it was important to ensure that persons concerned should be allowed a reasonable time in which to transfer their residence. That approach was reflected in paragraph 3 of article 10 as proposed by the Special Rapporteur. Other members had been of the opinion that the requirement as to transfer of residence did not take account of human rights law at its current stage of development and that the draft article should prohibit States from imposing such a requirement even if that meant moving into the realm of *lex ferenda*. In the light of those considerations, the Drafting Committee had decided not to include any provision on the matter in the draft, thus opting for a solution that affected neither position and allowing scope for some advances to be made in State practice and development of the law in the future.

58. The Drafting Committee had not changed the content of article 14 (Non-discrimination), which the Special Rapporteur had proposed as article 12, but had reworded it to express the idea more emphatically and also to make the notion of discrimination, which had been included in the title but not in the body of the text, explicit. The central object of the article was to prohibit discrimination on any ground. The illustrative list of grounds set forth in the earlier draft had been removed, so that the article could be applied in a wide variety of instances and an *a contrario* interpretation was thereby avoided. Some of the more common grounds of discrimination would be listed in the commentary.

59. With regard to article 15 (Prohibition of arbitrary decisions concerning nationality issues), which corresponded to article 13 as proposed by the Special Rapporteur, the scope of application of paragraph 1 had been restricted to persons concerned, to bring it into line with the scope of the draft articles. Otherwise, only minor changes of a drafting nature had been made to the article.

60. With regard to article 16 (Procedures relating to nationality issues), which corresponded to article 14 as proposed by the Special Rapporteur, the Drafting Com-

⁶ See 2495th meeting, footnote 3.

mittee had opted in favour of addressing the obligations laid down in the article directly to States concerned rather than leaving it to those States to ensure that they were fulfilled, as had been proposed earlier. It had further simplified the text by removing the illustration of what the words "relevant decision" might include. The commentary would contain a clear statement that it covered both positive decisions, such as attribution of a nationality, and negative decisions, such as refusal to issue a certificate of nationality. The Drafting Committee had also added the word "effective" before the words "administrative and judicial review" to clarify the standard such a review must meet.

61. Article 17 (Exchange of information, consultation and negotiation) was based on what had been proposed by the Special Rapporteur as article 15. Paragraph 1 of article 15 as proposed by the Special Rapporteur had dealt with the basic issue of the obligation of States concerned to consult with a view to identifying any adverse effects of a succession of States on the persons concerned, in a spirit of positive cooperation and good faith, and to provide solutions, if necessary, through negotiations to any problems involved. Paragraph 2 of that article had dealt with the situation that could arise from non-cooperation or lack of agreement between States concerned regarding the matters involved and had provided for unilateral dispensation for the State concerned in order to be consistent with the provisions of the draft articles. Underlying the two paragraphs had been an attempt by the Special Rapporteur to indicate the basic difference, in nature and purpose, between the provisions of Parts I and II. The Drafting Committee had decided, on the basis of the views expressed in plenary, to delete paragraph 2, which raised more questions than it solved. It had also decided to deal with the underlying issue of the difference between Parts I and II separately, at the beginning of Part II.

62. Article 17 was therefore based solely on paragraph 1 of article 15 as proposed by the Special Rapporteur, which then had been separated into two paragraphs for the sake of clarity. Paragraph 1 of article 17 imposed an obligation on States concerned to exchange information and to consult with a view to examining and identifying the negative repercussions a particular State succession could have on the lives of the persons concerned in such matters as pension, social security, military conscription and so on. The Drafting Committee's view was that exchange of information was an essential component of any meaningful examination of those effects of succession on persons concerned and paragraph 1 of article 17 had therefore been drafted to include an express requirement to exchange information. Paragraph 2 provided that, when necessary, States concerned must seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement. It was nevertheless worthwhile to note two points. First, the obligation to negotiate to seek a solution was not automatic and did not apply where it was not necessary. Clearly, States did not have to negotiate where there were no adverse effects on the lives of persons concerned. Secondly, while States could, if needed, conclude an agreement to eliminate or mitigate such negative effects, it should not be presumed that every negotiation would

inevitably lead to the conclusion of an agreement. The object could be achieved, for instance, by reinforcing national legislation with reciprocal effects or by other administrative decisions.

63. Article 18 (Other States) corresponded to article 16 as proposed by the Special Rapporteur and had been the subject of lengthy debate in both the plenary and the Drafting Committee. With regard to paragraph 1, views had differed on whether the draft articles should deal with the question of the non-opposability vis-à-vis third States of nationality attributed in the absence of a genuine and effective link. It had finally been decided to cover the point in paragraph 1 of the article, although some members had maintained their reservations. The paragraph had therefore been redrafted as a savings clause and simplified. Its scope was strictly limited to persons concerned. The commentary would explain that the words "nothing in the present draft articles" were designed to emphasize that the article was concerned only with the acquisition or retention of a nationality without a genuine and effective link in the context of a succession of States. The word "link" was now qualified by two adjectives, "genuine" and "effective", which had been used in that connection by ICJ in the *Nottebohm* case.⁷ To avoid any possible *a contrario* interpretation of the provision, the commentary would also explain that the issue of opposability or non-opposability of a nationality attributed when a genuine and effective link did in fact exist fell outside the scope of the draft articles.

