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**Summary record of the 2508th meeting**

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

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## 2508th MEETING

Wednesday, 9 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

### 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*)

#### PART II (*concluded*)

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

#### ARTICLE 26 (Granting of the right of option by the predecessor and the successor States)

1. Mr. ECONOMIDES said that the draft articles in general, and article 26 in particular, were based on an internal law approach which was at variance with the international law approach that he espoused. Under international law, the right of option was invariably granted by the successor State and not by the predecessor State, which remained outside the process of State succession. He failed to see why a predecessor State which had already lost part of its territory and population should be further penalized by the obligation to grant a right of option. He had no specific proposal to make regarding article 26 and simply wished to place his view on record.

2. Mr. MIKULKA (Special Rapporteur) said he wondered how the right of option could be exercised without involving the predecessor State. Both States must be prepared to make concessions and the successor State was not in a position to allow certain persons to keep the nationality of the predecessor State without the latter's consent.

<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; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles see 2504th meeting, para. 28.

3. The reference to an additional sacrifice on the part of the predecessor State was surprising, since Mr. Economides had consistently maintained that persons who originated in the territory affected by the succession and whose habitual residence was either in a third State or in the predecessor State should be given the option, in addition to persons having their habitual residence within the affected territory, of acquiring the nationality of the successor State. It was hard to see how that option could be exercised without reference to the nationality of the predecessor State.

4. In response to a request from Mr. BENNOUNA for practical examples, he mentioned the Treaty of Versailles, under which Czechoslovakia, Poland and other States had become successor States following their separation from the Austro-Hungarian Empire. The main rule had been that all persons acquired the nationality of the successor State on the territory of which they had their habitual residence. However, persons of German ethnic origin had been given the right to opt for retention of Austrian nationality, although they were resident in, for example, Czechoslovak territory. During the period of decolonization, States such as France, the United Kingdom of Great Britain and Northern Ireland and Italy that had formerly administered the colonies, noting that certain newly independent States were not granting their nationality to all habitual residents in their territory, had granted a right to opt for their nationality to persons who would otherwise have become stateless. Examples of such cases were to be found in de Burlet's work.<sup>3</sup>

5. Mr. GOCO inquired about the relationship between article 26 and article 10 (Respect for the will of persons concerned) which provided for the granting of a right of option by "States concerned", a term defined by the Commission as referring to both successor and predecessor States. He asked if article 26 was merely a reiteration of that provision.

6. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 26 reiterated the provision for a right of option in the specific case of separation of part of a territory.

7. Mr. ECONOMIDES said that he knew of no case in State practice, prior to the Second World War, in which a predecessor State had granted a right of option. After the First World War, on the other hand, successor States had offered certain sectors of the population who had come under their sovereignty the right to opt, within a reasonable period of time, for retention of the nationality of the predecessor State.

8. The Special Rapporteur had referred to his proposal to enlarge the category of persons who had an appropriate connection with the territory. His position from the outset regarding persons concerned, within the meaning of international law, was that they were in all cases specific persons: all nationals of the predecessor State in the case of dissolution of a State, and nationals of the predecessor State having their habitual residence in the transferred

<sup>3</sup> Bibliothèque de la Faculté de droit de l'Université catholique de Louvain, *Nationalité des personnes physiques et décolonisation: Essai de contribution à la théorie de la succession d'États*, by J. de Burlet, vol. X (Brussels, Bruylant, 1975).

territory in the cases of transfer and separation. Other categories, such as persons having an appropriate connection with the territory, might wish to change their nationality, but they would do so on the basis of internal rather than international law. The successor State could offer its nationality to such other categories of persons and the predecessor State would remain outside that process. Although he had accommodated himself to the Commission's approach, he had not departed from his original position, which was fully consistent with international law.

9. The CHAIRMAN asked Mr. Economides whether he foresaw any specific adverse consequences ensuing from the adoption of article 26.

