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THIRD REPORT ON NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

by

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Addendum

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PART II

PRINCIPLES APPLICABLE IN SPECIFIC SITUATIONS OF SUCCESSION OF STATES

Commentary

(1) As has frequently been stated, "nationality principles are different in the context of State succession than they are under normal naturalization procedures".[1] Indeed, the term "collective naturalization" may not be the best way to describe the process of acquisition, by the initial body of its population, of a successor State's nationality. The use of the term "naturalization" may lead to false analogies with a rather different legal institution. It is at the origin of attempts to transpose various preconditions for the acquisition of a successor State's nationality which are fully legitimate in relation to a real "naturalization" to the context of State succession where such requirements are not justified.

(2) It has been rightly observed in a recent report that "[r]ules on acquisition and loss of nationality in cases of State succession ... do not apply to immigrants in the conventional sense, but to persons who have resided on the territory as citizens, who have acted accordingly and who have taken decisions concerning their future on the tacit assumption that they will remain citizens."[2]

(3) The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of State succession. As Jacques de Burlet has observed, "the international effectiveness of nationalities called into question by a change of sovereignty is always assessed in relation to the facts likely to corroborate the juridical link to which such nationalities attest."[3] In the same spirit, Rezek has stressed that "the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State."[4] As others have also noted,

> "... it is in the interest of the successor State ... to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are

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[1] The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit., para. 23.

[2] Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 150.

[3] De Burlet, op. cit., p. 311.

[4] Rezek, op. cit., p. 357.

considered to be 'foreigners' in 'their own country' clearly that is not in the interest of the State itself."[5]

(4) The articles in part II are primarily based on the conclusions contained in the 1995 report of the Working Group.[6] Their purpose is to offer States concerned a basis for the negotiations which they are under an obligation to undertake.[7]

(5) The mosaic of criteria used by the Working Group for the purpose of determining the categories of persons whose nationality may be affected as a result of State succession and of formulating guidelines for negotiations concerning the acquisition of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option,[8] gave rise to a number of comments both in the Commission and in the Sixth Committee.

(6) Several members of the Commission, as well as representatives in the Sixth Committee, when commenting on the obligation of the successor State to grant its nationality, underlined the importance of the criterion of habitual residence in the territory of the successor State.[9]

(7) Indeed, habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one.[10] It is explained by the fact that "the population has a 'territorial' or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority".[11] Also, in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), "there is

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[5] Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 144.

[6] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, paras. 9-24.

[7] Ibid., para. 8.

[8] Ibid., para. 10.

[9] Ibid., para. 17.

[10] O'Connell termed it "the most satisfactory test", op. cit. (1967), p. 518.

[11] Brownlie (1990), op. cit., p. 665.

substantial connection with the territory concerned through residence itself, one aspect of the general principle of the genuine effective link."[12]

(8) Some members of the Commission were concerned that, in their view, the Working Group seemed to confer on jus soli the status of a kind of peremptory norm of general international law, whereas the principle of jus sanguinis was taken into account in a much more convoluted manner. The Commission was therefore invited to start from the premise that individuals had the nationality of the predecessor State and to avoid making rigid distinctions as to the way such nationality had been acquired.[13]

(9) Similarly, one representative in the Sixth Committee, presumably supporting the criterion of habitual residence, expressed the view that the mode of acquisition of the nationality of the predecessor State - as long as it was recognized by international law - and the place of birth were questionable criteria for determining the categories of individuals to which the successor State had an obligation to grant its nationality.[14] According to the comment to article 18 of the 1929 Harvard Draft Convention on Nationality, "[a]ssuming that naturalization effects a complete transformation in the national character of a person, there is no reason whatsoever for drawing a distinction between persons who have acquired nationality at birth and those who have acquired nationality through some process of naturalization prior to the transfer".[15]

(10) With regard to the criticism relating to an alleged overemphasis on the principle of jus soli, it must be noted, however, that examining the function attributed to the criterion of the mode of acquisition of the

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[12] The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit., para. 29. According to yet another view, "[i]t seems evident that the interest of the individual to acquire the nationality of the State of residence is considerably higher when he is a former citizen who has lost against his will, through State succession, rights attached to his former citizenship than when he is a foreigner who has always lived as a foreign inhabitant in the place of residence." (Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 151). It has been stated, in the same spirit, that "one particular potential function of nationality, probably the most crucial one, [is] the specific legal ties of a national to his or her home territory. For in the twentieth century, it is only within the home State that man can enjoy the full array of rights connected with [the status of a national]; only there does man also bear all the burdens of citizenship." (Wiessner, op. cit., p. 452).

[13] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 210.

[14] A/CN.4/472/Add.1, para. 18.

[15] Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 63.

predecessor State's nationality in State practice does not necessarily mean approving or even recommending its use in each and every case.[16]

(11) The Special Rapporteur has already pointed out that the fact of birth had systematically been considered in the Working Group in conjunction with the criterion of the place of habitual residence. The order in which these elements were spelled out with regard to the hypothetical situations examined, once they were linked, did not imply any preference for one over the other; this was just a matter of taste in drafting. Furthermore, the Working Group, in its conclusion, gave a more prominent role to the fact of residence than to the fact of birth.[17] The place of birth, however, becomes important when it remains the only link of a person concerned with a State concerned (e.g., when the person concerned has his or her habitual residence in a third State and loses the nationality of the predecessor State as a consequence of the disappearance of that State following a succession). To refrain from the use of this criterion in such a situation would be entirely unjustified.

(12) The concept of "secondary nationality", also examined by the Working Group, was queried by several members of the Commission. In particular, the notion that there could be different degrees of nationality under international law and that nationality could refer to different concepts was viewed as questionable.[18] On the other hand, the view was expressed in the Sixth Committee that, in the case of a federal predecessor State composed of entities which attributed a secondary nationality, the application of the criterion of such secondary nationality could provide one possible solution that recommended itself on account of its simplicity, convenience and reliability.[19]

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[16] This point was clearly made by the Working Group, which felt it necessary to stress, on some occasions, that provisions on acquisition and loss of nationality and the right of option applied to persons concerned irrespective of the mode of acquisition of the nationality of the predecessor State. See, e.g., Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 17 (a).

[17] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 223.

[18] The objection was raised in particular that the criterion of secondary nationality should be given such an importance as is the case in paragraph 11 (d) of the Working Group's report, dealing with the obligation of the predecessor State not to withdraw its nationality from persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence. It was observed that there was no reason to prohibit the predecessor State from withdrawing its nationality from such persons, after a given period, if the latter resided in the successor State (ibid., para. 211). The criterion of secondary nationality was also questioned in the context of the obligation to grant a right of option to certain categories of persons (ibid., para. 212).

[19] A/CN.4/472/Add.1, para. 29.

(13) The discussion on the use of different criteria is not about the "legality" of any such criterion but about its appropriateness. This was also the view of experts of the Council of Europe with respect to a specific case of succession: while regretting that the two States in question did not choose to make use of the test of habitual residence, the experts considered that they were not in breach of international law only for this reason, in spite of the fact that the criterion of the secondary nationality was "less significant for expressing the genuine and effective link between an individual and a State and there could be doubts as to whether the criterion actually chosen sufficiently expresse[d] 'a genuine connection of existence, interests and sentiments'".[20]

(14) The point made in the Sixth Committee that the criteria for determining which categories of persons acquired the nationality of the successor State both ex lege and through the exercise of the right of option should be established on the basis of existing legal instruments[21] is indeed well-taken. Accordingly, in the commentaries to individual articles of Part II, special care has been taken to analyse State practice also from the point of view of the criteria used by States in order to determine the relevant categories of persons for the purpose of granting or withdrawing nationality or for allowing the option.

(15) As to the rules governing the option of choosing among the nationalities of several States concerned, they have the same general aim as those governing the granting or withdrawal of nationality by the States concerned, namely, the aim of basing nationality on genuine links. The principle of effective nationality, however, in no way has the effect of forcing a choice.[22] The right of option is a pragmatic solution to the problems that may result from the application of general principles to specific cases. It does not necessarily imply the choice of a dominant nationality;[23] it may not even imply any choice among nationalities.[24]

(16) The provisions of part II are grouped into four sections, each dealing with a specific type of succession of States. This typology follows, in principle, that of the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts, in accordance with the proposal

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[20] Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 46.

[21] A/CN.4/472/Add.1, para. 18.

[22] See Rezek, op. cit., pp. 364-365.

[23] On the question of dominant nationality, see ibid., pp. 366-369.

[24] See, e.g., the case of any former Czechoslovak national who could acquire Slovak nationality upon declaration made within one year from the dissolution of Czechoslovakia without any further condition, including renunciation of Czech nationality acquired under the Czech Law on Nationality. See A/CN.4/480, para. (30) of the commentary to draft articles 7 and 8.

of the Special Rapporteur in his first report which was supported by the Commission.[25]

(17) In order to make the text of individual draft articles less cumbersome, where a section contains more than one article, those articles are preceded by a provision defining the scope of application of the section, i.e., the particular type of succession of States. This avoids a repetitive description of the type of succession in every article of the relevant section.

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 17

Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall grant its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which all such persons shall be granted.

Commentary

(1) Classical doctrine considered the question of the effects of territorial acquisitions on the nationality of persons living on such territory mainly in the context of acquisitions upon conquest. Thus, in the opinion of the Supreme Court of the United States in American Insurance Company v. Canter (1828), Chief Justice Marshall said that, on the transfer of territory, the relations of its inhabitants with the former sovereign were dissolved; the same act which transferred their country, transferred the allegiance of those who remained in it.[26]

(2) Similarly, Hall found that "subjects of a partially conquered State as [were] identified with the conquered territory at the time when the conquest [was] definitively effected" became subjects of the annexing State.[27]

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[25] See para. 11 above (Introduction) (ibid.).

[26] Quoted in Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., pp. 61-62.

[27] William Edward Hall, A Treatise on International Law, 8th ed. (Oxford, Clarendon Press, 1924), para. 205.

(3) Transfer of part of the territory is the first type of succession of States to be examined by the Commission. There are numerous examples of the way in which problems of nationality were resolved in this particular type of succession. Some of them are briefly recalled below.

(4) Article 3 of the Treaty of Paris of 1803, by which France ceded Louisiana to the United States of America, provided that the inhabitants of the ceded territory would be granted citizenship of the United States; it contained no provision on the right of option. A similar provision was included in the Treaty of 1819 by which Spain ceded Florida to the United States.[28]

(5) The Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America, of 2 February 1848, provided, in its article VIII, for the right of option of Mexican nationals established in territories which earlier belonged to Mexico and were transferred to the United States, as well as for their right to move to Mexico. Nevertheless, said article provided that:

> "... those who shall remain in the said territories after the expiration of [that] year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States."[29]

(6) Following the cession of Venetia and Mantua by Austria to the Kingdom of Italy, the question of acquisition of Italian nationality was explained in a circular from the Minister for Foreign Affairs to the Italian consuls abroad in the following terms:

> "The citizens of the Provinces ceded by Austria under the Treaty of 3 October [1866] cease pleno jure to be Austrian subjects and become Italian citizens. The Royal Consuls are therefore responsible for providing them with legal papers showing their new nationality ..."[30]

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[28] Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., pp. 65-66.

