

Document:-
A/CN.4/SR.2482

Summary record of the 2482nd 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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

was simply to add a condition of habitual residence to the possession of the nationality of the predecessor State, half the draft articles would no longer serve any purpose. First of all, that would be tantamount to excluding the consideration of persons who had had the nationality of the predecessor State, but who at the moment of dissolution had had their habitual residence in another State and, secondly, if the point was that those persons had a right to the nationality of the State on whose territory they had their habitual residence, the other articles were unnecessary because all the problems were resolved from the outset.

51. Mr. PAMBOU-TCHIVOUNDA said that he was puzzled about the very general nature of the scope of article 1, paragraph 1, because he remained convinced that a distinction should be drawn, which would not encumber the provisions of Part II, depending on whether the predecessor State had or had not ceased to exist. In his view, the Special Rapporteur seemed to be limiting himself to the hypothesis that, as the predecessor State continued to exist, the categories of natural persons claiming its nationality retained it, although the opposite hypothesis should also be borne in mind, namely, that of persons who lost the nationality of the predecessor State precisely because it had ceased to exist. As to procedure, he requested the Chairman to confirm that members of the Commission who were not members of the Drafting Committee could submit draft articles or amendments in writing to the Committee.

52. The CHAIRMAN confirmed that that was possible. He also requested the members of the Commission to take as clear a decision as possible both on the principle of referring articles 1, 2 and 3 to the Drafting Committee and on the Drafting Committee's specific mandate. Apart from putting the finishing touches on the draft, the Drafting Committee should consider draft article 2 *bis* proposed by Mr. Brownlie, the proposals made by Mr. Economides and the desirability of inserting in the text a number of general principles which had been the subject of lengthy discussion, such as the principle that State succession could not have any effect on the prior nationality of a third State or the idea that the rules set forth were of a residual nature.

53. Mr. MIKULKA (Special Rapporteur) said that it would be better for the Drafting Committee to consider certain specific proposals and not vague ideas put forward anonymously. As to the residual nature of the instrument being drafted, that idea had its place in a paragraph of the preamble and not in the body of the text itself. Likewise, he did not regard it as essential to state the principle that the succession of States had no impact on the nationality of a third State which a person concerned possessed, since it was obvious and rather banal. The Vienna Convention on the Law of Treaties contained no analogous provision preserving the integrity of the treaties between third States.

54. In conclusion, he said that the draft articles already contained the main points; any member who thought that a particular provision should be added should submit a proposal in writing.

55. The CHAIRMAN proposed that the members of the Commission should refer draft articles 1, 2 and 3 to the

Drafting Committee, requesting it to give particular consideration to the formal proposal for a new draft article 2 *bis* submitted by Mr. Brownlie and to the proposals made in the Commission in the framework of both the general discussion and the debate on articles 1, 2 and 3. He joined the Special Rapporteur in urging the members of the Commission to formulate their proposals in writing and give them to the Special Rapporteur or the Drafting Committee. For the further consideration of the draft, he invited the members to submit their proposed articles or additional paragraphs if possible in the course of the debate.

56. He said that, if he heard no objections, he would take it that the Commission decided to refer articles 1, 2 and 3 to the Drafting Committee and that it approved the proposed procedure.

It was so decided.

The meeting rose at 1 p.m.

2482nd MEETING

Friday, 23 May 1997, at 10.35 a.m.

Chairman: Mr. Alain PELLET

later: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, 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*)

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

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

ARTICLES 4 TO 6

1. Mr. MIKULKA (Special Rapporteur) informed members that a number of corrections had been made to articles 4 and 5.

2. In the French version of article 4 (Granting of nationality to persons having their habitual residence in another State), paragraph 1, the words *personnes intéressées* should be changed to read *personnes concernées*. In article 4, paragraph 2, at the beginning of the paragraph, the word "concerned" should be inserted after "persons" of the English version, and *concernées* after *personnes* of the French version.