10. Mr. ECONOMIDES said that he had insufficient experience to make a firm prediction. He was simply drawing attention to the fact that article 26 had nothing to do with State succession under international law. The right of option was always granted by the successor State in favour of the nationality of the predecessor State or another successor State. A predecessor State which was obliged to grant the right of option would inevitably face adverse consequences. The stability of States and inter-State relations would be undermined. He feared that the Commission was departing significantly from traditional international law without having examined the implications of its approach.

11. The CHAIRMAN asked whether the obligation for both the successor State and the predecessor State to grant the right of option might entail conflicts of law or problems of incompatibility between the positions of those States.

12. Mr. MIKULKA (Special Rapporteur) said that, when the Commission had discussed article 10, introducing the provisions regarding the right of option, it had agreed to interpret the word "option" in a broad sense as the possibility offered to a person concerned to choose between two nationalities if the person was entitled to acquire both or to keep one nationality while acquiring another. In the case of separation, three different nationalities might be involved. When Croatia and Slovenia had separated from the former Yugoslavia, a person with Yugoslav nationality might have had connections with both Slovenia and Croatia, for example an ethnic Croat—hence a "citizen" of the Republic of Croatia within the Federal Republic of Yugoslavia—who was habitually resident in Slovenia. Several of the criteria set forth in the draft articles would apply to the person concerned. Slovenia, a successor State, had the right to attribute its nationality to all persons having their habitual residence in its territory; Croatia, another successor State, could grant its nationality to any citizen of the former constituent republics of Yugoslavia; and Yugoslavia (Serbia and Montenegro) viewed the person concerned as still possessing Yugoslav nationality. In the case of all three States, the right of option included the obligation to allow the person concerned to renounce his or her nationality. The situation would, of course, be less complex for the bulk of the population who had their habitual residence and connections in the same State.

13. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that when the Drafting Committee had discussed the draft, grey areas had been found in almost every article, so that a nagging doubt had persisted as to the comprehensiveness of the provisions. Some of them had therefore been retained even where they seemed to be redundant. It was preferable to leave such matters pending until the second reading, by which time more information on practical situations might have come to light.

14. He wished to draw attention to the word "qualified" in article 26. Persons having their habitual residence in the predecessor State were already qualified to have the nationality of that State. But nationals of the predecessor State who were resident elsewhere could be divested of their nationality and their qualification to keep it must therefore be recognized.

15. As to the question of whether a State which had lost territory should yield more of its population to the new territory by granting them a right of option, he would cite the example of Pakistan. Although Pakistan had been established on the basis of religion, not every Muslim in India had been accorded the right to emigrate to Pakistan. Only territories with a Muslim majority had been transferred to the new State. However, Muslims from other distant parts of India had begun to migrate to Pakistan. If the predecessor State had wished to stem the outflow by refusing to grant the right of option, considerable problems might have arisen.

16. Mr. ECONOMIDES said he would apply the rules of international law to the Special Rapporteur's example. When Slovenia became independent, all persons who had Yugoslav nationality and were resident in the territory of Slovenia, including Croats, Serbs and others, would automatically acquire Slovene nationality. Slovenia, as the successor State, must then grant persons concerned the right to opt for the nationality of the predecessor State or other successor States. International law made no provision, however, for Slovenes who were resident abroad. It was for internal law to regularize their situation on an individual basis by means of a naturalization procedure.

17. Mr. ADDO said he had no problem with article 26. Mr. Economides had expressed reservations for the record but was willing to go along with it. He therefore urged the Commission to take a decision and move on to the next point.

18. Mr. MIKULKA (Special Rapporteur) said he failed to see in what way the example given by Mr. Economides could be in conflict with article 26. He wished to point out, however, that the hypothetical Slovenes living abroad were still Yugoslavs, so that Yugoslavia was still involved inasmuch as it must allow them to renounce its nationality if they opted for that of Slovenia.