[29] See the materials submitted by Mexico.

[30] Materials on succession of States, op. cit., p. 7. When a question arose as to whether article XIV of the Peace Treaty of 3 October 1866 with Austria governing the nationality of the inhabitants of the provinces ceded to Italy applied not only in the case of persons originating from those provinces, as was specifically provided, but also in cases where only the family as such originated therefrom, the Minister for Foreign Affairs, in a dispatch to the Italian Consul General at Trieste, stated that he did not consider the restrictive view taken by Austria unfounded, and commented as follows:

> "Where there is cession of territory between two States, one of these States as a rule relinquishes to the other only what happens to be in that part of the territory which it renounces; nor has the new owner the right to lay claim to that which lies outside that same territory.

(7) Article 3 of the Treaty of 1867 between the United States and Russia concerning the cession of Alaska to the United States gave the inhabitants of the territory the right to retain their Russian allegiance and return to Russia within three years, but further provided that, if they remained in the territory beyond that period, "they, with the exception of uncivilized native tribes, [would] be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States".[31]

(8) Article V of the Treaty on the Delimitation of the Frontier between Mexico and Guatemala of 27 September 1882 established a right of option for "nationals of either of the two Contracting Parties who, by virtue of the provisions of this Treaty, shall henceforth be residing in territories of the other", stating, at the same time, that:

> "... persons who remain in the said territories after the year has elapsed without having declared their intention of retaining their former nationality shall be deemed to be nationals of the other Contracting Party."[32]

(9) The Treaty of 4 August 1916 between the United States and Denmark concerning the cession of the Danish West Indies provided in article 6 that Danish citizens residing in the said islands who remained therein would preserve their citizenship in Denmark by making, within a one-year period, a declaration to that end.[33]

(10) The Peace Treaty of Versailles contained a whole series of provisions on the acquisition of the nationality of the successor State and the consequent loss of German nationality in connection with the cession by Germany of numerous territories to neighbouring States. Thus, in relation to the renunciation by Germany of rights and title over Moresnet, Eupen and Malmédy in favour of Belgium, article 36 of the Treaty provided:

> "When the transfer of the sovereignty over the territories referred to above has become definitive, German nationals habitually resident in the territories will definitively acquire Belgian nationality ipso facto, and will lose their German nationality.

> "It therefore follows that the mere fact of giving persons originating from the ceded territory, who are living outside that territory, the right to keep the nationality of their country of origin in itself constitutes an actual concession." Ibid., p. 8.

[31] See Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 66. The "uncivilized tribes" were to be subject to special laws and regulations.

[32] See the materials submitted by Mexico.

[33] See Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., pp. 66-67.

"Nevertheless, German nationals who became resident in the territories after 1 August 1914 shall not obtain Belgian nationality without a permit from the Belgian Government."[34]

However, the acquisition of Belgian nationality ipso facto and the subsequent loss of German nationality by persons habitually resident in the ceded territories could have been reversed by the exercise of the right of option.[35]

(11) Regarding the restoration of Alsace-Lorraine to France, paragraph 1 of the annex relating to article 54 of the Treaty of Versailles provided that:

"As from 11 November 1918, the following persons are ipso facto reinstated in French nationality:

"(1) Persons who lost French nationality by the application of the Franco-German Treaty of 10 May 1871 and who have not since that date acquired any nationality other than German;

"(2) The legitimate or natural descendants of the persons referred to in the immediately preceding paragraph, with the exception of those whose ascendants in the paternal line include a German who migrated into Alsace-Lorraine after 15 July 1870;

"(3) All persons born in Alsace-Lorraine of unknown parents, or whose nationality is unknown."[36]

However, article 54 is to be read in conjunction with article 53, according to which:

"... Germany undertakes as from the present date to recognize and accept the regulations laid down in the annex hereto regarding the nationality of the inhabitants or natives of the said territories, not to claim at any time or in any place whatsoever as German nationals those who shall have been declared on any ground to be French [and] to receive all others in her territory ..."[37]

Paragraph 2 of the annex relating to article 79 of the Treaty of Versailles enumerated several categories of persons entitled to claim French nationality, in particular, persons not restored to French nationality under other provisions of the annex whose ascendants included a Frenchman or Frenchwoman, persons born or domiciled in Alsace-Lorraine, including Germans, or foreigners who acquired the status of citizens of Alsace-Lorraine. It reserved, at the same time, the

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[34] Materials on succession of States, op. cit., p. 20.

[35] See article 37 of the Treaty referred to in A/CN.4/480, para. (8) of the commentary to draft articles 7 and 8.

[36] Materials on succession of States, op. cit., pp. 26-27.

[37] Ibid., p. 21.

right of French authorities, in individual cases, to reject the claim to French nationality.[38]

(12) Article 84 of the Treaty of Versailles provided for the ipso facto acquisition of Czecho-Slovak nationality and loss of German nationality by persons habitually resident in the territories recognized as forming part of the Czecho-Slovak State, including those territories that were ceded to Czechoslovakia by Germany.

(13) Article 85 of the Treaty further provided for the right of option of German nationals habitually resident in the said territories:

> "Within a period of two years from the coming into force of the present Treaty, German nationals over eighteen years of age habitually resident in any of the territories recognized as forming part of the Czecho-Slovak State will be entitled to opt for German nationality. Czecho-Slovaks who are German nationals and are habitually resident in Germany will have a similar right to opt for Czecho-Slovak nationality ..."[39]

(14) Similarly, in relation to the recognition of the independence of Poland and the cession of certain territories by Germany to Poland, article 91 of the Treaty of Versailles provided that:

> "German nationals habitually resident in territories recognized as forming part of Poland will acquire Polish nationality ipso facto and will lose their German nationality.
>
> "German nationals, however, or their descendants who became resident in these territories after 1 January 1908 will not acquire Polish nationality without a special authorization from the Polish State ..."[40]

Article 91 further contained provisions analogous to those in article 85 concerning the right of option of German nationals habitually resident in territories recognized as forming part of Poland who acquired Polish nationality ipso facto.[41]

(15) Article 112 of the Treaty of Versailles, concerning nationality issues arising in connection with the restoration of Schleswig to Denmark, was drafted along the lines of the above-mentioned articles and also envisaged automatic

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[38] Ibid., p. 27.

[39] Ibid., pp. 28-29.

[40] Ibid., p. 30.

[41] Ibid.

acquisition and loss of nationality.[42] Article 113 further provided for the right of option of persons concerned.[43]

(16) The Peace Treaty of Saint-Germain-en-Laye dealt with the various kinds of territorial changes that resulted in the total dismemberment of the Austro-Hungarian Monarchy. Its provisions applied also to situations comparable to territorial cessions, namely, the attribution of certain territories to one or the other State following a plebiscite. The basic rule was embodied in article 70:

> "Every person possessing rights of citizenship (pertinenza) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain ipso facto to the exclusion of

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[42] It read:

> "All the inhabitants of the territory which is returned to Denmark will acquire Danish nationality ipso facto, and will lose their German nationality.
>
> "Persons, however, who had become habitually resident in this territory after 1 October 1918 will not be able to acquire Danish nationality without permission from the Danish Government." Ibid., p. 32.

[43] It read:

> "Within two years from the date on which the sovereignty over the whole or part of the territory of Schleswig subjected to the plebiscite is restored to Denmark:
>
> "Any person over 18 years of age, born in the territory restored to Denmark, not habitually resident in this region, and possessing German nationality, will be entitled to opt for Denmark;
>
> "Any person over 18 years of age habitually resident in the territory restored to Denmark will be entitled to opt for Germany;
>
> "Option by a husband will cover his wife and option by parents will cover their children less than 18 years of age;
>
> "Persons who have exercised the above right to opt must within the ensuing twelve months transfer their place of residence to the State in favour of which they have opted. ..." Ibid.

Austrian nationality the nationality of the State exercising sovereignty over such territory."[44]

Nevertheless, according to article 79 of the Treaty:

"Persons entitled to vote in plebiscites provided for in the present Treaty shall within a period of six months after the definitive attribution of the area in which the plebiscite has taken place be entitled to opt for the nationality of the State to which the area is not assigned. The provisions of article 78 relating to the right of option shall apply equally to the exercise of the right under this article."[45]

(17) The Peace Treaty of Neuilly-sur-Seine also contained provisions on the acquisition of the nationality of the successor State. They concerned the renunciation by Bulgaria of rights and title over certain territories in favour of the Serb-Croat-Slovene State and Greece. Article 39 of section I provided that:

"Bulgarian nationals habitually resident in the territories assigned to the Serb-Croat-Slovene State will acquire Serb-Croat-Slovene nationality ipso facto and will lose their Bulgarian nationality. Bulgarian nationals, however, who became resident in these territories after 1 January 1913 will

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[44] Ibid., p. 496. Nevertheless, the situation differed in the case of territory transferred to Italy, where the ipso facto scenario did not apply vis-à-vis persons possessing rights of citizenship in such territory who were not born there and persons who acquired their rights of citizenship in such territory after 24 May 1915 or who acquired them only by reason of their official position (article 71). Such persons, as well as those who formerly possessed rights of citizenship in the territories transferred to Italy, or whose father, or mother if the father was unknown, possessed rights of citizenship in such territories, or those who had served in the Italian Army during the war and their descendants, could claim Italian nationality subject to the conditions prescribed for the right of option (article 72). Italian authorities were entitled to refuse such claims in individual cases (article 73). In that event, or when no such claim was made, the persons concerned obtained ipso facto the nationality of the State exercising sovereignty over the territory in which they possessed rights of citizenship before acquiring such rights in the territory transferred to Italy (article 74). Moreover, according to article 76, persons who acquired pertinenza in territories transferred to the Serb-Croat-Slovene State or to the Czecho-Slovak State could not acquire the nationality of those States without a permit. If the permit was refused, or not applied for, such persons obtained ipso facto the nationality of the State exercising sovereignty over the territory in which they previously possessed rights of citizenship (articles 76 and 77). Ibid., pp. 496-497. For the application of article 70, see, e.g., D. v. Tirol, Verwaltungsgerichtshof, 26 November 1968 (see the materials submitted by Austria).

[45] Materials on succession of States, op. cit., p. 497.

not acquire Serb-Croat-Slovene nationality without a permit from the Serb-Croat-Slovene State."[46]

(18) A similar provision was to be found in article 44 of section II, concerning territories ceded to Greece.[47] The Treaty further provided for the right of option in articles 40 and 45,[48] drafted along the same lines as articles 85 and 37 of the Treaty of Versailles.

(19) Article 9 of the Peace Treaty of Tartu between Finland and Soviet Russia of 11 December 1920, by which Russia ceded to Finland the area of Petsamo, provided that:

"Russian citizens domiciled in the territory of Petsamo (Petchanga) shall, without any further formality, become Finnish citizens. Nevertheless, those who have attained the age of 18 years may, during the year following the entry into force of the present Treaty, opt for Russian nationality. ..."[49]

(20) The Treaty of Lausanne of 24 July 1923 contained two types of provisions concerning the acquisition of nationality. In accordance with article 21:

"Turkish nationals ordinarily resident in Cyprus on 5 November 1914, will acquire British nationality subject to the conditions laid down in the local law, and will thereupon lose their Turkish nationality ...

