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A/CN.4/SR.2480

Summary record of the 2480th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1997, vol. I

had been included because, unlike those Conventions, the current draft concerned relations between the State and individuals; hence the need to mention the question of human rights in the preamble.

64. He stressed, in conclusion, that the Working Group had always been kept informed of the progress of the work done on the topic in other bodies. He proposed that the title, the definitions and the preamble of the draft articles should be referred to the Drafting Committee. Of course, the Drafting Committee would not be able to undertake anything more than preliminary work until the whole of the draft had been considered, but such an exercise would be very useful, especially with regard to the definitions.

65. Mr. SEPÚLVEDA said that he had not proposed that the Commission should define the notion of population, but had simply commented that, since the Commission was dealing with questions of nationality, it should not restrict itself to the notion of territory alone, for a territory could be unpopulated.

66. The CHAIRMAN said that the question whether the draft articles should take the form of a declaration or a convention had been clearly settled in paragraph 8 of General Assembly resolution 51/160, which referred to paragraph 88 of the Commission's report on the work of its forty-eighth session.[6] Paragraph 88 (*b*) stated "For present purposes—and without prejudicing a final decision—the result of the work on the question . . . should take the form of a declaration of the General Assembly...". He therefore proposed that the title, the definitions and the preamble of the draft should be referred to the Drafting Committee and that its consideration, article-by-article, should begin at the next meeting, starting with articles 1, 2 and 3.

It was so decided.

Organization of work of the session (*continued*)*

[Agenda item 1]

67. The CHAIRMAN announced that the Working Group on State responsibility, established at the 2477th meeting, would meet later that day.

The meeting rose at 1.05 p.m.

* Resumed from the 2477th meeting.

[6] *Yearbook . . . 1996*, vol. II (Part Two).

2480th MEETING

Wednesday, 21 May 1997, at 10.10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

Nationality in relation to the succession of States (*continued*) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,[1] A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to consider the first three articles of Part I of the draft articles on nationality in relation to the succession of States contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1).

PART I (General principles concerning nationality in relation to the succession of States) (*continued*)*

ARTICLES 1 TO 3

2. Mr. MIKULKA (Special Rapporteur) said that he wished to re-emphasize some of the points made in his initial introduction of Part I (General principles concerning nationality in relation to the succession of States). However, he must first point out that the French version of article 1 (Right to a nationality), paragraph 1, was incorrect. He read out the correct French text and also noted that in paragraph 2, "concerné" should be inserted after "État", in the last part of the paragraph.

3. The main purpose of article 1, paragraph 1, was to ensure that all persons in a successor State ended up with the nationality of at least one of the States concerned. However, that rule did not function in isolation from the other draft articles: other rules were needed to cover particular cases. As to whether the provision stated only the subjective right of individuals concerned or a more gen-

* Resumed from the 2475th meeting.

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

eral obligation of States, two hypotheses could be maintained. In some situations when the State that would be obliged to grant its nationality could be identified, for example after the unification of States, then the subjective right of the individual came into play. In other cases, the right to a nationality had as a corollary an obligation of the State concerned to take measures to ensure exercise of the right of the individual. If several States were concerned, an agreement might be needed between them. In most cases it was easy to identify the State concerned that was obliged to grant its nationality. However, there was a category of persons who had links to two States, a situation that was dealt with in article 7 (The right of option).

4. Article 1, paragraph 2, concerned the right of children and was based on provisions of the Convention on the Rights of the Child. As Mr. Galicki had noted (2478th meeting), like the Convention, it gave some priority to the criterion of *jus soli*. The basic assumption was that, in the absence of any link other than birth, the State of birth must grant its nationality. The Convention did not say expressly that it was the territorial State which had that obligation, but the rule was implicit. It required a State party to ensure that, from the moment of birth, a nationality was granted to every child born within its jurisdiction, which must mean territorial jurisdiction, for any other jurisdiction or personal competence would have to be based on nationality itself. That rule had now been incorporated in much internal legislation.

5. When article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness) was compared with article 1, it could be seen as the other side of the coin: the obligation of the State concerned to avoid statelessness in the case of persons having only the nationality of a predecessor State. The Working Group on State succession and its impact on the nationality of natural and legal persons had agreed that the point had to be stated expressly in the article. However, the obligation was one of means rather than of result, because a State was responsible only for what happened within its territorial jurisdiction and not for statelessness caused by the conduct of another successor State.