3. The French text of article 5 (Renunciation of the nationality of another State as a condition for granting nationality) had been brought closer into line with the English, which was the original version, and should read:

"Lorsqu'une personne concernée ayant le droit d'acquérir la nationalité d'un État successeur a la nationalité d'un autre État concerné, le premier État peut subordonner l'acquisition de sa nationalité à la renonciation par cette personne de la nationalité du second. Cette condition ne peut toutefois être appliquée d'une manière qui aurait pour conséquence de faire de la personne concernée un apatride, même temporairement."

4. Mr. GOCO, referring to article 4, said he wondered whether it was really necessary to retain paragraph 1, considering that, as defined, the person concerned meant someone who was a national of the predecessor State or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State. If a person had habitual residence in another State and also had the nationality of that State, it did not seem to him that the provision was needed. Bearing in mind the definition of "person concerned", there was certainly no obligation on the part of the successor State to grant the person concerned its nationality. As to article 4, paragraph 2, he took it that the word "who" related to nationals of the predecessor State; that called for some clarification.

5. The phrase "and also of the predecessor State" should be inserted at the end of the first sentence of article 5 because the situation was one that involved dual citizenship. The "person concerned" referred to the national of the predecessor State, and that same national had the nationality of another State concerned. Hence, renunciation should cover the nationality not only of the predecessor State but also that of another State.

6. Article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), paragraph 1, presumably implied that the predecessor State still existed and therefore might also make provision in its legislation for the voluntary acquisition of the nationality of the State. In respect of paragraph 2, there seemed to be a difference, as far as the result was concerned, between the voluntary acquisition of the nationality of a State and the exercise of the right of option

7. Mr. ELARABY said that Mr. Goco's point on article 4, paragraph 1, was well taken, because the text

implied that such a person was a national of the State and had his habitual residence in another State, and might also have the latter's nationality. As such, the successor State, by not granting him nationality, would be denying him a right which he already had. It might be necessary to make the words "does not have the obligation" less precise. Perhaps the formulation should be redrafted so that the person concerned would have the choice of taking the nationality of the two States, assuming the laws so permitted. If necessary, he would support Mr. Goco's proposal to delete the paragraph.

8. Mr. GALICKI said that the phrase in article 4, paragraph 1, to the effect that "A successor State does not have the obligation to grant its nationality to persons concerned" might create difficulties. Taking an *a contrario* approach, it would mean that the successor State had the obligation to grant its nationality to persons concerned if they did not have habitual residence in another State and if they did not have the nationality of that State. In his view, the idea of creating a positive obligation on States in that fashion did not command any support.

9. Mr. ECONOMIDES said that, if it was the intention of article 4, paragraph 1, to introduce a rule, it was a poor way of doing so. Any rules belonged in Part II of the draft (Principles applicable in specific situations of succession of States).

10. Article 4, paragraph 1, was worded very flexibly. The successor State did not have an obligation to grant its nationality to such persons, but could do so if it wished. That being the case, there seemed to be an inconsistency between paragraph 1 and paragraph 2, according to which nationality could not be imposed unless the person concerned would otherwise become stateless. Pursuant to paragraph 1, the successor State did not have an obligation to do so, but if it did grant nationality, it then violated paragraph 2. He did not see any great need for paragraph 1, but if it was retained, it would have to be brought into line with paragraph 2 by saying that, if the successor State granted its nationality, it must do so solely on a voluntary basis. In other words, the person concerned could choose to acquire the nationality of the successor State. He pointed out that the Venice Declaration² already made provision for such cases. For example, provision 9 of the Venice Declaration said it was desirable that successor States grant their nationality, on an individual basis, to applicants belonging to certain specified categories. The Venice Declaration might perhaps be drawn upon to improve paragraph 1 so as to preclude the possibility of an arbitrary attribution of nationality.