64. The Drafting Committee had also decided to include paragraph 2, even though some members had maintained their reservations on that score. It had been redrafted as a savings clause and its application confined to persons concerned. Since the primary objective was to prevent statelessness, it had been decided not to restrict the paragraph to situations where statelessness was a result of a violation by a State of the principles set forth in the draft articles, as had originally been suggested by the Special Rapporteur. In addition, the Drafting Committee had added the words "for the purposes of their domestic law" to clarify the circumstances in which a State could treat a person concerned as a national of a particular State concerned. It had also replaced the words "in the interest of" by "beneficial to" so as to indicate that such treatment was permitted only when it was, in effect, beneficial to the individual concerned.

65. Lastly, he commended the articles in Part I of the draft for the Commission's approval. Should any minor consequential adjustments be required in the light of the subsequent consideration of Part II, they would of course be referred to the Commission for consideration.

66. The CHAIRMAN thanked the Chairman of the Drafting Committee for his lucid exposé of the changes introduced into Part I of the draft by the Drafting Committee.

ARTICLE 12 (Child born after the succession of States)

Article 12 was adopted.

⁷ See 2475th meeting, footnote 6.

ARTICLE 13 (Status of habitual residents)

67. Mr. CRAWFORD said he felt that article 13, paragraph 2, exceeded the scope of the draft articles. However, he would not oppose its content, since it appeared to be reasonably ancillary.

Article 13 was adopted.

ARTICLE 14 (Non-discrimination)

68. Mr. CRAWFORD observed that the provision regarding non-discrimination in article 14 was somewhat limited. He asked whether consideration had been given to the question of whether there should be a prohibition of discrimination against persons who had acquired their nationality through State succession as distinct from other methods. If a problem did arise in practice, he would propose new wording to the effect that "States shall not discriminate against persons on the ground that they acquired their nationality by reason of succession". Otherwise, he would be content with the version of article 11 as proposed by the Special Rapporteur, which tied in with general principles of non-discrimination and was to be placed in the preamble.

69. Mr. MIKULKA (Special Rapporteur) said that, while he had not found any practical instances of such discrimination in his research, he could not rule it out. However, it was a type of discrimination that occurred after the acquisition of nationality, whereas article 14 dealt with discrimination during the process of acquiring a nationality. A possible solution would be to state in the commentary that the discrimination issue had not been exhausted in article 14 and that the Commission had taken note of a problem that might arise at a later stage and was prepared to take it up on second reading. States could then respond and perhaps provide examples of the type of discrimination in question.

70. Mr. FERRARI BRAVO said that the wording of articles 14 and 15 was not sufficiently incisive. Acts by States that were discriminatory on any ground were wrongful acts and hence the appropriate penalty was to declare them null and void. He deferred to the opinion of the Drafting Committee, which had opted for less vigorous wording, but proposed that the commentary should refer to the existence of a radical alternative which insisted on the nullity of such acts.

71. Mr. MIKULKA (Special Rapporteur) suggested that the commentary to article 18, paragraph 2, would be a more appropriate place, since the paragraph provided for a form of "penalty". The question of nullity had been discussed by the Working Group in previous years and eventually rejected. The Working Group had viewed it as a consequence of the non-conformity of legislation with the draft articles. A comment might be made to the effect that some members had advocated an approach which would view such acts as null and void. Although he did not share that view in substance, he recognized its validity.

72. The CHAIRMAN asked Mr. Ferrari Bravo whether such a course would be acceptable, provided reference

was made, *inter alia*, to acts that were not in conformity with articles 14 and 15.

73. Mr. FERRARI BRAVO said that he had no objection to the idea in principle.

74. Mr. PAMBOU-TCHIVOUNDA proposed that the phrase *en opérant des discriminations* in the French version of article 14 should be simplified to read *par des discriminations* or *au moyen de discriminations*.

75. He was concerned at the somewhat vapid flavour of the phrase "discriminating on any ground". Article 12 as proposed by the Special Rapporteur had contained a more explicit reference to the type of discrimination envisaged. He proposed that the phrase should be replaced by "discrimination based on, *inter alia*, ethnic, linguistic, religious or cultural considerations".

76. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the references to the type of discrimination contained in article 12 as proposed by the Special Rapporteur had been deleted after a lengthy discussion in the Drafting Committee. Some members had initially felt that the list was incomplete, and that had led to differences of opinion over which criteria were more important and which might be omitted. It had further been noted that, if some were mentioned and others were omitted, a certain order of priority would be established. The Committee had eventually agreed that the process of identifying categories was unproductive and that it was preferable, and also a more emphatic statement of principle, to outlaw discrimination on any ground. The most common grounds on which discrimination was possible would in any case be listed in the commentary.