6. As to article 3 (Legislation concerning nationality and other connected issues), paragraph 1, although international law did not impose an obligation on States to have written legislation, it had been felt useful to say that States should enact legislation concerning nationality as quickly as possible, for they would thus avoid many potential problems. Such legislation should also clearly establish the effects of certain behaviour of individuals on their status, for example in the case of voluntary acquisition of the nationality of another State concerned.

7. Article 3, paragraph 2, imposed on States the obligation to make their legislation retroactive, in keeping with the assumption of continuity of nationality. Although the Working Group had not included the point, his text also covered the case of the acquisition of nationality upon the exercise of the right of option, which must also be retroactive.

8. Mr. HAFNER said that article 1 was a key provision, but posed a number of problems. He was not sure, for example, that the structure of paragraph 1 was in conformity with the general direction of the other draft articles. It gave the impression of being based on the human rights concept that an individual could have rights enforceable against a State, but it was not clear which State, and it was certainly not within the discretionary power of an individual to choose between States. However, the article became clearer in the context of Part II of the draft (Principles applicable in specific situations of succession of States), which indicated which State had the primary obligation to grant nationality in certain cases of State succession. Yet the obligations set out in Part II could not be enforced by individuals but only by other States. In any event, Part II was unequivocally based on the assumption that nationality could be derived only from national law, and not from international law, as suggested by article 1, paragraph 1. Hence there was a discrepancy which needed clarification.

9. It was also possible to proceed on the assumption that article 1, paragraph 1, itself imposed an obligation on States, even though the wording created some difficulties regarding such an assumption. Again it was not clear on which State the obligation was imposed. The possibility of a shared responsibility of all the States concerned could be ruled out, since Part II identified the obligated States. But what then was the purpose of article 15 (Obligation of States concerned to consult and negotiate), other than simply the subsidiary purpose of dispute settlement? Another problem was that article 1 used the formulation "right to the nationality" in paragraph 1 but "right to acquire the nationality" in paragraph 2. Perhaps the Special Rapporteur could explain the reason for the difference. His own preference would be for article 1 to invest individuals with a direct right of action in order to avoid any interruption of nationality. But practice and also the views expressed in the Sixth Committee seemed to exclude such a possibility. The Commission should therefore proceed on the assumption that paragraph 1 imposed a clear obligation on States and that it should be linked to the other parts of the text by the phrase "as provided for in these draft articles".

10. Article 1, paragraph 2 was much more explicit and firmly grounded, but he could not understand the reason for the formulation "one of the States concerned, or that of a third State". Would it not be sufficient to use wording such as "not having acquired any nationality"? Nor did he understand how long the right to acquire a nationality should exist; in other words, when did a person cease to be a child? At the age of 14, at the age of 18? There did not seem to be any reason to preserve the exclusive character of the provision, for the right appeared to be unconditional; at least it did not depend on the absence of any nationality of the child. Perhaps the paragraph should be read in conjunction with article 5 (Renunciation of the nationality of another State as a condition for granting nationality), which offered some response to the problem. There was also the risk of a contradiction between the unconditional right stated in paragraph 2 and the principle of unity of families contained in article 9 (Unity of families). Lastly, paragraph 2 made good sense only on the assumption that children necessarily took the nationality of their parents, but that principle was not spelled out.

11. In his general comments at an earlier meeting he had drawn attention to the differing use of "shall" and

"should" in formulating the obligations. Mr. Simma had said (2477th meeting) that the difference was justified. However, that was not true of article 3, because Part II imposed strict obligations on certain States in accordance with the principle *pacta sunt servanda*. In its current wording, article 3 reduced the obligations spelled out later in the text to no more than programmatic norms. The obligation to apprise persons, including those living outside the State's territory of the legislation enacted, as provided for in the second sentence of paragraph 1, should certainly be expressed by "shall", even though the obligation would be difficult to carry out. Similar arguments applied to paragraph 2: since the aim was to avoid statelessness, the wording must provide for uninterrupted possession of a nationality. The obligation to grant a nationality must therefore have a compulsory effect retroactive to the date of the succession, even though the commentary gave the impression that the Working Group had preferred a recommendatory approach.