11. The CHAIRMAN said that, if the proposal by Mr. Economides was adopted, it would mean eliminating the possibility for the successor State of imposing its nationality, yet that was the very purpose of paragraph 2.

12. Mr. ECONOMIDES said that, according to paragraph 2, the successor State could impose its nationality if the person concerned was in danger of becoming stateless. Paragraph 1 dealt with persons who had a nationality other than that of the predecessor State, and hence there was no risk of statelessness. Nevertheless, it flowed from

² See 2475th meeting, footnote 22.

paragraph 1 that the successor State could attribute its nationality to persons who had their habitual residence in another State and also had the nationality of that State. Perhaps the inconsistency between the two paragraphs could be overcome by further drafting.

13. Mr. FERRARI BRAVO said that it complicated matters to have to work with the English text. Unfortunately, the Secretariat had not distributed the French version, which had been the subject of quite a few changes.

14. There seemed to be an inconsistency in article 4. The key in paragraph 1 was “person concerned”, and it was useful in that context to refer to the definition of that term, namely “every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality”. The persons concerned were nationals of part of a given State which subsequently became independent from the other part. Paragraph 1 could be taken to mean that a successor State did not have the obligation to grant its nationality to persons concerned because they had the nationality of another State. Then, in paragraph 2, reference was made to persons concerned who had their habitual residence “in another State”, but that might mean a third State. That seemed to be a contradiction. It could lead to a situation in which, if a person became stateless, the State might impose its nationality. Recent history suggested the opposite. He was thinking of the case of a successor State which did not grant its nationality to persons, allowing them to become stateless, because it did not want certain minorities. That was not clear in article 4, and he sought clarification from the Special Rapporteur. As he saw it, paragraph 1 was confined to the successor State, whereas paragraph 2 opened the door to third States. That might be the case where the persons concerned had their residence in a third State but still had the nationality of one of the successor States. Hence, there was some confusion between “persons concerned”, which meant persons relating to the States created by the succession, and the reference to another State, that is to say, any third State.

15. Mr. LUKASHUK said that article 4, paragraph 2, was a violation of human and civil rights. There could be no question of a State imposing its nationality on persons against their will, because persons had the right at any time to renounce their nationality. He was in favour of deleting paragraph 2.

16. The CHAIRMAN observed that Mr. Lukashuk was in favour of a right to statelessness.

17. Mr. SIMMA said that the commentary to article 4, contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1), made it perfectly clear why the Special Rapporteur had used “another State” instead of “third State”. In the context of article 4 there was no reason why “another State” should not embrace the successor States. Perhaps the problems were due to the abstract form of language used.

18. Mr. HAFNER said that he too had problems with article 4 but felt that an article of that kind must nevertheless be retained. It should certainly be read in conjunction with Part II and he was inclined to agree with Mr. Economides that it should be placed in Part II.

19. He wondered whether it was really necessary for both the requirements of paragraph 1—the habitual residence in and the nationality of that State—to be met. He also wondered whether it would not also be possible to allow an exception to the successor State’s duty to impose its nationality when the person concerned had his habitual residence in another State and the nationality of any other State. Such a provision would still avoid the problem of statelessness.

20. Paragraph (1) of the commentary to article 5 indicated that the scope of article 4 went beyond State succession. That was particularly true of paragraph 2: since no time limit was specified, the provision meant that Austria, for example, which had become a successor State in 1918, was still subject to the obligation not to impose its nationality. He asked if that was truly the aim of paragraph 2 or whether the provision should be limited to specific cases of State succession. The problem could be overcome by referring to “persons concerned” instead of simply “persons” in the first line of paragraph 2, for then a time limit would be implied.

21. He noted the discussion in the commentary of the merits of the phrase “against their will” and the alternative “with their consent”. The latter was preferable for two reasons. It would be difficult for a person residing outside the territory of the successor State to familiarize himself with the latter’s legislation; and “against their will” certainly entailed the need for an opting-out provision, and he could find no such provision in the text. There was also the question of whether the possibility of acquiring a nationality against one’s will was consistent with the requirement of voluntary acquisition contained in articles 5 and 6.