"It is understood that the Government of Cyprus will be entitled to refuse British nationality to inhabitants of the island who, being Turkish nationals, had formerly acquired another nationality without the consent of the Turkish Government."[50]

(21) With regard to the other territories detached from Turkey under that Treaty, article 30 stipulated that:

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[46] Ibid., p. 38.

[47] It read:

"Bulgarian nationals resident in the territories assigned to Greece will obtain Greek nationality ipso facto and will lose their Bulgarian nationality.

"Bulgarian nationals, however, who became resident in these territories after 1 January 1913 will not acquire Greek nationality without a permit from Greece." Ibid., p. 39.

[48] For the text of articles 40 and 45, see A/CN.4/480, note 143.

[49] See the materials submitted by Finland.

[50] Materials on succession of States, op. cit., p. 46.

> "Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipso facto, in the conditions laid down by the local law, nationals of the State to which such territory is transferred."[51]

The Treaty also guaranteed the right of option for a period of two years from its entry into force to Turkish nationals habitually resident in the island of Cyprus. Individuals who opted for Turkish nationality were to leave Cyprus within 12 months of exercising the right of option. The Treaty also included provisions on the right of option of Turkish subjects habitually resident in the territories detached from Turkey under that Treaty or natives of those territories who were habitually resident abroad.[52]

(22) As regards cases of State succession after the Second World War, the Treaty of Peace between the Allied and Associated Powers and Italy, signed at Paris on 10 February 1947, contained provisions on acquisition of nationality in connection with the cession of certain territories by Italy to France, Yugoslavia and Greece. According to paragraph 1 of article 19 of the Treaty:

> "Italian citizens who were domiciled on 10 June 1940 in territory transferred by Italy to another State under the present Treaty, and their children born after that date, shall, except as provided in the following paragraph [with respect to the right of option], become citizens with full civil and political rights of the State to which the territory is transferred, in accordance with legislation to that effect to be introduced by that State within three months from the coming into force of the present Treaty. Upon becoming citizens of the State concerned they shall lose their Italian citizenship."[53]

The Treaty envisaged, in addition, that persons domiciled in territory transferred by Italy to other States and whose customary language was Italian would have a right of option.[54]

(23) As a result of the Armistice Agreement of 19 September 1944 and the Treaty of Peace of 10 February 1947, Finland ceded part of its territory to the Soviet Union. The loss of Finnish citizenship by the population concerned was at the time regulated by the internal law of that State, i.e., the Act on the Acquisition and Loss of Finnish Citizenship of 9 May 1941, which did not contain specific provisions regarding territorial changes. In other words, the loss of Finnish citizenship was essentially regulated by the standard provisions of the Act, which read:

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[51] Ibid.

[52] See A/CN.4/480, notes 145 and 146.

[53] Materials on succession of States, op. cit., p. 59.

[54] For the text of article 19, paragraph 2, see A/CN.4/480, note 147.

> "... A Finnish citizen who becomes a citizen of another country otherwise than upon his application shall lose his Finnish citizenship if his actual residence and domicile are outside Finland; if he resides in Finland he shall lose his Finnish citizenship on removing his residence from Finland ..."[55]

(24) Other examples of provisions on acquisition of nationality can be found in two treaties on the cession to India of French Territories and Establishments in India. Article II of the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France, signed at Paris on 2 February 1951, provided that:

> "French subjects and citizens of the French Union domiciled in the territory of the Free Town of Chandernagore on the day on which the present Treaty comes into force shall become, subject to the provisions [regarding the right of such persons to opt for the retention of their nationality], nationals and citizens of India."[56]

Articles III and IV of that Treaty provide an example of the "opting out" concept. Thus, persons referred to in article II could, according to article III, opt for the retention of their nationality by a written declaration made within six months following the coming into force of the Treaty.[57]

(25) The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam between India and France, signed at New Delhi on 28 May 1956, contains similar provisions. According to article 4:

> "French nationals born in the territory of the Establishments and domiciled therein at the date of the entry into force of the Treaty of Cession shall become nationals and citizens of the Indian Union, with the exceptions enumerated under article 5 hereafter".

Article 6 further stipulated that:

> "French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union on the date of the entry into force of the Treaty of Cession shall become nationals and citizens of the Indian Union ..."[58]

The automatic loss of French nationality resulting from the acquisition of Indian nationality by virtue of articles 4 and 6 of the Treaty was subject to

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[55] Article 10. See the materials submitted by Finland.

[56] Materials on succession of States, op. cit., p. 77.

[57] Ibid. For the text of article IV, see A/CN.4/480, note 152.

[58] Article 5 and the second part of article 6 provided for the right of opting out, i.e., retaining French nationality. Ibid., p. 87.

the right of the persons concerned to opt for the retention of French nationality. Moreover, article 7 of the Treaty explicitly provided that:

> "French nationals born in the territory of the Establishments and domiciled in a country other than the territory of the Indian Union or the territory of the said Establishments on the date of entry into force of the Treaty of Cession shall retain their French nationality, with the exceptions enumerated in article 8 hereafter".[59]

(26) Article 4 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954, provided that:

> "Questions pertaining to citizenship shall be determined before de iure transfer takes place. Both the Governments agree that free choice of nationality shall be allowed."[60]

(27) Article 3 of the Treaty between Spain and Morocco of 4 January 1969 regarding Spain's retrocession to Morocco of the territory of Ifni read as follows:

> "With the exception of those who have acquired Spanish nationality by one of the means of acquisition laid down in the Spanish Civil Code, who shall retain it in any case, all persons born in the territory who have had Spanish nationality up to the date of the cession may opt for that nationality by making a declaration of option to the competent Spanish authorities within three months from that date."[61]

(28) Regarding the consequences of partial succession on nationality, the 1929 Harvard Draft Convention on Nationality provided in the second paragraph of article 18:

> "When a part of the territory of a State is acquired by another State [...], the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof."[62]

(29) According to the comment to article 18, this provision was "believed to express a rule of international law which is generally recognized, although there might be differences of opinion with regard to its application under

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[59] Article 8 provided for the right to choose to acquire Indian nationality by means of a written declaration. Ibid.

[60] Ibid., p. 80.

[61] See the materials submitted by Spain.

[62] See note 23 above.

particular conditions". The comment went as far as to assert that, in the situation envisaged, "international law, without an applicable provision in the municipal law of a State, declares that a person has the nationality of the State."[63]

(30) It was further stated in the comment that, in the case of a territorial cession, "residence is a necessary element to be considered, and nationals of the predecessor State do not acquire the nationality of the successor State unless they continue their habitual residence in the territory transferred. "It is implied in this provision that former residents of the territory who had abandoned their residence therein at the time of the transfer are not affected as to their nationality by the transfer.[64] Concerning the right of option, it was argued that "it is [...] possible, in the absence of a treaty provision to the contrary, though not compulsory, for the successor State to adopt legal means by which nationals having their habitual residence in the territory transferred may decline its nationality."[65] It was said, moreover, that "it is doubtless desirable for the annexing State to allow the nationals of the [predecessor] State an option with regard to acquiring its nationality."[66] Reference was made to American authorities which in the main seemed to consider that "it is incumbent upon the annexing State to give such option, either by allowing a national to make a formal declaration declining the nationality of the annexing State or by allowing him to depart from the territory."[67]

(31) Doctrinal views on this subject, in any event, seem to have evolved from the position according to which "it is understood that the former citizens have the option to stay or leave country, and the continuance of their domicile is conclusive on the obligation of permanent allegiance"[68] to the recognition of a right of choice which is not seen as an implicit consequence of the right to leave the territory, but rather as an autonomous right, even if it still entails the obligation to transfer one's residence accordingly.[69] Thus, Fauchille seems

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[63] Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 61.

[64] Ibid.

[65] Ibid.

[66] Ibid., p. 64.

[67] Ibid.

[68] Quoted in ibid., p. 63.

[69] In this respect, see, e.g., Westlake who states that:

> "Anciently cessions were carried into effect on the footing that the allegiance both of the present and of the absent was transferred by that means without an option being given ... but the established practice has long been to fix a time within which individuals may, formally or practically, opt for retaining their old nationality, on condition of

to express a general view when asserting that, in the case of cession of a part of the territory, respect due to the liberty of persons requires that those residing in the territory may make an option to retain their original nationality.[70]

(32) Transfer of territory is the only category of succession of States which is considered expressis verbis in the 1961 Convention on the Reduction of Statelessness. It goes without saying that the Convention does not deal with the whole spectrum of questions concerning nationality in this case, but focuses merely on ensuring that statelessness will not ensue as a result of the transfer.[71]

(33) The Draft European Convention on Nationality does not set out rules applicable in specific cases of succession of States and remains silent about what particular consequences the transfer of part of the territory might have on nationality. However, under article 18, States are required in deciding (clearly this means "legislating") on the granting or the retention of nationality in any case of succession, to respect the general principles contained in articles 4 and 5[72] and to take into account:

"(a) the genuine and effective link of the person concerned with the State;

"(b) the habitual residence of the person concerned at the time of State succession;

"(c) the will of the person concerned;

"(d) the territorial origin of the person concerned."

(34) The Venice Declaration is much more specific as to the categories of persons eligible to acquire the nationality of the successor State and to lose the nationality of the predecessor State. While it also does not contain separate provisions for each specific case of State succession, the wording used makes it possible to perceive a connection between certain rules and certain types of succession. In the case of a transfer of part of a territory, the following rules appear to be pertinent:

"8. (a) ... [T]he successor State shall grant its nationality to all nationals of the predecessor State residing permanently on the transferred territory.

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removing their residence from the ceded territory." John Westlake, International Law, vol. 1, p. 71.

[70] Paul Fauchille, Traité de droit international public, vol. 1 (Paris, Rousseau, 1922), p. 857.

[71] For the text of article 10, see para. (9) of the commentary to draft article 2.

[72] For the text of articles 4 and 5, see A/CN.4/480, note 219.

"...

"9. It is [further] desirable that successor States grant their nationality, on an individual basis, to applicants belonging to the following ... categories:

(a) persons originating from the transferred territory who are nationals of the predecessor State but resident outside the territory at the time of succession;

"...

"12. The predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State.

"13. (a) ... [T]he successor State(s) shall grant the right of option in favour of the nationality of the predecessor State.

"...

"14. The successor States may make the exercise of the right of option conditional on the existence of effective links, in particular ethnic, linguistic or religious, with the predecessor State [or another successor State]."

(35) The conclusions of the Working Group concerning transfer of part of the territory are contained in paragraphs 11 to 15 of its preliminary report.[73] At that time, the Working Group considered the case of transfer of part of a State's territory together with the case of secession (now termed separation of part of the territory). The reason was the existence of certain common features between the two situations, in particular the continued existence of the predecessor State. At a later stage, following informal consultations with former members of the Working Group, the Special Rapporteur arrived at the conclusion that transfer of territory and separation of part of the territory should be dealt with in different articles, because some provisions that are necessary to deal with the problems arising from separation in a comprehensive manner are not relevant in the case of transfer. Such separate treatment also conforms to the decision of the Commission to retain the categories of succession established in the 1983 Vienna Convention.