12. Mr. MELESCANU said that the Commission could adopt either a theoretical approach to article 1, as recommended by Mr. Hafner, or a practical one. Other conventions certainly took Mr. Hafner's human rights approach to the justification of rights of the individual. However, the merit of the current draft articles was that they addressed practical problems: the keynote of article 1 was the notion of continuity of nationality and the impossibility of a person's losing his nationality as a result of a succession of States. As to the relationship between paragraph 2 and article 9, paragraph 2 should be regarded as providing a safety net for children who had not acquired the nationality of some other State. In his opinion, most of the problems raised by Mr. Hafner could be resolved by the Drafting Committee.

13. Mr. GALICKI said that he agreed with most of what Mr. Hafner had said, but it had to be recognized that the right to a nationality, as a global concept, was appearing for the first time in the draft under consideration, thus placing a considerable burden of responsibility on the Commission. Admittedly, the Convention on the Rights of the Child dealt with a child's right to acquire nationality in certain circumstances, but that was something slightly different. The draft did not, however, answer the main question—what was the substance of the right to a nationality—and it gave no indication of the entity from which that right could be claimed. A partial answer to the question was given later in the draft, particularly in Part II, but it was not immediately apparent. The right to a nationality, as proclaimed in paragraph 1 of the article, and the right to acquire a nationality, as set forth in paragraph 2, could reasonably be regarded as qualified forms of the general right to a nationality laid down in the Universal Declaration of Human Rights.[2] Perhaps it would be advisable for the sake of clarity for paragraph 2 of article 1 to form the subject of a separate article. It should also be made clear that the issue was not one of the right to a nationality in general but rather of the right to a nationality in cases of succession, when the position of individuals could be prejudiced.

14. Mr. OPERTTI BADAN said that article 6 (Acquisition of nationality) of the European Convention on Nationality[3] drew a clear distinction between the acquisition of nationality *ex lege* in certain specific situations as detailed in that Convention, and the acquisition of nationality by children born on the territory of a State party who did not acquire at birth another nationality. As the Commission's draft covered both cases, it should suffice.

15. Mr. PAMBOU-TCHIVOUNDA suggested that any proposals made during the discussion should be submitted to the secretariat or to the Chairman of the Drafting Committee in writing.

16. The CHAIRMAN said he agreed that, in the case of drafting proposals, that could indeed save time. Proposals involving points of substance should, of course, first be discussed in plenary.

17. Mr. LUKASHUK said that the right to a nationality laid down in article 1 was a recognized principle of international law and was embodied in many legal and paralegal instruments. As such, it should be included in the draft. The subject had, however, already been debated at length at the Commission's forty-eighth session and there was no need to prolong the discussion. There was another question he would commend for attention although it was perhaps of a purely theoretical nature, namely, whether an individual had a right to be stateless.

18. It was important not only to declare the right to a nationality but also to spell out its content in cases of statelessness. That content, as determined in the light of international instruments—in other words the content *de lege lata*—was the following. In particular, in cases of State succession, the interest not only of States but also of individuals must be taken into account; States must respect the will of the person concerned; every State must permit a renunciation of its nationality; no one should be arbitrarily deprived of his or her nationality; States must ensure that decisions relating to the acquisition, retention and loss of nationality were open to review in conformity with their respective internal laws; and, most important of all, a successor State should grant its nationality to all nationals of the predecessor State who resided permanently on the transferred territory.

19. Mr. MIKULKA (Special Rapporteur) said that Mr. Hafner seemed to believe article 1 should resolve all the questions that arose in connection with the subject. But, if that were so, what then was the point of the other articles? Rather, article 1 had to be understood as forming a whole together with the articles: it could not be read in isolation. It laid down a starting principle that could be implemented only via the provisions that followed.

20. As to whether article 1 should be understood as declaring a subjective right of the person vis-à-vis the State or whether it should be interpreted as referring to the relationship between States, he, for one, saw no reason why such a subjective right could not be recognized for the person concerned, when the State upon which the obligation is incumbent correspondingly could easily be determined, as, for example, in the case of unification.

[2] See 2475th meeting, footnote 8.

[3] See 2477th meeting, footnote 7.

However, a wide range of different situations could arise. In some cases it would be difficult for a person to claim the right to a nationality as a subjective right and the States concerned would have to agree among themselves on certain rules to ensure that all those involved would end up at least with the nationality of one of the successor States.

21. He had been asked why he spoke of a right to a nationality without specifying whether that right also included a right to acquire nationality. The answer was that article 1, paragraph 1, laid down a general formula which covered all situations. In some cases, the right to a nationality signified a right to keep the nationality of the predecessor State. In others, it signified the right to acquire the nationality of one of the successor States. In yet others, it meant a right of option between acquisition of the nationality of the successor State and maintenance of the nationality of the predecessor State or between acquisition of the nationality of one or other of the successor States. In the other articles he had, however, endeavoured to be as specific as possible.