22. Mr. MIKULKA (Special Rapporteur) said that he would have preferred to have had an opportunity to respond earlier to the flood of questions raised, many of which had in fact already been answered in the commentary and in his earlier statements. Moreover, his third report reflected the conclusions reached by the Working Group on State succession and its impact on the nationality of natural and legal persons after two years of deliberations.³ With regard to one of the points raised by Mr. Hafner, for example, he had already made it clear that, at the beginning of paragraph 2, “persons” should read “persons concerned”. And he could again confirm for Mr. Ferrari Bravo that “another State” meant the same thing in both paragraphs.

23. Article 4 was concerned with the obligations of the successor State and the limits thereon. In paragraph 1 “persons concerned” meant, of course, persons who might have a claim to the nationality of the successor State, in other words, persons who might have dual nationality. The limiting provision was supported by most of the writers on the topic. However, if the Commission concluded that the obligation to grant nationality should exist even in the case covered by paragraph 1, it might find a compromise solution by adding the proviso “without prejudice to the provisions of articles 7 and 8”.

³ See 2475th meeting, footnote 5.

24. The basic approach in paragraph 2 was slightly different in that it dealt with the extent to which a successor State could impose its nationality rather than with the limitation of its obligation to grant nationality. As Mr. Simma had pointed out, the commentary explained the reasons for using the term "another State", which covered other successor States and third States. Some members had asked whether the Commission should provide that a successor State could impose its nationality on persons concerned if they would otherwise become stateless. The Working Group had answered the question in the affirmative, since the aim was to eliminate statelessness. He must say to Mr. Lukashuk, who had disagreed on that point, that nowhere in the literature on the topic had he found any support for a right to statelessness. If the Commission agreed with Mr. Lukashuk, it could delete "unless they would otherwise become stateless", although that would create a gap in the scheme of the draft articles.

25. Mr. KABATSI said that he could generally accept the spirit of article 4 but was concerned about the human rights implications, for there might be instances in which the obligation limited by paragraph 1 should still obtain. A person having links to a predecessor State but the nationality of a third State might wish to maintain those links by acquiring the nationality of the successor State if its legislation allowed dual nationality. That was especially true when the predecessor State was entirely absorbed into the successor State. To take a concrete example, if a national of Lesotho was also a national of a third State and if Lesotho were to be absorbed into the Republic of South Africa, he might want to maintain his links to Lesotho, and the Republic of South Africa should be under an obligation to grant him its nationality.

26. As far as paragraph 2 was concerned, there should of course not be an unlimited right to statelessness. However, if a person did not wish to be a national of the successor State and had applied for the nationality of some other State but the imposition of nationality by the successor State prejudiced his application, he might welcome the right to be stateless during an interim period.

27. Mr. BROWNLIE, speaking on a point of order, said that it would be better not to use concrete examples naming countries, as Mr. Kabatsi had just done.

28. The CHAIRMAN said that he disagreed: it was perfectly legitimate to give such examples.

29. Mr. ECONOMIDES said that the misunderstandings about paragraph 1 stemmed from the words "does not have the obligation to grant". They meant that, although the State did not have an obligation to grant its nationality, it could do so under its internal law. He could not accept that possibility because, from the standpoint of international law, a State should not have the right to grant its nationality to persons not residing in its territory and having the nationality of the State in which they resided unless such persons so requested or consented. The beginning of the paragraph should therefore read "A successor State has the obligation not to grant . . .". A provision would then have to be added to the effect that it might grant nationality if the person concerned agreed.

30. The provision contained in paragraph 2 had no place in article 4. While it was true that in the event of stateless-

ness a successor State had the obligation to grant its nationality to persons residing outside its territory, the problem should be dealt with not in the terms used in paragraph 2 but rather those of article 7 (The right of option).