(36) The draft article reflects the practice many examples of which were provided above. It sets out, firstly, a basic rule, namely that the successor State shall grant its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons. This basic solution may, however, be modified through the exercise of the right of option. In the case of

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[73] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex.

transfer, all persons habitually resident in the territory transferred shall have a right of option.

(37) The nationality of all other nationals of the predecessor State - those residing in the predecessor State as well as in third States - remains unchanged. It is for the successor State to decide whether it wants to allow some of them (for example, persons born on the territory transferred) to acquire its nationality on an optional basis. In such case, the general provisions of draft articles 4 and 5 apply. The Special Rapporteur, however, does not feel that it is necessary to propose any further provision in that respect.

SECTION 2

UNIFICATION OF STATES

Article 18

Granting of the nationality of the successor State

> Without prejudice to the provisions of article 4, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have merged, the successor State shall grant its nationality to all persons who, on the date of the succession of States, had the nationality of at least one of the predecessor States.

Commentary

(1) The loss of the nationality of the predecessor State is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of the predecessor State.

(2) When the United States acquired Hawaii and the previously independent State was thus extinguished, the former provided by statute that "all persons who were citizens of the Republic of Hawaii on 12 August 1898 are citizens of the United States and citizens of the territory of Hawaii".[74]

(3) Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that:

> "... Nationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or

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[74] Act of 30 April 1900, quoted in Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 63.

statutes in force in Syria or Egypt at the time this Constitution takes effect."[75]

This provision was re-enacted in article 1 of the Nationality Law of the United Arab Republic.[76]

(4) The resolution of nationality problems occurred sometimes in a rather complex framework of consecutive changes, as was the case with Singapore, which acceded to independence through a transient merger with the already independent Federation of Malaya. Thus, on 16 September 1963, the Federation of Malaysia was constituted, comprising the States of the former Federation, the Borneo States, namely Sabah and Sarawak, and the State of Singapore. There was a division of legislative power among the Federation and its component units. Under the Malaysian Constitution, separate citizenship for those units was maintained and, in addition, a Federal citizenship was established. There were separate provisions in the Malaysian Constitution governing the acquisition of Federal citizenship by persons of the States of Malaya, by persons of the Borneo States and by persons who were Singapore citizens or were residents of Singapore (articles 15, 16 and 19). A person who was a citizen of Singapore acquired the additional status of citizen of the Federation by operation of the law, and Federal citizenship was not severable from Singapore citizenship. If any person who was both a Singapore citizen and a Federal citizen lost either status, he also lost the other (article 14, paragraph 3).[77]

(5) The reunification of Germany with the simultaneous disappearance of the nationality of the German Democratic Republic (instituted by a law of 20 February 1967) is a sui generis case, for the Federal Republic, whose international personality was not affected by reunification, has maintained throughout the entire existence of the German Democratic Republic the concept of the singleness of German nationality (defined by a 1913 law).[78] Thus, despite the existence under the 1967 law of a nationality specific to the German Democratic Republic, the Federal Republic is, according to the Federal Constitutional Tribunal, required to treat any citizen of the German Democratic Republic residing in an area under the protection of the Federal Republic and its Constitution as German, in accordance with article 116, paragraph 1, of the Basic Law - in other words, the same as any citizen of the Federal Republic.[79]

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[75] Text reproduced in Eugène Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", The International and Comparative Law Quarterly, vol. 8 (1959), p. 374.

[76] Ibid., p. 372.

[77] Goh Phai Cheng, Citizenship Laws of Singapore (Singapore, Educational Publications), pp. 7-9. See the materials submitted by Singapore.

[78] Pierre Koenig, "La nationalité en Allemagne", Annuaire français de droit international, 1978, vol. XXIV, p. 237.

[79] Judgement of the Federal Constitutional Tribunal, 31 July 1974, part B, V, cited in ibid., p. 252.

(6) According to some authors,[80] German naturalized aliens residing in the German Democratic Republic before 1967 had acquired German nationality within the meaning of article 116 of the Basic Law and could avail themselves thereof if they stayed in the Federal Republic. If, on the other hand, an alien had been naturalized in the German Democratic Republic after 1967, this did not have the effect of acquiring for him German nationality within the meaning of the Basic Law. This difference in status assumed practical importance at the time of reunification, when the nationality of the German Democratic Republic ceased to exist.

(7) The first paragraph of article 18 of the 1929 Harvard Draft Convention on Nationality provided:

> "When the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State."[81]

(8) According to the comment, the paragraph "relates to the nationals of a State the entire territory of which is acquired by another State, the first being thereby extinguished."[82]

(9) With regard to the categories of persons to whom the provision should apply, the comment stated that "[t]he persons affected by this article are nationals of the predecessor State; it is not so broad as to cover all inhabitants, nor so narrow as to be applicable only to natives of the territory transferred. It is applicable to naturalized persons as well as to those who acquired nationality at birth."[83] Finally, concerning the role of the will of persons, it was observed that "it is permissible for the annexing State to

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[80] See, for example, Professor Kriele, cited in ibid., note 39.

[81] See A/CN.4/480, note 23.

[82] Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 60. Nevertheless, the question arises as to how this rule would operate in a second situation envisaged in the comment. It is stated that this provision "would also be applicable in principle to a case in which a State is extinguished by partition and division of the territory among two or more States" (ibid.). It seems that the problem of the plurality of successor States in the second scenario escaped the minds of the authors of the comment. This mistake is even more obvious when one reads the comment concerning the use of the criterion of residence: while it is understandable that, in the case of simple unification through incorporation, "the place of residence ... is not considered [and] the nationality of the successor State is acquired regardless of residence, to avoid statelessness" (ibid., p. 61), this statement certainly cannot be valid in the case of partition of the territory of the extinguished State between other States. In such case, it seems, the situation is similar to dissolution rather than to unification.

[83] Ibid.

provide by law a means by which former nationals of the extinct State may decline the nationality of the annexing State, but it does not seem that it is incumbent upon the latter to make such provision."[84]

(10) The Working Group concluded on a preliminary basis that, in the case of unification, including absorption, the successor State should have the obligation to grant its nationality to the former nationals of a predecessor State residing in its territory and to the former nationals of the predecessor residing in a third State, unless they also had the nationality of a third State.[85]

(11) It has already been observed that the Draft European Convention on Nationality only contains general guidelines for States involved in a succession.[86] These are to be applied with utmost caution in the case of unification; they should certainly not be interpreted in a way that would justify the refusal of the successor State to grant its nationality to all nationals of the predecessor State, including those residing in a third State (with the exception of persons residing in a third State and having the nationality of a third State).

(12) This applies, in particular, with regard to the application of the rule concerning a genuine link. Its use in the case of unification of States would be liable to raise objections. According to the Italo-American Conciliation Commission in the Flegenheimer case:

> "when a person is vested with only one nationality, which is attributed to him or her [in a valid manner], the theory of effective nationality cannot be applied without the risk of causing confusion ... the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State".[87]

Moreover, if the doctrine of effective nationality was applied for the purposes of the granting of nationality in the case of unification, it would have awkward consequences (i.e., it would result in numerous cases of statelessness).

(13) With regard to the unification of States, there appears to be a gap in the Venice Declaration. The rules contained therein which might be applicable

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[84] Ibid., p. 64.

[85] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 17.

[86] See A/CN.4/480, para. (31) of the commentary to draft article 17.

[87] United Nations, Reports of International Arbitral Awards, vol. XIV, p. 377.

in the case of unification omit nationals of the predecessor State who were resident in a third State at the time of succession and did not originate from the territory involved in the succession.[88]

(14) The Working Group's conclusions on unification are set out in paragraphs 16 and 17 of its preliminary report.[89] The Working Group considered that, irrespective of whether unification entailed the disappearance of both (or all) merging States or involved the absorption of the predecessor State by another State which retained its international personality, the successor State should have the obligation to grant its nationality to all nationals of the predecessor State - no matter how that nationality had been acquired - who resided in the successor State, but also to all nationals of the predecessor State residing in a third State, unless they also had the nationality of a third State. In the latter case, the successor State could, however, grant its nationality to such persons subject to their agreement. Draft article 18 covers all these points.

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[88] The provisions of the Declaration applicable to unification appear to be those of article 10, which stipulates:

> "The successor State shall grant its nationality:
>
> "(a) to permanent residents of the [territory concerned] who become stateless as a result of the succession;
>
> "(b) to persons originating from the [territory concerned], resident outside that territory, who become stateless as a result of the succession."

Thus, the fate of persons born outside the territory of the predecessor State who acquired its nationality by means of naturalization or filiation, and who were resident in a third State at the time of succession, is not settled. In addition, persons originating from a territory involved in a succession who are not resident there and who have the nationality of a third State should undoubtedly (if they also had the nationality of the predecessor State at the time of succession) have the opportunity to acquire the nationality of the successor State, if they so wish.

[89] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex.

SECTION 3

DISSOLUTION OF A STATE

Article 19

Scope of application

The articles of this section apply when a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States.

Article 20

Granting of the nationality of the successor States

Subject to the provisions of article 21, each of the successor States shall grant its nationality to the following categories of persons concerned:

(a) persons having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 4:

(i) persons having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last permanent residence in what has become the territory of that particular successor State; or

(ii) where the predecessor State was a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

Commentary

(1) In the case of dissolution, the loss of the nationality of the predecessor State is an automatic consequence of the disappearance of that State. The main problem therefore relates to the acquisition of the nationality of the successor States by persons who, prior to the dissolution, were nationals of the predecessor State.

(2) The effects on nationality of the dismemberment of the Austro-Hungarian Monarchy, involving also the dissolution of the core of the dualist Monarchy, were regulated in a relatively uniform manner. Articles 64 and 65 of the Peace Treaty of Saint-Germain-en-Laye read as follows:

"Article 64. Austria admits and declares to be Austrian nationals ipso facto and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (pertinenza) within Austrian territory who are not nationals of any other State.

"Article 65. All persons born in Austrian territory who are not born nationals of another State shall ipso facto become Austrian nationals."[90]

(3) Similar provisions are contained in articles 56 and 57 of the Peace Treaty of Trianon concerning the acquisition of Hungarian nationality.[91]

(4) The expression "nationals of any other State" in the above provisions must be understood as meaning the nationals of other States emerging from the dismemberment of the Monarchy. The acquisition of the nationality of each of the successor States other than Austria was contemplated in article 70 of the Treaty of Saint-Germain-en-Laye, according to which a person acquired the nationality of the State exercising sovereignty over the territory in which he or she possessed citizenship rights.[92]

(5) In recent cases of State succession in Eastern and Central Europe, the nationality laws of the successor States resulting from the dissolution of federal States often provided that individuals who, on the date of State succession, had "the secondary nationality" of the territorial unit which acceded to independence would automatically acquire the nationality of the latter.

(6) Article 39 of the Citizenship Act of Slovenia provided that:

"Any person who held citizenship of the Republic of Slovenia and of the Socialist Federal Republic of Yugoslavia according to existing valid regulations is considered to be a citizen of the Republic of Slovenia."[93]

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[90] Laws concerning nationality, op. cit., p. 586.

[91] Ibid., p. 587.