22. He could not agree that the concept of the right to a nationality was very broad, nor that it was being broached for the first time in the draft. Its scope of application was in fact limited to the specific case of persons who had the nationality of the predecessor State at the outset. And its purpose was to ensure either that that person kept the nationality of the predecessor State or that he acquired the nationality of the successor State. Mr. Galicki had referred to the European Convention on Nationality, which, in article 4 (Principles), stated that the "rules on nationality of each State Party shall be based on the following principles: (*a*) everyone has the right to a nationality; . . .". That was a far wider concept than his own restrictive provisions, whereby a person who had once had the nationality of the predecessor State had the right either to keep that nationality or, if that was out of the question for some reason, to acquire one of the nationalities of the successor States, and the whole process was made subject to negotiation between States.

23. Part II of the draft did not, contrary to what Mr. Hafner had said, impose strict obligations. As he had explained in his oral introduction (2475th meeting), whereas Part I declared principles of law and principles as to the policy States were invited to adopt—and which it was assumed they would—the purpose of Part II was to provide the States concerned with guidance. To that end, Part II set forth principles that States were free to use if they saw fit and which, if they did so, would avoid statelessness and discrimination. The States concerned remained free to conclude any other agreements or arrangements.

24. Mr. FERRARI BRAVO, agreeing with the Special Rapporteur's analysis, said that article 1 was not unusual in enacting rules without providing for their implementation, since that would depend on the internal law of the States concerned. Criteria would be laid down for that purpose in other articles, which States would be free to follow or not. It was also quite normal for article 1 to assert, in the present tense, that every individual "has the right to the nationality", without specifying how that right would be achieved. Possibly, however, there might be some gaps because of the interplay between internal law and international law.

25. Paragraph 2 of article 1 dealt with the specific case of a child born at a certain moment and it also introduced the element of a third State, neither which had anything to do with the general statement in paragraph 1. Paragraphs 1 and 2 should therefore be separated to form the subject of two distinct articles, one dealing with nationality and the other with the specific case of the rights of children.

26. Mr. ECONOMIDES said that the draft should start with a general provision defining its character. As already stated, the draft was of a residual nature in that the States concerned could settle otherwise the question of the nationality of individuals involved in a case of State succession. They must, however, be under an obligation to respect the treaty obligations they entered into in connection with the rights of the persons concerned and any existing customary obligations in the matter. Such a provision was indispensable to the draft and should be placed right at the beginning or at the end or, if need be, in the preamble.

27. He fully agreed with Mr. Hafner about paragraph 1 of article 1. Wherever possible, more emphasis should be placed on the succession of State aspect and less on the nationality aspect. In other words, nationality should always be approached via State succession and that principle should govern the underlying approach to the draft as a whole.

28. Paragraph 1 in its current formulation set forth a right of the individual. In that connection, it would be useful to adopt the same formula as in articles 2 and 7, referring to "the States concerned . . .", which would not only make the obligation incumbent upon the States concerned but would also bring the relevant provisions of the draft into line. It would also be useful to link Parts I and II by stating, at the end of paragraph 1 of article 1, "as provided for in Part II", which would govern how nationality would be allocated in each case. The Venice Commission had adopted the same method by specifying that the States involved in succession respected the principle whereby each person had a right to a nationality.[4]

29. The words "irrespective of the mode of acquisition of that nationality", in paragraph 1, were superfluous, and should be deleted. That detail could be given in the commentary.

30. On a point of drafting, the words "had" and "was", which appeared in the imperfect tense in paragraph 1, should be replaced by the present tense, as was customary in all legislative texts. Paragraph 1 used the expression "States concerned". Such States were, however, generally successor States. A solution to the problem could perhaps be found by linking paragraph 1 with the rest of the draft and particularly with Part II.

31. Paragraph 2 of article 1 had no place in the draft. In the first place, it dealt more with nationality than with State succession and it was manifestly lacking in precision. Secondly, it covered an entirely isolated case of

[4] See 2475th meeting, footnote 22.

nationality which was of little practical interest and would be more appropriately regulated in a nationality code. If paragraph 2 were retained, however, it should be incorporated in a special provision towards the middle or end of Part I.