19. Mr. GOCO noted that the whole matter had been discussed at length under article 10, which was very similar to article 26. He therefore supported Mr. Addo's proposal to close the debate.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 26.

*Article 26 was adopted.*

NEW ARTICLE (Cases of succession of States covered by the present draft articles)

21. Mr. BROWNLIE proposed the following text for inclusion as a new article in the draft:

*“Cases of succession of States covered by the present draft articles*

“The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”

22. The point of the proposal was that the 1978 and 1983 Vienna Conventions contained similar articles and he believed that the matter should be treated differently in the current context. It was important to ensure absolute clarity with regard to the applicability of the scope of the future declaration. A mention in the commentary would not be sufficient, because most readers would concentrate their attention on the draft articles themselves. There was thus a good case for stating in the body of the draft itself that the articles applied only to the effects of a succession of States which had occurred in a lawful manner.

23. As to the placing of the proposed new article, he would be quite content if, for the time being, it appeared at the end of the draft. A decision to move it elsewhere in the text could be taken on second reading.

24. The CHAIRMAN appealed to members to refrain from discussing the question of the placement of the article.

25. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the question raised by Mr. Brownlie had not come up in the Drafting Committee in that form. There was, however, no doubt as to the clear intention that the draft articles would apply only in lawful cases of succession of States. As Chairman of the Drafting Committee he could not, of course, take up an independent position in the matter, but he was personally in agreement with the proposal and would have no objection to it being incorporated in the draft.

26. Mr. MIKULKA (Special Rapporteur), expressing complete agreement with the contents of the proposed new article, recalled that a similar proposal had been made by Mr. Economides at an early stage of the consideration of the topic (2477th meeting). He was under the impression it had then been agreed that the matter could be accommodated in the commentary. However, he could accept without any difficulty the idea of incorporating the proposed new article in the body of the draft.

27. Mr. SIMMA, also recalling the extensive discussion which had taken place on the same point at the outset of the debate, said he still took the view that it might be better not to insert a provision of the kind proposed by Mr. Brownlie either in the body of the draft or to discuss it in the commentary. In the first place, State succession rarely took place in so calm and orderly a way as in the case of the separation of Slovakia and the Czech Republic. More usually, as in the case of the dissolution of the former Yugoslavia, it was extremely difficult to determine

whether a succession of States had or had not occurred in conformity with international law. Secondly, the draft under consideration, unlike the 1978 and 1983 Vienna Conventions, dealt with the fate of individuals and thus included a strong human rights element. Surely, it would be in the interests of those individuals to omit the proposed article, leaving open the question of the applicability of the draft articles in cases where the lawfulness of a succession of States was in doubt. In his opinion, many of the articles were applicable irrespective of whether the succession was legal. To include the article proposed by Mr. Brownlie could diminish the practical importance of the declaration as a whole.

28. Recalling that Mr. Economides had, on earlier occasions, invoked the Venice Declaration,<sup>4</sup> he said that provision 1 of the Declaration defined State succession as comprising annexation as well as union, dissolution and separation. That showed the extent of confusion that could arise in attempting to define what was and what was not in conformity with international law and the Charter of the United Nations. He would not stand in the way of consensus, but wished his position to be placed on record.

29. Mr. DUGARD said he agreed with Mr. Simma. The proposed article could apply in cases such as that of the bantustans<sup>5</sup> or of the Republic of Cyprus where the Security Council had deplored the creation of a new State.<sup>6</sup> In many other cases, however, it was not clear whether or not State succession had occurred in conformity with international law. There was a risk that individuals might suffer if they were excluded from the scope of the declaration. If the new article was adopted, it should perhaps be accompanied by a savings clause to the effect that, where the rights of individuals were affected by an unlawful succession of States, those individuals would nonetheless benefit from the draft articles. Such a clause would, however, be difficult to draft, and he was therefore in favour of leaving the matter open, as recommended by Mr. Simma.