77. The CHAIRMAN said he hoped that the list would contain a reference to discrimination based on sex.

78. Mr. GALICKI said he agreed with the Chairman of the Drafting Committee. The broad scope and progressive character of the anti-discrimination formula could actively be viewed as a significant achievement.

79. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 14.

Article 14 was adopted.

ARTICLE 15 (Prohibition of arbitrary decisions concerning nationality issues)

80. Mr. CRAWFORD said he had some difficulty understanding the meaning of article 15, paragraph 1, which seemed to say that, if persons were entitled to a nationality in accordance with a treaty, they were not to be arbitrarily deprived thereof. The word "arbitrarily" was surely superfluous in the context of a treaty obligation, although it might have some foundation in the case of a law, which a State could change.

81. The CHAIRMAN observed that it would have been preferable to raise that difficulty during the discussion of article 13 as proposed by the Special Rapporteur, the wording of which was virtually identical.

82. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had linked the words "shall not be arbitrarily" more to the phrase "denied the right to acquire the nationality of the successor State" than to the preceding phrase "deprived of the nationality of the predecessor State". If there was a problem of syntax, the formulation could be reworded by the Drafting Committee.

83. The CHAIRMAN said he thought that Mr. Crawford's problem was of a more substantive nature.

84. Mr. MIKULKA (Special Rapporteur) said that the purpose of the article was to obviate the risk that some persons might not be covered by legislation or a treaty and hence be deprived of the right to acquire a nationality. Moreover, a law or treaty might be fully consistent with the article yet be applied in an arbitrary fashion. Article 15 was intended to address such cases and might be applied, for example, to action by an individual bureaucrat.

85. Mr. SIMMA drew attention to the saying *lex posterior derogat priori*, which meant in essence that a later legislator might be wiser than an earlier one. The same could be true of the members of the Commission, even within such a short period as the current session. He shared Mr. Crawford's concern regarding an issue of possibly fundamental importance that could not be resolved simply by drafting. He asked the Special Rapporteur whether the bureaucrat he had had in mind could deprive a person with a right to a nationality of that entitlement in a non-arbitrary way. Surely, there was a general prohibition on depriving somebody of a nationality to which he or she had a right. Arbitrariness would constitute an additional element of illegality.

86. The CHAIRMAN said he understood that the point being made by Mr. Crawford and Mr. Simma was that prohibition of the arbitrary exercise of State powers implied recognizing that such powers existed notwithstanding the rights of the persons concerned.

87. Mr. BENNOUNA, speaking on a point of order, said that he objected to the way in which the discussion was being conducted. All members of the Commission should be afforded the opportunity to express their views on a subject before the presiding officer offered his comments.

88. The CHAIRMAN said that he took note of the point of order.

89. Mr. CRAWFORD said that he fully understood and accepted the Special Rapporteur's explanation of the purpose of article 15. He suggested that the following rewording of paragraph 1 might preclude any misinterpretation:

"In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, to which they are entitled in relation to the succession of States."

The emphasis would then be shifted to the application of laws or treaties.

90. Mr. BENNOUNA said that, as a jurist, he experienced difficulty with the idea of prohibiting "the arbitrary", which appeared to be a great discovery. Indeed, arbitrary acts were prohibited in all circumstances, as a fundamental legal principle. The same procedure should be followed as in the case of article 11 as proposed by the Special Rapporteur: the content of article 15 should be reformulated as a paragraph of the preamble which would emphasize the need to refrain from any arbitrary acts. Even that was labouring the point.

91. To his mind, the article related to a limited discretionary power offered to the State rather than a State's right exercised pursuant to the provisions of a law or treaty. If it related to a right, Mr. Crawford's comment was perfectly justified. If it referred to a limited discretionary power, such power could and should be exercised when certain conditions were fulfilled, but the State could not exercise it arbitrarily. The wording of the article might therefore be improved by introducing that notion.

92. Mr. PAMBOU-TCHIVOUNDA said that Mr. Ferrari Bravo, in speaking of wrongful acts, had drawn attention to what should have been the object of article 15. The acts in question were undoubtedly illegal. However, he was unhappy with the word "arbitrary". Legally speaking, the term "arbitrary" referred not only to what was contrary to the law but also to what was not substantiated. Where the State considered that the conditions for non-attribution of nationality existed and it substantiated its decision, who was to say whether its action was arbitrary or not. The underlying idea was to prohibit and punish wrongful and illegal acts in situations covered by specific laws and international treaties. He added that it would be logical, in his view, to move article 15 and place it immediately after article 10, on respect for the will of persons concerned.

The meeting rose at 1.05 p.m.

2499th MEETING

Wednesday, 25 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Al-Bahama, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,