[92] These were rather cases of separation. For the text of article 70, see A/CN.4/480, para. (15) of the commentary to draft article 17.

[93] Citizenship Act of Slovenia of 5 June 1991, in "Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, CEDIN, Paris X-Nanterre, Table ronde, décembre 1993.

In addition to automatic acquisition, other means of acquiring Slovenian citizenship were envisaged for certain categories of persons.[94]

(7) The Law on Croat Nationality of 26 June 1991 is also based on the concept of the continuity of Croat nationality which, in the Socialist Federal Republic of Yugoslavia, existed alongside Yugoslav federal nationality.[95] With regard to citizens of the former Federation who did not at the same time hold Croat nationality, article 30, paragraph 2, of the Law provided that any person belonging to the Croat people who did not hold Croat nationality on the day of the entry into force of the Law but who could prove that he had been legally resident in the Republic of Croatia for at least 10 years, would be considered to be a Croat citizen if he supplied a written declaration in which he declared that he regarded himself as a Croat citizen.[96]

(8) Article 46 of the Yugoslav Citizenship Law (No. 33/96) defined the basic body of Yugoslavia's citizens as follows:

> "... a Yugoslav citizen is any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of the Republic of Serbia or the Republic of Montenegro on the date of Proclamation of the Constitution of the Federal Republic of Yugoslavia on 27 April 1992, as well as his/her children born after that date."[97]

(9) Article 1, paragraph 1, of the Czech Law on Acquisition and Loss of Citizenship provided that:

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[94] Thus article 40 of the Citizenship Act of Slovenia provided that:

> "A citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite on the independence and autonomy of the Republic of Slovenia on 23 December 1990 and is actually living there, can acquire citizenship of the Republic of Slovenia, on condition that such a person files an application with the administrative organ competent for internal affairs of the community where he resides ..."

Article 41 of the same Act envisaged that those persons who had previously been deprived of the citizenship of the People's Republic of Slovenia and the Socialist Federal Republic of Yugoslavia, as well as officers of the ex-Yugoslav army who did not want to return to their homeland, emigrants who had lost their citizenship as a result of their stay abroad and some other categories of persons might acquire the citizenship of Slovenia on the basis of an application within a one-year period. Ibid.

[95] See the Law on Nationality of the Socialist Republic of Croatia, Official Gazette, No. 32/77, abrogated by the Law on Croat Nationality of 26 June 1991 (articles 35 and 37). Ibid.

[96] Ibid.

[97] See the materials submitted by Yugoslavia.

> "Natural persons - citizens of the Czech Republic and at the same time citizens of the Czech and Slovak Federal Republic on 31 December 1992 - become, as of 1 January 1993, citizens of the Czech Republic."[98]

In addition to the provisions on ipso facto acquisition of nationality, the Law contained provisions on the acquisition of nationality on the basis of a declaration. This possibility was open to individuals who, on 31 December 1992, were citizens of Czechoslovakia but not citizens of the Czech or the Slovak Republic and, under certain conditions, to individuals who, after the dissolution of Czechoslovakia, acquired the nationality of Slovakia, provided that they had been permanent residents of the Czech Republic for at least two years or they were permanent residents in a third country but had their last permanent residence before leaving Czechoslovakia in the territory of the Czech Republic.[99]

(10) Article 2 of the Law on Citizenship of the Slovak Republic contained provisions on ipso facto acquisition of nationality similar to those of the relevant legislation of the Czech Republic:

> "Persons who were on 31 December 1992 citizens of the Slovak Republic according to Law No. 206/1968 of the Slovak National Council on the acquisition and loss of citizenship of the Slovak Socialist Republic as amended by Law No. 88/1990, are according to the present Law citizens of the Slovak Republic."[100]

(11) It is also interesting to note the order in which article 18 of the Draft European Convention on Nationality enumerates the following criteria to be taken into account by States involved in a succession: genuine and effective link; habitual residence at the time of State succession; will of the person; and territorial origin.[101]

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[98] Law on Acquisition and Loss of Citizenship of 29 December 1992 (No. 40/1993, Col. of Laws). Article 1, paragraph 2, provided that:

> "The decision whether a natural person is a citizen of the Czech Republic, or was a citizen of the Czech and Slovak Federal Republic on 31 December 1992, shall be made on the basis of legislation valid at the time when the person was supposed to acquire or lose his/her citizenship".

See the materials submitted by the Czech Republic.

[99] Articles 6 and 18 of Law No. 40/1993. See also A/CN.4/480, para. (31) of the commentary to draft articles 7 and 8.

[100] Law on Citizenship of the Slovak Republic of 19 January 1993 (No. 40/1993). See the materials submitted by Slovakia.

[101] See A/CN.4/480, para. (31) of the commentary to draft article 17.

(12) As to the Venice Declaration, it is mainly article 10 that seems to apply to the granting of nationality in the case of dissolution, according to which the successor State shall grant its nationality to permanent residents of the territory concerned as well as to persons originating therefrom and resident outside that territory, who become stateless as a result of the succession.

(13) The Working Group also considered the categories of persons to whom the successor State had an obligation to grant its nationality. Those categories were established in the light of various elements, including the question of the delimitation of powers between the different successor States.[102] The Working Group concluded that each of the successor States should have the obligation to grant its nationality to:

(a) Persons born in what became the territory of that particular successor State and residing in that successor State or in a third State;

(b) Persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of jus sanguinis and residing in the particular successor State;

(c) Persons naturalized in the predecessor State and residing in the particular successor State;

(d) Persons having the secondary nationality of an entity that became part of that particular successor State and residing in that successor State or in a third State.

(14) On the other hand, the Working Group concluded that the successor State should not be under obligation to grant its nationality to persons born in what became the territory of that particular successor State or persons having the secondary nationality of an entity that became part of that particular successor State if those persons resided in a third State and also had the nationality of the third State. It should, moreover, not be entitled to impose its nationality on such persons against their will.

(15) Draft article 20 is based upon the above conclusions of the Working Group. It emphasizes the main element common to all categories for which the Working Group concluded that the obligation to grant nationality should exist: permanent residence in the territory of the successor State (paragraph (a)). Permanent residents constitute the core body of the successor State's population to which, as also stated by some representatives in the Sixth Committee,[103] that State has the obligation to grant its nationality. That obligation was

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[102] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, paras. 19-20.

[103] A/CN.4/472/Add.1, para. 17.

considered to be a logical consequence of the fact that every entity claiming statehood must have a population.[104]

(16) This conclusion seems to be valid even when the main criterion used for the ex lege acquisition of the successor State's nationality is that of the "secondary nationality" of the former component unit of the predecessor State. As, for instance, the practice of the Czech Republic shows, nearly all persons concerned habitually resident in its territory who did not acquire Czech nationality by virtue of the above ex lege criterion, acquired Czech nationality via optional application under the Czech legislation.[105] Thus, the outcome of the application of this criterion was not substantially different from the situation which would have resulted from the use of the criterion of permanent residence.

(17) Paragraph (b) deals with the granting of nationality to persons having their habitual residence in a third State. In addition to the two categories already identified by the Working Group, i.e., persons who were born in what has become the territory of that particular successor State or who had the secondary nationality of an entity that has become part of that successor State, the Special Rapporteur proposes to include the category of persons who, before leaving the predecessor State, had their last permanent residence in what has become the territory of that particular successor State. This proposal is inspired from various laws of successor States.

(18) However, the successor State does not have the obligation to grant its nationality to these categories of persons if they have the nationality of the particular third State. This is expressed in the chapeau of paragraph (b).

Article 21

Granting of the right of option by the successor States

1. The successor States shall grant a right of option to all persons concerned covered by the provisions of article 20 who would be entitled to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right of option to persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 20, paragraph (b), irrespective of the mode of acquisition of the nationality of the predecessor State.

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[104] See the statement by the delegation of Austria (A/C.6/50/SR.23, para. 31).

[105] Approximately 376,000 Slovak citizens acquired Czech citizenship in the period from 1 January 1993 to 30 June 1994, mostly by option under article 18 of the Czech Law. See Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 22 and footnote 7.

Commentary

(1) Several treaty provisions addressing nationality issues, including the right of option, that arose from the dismemberment of the Austro-Hungarian Monarchy have already been mentioned.[106] Most of those provisions relate to the case of separation of part of a State's territory. The right of option in the case of dissolution, namely, the choice between Austrian and Hungarian nationality, was provided for in article 64 of the Treaty of Peace signed at Trianon.[107]

(2) In recent cases of State succession in Eastern and Central Europe, the possibility of choice by declaration was envisaged in the national legislation of successor States.[108]

(3) The Law on Citizenship of the Slovak Republic provided in its article 3, paragraph 1, that every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia.[109]

(4) The Czech Law on Acquisition and Loss of Citizenship envisaged, in addition to provisions on ex lege acquisition of Czech nationality, that such nationality could be acquired on the basis of a declaration. According to article 6:

> "(1) A natural person who was, on 31 December 1992, the citizen of the Czech and Slovak Federal Republic but not the citizen of the Czech or the Slovak Republic may opt for citizenship of the Czech Republic by declaration.
>
> "(2) The declaration shall be made before [a competent authority] according to the place of permanent residence of the natural person making the declaration. Outside the territory of the Czech Republic the declaration shall be made at the diplomatic mission of the Czech Republic.
>
> "(3) The competent authority shall issue a certificate of the declaration."[110]

While article 6 was addressed to a relatively small number of individuals (there were very few Czechoslovak nationals who did not have at the same time either

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[106] See A/CN.4/480, paras. (14) to (18) of the commentary to draft articles 7 and 8.

[107] Ibid., para. (17).

[108] Ibid., para. (29).

[109] See the materials submitted by Slovakia. See also ibid., para. (30).

[110] See the materials submitted by the Czech Republic.

Czech or Slovak "secondary" nationality), article 18 was addressed to a much larger group and set out the conditions for the optional acquisition of Czech nationality.[111]

(5) Another recent case of State succession in relation to which the question of the free choice of nationality has been raised is the disintegration of the Socialist Federal Republic of Yugoslavia. The Yugoslav Citizenship Law (No. 33/96), in addition to providing for ex lege acquisition of citizenship,[112] stipulated in its article 47:

> "(1) Yugoslav citizenship may be acquired by any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of another ... republic [of the Federation] ... whose residence was in the territory of Yugoslavia on the date of the proclamation of the Constitution ... and his/her children born after that date, as well as any citizen of another ... republic [of the Federation] who had accepted to serve [in the Yugoslav army], and members of his immediate family ... if they have no other citizenship.
>
> "(2) Any citizen of another ... republic [of the Federation] may file ... an application for being entered in the register of Yugoslav citizens, within a year from the date when this Law becomes effective. In justified cases, the application may be filed even after the expiration of this time limit, but not later than three years from the date when this Law becomes effective.
>
> "...
>
> "(4) The application ... shall be filed together with the applicant's signed statement that he/she has no other citizenship, or a statement that he/she has renounced such citizenship."[113]

(6) As already mentioned, Opinion No. 2 of the Arbitration Commission of the International Conference on Yugoslavia made certain observations, among other things, concerning the possible recognition of a right of choice of nationality for the members of the Serbian population in Bosnia and Herzegovina and Croatia under agreements between those Republics.[114]

(7) While restating the traditional view that "it will be for the law of the successor State to determine whether and on what conditions [the former nationals of the extinct State] acquire its nationality and whether, for purposes of its law, some meaning may still be given to the former nationality of the extinct State", Jennings and Watts nevertheless admit that international

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[111] For the provisions of article 18, see A/CN.4/480, note 161.