30. Mr. LUKASHUK said that he entirely agreed with Mr. Simma.

31. Mr. ADDO said he also agreed that the new article should not be included in the draft, but, like Mr. Simma, he would not stand in the way of a consensus.

32. Mr. GALICKI said he, too, supported Mr. Simma's position. A similar point relating to State succession had arisen in connection with the elaboration of the European Convention on Nationality,<sup>7</sup> and the drafters had eventually decided not to include a firm statement concerning applicability. Mr. Brownlie's point could be covered in the commentary without any risk of future controversy.

33. Mr. BENNOUNA said that the issue was a delicate one. On the one hand, it could not be admitted that a legal text such as the one under consideration, whatever form it might eventually take, would be applicable to an unlawful succession of States. On the other hand, he sympathized with the arguments advanced by Mr. Simma. It was,

<sup>4</sup> See 2475th meeting, footnote 22.

<sup>5</sup> See Security Council resolution 402 (1976) of 22 December 1976.

<sup>6</sup> See Security Council resolution 541 (1983) of 18 November 1983.

<sup>7</sup> See 2477th meeting, footnote 7.

unfortunately, a fact of life that new States were born in violence. Nations were not all as reasonable as the Czechs and Slovaks. When a succession of States occurred, it generally did so in a manner contrary to international law, or at least in a manner whose legality was open to doubt. He wondered whether the proposed article might not be redrafted in negative terms so as to say that the draft did not apply to the effects of a succession of States which had occurred in violation of international law. Alternatively, a reference to the principles of international law and to the Charter of the United Nations might perhaps be included in the preamble. The proposed article in its current form was not acceptable.

34. Mr. MELESCANU said that, since the draft articles were going to take the form not of an international convention but of a declaration designed merely to influence the decisions of States, the question of their precise applicability was perhaps without great practical significance.

35. Mr. HE said that he was entirely in agreement with Mr. Brownlie's proposal and with the first part of Mr. Bennouna's comments. Every State succession had to be in conformity with the principles of international law embodied in the Charter of the United Nations. That was a fundamental principle for keeping the world in good order. Anything else would open the way to intervention by other States or separatist groups from other States and give rise to disorder, which should be avoided in all cases.

36. Mr. ECONOMIDES said that it was precisely because the draft dealt with individuals that it could not be allowed to remain silent on the issue of the lawfulness of a succession of States. It would be completely unacceptable, for example, if an aggressor State were given the right to attribute its nationality to the population of a territory it had unlawfully occupied. The draft declaration should, if anything, be even stricter than the 1978 and 1983 Vienna Conventions. He entirely supported Mr. Brownlie's proposal and, with reference to the two cases cited by Mr. Dugard, said that the proposed new article as he understood it meant that the draft articles would not apply in cases of State succession determined as being unlawful by the Security Council, an arbitration tribunal or ICJ. As to Mr. Simma's point in connection with the Venice Declaration, the term "annexation" in provision 1, clearly meant a lawful transfer of territory. The question of unlawful use of force was explicitly covered in the report attached to the Declaration,<sup>8</sup> a copy of which he would be pleased to make available to members.

37. Mr. HAFNER said that, while sympathizing with Mr. Simma's position, he shared the legal concerns voiced by Mr. Economides and therefore was inclined to go along with Mr. Brownlie's proposal. In the event of strong opposition to that proposal, he would be prepared to accept a savings clause along the lines suggested by Mr. Dugard.

38. Mr. KATEKA said the fact that some cases of State succession were unlawful should not stop the Commission from stating what it believed to be the situation in law. Rejection of Mr. Brownlie's proposal could be inter-

preted as condoning unlawful cases of State succession. The proposal should be adopted, possibly with a savings clause to protect the situation of the individuals concerned.

39. Mr. RODRÍGUEZ CEDEÑO said he agreed that failure to include the proposed new article could be interpreted as a permissive attitude toward violations of international law as embodied in the Charter of the United Nations. Mr. Simma's point could perhaps be met by couching the article in negative terms, as suggested by Mr. Bennouna.