32. Draft article 2 had his full support, although he would have liked the wording, which stated an obligation of means and not of result, to be strengthened.

33. As to substance, article 3 should begin by setting forth the general principle that in all cases of State succession the parties concerned must, as an obligation of an international character, settle by agreement or other means, the question of the nationality of the individuals involved in the succession. Only after that general principle was set forth should the article address the question of national legislation.

34. The major issues to be addressed by national legislation were acquisition and loss of nationality as a result of State succession. The wording of article 3, paragraph 1, however, also introduced a number of additional issues which the Drafting Committee should consider deleting. Paragraph 2 of article 3 set forth the important principle of automatic *ipso jure* acquisition of the nationality of the successor State on the date of State succession. However, that principle should be safeguarded by means of an independent provision in the draft explicitly stating that nationality must be accorded at the date of succession, rather than through the indirect channel of imposing that obligation on national legislation.

35. The same was true of the second issue raised in paragraph 2. The practice was that, on the date of the succession of States, the successor State automatically granted its nationality to all individuals who had previously had the nationality of the predecessor State. It might subsequently give some categories of individuals the option of selecting the nationality of the predecessor or the successor State; and those who did not exercise that option would automatically retain the nationality of the successor State. The second provision of article 3, paragraph 2, would, however, be of value in avoiding cases of statelessness where States failed to follow that practice.

36. Mr. GOCO agreed that the right to a nationality proclaimed in the Universal Declaration of Human Rights could not be fully equated with the right to a nationality set forth in the draft, since States were subject to different constraints in situations of State succession. He also agreed with Mr. Economides on the need for automatic conferral of citizenship on citizens of the predecessor State by the successor State, subject to certain conditions, for in the absence of such automatic conferral, many problems would arise. Paragraph (6) of the commentary to article 3, contained in the third report of the Special Rapporteur, alluded to the problem of the timeliness of internal legislation. What would be the status of the individuals affected by State succession pending the enactment of such legislation? Did the principle of continuity already referred to mean that such persons should continue to be nationals of the predecessor State, or that they became nationals of the successor State immediately upon succession? As to the question of obligations, on which State were those obligations incumbent?

37. Mr. GALICKI said he wished to defend article 1, paragraph 2. Although he had criticized various aspects of the paragraph, he strongly favoured its inclusion as a very important provision for the progressive development of international law, one that went even further than article 6 of the European Convention on Nationality. In the interests of clarity, however, consideration should perhaps be given to incorporating it in revised form as a new paragraph 2 of article 2, since article 2 concerned the obligation to take all reasonable measures to avoid statelessness and article 1, paragraph 2, illustrated one such measure. Article 1 would gain in clarity as a result of such redrafting.

38. The formulation "has not acquired the nationality of at least one of the States concerned, or that of a third State," in article 1, paragraph 2, might be better expressed in the form: "has not acquired any nationality at birth or later". He wished to draw the Special Rapporteur's attention to the danger that, in practice, the provision might result in children having a different nationality to that of their parents. Could a way be found of avoiding that outcome?

39. Mr. PAMBOU-TCHIVOUNDA said that articles 1, 2 and 3 constituted the three pillars on which the entire edifice of the draft articles rested and highlighted the rights and obligations of the various States and individuals concerned. One possible shortcoming of those articles, however, was their failure to place sufficient emphasis on the role accorded, as a customary rule of general international law, to geographical territory as an underlying factor in the presumption of nationality. Furthermore, the assumption behind the draft articles, reflecting their title and that of the third report, should perhaps be embodied in an article 1 of a general introductory nature, setting forth the full scope of the impact of State succession on the nationality of natural persons of the predecessor State, having regard to all the possible forms State succession could assume.

40. As to article 1, paragraphs 1 and 2 should be dissociated and, in an amended form, paragraph 2 should make up a separate article, in view of its very specific subject matter. Paragraph 1 of the article also failed sufficiently to stress that, at the date of that State succession, there were many categories of individuals who might not have lost the nationality of the predecessor State. If the predecessor State still existed, the individuals living on its territory remained its nationals. Thus, in order to be fully significant, paragraph 1 must address the plight of those individuals who had lost their territorial link with the predecessor State. That aim could be achieved by adopting the wording: "Every individual who, on the date of the succession of States, has lost the territorial link with the predecessor State . . .", followed either by the formulation: ". . . may avail himself of the nationality of at least one of the States concerned" or by the formulation: ". . . shall possess the nationality of the successor State on the territory of which he is located".

41. Article 2 called for no comment, subject to the possible incorporation of article 1, paragraph 2, therein, as previously proposed. Article 3, however, prompted three comments. First, he endorsed Mr. Economides' remarks concerning the tenses of the verbs: in the interests of con-

sistency and of asserting States' obligations in direct terms, the conditional tense of article 3 should be brought into line with the present tense used in articles 1 and 2. Secondly, the allusion to "undue delay" left the field open for subjective and biased interpretations. Those words posed more problems than they solved. Similarly, the notion of "connected issues" could give rise to ambiguity unless further specification was provided in the text itself, rather than in the commentaries. It was a question of substance, not merely one of form.

42. He agreed with Mr. Economides' suggestion that article 3, paragraph 1, was in need of some pruning. The words "the effect of", for instance, were redundant and should be deleted. There were also problems of substance: access to a State's legislation was a luxury not available to those who, for instance, were unable to read. How, then, were all the persons concerned to be apprised of the information referred to in paragraph 1? States would need guidance on ways of securing application of the measures referred to in that paragraph. Lastly, he endorsed the view that the date to be taken into consideration for the purposes of paragraph 2 was, of course, the date of the succession of States.

43. Mr. MELESCANU said he had reservations about the advisability of obliging States to adopt legislation on nationality in relation to the succession of States. Many countries already had nationality laws that could also be applicable in cases of State succession. It thus seemed somewhat excessive to require them to adopt legislation in that regard. As for Mr. Pambou-Tchivounda's proposal that account should be taken of the role of territory when determining nationality, he would point out that, in many parts of the world, including central Europe, the territorial link, while important, was not crucial. Ethnic, cultural, religious and other factors were equally important, if not more so. He was thus opposed to according pride of place to the territorial factor in determining nationality, at least where his own region was concerned.

44. Mr. GALICKI, referring to article 3, said that he agreed with Mr. Pambou-Tchivounda's point about "undue delay" and the need to be more specific if laws had to be enacted concerning nationality and other connected issues arising in relation to the succession of States. As already pointed out, States usually had their own nationality laws. However, those laws did not normally provide for cases of succession, because States generally did not consider such an eventuality. Therefore, the problem was one of the application of existing laws. But the latter might not be sufficient, and he wished to draw the Special Rapporteur's attention to an alternative solution, set out in article 19 of the European Convention on Nationality, which stated that

> In cases of State succession, States Parties concerned shall endeavour to regulate matters relating to nationality by agreement amongst themselves and, where applicable, in their relationship with other States concerned.

The Special Rapporteur had referred to article 15 of the draft, on the obligation of States concerned to consult and negotiate. His own impression was that that was not the same thing, because article 15 dealt with specific problems which might arise later as a result of succession. Alternative solutions in the form of international agreements were not always possible, because if a State disappeared, it was impossible for it to be party to a given treaty. But if States agreed to address the problem of nationality in certain ways, that was preferable to forcing them to enact internal laws.

45. Mr. ECONOMIDES said that Mr. Pambou-Tchivounda had rightly drawn attention to an aspect which seemed to be missing in article 1, paragraph 1. In his view, that paragraph was a general provision which should simply lay down the principles whereby each person affected by a State succession had a right to a nationality; it should not contain substantive elements. Yet paragraph 1 did just that, because it referred to every individual who had the nationality of the predecessor State. On the other hand, it failed to mention a second condition which was just as necessary, namely residence in the territory that was the subject of the succession. In his opinion, either the principles should be set forth in a general fashion or article 1, paragraph 1, should also make provision for the latter requirement. He was in favour of simply laying down the general principles; the details should be left to Part II of the draft.

46. Mr. MELESCANU said that the territory could not play such an important role. Any reference to residence would have two consequences: first, it would force a person to have a nationality that he did not want; and, secondly, it would exclude the large numbers of citizens living abroad. There were many such examples in today's Europe, and he cited the Yugoslavs and Turks living in Germany. A Slovak who had lived in Prague for 30 years might not want to become a Czech. If the notion of territory of residence were introduced in article 1, it might create difficulties.