[112] See A/CN.4/480, para. (8) of the commentary to draft article 20.

[113] See the materials submitted by Yugoslavia.

[114] See A/CN.4/480, note 162.

law "probably oblige[s] the successor State to provide for the possibility of those nationals acquiring its nationality at least in the case of those of them who are resident in or have a substantial connection with the territory which the successor State has absorbed."[115]

(8) The Draft European Convention on Nationality, which embodies the obligation of States involved in a succession to take into account the will of persons concerned,[116] does not, however, contain specific provisions on the dissolution of a State.

(9) Moreover, article 13, paragraph (b), of the Venice Declaration stipulates that:

> "When two or more States succeed to a predecessor State which ceases to exist, each of the successor States shall grant the right of option in favour of the nationality of the other successor States."

(10) The Working Group's conclusions regarding option in the case of dissolution of States are contained in its 1995 preliminary report.[117] Draft article 21 draws its inspiration from these conclusions of the Working Group. However, it offers a simplified solution, based on the application of the general provision on the role of the will of individuals contained in draft article 7, paragraph 1.

(11) Paragraph 1 of draft article 21 deals with the option by persons concerned who are entitled to acquire the nationality of two or, in certain cases, even more successor States, irrespective of whether they have their habitual residence in one of those States or in a third State. The basic assumption is that the nationality of several successor States is involved as a result of the application of the criteria set out in article 20.

(12) Paragraph 2 deals with persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 20, paragraph (b). Those persons are candidates for statelessness, unless they have the nationality of a third State. In contrast to paragraph 1, the main purpose of the option envisaged here is not to resolve the positive conflict between two or more nationalities of successor States, but to allow persons who acquired the nationality of the predecessor State by such means as filiation or naturalization and who were never residents thereof to acquire the nationality of at least one successor State.

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[115] Oppenheim's International Law, op. cit., p. 219.

[116] For the text of article 18, see A/CN.4/480, para. (31) of the commentary to draft article 17.

[117] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, paras. 21-22.

SECTION 4

SEPARATION OF PART OF THE TERRITORY

Article 22

Scope of application

The articles of this section apply when part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist.

Article 23

Granting of the nationality of the successor State

Subject to the provisions of article 25, the successor State shall grant its nationality to the following categories of persons concerned:

(a) persons having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 4, where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

Commentary

(1) Problems of nationality connected to the birth of a State as a result of the separation of part of the territory of the predecessor State are rather complex, as they involve in parallel the acquisition of the nationality of the successor State, the loss of the nationality of the predecessor State by part of its population and the right of option for persons concerned between the nationalities of the predecessor and the successor State, or, in certain cases, between the nationalities of several successor States.

(2) The establishment of the Free City of Danzig, which constituted a *sui generis* type of territorial change, has some similarities with the case of creation of a State by separation. Concerning the acquisition of the Free City's nationality and loss of German nationality, article 105 of the Peace Treaty of Versailles provided that:

"On the coming into force of the present Treaty German nationals ordinarily resident in the territory described in article 100 will

ipso facto lose their German nationality, in order to become nationals of the Free City of Danzig."[118]

(3) The provisions of the Peace Treaty of Saint-Germain-en-Laye concerning the effects of the dismemberment of the Austro-Hungarian Monarchy on nationality did not clearly differentiate between separation and dissolution. Those dealing with the issue of the determination of the nationals of Austria and Hungary, which may be considered as relating to the case of dissolution, have already been examined in that context.[119] We shall focus here on the granting of the nationality of the successor States which emerged from the separation of parts of the territory of the former dualist Monarchy to persons concerned.

(4) As already recalled in another context, article 70 of the Treaty provided:

"Every person possessing rights of citizenship (pertinenza) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain ipso facto to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory."[120]

(5) The Treaty of Versailles with Poland provided in its articles 3, 4 and 6 as follows:

"Article 3. Poland admits and declares to be Polish nationals ipso facto and without the requirement of any formality German, Austrian, Hungarian or Russian nationals habitually resident at the date of the coming into force of the present Treaty in territory which is or may be recognised as forming part of Poland, but subject to any provisions in the Treaties of Peace with Germany or Austria respectively relating to persons who became resident in such territory after a specified date ...

"Article 4. Poland admits and declares to be Polish nationals ipso facto and without the requirement of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there ...

"Article 6. All persons born in Polish territory who are not born nationals of another State shall ipso facto become Polish nationals."[121]

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[118] Materials on succession of States, op. cit., p. 489.

[119] See paras. (2) to (4) of the commentary to draft article 20 above.

[120] Materials on succession of States, p. 496.

[121] G. F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, pp. 505-506.

(6) Similar provisions are also to be found in respective articles 3, 4 and 6 of the Treaty of Saint-Germain-en-Laye with Czechoslovakia,[122] the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State[123] and the Treaty of Paris with Romania.[124]

(7) Another example is that of the separation of Singapore from the Federation of Malaysia.[125] Under the Malaysian Constitution, there existed a separate citizenship of the component units of the Federation in parallel to Federal citizenship. When, on 9 August 1965, Singapore seceded from the Federation of Malaysia to become an independent State, Singapore citizens ceased to be citizens of the Federation of Malaysia and their Singapore citizenship became the only one of relevance. Its acquisition and loss were governed by the Singapore Constitution and the provisions of the Malaysian Constitution which continued to apply to Singapore by virtue of the Republic of Singapore Independence Act, 1965.[126]

(8) When Bangladesh became an independent State on 26 March 1971, residence in that territory was considered to be the primary criterion for the granting of the nationality of Bangladesh, regardless of any other attributes. However, non-Bengalese inhabitants of the territory were required to make a simple declaration in order to be recognized as nationals of Bangladesh; they could also opt for the retention of Pakistani nationality.[127]

(9) The establishment of the German Democratic Republic can, in some respects, be classified as separation. It cannot, however, be weighed independently of the subjugation of Germany and the question of German nationality in general. After the Second World War, and especially after the adoption in 1949 of the constitutions of the Federal Republic of Germany and the German Democratic Republic, the problem of German nationality "became so complex that it could be discussed profitably only by a few specialists."[128] The maintenance of the institution of German nationality after 1945 seems, however, to have been generally accepted. Even Michel Virally, who held that "at the time of the unconditional surrender ... the German State had, de facto and de jure, ceased to exist", recognized nonetheless that "the German laws on

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[122] Ibid., pp. 514-515.

[123] Ibid., pp. 524-525.

[124] Ibid., p. 531.

[125] For the previous unification of Singapore with the Federation of Malaysia, see para. (4) of the commentary to draft article 18 above.

[126] Goh Phai Cheng, op. cit., p. 9.

[127] M. Rafiqul Islam, "The Nationality Law and Practice of Bangladesh", in Ko Swan Sik (ed.), Nationality and International Law in Asian Perspective (Dordrecht, Martinus Nijhoff, 1990), pp. 5-8.

[128] Koenig, op. cit., p. 253.

nationality remained ... as implied by certain decisions of the Control Council".[129] According to another author, "short of rendering some 60 million people stateless, the Allies - embarked upon the 'dismemberment' process, at least until Potsdam - could not abolish German nationality."[130] It was against this backdrop that the German Democratic Republic, which had regarded itself as a new State since 1955, established its own nationality by means of the 1967 law. Under this law, each person subject to the jurisdiction of the German Democratic Republic who had German nationality at the time of the establishment of the German Democratic Republic became a citizen of that State.[131]

(10) The relevance of the case of the three Baltic Republics, i.e., Estonia, Latvia and Lithuania, which regained their independence in 1991 for the study of situations of secession, is questionable, as they maintain that they never legally formed part of the Soviet Union and, accordingly, the resumption of their sovereignty is not a case of succession of States in the proper meaning of the term.

(11) It is worth recalling, however, that those States have resorted to the retroactive application of the principles embodied in the nationality laws in force prior to 1940. Thus, the Law on Citizenship of Estonia of 1938 and the Law on Citizenship of Latvia of 1919 were re-enacted in order to determine the aggregate body of citizens of those Republics.[132] Similarly, articles 17 and 18 of the Law on Citizenship of Lithuania of 5 December 1991 provided for the retention or restoration of the rights to citizenship of Lithuania with reference to the law in force before 15 June 1940.[133] Other persons permanently residing in those Republics could acquire citizenship upon request, upon fulfilling other requirements spelled out in the law.[134]

(12) When Ukraine became independent following the disintegration of the Soviet Union, the acquisition of its citizenship by persons affected by the succession was regulated by the Law on Citizenship of Ukraine No. 1635 XII of 8 October 1991, article 2 of which read:

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[129] Michel Virally, L'administration internationale de l'Allemagne, 1948, Nos. 129 and 131.

[130] Koenig, op. cit., p. 238.

[131] Ibid., pp. 255-256.

[132] See the Resolution of the Supreme Council of the Republic of Estonia of 26 February 1992, reintroducing, with retroactive effect, the 1938 Law on Citizenship; and the Resolution of the Supreme Council of the Republic of Latvia on the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization, of 15 October 1991, in "Nationalité, minorités et succession d'États", op. cit.

[133] Ibid.

[134] See the second report, A/CN.4/474, note 138.

"The citizens of Ukraine are:

"(1) The persons who at the moment of enactment of this Law reside in Ukraine, irrespective of their origin, social and property status, racial and national belonging, sex, education, language, political views, religious confession, sort and nature of activities, if they are not citizens of other States and if they do not decline to acquire the citizenship of Ukraine ..."[135]

(13) Article 2 of the Law on Citizenship of the Republic of Belarus of 18 October 1991, as amended by the Law of 15 June 1993 and the Proclamation of the Supreme Soviet of the Republic of Belarus of 15 June 1993, provided:

"The citizens of the Republic of Belarus are:

"(1) persons who on the date of entry into force of the Law have their permanent residence in the territory of the Republic of Belarus ..."[136]

The term "persons" obviously means former citizens of the Soviet Union, as is also clear from the text of paragraph 1 of the Proclamation, according to which,

"Article 2(1) of the Law on Citizenship does not apply to foreign citizens and stateless persons who on the date of the entry into force of the Law ... have their permanent residence in Belarus in accordance with relevant authorization".

On the contrary, according to paragraph 2 of the Proclamation, persons temporarily residing abroad owing to a number of reasons specified therein, such as military service, professional assignment, etc., were considered as having their permanent residence in the territory of the Republic of Belarus.

(14) The nationality of Eritrea, an independent State since 27 April 1993, was regulated by Eritrean Nationality Proclamation No. 21/1992 of 6 April 1992.[137] The provisions on acquisition of Eritrean nationality on the date of independence make a distinction between persons who are of Eritrean origin, persons naturalized ex lege as a result of their residence in Eritrea between 1934 and 1951, persons naturalized upon request and persons born to such categories of individuals. According to article 2(2) of the Proclamation:

"A person who has 'Eritrean origin' is any person who was resident in Eritrea in 1933."