40. Mr. THIAM said he, too, supported Mr. Brownlie's proposal. The international community would be troubled by a deliberate decision on the part of the Commission to remain silent on the matter of unlawful State succession. As for protecting the rights of the individuals concerned, the principles of international law embodied in the Charter of the United Nations surely included principles governing human rights.

41. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), speaking as a member of the Commission, suggested that the opposing points of view which had been expressed, and with both of which he had sympathy, might be reconciled by adding to the text proposed by Mr. Brownlie a sentence such as: "However, a dispute about the legality of succession shall not adversely affect the legal nationality status of the persons concerned" or "However, the legal consequences of a succession of States recognized as unlawful shall be construed in a manner beneficial to the persons concerned".

42. Mr. CANDIOTI said he fully agreed with Mr. Brownlie, Mr. Economides and Mr. Hafner that a provision like the one proposed should be incorporated in the draft. He also shared the concerns expressed by Mr. Simma about the protection of human rights in the event of unlawful succession of States. Article 11 proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)<sup>9</sup> had referred specifically to the protection of the human rights of the persons concerned, but the Commission had decided to include that reference in the preamble. It was currently in the sixth paragraph of the preamble, which could perhaps be strengthened so that it clearly referred to all cases of succession of States, whether legal, illegal or in a grey area between the two.

43. Mr. GOCO said he had no objection to Mr. Brownlie's proposal and pointed out that the same wording was to be found in article 6 of the 1978 Vienna Convention. He was nonetheless somewhat concerned about the phrase "apply only to the effects", for that implied that other effects were not covered. Article 3 of the 1978 Vienna Convention was entitled "Cases not within the scope of the present Convention", and it might be useful to include a similar article in the draft.

44. Mr. ROSENSTOCK said the members of the Commission seemed generally to agree that the consequences of illegal annexation should not be recognized as legal and that the draft articles should not depart from the pattern

<sup>8</sup> Explanatory report on the Declaration on the consequences of State succession for the nationality of natural persons (see 2475th meeting, footnote 22), pp. 7-13.

<sup>9</sup> For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

set by the 1978 and 1983 Vienna Conventions, which did not address themselves to what had preceded or followed the succession of States. On the other hand, in a context not of treaties, debts or archives, but of human rights, it would be unfortunate if, in order for a person to claim the benefits of protection under the current draft articles, a succession of States must be recognized as legal. It should be possible to provide for those benefits, even in the event of totally illegal State succession. Those concerns might be met by incorporating a formulation like the one proposed by Mr. Sreenivasa Rao, but in an early part of the commentary, rather than in the draft articles. That part of the commentary would explain that the draft was intended to deal with succession of States occurring in conformity with international law, but that, in any event, the rights granted to the persons concerned must be deemed to be fundamental human rights not affected by any circumstances whatsoever.

45. Mr. AL-BAHARNA said it was a pity that such an important proposal had not been made earlier, during the work in the Drafting Committee. He was not in favour of adding a new article, but thought that, to take account of legitimate concerns about illegal cases of State succession, such cases could be covered elsewhere in the draft. It might suffice to include a reference to annexation, which was the only illegal case that came to mind. Alternatively, a reference to succession in conformity with international law could be included as the penultimate paragraph of the preamble. Finally, if there was to be an additional article, he thought it should read: "The present articles do not apply to effects of cases of succession arising from annexation of territory by force".

46. Mr. BAENA SOARES said it was essential for the Commission to incorporate in the draft wording like that proposed by Mr. Brownlie, and he endorsed the version suggested by Mr. Bennouna. Unlike Mr. Rosenstock, he did not think the issue of human rights should be addressed in the commentary.

47. Mr. LUKASHUK, speaking on a point of order, proposed that Mr. Hafner should be asked to prepare a text reflecting his ideas.

48. Mr. BROWNLIE, speaking on a point of order, said he insisted on being given the right to reply briefly to points raised so far during the discussion.