Mr. Kabatsi took the Chair.

31. Mr. ELARABY said that there was some inconsistency between paragraphs 1 and 2 of article 4. Whereas paragraph 2 made it clear that a successor State could not impose its nationality on certain persons against their will, there was no similar reference to the will of those concerned in paragraph 1. When it came to whether a successor State had an obligation to grant its nationality in the circumstances covered by paragraph 1, the will of the persons concerned should, as a matter of human rights, be taken into consideration.

32. Mr. MIKULKA (Special Rapporteur) said that that point was a purely drafting matter. He could only reiterate his proposal that it should be handled by adding to paragraph 1 of article 4 the words "without prejudice to the provisions of articles 7 and 8".

33. Mr. GALICKI said that, to avoid misunderstanding, it might be better to replace the words "does not have the obligation", in paragraph 1, by "may refuse". He also wondered whether the words "of that State", in the same paragraph, were not somewhat restrictive and should not therefore be replaced by "of any State".

34. Mr. ROSENSTOCK, stressing the importance of articles 4, 7 and 8 (Granting and withdrawal of nationality upon option), said that the obligations placed on States in the matter of nationality should, in his view, be limited to special situations such as statelessness. The softer word "should", used in articles 7 and 8, rightly served to mark the distinction between those two provisions and article 4 and also to indicate why article 4, though not absolutely essential, was useful in the context of the draft as a whole. The point made about the words "of that State", though purely a drafting matter, merited further reflection in the Drafting Committee.

35. Mr. BROWNLIE, said that, while some of the points raised might be drafting matters, they derived to some extent from certain underlying issues and as such would, he trusted, receive due consideration. The difficulty was that the Commission was not dealing globally with the limitations on the grant or withdrawal of nationality by States to or from individuals but with State succession. It was precisely because the successor State became the lawful sovereign—assuming a lawful transfer of territory—that the question of nationality must be subject to objective standards. Otherwise, if power and legitimacy were given to the reach, through nationality or otherwise, of the predecessor State there would be a derogation from the lawful transfer of the territory, and of the sovereignty and the powers that went with it. If his proposed article 2 *bis*, or some similar provision, were placed earlier in the draft, it might help to clarify some of the issues raised. But the problems which peeped out of the drafting and surfaced in paragraph 1 of article 6 involved an assumption that, unless further dispositions were made, the nationality of the predecessor State continued to apply in various ways. With some of the articles, there was an unfortunate

attempt to deal also with the specialized problem of the situation vis-à-vis third States other than the predecessor State. The situation vis-à-vis the predecessor State was of a specific nature precisely because, if it were not handled carefully, it could lead to a situation in which the lawful transfer of sovereignty was treated in such a way that the new legitimacy of control of the successor State was derogated from in the sphere of nationality because too much continuing power might be allowed to the predecessor State.

36. Mr. CRAWFORD said that a disturbing disparity in the treatment of the predecessor State and the successor State emerged from article 6. As he read it, the successor State might *ex lege* recognize the nationality of the persons habitually resident on its territory. The predecessor State might not, however, *ex lege* withdraw its nationality unless it was satisfied that such persons had assumed the new nationality voluntarily. In the context of *ex lege* naturalization, the predecessor State could know that only by adopting some form of statutory presumption.

37. Mr. MIKULKA (Special Rapporteur) said the problem was that the situation of the predecessor State differed from that of the successor State in that the legislation of the former did not necessarily provide only for the situation of the successor State. It also provided for the voluntary acquisition of the nationality of, say, a third State. There was a valid reason for separating the paragraph on the predecessor State from that on the successor State since, if the predecessor State survived the State succession, it had to be presumed that, apart from certain special cases, the nationality of the predecessor State could not disappear. In other words, in the event of State succession, the nationality of the predecessor State could be questioned only in cases where the nationality of the successor State was acquired. There was always a hard core of persons who necessarily acquired the nationality of the successor State and, in their case, the predecessor State had to respect the fact that they had become nationals of the successor State and it had to give effect to that state of affairs by withdrawing from them its own nationality.