Article 3(1) provided for ex lege naturalization:

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[135] See the materials submitted by Ukraine.

[136] See the materials submitted by Belarus.

[137] Text in Eritrea - Referendum of Independence, April 23-25, 1993 (African-American Institute), pp. 80-84.

"Eritrean nationality is hereby granted to any person who is not of Eritrean origin and who entered, and resided in, Eritrea between the beginning of 1934 and the end of 1951, provided that he has not committed anti-people acts during the liberation struggle of the Eritrean people ..."

The Proclamation automatically conferred Eritrean nationality on any person born to a father or a mother of Eritrean origin in Eritrea or abroad (article 2(1)) and any person born to a person naturalized ex lege (article 3(2)).

(15) Even if the birth of newly independent States is different from separation, the practice of States which emerged from the process of decolonization can provide certain guidance with respect to the latter. Such practice presents many common characteristics. Thus, according to the Constitution of Barbados, two types of acquisition of citizenship were envisaged in relation to accession to independence. Section 2 enumerated the categories of persons who automatically became citizens of Barbados on the day of its independence, 30 November 1966. It read:

"(1) Every person who, having been born in Barbados, is on 29 November 1966 a citizen of the United Kingdom and Colonies shall become a citizen of Barbados on 30 November 1966.

"(2) Every person who, having been born outside Barbados, is on 29 November 1966 a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death have become a citizen of Barbados in accordance with the provisions of subsection (1), become a citizen of Barbados on 30 November 1966.

"(3) Any person who on 29 November 1966 is a citizen of the United Kingdom and Colonies:

"(a) Having become such a citizen under the British Nationality Act 1948 by virtue of his having been naturalized in Barbados as a British subject before that Act came into force; or

"(b) Having become such a citizen by virtue of his having been naturalized or registered in Barbados under that Act, shall become a citizen of Barbados on 30 November 1966."[138]

(16) Similar provisions can be found in the Constitutions of a number of other States which acceded to independence after the Second World War,

[138] Materials on succession of States, op. cit., p. 124.

such as Botswana,[139] Guyana,[140] Jamaica,[141] Kenya,[142] Lesotho,[143] Mauritius,[144] Sierra Leone,[145] Trinidad and Tobago[146] and Zambia.[147]

(17) Section 1 of the Constitution of Malawi provided for automatic acquisition of citizenship following accession to independence as follows:

> "Every person who, having been born in the former Nyasaland Protectorate, is on 5 July 1964 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Malawi on 6 July 1964;
>
> "Provided that a person shall not become a citizen of Malawi by virtue of this subsection if neither of his parents was born in the former Nyasaland Protectorate."[148]

(18) According to section 2 of annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960:

> "1. Any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any qualifications specified in paragraph 2 of this section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty.
>
> "2. The qualifications referred to in paragraph 1 of this section are that the person concerned is:
>
> "(a) A person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943; or
>
> "(b) A person who was born in the Island of Cyprus on or after 5 November 1914; or

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[139] Ibid., pp. 137-139.

[140] Ibid., pp. 203-204.

[141] Ibid., p. 246.

[142] Ibid., pp. 254-255.

[143] Ibid., p. 282.

[144] Ibid., p. 353.

[145] Ibid., pp. 389-390.

[146] Ibid., p. 429.

[147] Ibid., p. 472.

[148] Ibid., p. 307.

"(c) A person descended in the male line from such a person as is referred to in subparagraph (a) or (b) of this paragraph.

"3. Any citizen of the United Kingdom and Colonies born between the date of this Treaty and [16 February 1961] shall become a citizen of the Republic of Cyprus at the date of his birth if his father becomes such a citizen under this section or would but for his death have done so."[149]

(19) Concerning the creation of a State by separation, the 1929 Harvard Draft Convention on Nationality provided in the second paragraph of article 18 as follows:

"When a part of the territory of a State ... becomes the territory of a new State, the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof."[150]

(20) The Draft European Convention on Nationality, as mentioned above, does not contain specific rules applicable to different cases of succession of States.[151] As to the Venice Declaration, while it also does not contain separate provisions for each specific case of State succession, it makes it possible to infer certain rules concerning the granting of nationality in the specific case of separation of part of a territory. Thus, in accordance with article 8, paragraph (a) - applicable in all cases of succession - the successor State has the obligation to grant its nationality to all nationals of the predecessor State residing permanently in the territory concerned.

(21) The Working Group reached several preliminary conclusions on the question of the granting of the nationality of a successor State which emerged from the separation of part of the territory of a predecessor State. It considered that the successor State should have the obligation to grant its nationality to certain categories of persons as a corollary of the right of the predecessor State to withdraw its nationality from those persons.[152]

(22) Draft article 23 addresses the first question to be answered in relation to separation of part of the territory: the granting of the nationality of the successor State to the inhabitants of territories lost by the predecessor State. Its provisions reproduce, with minor drafting changes, those of draft article 20, but without its paragraph (b) (i). The omission of that

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[149] Ibid., p. 173.

[150] See A/CN.4/480, note 23.

[151] For the general guidelines in article 18, see para. (31) of the commentary to draft article 17.

[152] Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10), annex, para. 13.

provision is a consequence of the fact that, in the case of separation of part or parts of the territory, the predecessor State does not cease to exist. Accordingly, there is no reason to raise any doubts as to the nationality of persons referred to in that provision; they continue to hold the nationality of the predecessor State.

(23) The reasons for the inclusion of the provisions in draft article 23 are the same as those underlying the text of the chapeau and paragraphs (a) and (b) (ii) of draft article 20, and are explained in the commentary thereto.

Article 24

Withdrawal of the nationality of the predecessor State

1. Subject to the provisions of article 25, the predecessor State shall not withdraw its nationality from:

(a) persons having their habitual residence either in its territory or in a third State; and

(b) where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

2. The predecessor State shall withdraw its nationality from the categories of persons entitled to acquire the nationality of the successor State in accordance with article 23. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State, unless they have the nationality of a third State.

Commentary

(1) Concerning the loss of Austrian nationality as a consequence of the acquisition of the nationality of a successor State which emerged from the separation from the Monarchy after the First World War, article 230 of the Peace Treaty of Saint-Germain-en-Laye provided:

"Austria undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers, and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance of their country of origin."[153]

[153] Laws concerning nationality, op. cit., p. 586.

An analogous provision was included in article 213 of the Peace Treaty of Trianon.[154]

(2) Reference has already been made to the maintenance of the institution of German nationality following the Second World War.[155] The existence of a single German nationality was confirmed by the case-law of the Federal Constitutional Tribunal.[156] The Basic Treaty of 21 December 1972 between the two German States did not settle the nationality issues and was limited to noting the existence of "differences on questions of principle ... including the national question".[157] The Federal Constitutional Tribunal interpreted the Treaty as follows:

> "The German Democratic Republic did not, following the entry into force of the Treaty, become a foreign country for the Federal Republic of Germany ...; the Federal Republic of Germany treats any citizen of the German Democratic Republic who resides in an area under the protection of the Federal Republic and its Constitution as German under article 116, paragraph 1 [of the Basic Law], the same as any citizen of the Federal Republic."[158]

(3) Instead of determining the categories of persons who are to lose their nationality, the predecessor State can, like the successor State, define in positive terms the categories of persons whom it regards as its nationals following the separation of some parts of its territory. Thus, the Russian Federation, which claims to have an international personality identical to that of the Union of Soviet Socialist Republics, defined its nationals in the Law on Nationality of the Russian Federation of 28 November 1991.[159] Under article 13, paragraph 1, of the Law, all citizens of the former USSR having their permanent residence in the territory of the Russian Federation on the date of the entry into force of the Law were recognized as citizens of the Russian Federation if within one year following that date they had not declared their wish to renounce

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[154] Ibid., p. 587.

[155] See para. (5) of the commentary to draft article 18 and para. (9) of the commentary to draft article 23 above.

[156] Koenig, op. cit., p. 242.

[157] Cited in ibid., p. 250.

[158] Judgement of the Federal Constitutional Tribunal, 31 July 1974, part B, V, cited in ibid., p. 252. One author expressed his bewilderment at this situation in the following terms: "What is one to think of this outright 'annexation of nationality' by the Federal Republic? Is this simply a case of an extreme application of the principle that each State should determine in a sovereign manner who its nationals are ... or, on the other hand, is the scope of the phenomenon equivalent to flagrant interference in the internal affairs of another State, recognized as such by the Federal Republic?" (ibid., p. 256.)

[159] Amended by the Law of 17 June 1993 and the Law of 18 January 1995.

such nationality. Under paragraph 2 of the Supreme Soviet Decree on Nationality of 17 June 1993, citizens of the former USSR having their permanent residence in the territory of the Russian Federation, but having temporarily left that territory prior to 6 February 1992 for professional, medical or private reasons, or in order to pursue their studies, and having returned only after the entry into force of the Law, were recognized as citizens of the Russian Federation under article 13, paragraph 1, of the Law.[160]

(4) Although decolonization does not fall under the category of succession of States called separation, there are certain similarities between these two phenomena consisting in the creation of a new State and the continued existence of the predecessor State. Accordingly, the techniques used for the resolution of nationality problems during the process of decolonization may also be of some interest here.

(5) Paragraph 1 of the First Schedule to the Burma Independence Act, 1947, enumerated two categories of persons who, being British subjects immediately before independence day, ceased to be British subjects:

> "(a) Persons who were born in Burma or whose father or paternal grandfather was born in Burma, not being persons excepted by paragraph 2 of this Schedule from the operation of this subparagraph; and
>
> "(b) Women who were aliens at birth and became British subjects by reason only of their marriage to any such person as is specified in subparagraph (a) of this paragraph."

According to paragraph 2:

> "(1) A person shall be deemed to be excepted from the operation of subparagraph (a) of paragraph 1 of this schedule if he or his father or his paternal grandfather was born outside Burma in a place which at the time of the birth [was under British jurisdiction] ...
>
> "(2) A person shall also be deemed to be excepted from the operation of the said subparagraph (a) if he or his father or his paternal grandfather became a British subject by naturalization or by annexation of any territory which is outside Burma."[161]

(6) The British Nationality (Cyprus) Order, 1960, contained detailed provisions on the loss of the citizenship of the United Kingdom and Colonies in connection with the accession of Cyprus to independence. It provided, in principle, that:

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[160] See the reply by the Russian Federation to the questionnaire transmitted by the Venice Commission on the consequences of State succession for nationality, document CDL-NAT (95) 2.

[161] Materials on succession of States, op. cit., p. 148.

"... any persons who, immediately before the sixteenth day of February 1961 is a citizen of the United Kingdom and Colonies shall cease to be such a citizen on that day if he possesses any of the qualifications specified in paragraph 2 of section 2 of annex D to the Treaty concerning the Establishment of the Republic of Cyprus ...[162]

"Provided that if any person would, on ceasing to be a citizen of the United Kingdom and Colonies under this paragraph, become stateless, he shall not cease to be such a citizen thereunder until the sixteenth day of August 1961."[163]

According to article 2 of the Order:

"... any citizen of the United Kingdom and Colonies who is granted citizenship of the Republic of Cyprus in pursuance of an application such as referred to in section 4, 5 or 6 of annex D shall thereupon cease to be a citizen of the United Kingdom and Colonies."[164]

(7) Section 2 (2) of the Fiji Independence Act, 1970, read as follows:

"Except as provided by section 3 of this Act, any person who immediately before [10 October 1970] is a citizen of the United Kingdom and Colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Fiji."[165]

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[162] Ibid., p. 171, article 1, paragraph 1. For the qualifications for ipso facto acquisition of the citizenship of the Republic of Cyprus, see para. (18) of the commentary to draft article 23 above.

[163] Article 1, paragraph 2, provided that persons possessing any of the qualifications specified in paragraph 2 of section 3 of annex D were exempted from the rule concerning the loss of the nationality of the United Kingdom and Colonies. Ibid., pp. 171-173.

[164] Ibid., p. 172.

[165] Ibid., p. 179. Section 3 (1) stipulated that the above provisions on automatic loss of citizenship of the United Kingdom and Colonies did not apply to a person if he, his father or his father's father:

"(a) Was born in the United Kingdom or in a colony or an associated State; or

"(b) Is or was a person naturalized in the United Kingdom and Colonies; or

"(c) Was registered as a citizen of the United Kingdom and Colonies; or

"(d) Became a British subject by reason of the annexation of any territory included in a colony."

Similar provisions can be found in the Botswana Independence Act, 1966,[166] the Gambia Independence Act, 1964,[167] the Jamaica Independence Act, 1962,[168] the Kenya Independence Act, 1963,[169] the Sierra Leone Independence Act, 1961,[170] and the Swaziland Independence Act, 1968.[171]

(8) Certain Acts did not provide for the loss of the citizenship of the predecessor State, but rather for the loss of the status of "protected person". Thus, for instance, the Ghana Independence Act, 1957, stipulated that:

> "... a person who, immediately before the appointed day, was for the purposes of the [British Nationality Act, 1948] and Order in Council a British protected person by virtue of his connection with either of the territories mentioned in paragraph (b) of this section shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the foregoing provisions of this Act, but shall so cease upon his becoming a citizen of Ghana under any law of the Parliament of Ghana making provision for such citizenship."[172]

Similar provisions are contained in the Tanzania Act, 1969.[173]

(9) The provisions of the second paragraph of article 18 of the 1929 Harvard Draft Convention on Nationality concerning the loss of the nationality of the predecessor State by persons who continue residing in the territory forming part of the new State which has emerged from separation are referred to above in the commentary to draft article 23.[174]

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and section 3 (2) stipulated that a person did not cease to be a citizen of the United Kingdom and Colonies if:

> "(a) He was born in a protectorate or protected State; or
>
> "(b) His father or his father's father was so born and is or at any time was a British subject." Ibid.

[166] Ibid., p. 129.

[167] Ibid., p. 189.

[168] Ibid., p. 239.

[169] Ibid., p. 248.

[170] Ibid., p. 386.

[171] Ibid., p. 404.

[172] Ibid., p. 194.

[173] Ibid., p. 523.

[174] See para. (19) of that commentary.

(10) The general principles set out in article 18 of the Draft European Convention on Nationality also relate to the retention of the nationality of the predecessor State and, consequently, are applicable in the case of separation. One cannot, however, draw any more specific conclusions from those principles with respect to the situation envisaged in draft article 24.[175]

(11) The Venice Declaration contains provisions which apply unquestionably in the case of separation of part of a State's territory. Thus, article 12 prohibits the predecessor State from withdrawing its nationality from its own nationals who have been unable to acquire the nationality of a successor State.

(12) In connection with the general observations regarding the limitations on the freedom of States in the area of nationality, in particular those resulting from obligations in the field of human rights, the Special Rapporteur suggested that the Commission should study the precise limits of the discretionary power of the predecessor State to deprive of its nationality the inhabitants of the territory it has lost[176] in cases of State succession in which the predecessor State continues to exist after the territorial change, such as secession and transfer of part of a territory.

(13) The Working Group concluded, on a preliminary basis, that the nationality of some categories of individuals defined in its report should not be affected by State succession and that, in principle, the predecessor State should have the obligation not to withdraw its nationality from those persons.[177]

(14) This preliminary conclusion of the Working Group was also supported by some representatives in the Sixth Committee.[178]

(15) The Working Group also defined, on a preliminary basis, the categories of persons from whom the predecessor State should be entitled to withdraw its nationality, provided that such withdrawal of nationality did not result in statelessness.[179] It further concluded that the right of the predecessor State to withdraw its nationality from the categories of persons mentioned in paragraph 12 of its report could not be exercised until a person had acquired the nationality of the successor State.

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[175] See A/CN.4/480, para. (31) of the commentary to draft article 17.

[176] See the first report, A/CN.4/467, para. 106, and Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 160.

[177] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 11.

[178] A/CN.4/472/Add.1, para. 21.

[179] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 12.

(16) During the debate in the Sixth Committee, no comments were made on the right of the predecessor State to withdraw its nationality from certain categories of persons and the conditions for such withdrawal.

(17) Paragraph 1 of draft article 24 reflects the conclusions of the Working Group. Although it is rather laconic, it covers the same categories of persons spelled out explicitly in paragraph 11 of the preliminary report of the Working Group. Simply stated, the predecessor State may not use separation of part of its territory as a justification for withdrawing its nationality from persons having their habitual residence either in its territory or in a third State. Moreover, where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, it may not withdraw its nationality from persons who have their habitual residence in a third State or in a successor State if they had the secondary nationality of an entity that remained part of the predecessor State. Of course, the effects of the rule in paragraph 1 may be altered by the exercise of the right of option to which some of these persons are entitled according to article 25.

(18) Paragraph 2 is an expression of the Working Group's conclusion in paragraph 13 of its preliminary report that the right of the successor State to grant its nationality to certain categories of persons is the corollary of the obligation of the predecessor State to withdraw its nationality from those same persons and that the withdrawal of the predecessor State's nationality must not be effective before such persons acquire the nationality of the successor State. There is, however, no reason for such suspension of the predecessor's right to withdraw its nationality from those persons when they have the nationality of a third State and, accordingly, the withdrawal does not result in statelessness, not even temporarily.

Article 25

Granting of the right of option by the predecessor and the successor States

The predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 23 and 24, paragraph 1, who would be entitled to have the nationality of both the predecessor and successor States or of two or more successor States.

Commentary

(1) There are numerous cases in State practice where a right of option was granted in case of separation of part of the territory, mostly between the nationality of the predecessor State and that of the successor State. Several such examples have already been referred to above. Relevant provisions include article 106 of the Peace Treaty of Versailles, relating to the Free City of

Danzig;[180] articles 78 and 80 of the Peace Treaty of Saint-Germain-en-Laye;[181] articles 3 and 4 of the Treaty of Versailles with Poland;[182] articles 3 and 4 of the Treaty of Saint-Germain-en-Laye with Czechoslovakia;[183] articles 3 and 4 of the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State;[184] as well as articles 3 and 4 of the Treaty of Paris with Romania.[185]

(2) As mentioned above, non-Bengalese residents of Bangladesh were granted the right to elect to retain the nationality of Pakistan or to make a declaration to acquire the nationality of Bangladesh.[186]

(3) The provision of the Law on Nationality of the Russian Federation concerning the right of persons who retained its nationality ex lege to decline such nationality is mentioned above.[187] The Law, however, also stipulated that former nationals of the USSR who did not retain Russian nationality ex lege could opt for such nationality. Article 18, paragraph (g), provided that citizens of the USSR having their permanent residence in the territory of the other republics of the USSR as at 1 September 1991, and those who had taken up residence in the territory of the Russian Federation after 6 February 1992, could be registered as Russian citizens under a simplified procedure if they had

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[180] Materials on succession of States, op. cit., p. 489. See also A/CN.4/480, para. (13) of the commentary to draft articles 7 and 8.

[181] Materials on succession of States, pp. 497-498. See also A/CN.4/480, paras. (14) and (16) of the commentary to draft articles 7 and 8. It is also worth noting that article 81 provided:

> "The High Contracting Parties undertake to put no hindrance in the way of the exercise of the right which the persons concerned have under the present Treaty, or under treaties concluded by the Allied and Associated Powers with Germany, Hungary or Russia, or between any of the Allied and Associated Powers themselves, to choose any other nationality which may be open to them."

Materials on succession of States, p. 498.

[182] G. F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, p. 505.

[183] Ibid., pp. 514-515.

[184] Ibid., p. 524.

[185] Ibid., p. 531.

[186] See para. (8) of the commentary to draft article 23.

[187] See para. (3) of the commentary to draft article 24.

made a declaration to that effect by 6 February 1995 [this period was subsequently extended to 31 December 2000].[188]

(4) Similarly, as discussed above,[189] the Law on Citizenship of Ukraine provided for the possibility to decline Ukrainian nationality. Furthermore, paragraph (2) of article 2 stipulated that the following were also citizens of Ukraine:

> "(2) The persons who are civil servants, who are conscripted to a military service, who study abroad or who lawfully left for abroad and are permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine ...".[190]

(5) It may also be useful to recall the above-mentioned documents dealing with nationality issues in relation to decolonization which contained provisions on the right of option, such as section 2 of the First Schedule to the Burma Independence Act[191] and article 4 of the Convention on Nationality between France and Viet Nam, signed at Saigon on 16 August 1955.[192]

(6) The Venice Declaration contains some provisions on the right of option which seem to be applicable also in the case of separation of part of the territory of a predecessor State.[193]

(7) The Working Group's conclusions concerning the right of option are contained in paragraph 14 of its preliminary report, which lists several categories of persons to whom such right should be granted by the predecessor and successor States. However, since the Working Group later formulated the conditions for the granting of the right of option in more general terms, which are reflected in paragraph 1 of draft article 7, the Special Rapporteur proposes an article inspired by this general provision rather than based on the preliminary detailed conclusions of the Working Group.

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[188] See the reply by the Russian Federation to the questionnaire transmitted by the Venice Commission on the consequences of State succession for nationality, document CDL-NAT (95) 2.

[189] See para. (12) of the commentary to draft article 23.

[190] See the materials submitted by Ukraine.

[191] Materials on succession of States, op. cit., p. 145. See A/CN.4/480, para. (23) of the commentary to draft articles 7 and 8.

[192] Materials on succession of States, p. 447. See also A/CN.4/480, para. (27) of the commentary to draft articles 7 and 8.

[193] See A/CN.4/480, para. (32) of the commentary to draft article 17.

(8) Draft article 25 recognizes a right of option for all persons who, by virtue of the application of draft articles 23 and 24, paragraph 1, would be entitled to the nationality of both the predecessor and successor States or of two or more successor States. The purpose of this draft article is to give effect, in the event of separation of part of the territory, to the general provisions in draft article 7, paragraph 1. It does not aim at precluding dual or multiple nationality - a matter to be decided by each individual State.

(9) Draft article 25 does not contain a provision analogous to paragraph 2 of article 21. Indeed, the continued existence of the predecessor State and its duty not to withdraw its nationality from persons concerned before they acquire the nationality of the successor State obviates the need for such a provision.