49. The CHAIRMAN said that neither of those comments had been points of order, the purpose of which was to mark disagreement with the manner in which the Chairman was conducting a meeting.

50. Speaking as a member of the Commission, he said he agreed with Mr. Kateka that omitting any reference to the issue under discussion would be difficult, indeed surprising. He was receptive to the arguments advanced by Mr. Simma and Mr. Dugard, but he had not been moved by the impassioned plea of Mr. Economides. As he saw it, the problem was whether to compound the disadvantages that illegal succession of States inflicted on the population by depriving it of the rights set out in the draft articles. Did the Commission wish to make people stateless? That would be deplorable.

51. Yet it was hard to find a way out. He shared Mr. Bennouna's intentions but his proposal did not seem an appropriate solution: couching the wording in negative rather than positive terms would only add a negative overtone and amount to telling the persons concerned that they could not enjoy certain rights. Perhaps the current positive wording could be retained, but with the deletion of the word "only". That would indicate that the draft articles applied to the effects of a legal succession of States, but did not preclude the possibility of them applying in other cases. There was a good reason for not using exactly the same language as in the 1978 and 1983 Vienna Conventions. Those texts contained the phrase "The present Convention", namely the whole of the Convention, whereas Mr. Brownlie's proposal referred to "The present draft articles", meaning each article individually, not the set of articles as a whole. If the word "only" was deleted, that would alert the attentive reader to a departure from the wording of the Vienna Conventions motivated by the problem currently under discussion.

52. The concerns of Mr. Simma and Mr. Dugard must be addressed, and that could be done in one of two ways: by adding one of Mr. Sreenivasa Rao's proposals, and personally he preferred the first one, because it seemed clearer; or making a strong statement in the commentary that the difference in wording from the 1978 and 1983 Vienna Conventions was not to be taken to mean that the draft did not apply to all situations in which the persons concerned enjoyed certain rights. Those rights must be safeguarded.

53. Mr. MIKULKA (Special Rapporteur) drew attention to article 40, paragraph 1, of the 1978 Vienna Convention, which contained the phrase "shall not prejudice". That wording might usefully be incorporated in Mr. Brownlie's proposal.

54. Mr. BROWNLIE said the corollary to that suggestion, from Mr. Simma's standpoint, was that the statement of principle would have to be removed even from the commentary. The Commission should consider very carefully whether that was a good idea. He had the impression that a clear majority of members supported his proposal. According to a recognized principle of interpretation to be found in the 1969 Vienna Convention, the text of a treaty was to be read as being compatible with general international law. Accordingly, the principle set out in his proposed article was inescapable and it applied, a fortiori, to a text not intended to be a treaty.

55. As to substance, Mr. Bennouna's point that all States were born in violence did not seem to be particularly relevant. The draft articles dealt, not with the birth of States, but with the role of external intervention, including the threat or use of force, in the formation of States. A historical example might be Manchukuo or any other situation in which fictional statehood was used to confer legitimacy on what would otherwise clearly be an unlawful annexation.

56. He agreed with Mr. Simma that the overriding objective was to protect human rights, but the problem was how to do that effectively. He was not convinced that that objective was well served by omitting a principle that was in fact borrowed from the 1978 and 1983 Vienna

Conventions. The entire draft actually created conditions of greater instability than those that would prevail under the operation of the normal principles of general international law. The right of option was, after all, administered by States, and that gave them a great deal of power. The possibility of a succession of States involving no illegality being combined with a grey area where there was an element of illegality might well undermine the objective of protecting individuals and creating conditions of stability after a territorial change. He therefore maintained his proposal as originally formulated, and thought that even minor modifications of the wording would send the wrong signals.