38. The point at issue was concerned with an exception which related to all categories of the succession of States. Possibly, when it came to the final revision of the draft as a whole, the question should be asked whether some of the provisions in Part I could not better fulfil their purpose if they were placed after the provisions in Part II. Indeed, that alternative had been considered by the Working Group, which, after deciding against a Part III of the draft, had opted for just two parts, one incorporating the principles relating to all categories of State succession and the other laying down more specific rules. He recognized, however, that Mr. Crawford's problem deserved attention in order to preclude the need to revert to the question of the structure of the draft at a later stage.

39. Mr. CRAWFORD, thanking the Special Rapporteur for his helpful explanation, said that, if the place in the draft of the rule in question were retained, a "without prejudice" clause would certainly have to be added. The solution proposed by the Special Rapporteur was probably even better, however.

40. Mr. Sreenivasa RAO said that, as he understood it, article 4 provided an exception to article 1 and the expression "another State" meant a third State that was neither a predecessor State nor a successor State. Also, he noted that paragraphs (3) and (4), respectively, of the commentary to article 5 contained the following unequivocal statements: it may happen that such renunciation is required only with respect to the nationality of another State concerned (or rather another successor State), but not the nationality of a third State and it is not for the Commission to suggest which policy States should pursue on the matter of dual/multiple nationality. Bearing those statements in mind and having regard to the need to avoid, in so far as possible, situations of dual/multiple nationality in cases of State succession, the question was whether the use of the expression "another State" would confine the effect of the provision to the successor State alone. With greater clarity in the drafting, some of the problems raised including those relating to paragraph 2 of article 4, could be eliminated.

41. Mr. ADDO said he would prefer the word "may", rather than "shall", in article 4, paragraph 1, since such a formulation would avoid giving the impression that the successor State was required by a peremptory norm to confer its nationality on seemingly stateless persons who might not wish to become nationals of that State.

42. Mr. Sreenivasa RAO said that, like the word "obligation" in paragraph 1, the word "impose" in paragraph 2 seemed rather too emphatic. While he understood that the basic intention was to avoid statelessness, there were situations in which statelessness might be to a person's advantage, or in which to be a national of certain countries might be a disadvantage. In such circumstances there was no need to go the extra mile by imposing a nationality upon persons against their will.

43. Mr. HERDOCIA SACASA said many of the problems raised stemmed from the fact that articles 4, 5 and 6, placed in a Part I of the draft which was devoted to general principles that must be fully respected, were negative provisions constituting exceptions to provisions set forth in a Part II of the draft which merely set out to offer technical guidelines for States. The Commission should try to ensure that all the general principles in Part I were set out in the form of obligations of a positive rather than a negative character, and those principles should not deal with issues such as dual nationality that were clearly matters for national legislation. It must also be borne in mind that the idea of a presumption of nationality conflicted with the provisions of a number of articles, among them article 6. He thus welcomed the possibility, left open by the Special Rapporteur, of placing those exceptions in Part II or elsewhere.

44. On a purely technical matter, he noted that article 4 used the expression "another State", one which, unlike the terms "successor State", "predecessor State", "State concerned" and "third State", was nowhere defined. Either that term should also be defined, or else its meaning in the context should be made explicit.

45. Mr. Sreenivasa RAO said the Special Rapporteur had made it abundantly clear in the commentary that the term "another State" referred to the successor State, the

predecessor State and also the third State. Whether the term should also be defined in the list of definitions was another matter, and one that the Drafting Committee could consider if need be.