47. Mr. MIKULKA (Special Rapporteur) said that to a certain extent, Mr. Economides was right that one element was well-established, namely the nationality of the predecessor State. It was important and corresponded to the scope of the draft, which related to persons who had the nationality of the predecessor State before the date of the succession. The question arose whether at the level of a principle as general as the one set out in article 1 it was possible to add other criteria. Mr. Economides said that article 1 should cover persons who had the predecessor's nationality and who had a link with the territory that was transferred, but that assumed that only a transfer of territory or a secession took place and that the predecessor State survived. There was not much risk in that case, because the predecessor State's survival ensured that persons who resided in other States had a nationality. But if a State disappeared in the event of dissolution, that hypothesis was no longer valid: everyone found himself without a nationality. Thus, stressing the criterion of territory placed all nationals of the predecessor State residing abroad at risk. If the point was to have a general principle, virtually nothing could be added to article 1. The Working Group had spent a number of weeks considering the matter, and Part II, which contained more specific criteria on particular cases of State succession, had been produced for precisely that reason. The Working Group had not found other criteria of a general nature that might be included.

48. With regard to article 1, paragraph 2, he had been criticized for speaking of the absence of the nationality of a third State. Purely from the drafting standpoint, it was possible to speak of a child that had not acquired any nationality. But if it had been stated in such a simplified manner, there would have been a long debate in which members of the Commission would have discovered that a child could, in fact, have the nationality of a third State. Therefore, it had been thought useful to include all those elements *expressis verbis* and to indicate that a situation was involved in which a child was born to the persons concerned and acquired the nationality neither of the predecessor State nor any successor State(s). But at the same time, that would leave out a whole group of children who might acquire the nationality of a third State; in other words, the category of children was even more restricted than the category of persons concerned in paragraph 1, which was not confined to persons who might be left stateless.

49. Paragraph 1 applied to the case, for example, of a Czechoslovak who also had Canadian nationality. The fact that that person continued to have Canadian nationality did not exclude him from the scope of paragraph 1: as he was Czechoslovak, he still had the right to either Czech or Slovak nationality, depending on the case. That implied that the Czech and Slovak States did not have the right to impose their nationality, because with Canadian nationality, the person concerned was protected by the rule that a State could not impose its nationality on persons who lived abroad and had the nationality of a third State.

50. The suggestion had been made to reword article 1 to the effect that the States concerned were under an obligation to ensure that all the persons concerned eventually obtained the nationality of one of those States. That was in conflict with the rule that States could not impose their nationality on individuals who resided in, and had the nationality of, a third State. If the Commission wished to recast article 1 in terms of obligations of States instead of rights of individuals, that would necessarily exclude some of those individuals covered in paragraph 1. What would happen with them? Speaking of a right to a nationality had an advantage, because it was the only formula to cover all persons who had been nationals of the predecessor State.

51. Mr. BROWNLIE said that much of the debate had focused on the problem of the balance between the general principles, especially in articles 1 and 2, and the particular mechanism, which the Special Rapporteur relied on heavily, especially in article 3, which was to put in place very specific duties for States to legislate. There was no simple means to guarantee either legal stability after State succession or to eliminate all sources of statelessness. But an attempt could be made to do so.

52. He was in favour of strengthening the complementarity between the general principles and the duty to legislate in specific ways. To that end, he would propose the insertion of a new article 2 *bis*, to read:

> "1. The States concerned shall implement the principle of general international law according to which on a succession of States persons having their habitual residence in the territory affected are presumed to acquire the nationality of the successor State on the date of the succession of States.
>
> "2. The principle referred to in paragraph 1 is without prejudice to the provisions of articles 7 and 8."

53. His intention was to introduce a general principle which would not have an adverse impact on the economy of the Special Rapporteur's draft.

54. Mr. ROSENSTOCK asked Mr. Brownlie to explain what happened in the case of a national of a third State who was a resident in the territory at the time of the State succession. The provision proposed seemed to grant the nationality of the successor State to that individual.

55. Mr. BROWNLIE said that the general principle was subject to much else in the draft. The concept was not to deal with all subsequent matters of nationality, but to apply the principle of continuity. The difficulty was in focusing on State succession as such and avoiding questions of nationality in general.

56. Mr. MELESCANU asked what happened with that presumption for citizens of a State who were living outside its borders. Would they not benefit from that presumption?

57. Mr. BROWNLIE said that the presumption was meant to maintain continuity. There was some analogy with the question of acquired rights after a change of sovereignty. The new sovereign could legislate in respect of property on its territory in the same way as any other sovereign. Its power to do so did not derive from the change of sovereignty except in the sense that it was now sovereign over that territory. The Commission must try to deal with the problem of State succession and not to regulate the subsequent powers of government that the new sovereign would have. That was one of the particular difficulties that the Special Rapporteur had had to face.

58. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) pointed out that the suggestions made would most usefully be discussed in depth in the Drafting Committee.

59. Mr. LUKASHUK said that he supported Mr. Brownlie's proposal.

60. Mr. GALICKI said that, in general, he too supported Mr. Brownlie's proposal. However, if the draft were to become a convention, the reference in the first paragraph of his proposal to the principle of general international law would not be easily accepted by States, and he was therefore opposed to including such a reminder simply to create a positive obligation for States.

61. Mr. ECONOMIDES said that Mr. Brownlie's suggestion to recall a principle of general international law was an excellent idea. In all cases of State succession when part of the territory came under new sovereignty, there was automatically a change in nationality. That had taken place so often that it could be recognized as a general rule of international law. But Mr. Brownlie's proposal spoke only of persons who had their residence in the territory affected by the succession, not of nationals of the predecessor State resident there. Without the element of nationality, the Special Rapporteur would then rightly

argue that in the case of the dissolution of a State, the nationals of the predecessor State residing abroad would all become stateless. It would therefore be necessary to have an automatic transfer of nationality to everyone.

62. Principles must be set out in very general terms and specific provisions must be used to settle problems in detailed fashion. The question of nationality should be linked with the articles of Part II.

63. Mr. MIKULKA (Special Rapporteur) said that he endorsed the philosophy behind Mr. Brownlie's proposal. The problem raised by Mr. Rosenstock could readily be resolved, because Mr. Brownlie certainly intended to cover "persons concerned". However, the principle was to be applied without prejudice not only to the provisions of articles 7 and 8 (Granting and withdrawal of nationality upon option), but also of article 18 (Granting of the nationality of the successor State), which spoke of unification, where the presumption of continuity extended to the entire population of the two countries which united.

64. Regarding the transfer of territory, it was also not certain that the population always shifted its nationality with the territory. On the contrary, in the case of small territorial exchanges, the population had often retained the nationality of the predecessor State. At issue instead was the basic principle of the right to opt for one nationality or another. He had cited two exceptions: unification and transfer of territory. Must a general principle be set forth when it only concerned dissolution and separation and would not cover the persons concerned abroad?

The meeting rose at 1.05 p.m.

2481st MEETING

Thursday, 22 May 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

Nationality in relation to the succession of States (*continued*) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,[1] A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN informed the Commission that, the day before, the General Assembly had adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses by 103 votes to 3, with 27 abstentions.

2. He invited the Commission to continue its consideration of draft articles 1 to 3, including new draft article 2 *bis* proposed by Mr. Brownlie (2480th meeting).

PART I (General principles concerning nationality in relation to the succession of States) (*continued*)

ARTICLES 1 TO 3 (*concluded*)

3. Mr. GOCO said he wondered whether the presumption stated in the new draft article 2 *bis* related exclusively to the criterion of habitual residence or whether it covered all the individuals referred to in article 1 (Right to a nationality), paragraph 1, in other words, those entitled to acquire the nationality of the predecessor State in accordance with the provisions of the internal law of that State.

4. Mr. HE pointed out that the right to a nationality set forth in article 1 was based on article 15 of the Universal Declaration of Human Rights[2] and article 7 of the Convention on the Rights of the Child. In the context of State succession, that right could be regarded as the positive expression of a State's duty to prevent statelessness. From that standpoint, article 1 was closely linked to draft article 2 *bis* proposed by Mr. Brownlie, which set out the duty of States to grant nationality. However, article 1 was more specific, providing for the right to the nationality "of at least one of the States concerned" and, thus, when read in conjunction with article 7 (The right of option), paragraph 1, and article 8 (Granting and withdrawal of nationality upon option), paragraph 3, paving the way for the phenomenon of multiple nationality. Although that phenomenon was made inevitable by the functioning of the various internal laws on nationality, it obviously had more disadvantages than advantages for individuals, States and the relations between them. There was so far no legal rule providing for the right of individuals to more than one nationality. Even the European Convention on Nationality,[3] which was fairly liberal in that regard, must be considered in conjunction with the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality. That Convention, like the many bilateral treaties between China and the other States of South-East Asia, for example, was based on the principle that the phenomenon of multiple nationality was generally undesirable and should be controlled to the greatest

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

[2] See 2475th meeting, footnote 8.

[3] See 2477th meeting, footnote 7.