57. Mr. SIMMA, reporting on the results of consultations, said that both sides had good reasons for their viewpoints, but something must be done to accommodate the concerns already spelled out. One way to do so might be to retain Mr. Brownlie's proposal, adding at the beginning, the phrase: "Without prejudice to the right to a nationality of persons concerned". Mr. Rosenstock had supplied that wording. Another option would be to add at the beginning of Mr. Brownlie's proposal a formulation put forward by Mr. Sreenivasa Rao, namely, "However, the legal consequences of any State succession in respect of nationality shall be construed in a manner beneficial to the persons concerned." Personally, he could accept either alternative, but preferred the first one.

58. Mr. LUKASHUK said he supported the first alternative suggested by Mr. Simma.

59. Mr. MELESCANU asked whether Mr. Brownlie could accept a more neutral formulation than the text he had proposed, such as "The present draft articles relate to the effects of the succession of States . . .". He could accept the first alternative proposed by Mr. Simma, but would also like Mr. Brownlie's text to be formulated in weaker terms.

60. Mr. ECONOMIDES, referring to the alternatives just put forward by Mr. Simma, asked whether an aggressor State that used force illegally, in violation of the Charter of the United Nations, could be considered to be a State concerned for the purposes of the draft articles.

61. Mr. BROWNLIE, replying to Mr. Melescanu, said his problem with small changes of wording was that, as the saying went, a very small amount of water could spoil a good drink. Explanations would be demanded for the changes. He could accept the Simma/Rosenstock formula, because the draft consisted of a sequence of articles and it could be assumed that the right to nationality, whatever it meant in the earlier articles, was being maintained. What signals would the Commission be giving, however, if it did not retain the formula used in the Vienna Conventions? Mr. Simma had not adequately explained the difference between the 1978 and 1983 Vienna Conventions and the current draft articles. After all, the Commission was dealing with an instrument on the nationality of natural persons, and was not drafting a human rights instrument per se.

62. Mr. SIMMA, replying to Mr. Economides, said that, obviously, he did not consider an aggressor State as a "State concerned" in the sense of the draft articles, nor did he consider the Manchukuo situation the only one in

which the question could arise as to whether State succession was legal or illegal. Rather, he had been thinking more of the Yugoslav context, where the issue was whether cases of secession of States were legal or illegal. That was a question which, in the light of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>10</sup> was highly controversial. The majority view in a United Nations body would be that secession could not be legal under any circumstances, whereas, under the penultimate paragraph of the Declaration, the minority view would conclude the opposite. His proposal was to retain the whole of the proposed article by Mr. Brownlie, including the word "only", and to add his proposed new clause at the beginning.

63. Mr. ROSENSTOCK said that the question of "the State concerned" was effectively dealt with in his proposal, but he could accept either version. The proposal was intended only to permit individuals to assert their rights under the draft articles and to avoid having to answer the question as to whether the succession was legal, while at the same time retaining the protection afforded by Mr. Brownlie's proposal.

64. Mr. BENNOUNA said he agreed with Mr. Brownlie that, if the Commission included an article on the question of legality or of international law, it should use the same wording as in the 1978 and 1983 Vienna Conventions. To make any changes would indeed be to have a little water ruin the drink. Furthermore, the Commission would be asked why and it would be completely altering the meaning. The idea of continuity with the 1978 and 1983 Vienna Conventions was excellent, and legally and technically defensible. The problem—and he agreed with the formulation "without prejudice", while retaining Mr. Brownlie's wording—was that he was not convinced the "without prejudice" phrase should be included in the same article. It could form part of a subsequent provision, leaving the Brownlie formula intact. What was important was that the formula should remain, as an indication of the Commission's continuity and consistency in the work it was doing. The savings clause, since the rights in question could be customary rights, could perhaps be included in a separate article.

65. The CHAIRMAN, speaking as a member of the Commission, said he disagreed with Mr. Bennouna that the clauses of the 1978 and 1983 Vienna Conventions should be kept in their entirety. Nor did he agree with Mr. Brownlie that, since the subject matter was the nationality of natural persons, the logic was therefore the same as for the Conventions. On the contrary, all of the texts were on different matters. In the current instance, the emphasis was on nationality, and it was the rights of individuals that lay at the heart of the draft. A different situation was involved. He favoured the Simma/Rosenstock formula, but was greatly opposed to retaining the word "only", for the provision would lose all logic. The draft articles were not a reiteration of the earlier texts; they applied, but not if they had prejudicial effects on natural persons. The word "only" must be deleted, both for moral reasons—in order to protect individuals—and logical reasons, as "without prejudice" could mean that some of the articles

<sup>10</sup> General Assembly resolution 2625 (XXV), annex.

or provisions could apply to situations created even by an illegal State succession. Another problem altogether, although as it was purely a matter of legal logic it would call into question the Conventions, was whether there was such a thing as illegal State succession.

66. Mr. MELESCANU said that neither the logic nor the system was the same as those of the 1978 Vienna Convention, in which articles 39 and 40 dealt with State responsibility and the outbreak of hostilities and certain cases of military occupation. They were absent from the current draft. There was in the current instance a difference of mechanism and structure compared with the 1978 Vienna Convention. Thus, the proposal should be watered down.

67. Mr. ECONOMIDES said the only compromise proposal acceptable was that of Mr. Al-Baharna and Mr. Candioti. Mr. Brownlie's proposed text, with the words "Recognizing that" inserted at the beginning, could be moved to the preamble, before the paragraph on human rights, which would read: "Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected in all cases and to the greatest extent possible."

68. He disagreed with the assertion that, as the draft articles concerned nationality in relation to the succession of States, they were different from the 1978 and 1983 Vienna Conventions. The proposed solution would enable the provisions of the Conventions to be retained intact, while at the same time indicating the need to ensure respect for human rights as much as possible and in every instance. The results of such a provision would be apparent only in future practice.

69. Mr. GALICKI said he fully supported both the Rosenstock/Brownlie formula and the Chairman's suggestion to delete the word "only", for both substantive and logical reasons.

70. Mr. HE said that, logically, the preamble should precede the draft articles and therefore Mr. Brownlie's proposed article should appear in the body of the text rather than in the preamble.

71. Mr. BROWNLIE said he preferred Mr. Simma's proposal to Mr. Rosenstock's.

72. Mr. ROSENSTOCK said his original proposal had been "Without prejudice to the rights of persons concerned as set out in these articles", whereas Mr. Simma's proposal was "Without prejudice to the right to a nationality of persons concerned". He would, however, go along with the consensus.

*By a show of hands, the Commission voted to insert Mr. Simma's proposed text before Mr. Brownlie's formulation, to delete the word "only" and to adopt the new draft article.*

*The new article, as amended, was adopted.*

*Part II, as amended, was adopted.*

*The meeting rose at 1.10 p.m.*

## 2509th MEETING

*Thursday, 10 July 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*later: Mr. João Clemente BAENA SOARES*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.*

### **Nationality in relation to the succession of States (concluded) (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> (concluded)

1. The CHAIRMAN said that, before continuing its consideration of the second part of the report of the Drafting Committee on the draft articles on nationality of natural persons in relation to the succession of States (A/CN.4/L.535 and Corr.1 and Add.1), the Commission should decide where it wished to insert the new article adopted at the previous meeting. It might perhaps form the first article of a Part III.

2. Mr. GALICKI said that he endorsed the Chairman's suggestion, for the article could not logically be inserted anywhere in the two parts that had already been adopted. Furthermore, the Commission had only just completed the first reading of the draft and it might add further articles later on. They would naturally fall in a Part III.

3. Mr. ROSENSTOCK said it did not seem essential to open a Part III at that stage. A more simple solution would be to insert the new article after article 26 and to insert three dots between them. The commentary would make it clear that the article had been adopted after the event and that its final place in the draft had not yet been decided.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Rosenstock's proposal.

*It was so agreed.*

<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; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles, see 2504th meeting, para. 28.