46. Mr. ECONOMIDES said that articles 5 and 6 dealt with traditional questions of nationality that were regulated by national legislation, rather than with questions of nationality in relation to State succession. The only provision therein that fell within the Commission's mandate was the last sentence of article 5; even that provision, however, did not regulate an issue of major importance. Otherwise, the provisions merely provided what amounted to gratuitous advice to States on what were essentially sovereign matters. His inclination was therefore to delete articles 5 and 6 *in toto*.

47. As to article 4, he would reiterate his view that, if paragraph 1 was to be retained, it should contain the idea that the successor State did not have the right to confer its nationality automatically in the circumstances envisaged, but that the option of naturalization was not ruled out, to allow such persons to acquire voluntarily the nationality of the successor State. In the last analysis, however, he could accept Mr. Rosenstock's opinion that, even if paragraph 1 was deleted, the substance of the article would not be affected. Paragraph 2, on the other hand, was indispensable, but must be redrafted.

48. Mr. LUKASHUK said that he appreciated Mr. Economides' position, but the Commission was preparing a document that was intended to provide guidance to States. A different approach was thus needed from what would be appropriate in the case of a legally binding instrument, and articles 5 and 6 could be extremely useful to States in that regard.

49. Mr. MIKULKA (Special Rapporteur), responding to Mr. Economides' comment regarding the value of the first sentence of article 5, said that a wealth of documentation had been produced by the Council of Europe and UNHCR on the question of temporary statelessness, and that there were also constant discussions between international bodies and successor States on the problem. Several successor States' legislation had even been amended because those States acknowledged the UNHCR argument that statelessness, even temporary statelessness, was unacceptable. The problem was thus one of the utmost topicality and urgency. Nor had he had the slightest intention of "advising" States in articles 5 and 6. Whenever his intention was to advise or invite States to take a certain course of action, he used the expression "should". In articles 5 and 6 he had noted what they "could" do—in other words, that they retained some freedom of action in those areas. If the Commission wished to establish strict rules, and even an obligation for States to grant their nationality to certain individuals, it could not simply ignore their freedom of action in certain areas. To do so would be to risk producing a draft text lacking in balance and thus unacceptable to States.

50. Mr. RODRÍGUEZ CEDEÑO said that article 4 consisted of two important paragraphs containing two necessary negative obligations. Regarding paragraph 1, the argument in favour of imposing a positive obligation on the successor State was misguided. The current wording

gave the successor State the power to decide whether or not to grant its nationality despite the fact that the persons concerned had their habitual residence in another State and also had the nationality of that State. It was important that the State should enjoy such discretion in a matter regulated by national legislation. In order to avoid misinterpretations, both paragraphs should be worded so as to refer in Spanish to "persons concerned".

51. An obligation of the type set forth in article 4, paragraph 2, should indeed be included in the draft, but he had some doubts about the last phrase of the paragraph. In his view, the Commission should try to draft an absolute obligation to the effect that the State could not impose its nationality on the persons concerned. The current wording conferred undue power on the successor State in that regard. It might also conflict with the provisions of article 7. In any case, it had rightly been pointed out that articles 4, 5 and 6 constituted exceptions to Part II. They should thus be considered at a later stage, in conjunction with articles 17, 18, 19 and 22, at which point a decision might also be taken on the most appropriate place for them in the draft.

52. Mr. GOCO, referring to article 4, paragraph 1, said he could see the rationale whereby the successor State might grant its nationality to persons concerned who had their habitual residence in another State but were not nationals of that other State. However, he failed to see why the successor State should reach out to persons who were not resident in the territory of the successor State and were indeed nationals of another State. He thus questioned the need for paragraph 1.

53. Mr. MELESCANU said it seemed that most of the problems aired could be reduced to matters of drafting. He therefore proposed that the Commission should agree to refer articles 4, 5 and 6 to the Drafting Committee.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer articles 4, 5 and 6 to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

2483rd MEETING

Tuesday, 27 May 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda,