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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

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CHAPTER II

NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

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Article 7 32/

Attribution of nationality to persons concerned having their habitual residence in another State

1. Subject to the provisions of article 10, a successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Commentary

(1) The attribution of the nationality of the successor State is subject to certain exceptions of a general character which apply to all types of succession of States. These exceptions, spelled out in article 7, concern both the obligation of the successor State to attribute its nationality and the power of the State to do so. Their purpose is to establish a balance between the competing jurisdictions of the successor State and other States where persons concerned have their habitual residence outside the former while still pursuing the goal of preventing statelessness.

(2) This question has been widely debated in the doctrine, an analysis of which leads to the following two conclusions: first, a successor State does not have the obligation to attribute its nationality to the persons concerned who would otherwise satisfy all the criteria required for acquiring its nationality but who have their habitual residence in a third State and also have the nationality of a third State; second, a successor State cannot attribute its nationality to persons who would otherwise qualify to acquire its nationality but who have their habitual residence in a third State and also have the nationality of that State against their will. 33/ When referring to a “third” State, commentators had in fact in mind States other than either the predecessor State, or, as the case may be, another successor

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32/ Article 7 corresponds to article 4 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 49.

33/ For cases involving the attribution of nationality to persons residing outside the territory affected by the succession of States, see O'Connell (1956), op. cit., pp. 251-258.

State. The Commission, however, considered that there is no reason not to extend the application of article 7 also to persons concerned who have their habitual residence not in a “third State”, but in another “State concerned”. Finally, as explicitly stated in paragraph 1 and as implied in paragraph 2, article 7 covers both persons who have their habitual residence in the State of which they are nationals as well as persons who have their habitual residence in one State, while being nationals of yet another State.

(3) Accordingly, paragraph 1 lifts, under specific conditions, any obligation which a successor State may have to attribute its nationality to persons concerned, as a corollary of a right of a person concerned to a nationality under the terms of article 1 of the present draft articles. However, if a person referred to in paragraph 1 who has an appropriate connection with a successor State wishes to acquire the nationality of that State, e.g. by exercising an option to that effect, the obligation of the latter to attribute its nationality to that person is not lifted. This is indicated by the opening phrase, “subject to the provisions of article 10”. Paragraph 1 of article 7 concerns the attribution of nationality by virtue of national legislation. It is, however, without prejudice to any obligation of a successor State vis-à-vis other States concerned under any relevant treaty.

(4) Paragraph 2 restricts the power of a successor State to extend its nationality to persons concerned not residing in its territory and having the nationality of another State. However, a successor State may attribute its nationality to such persons on a consensual basis. This raises the question as to how consent should be ascertained. Establishing a requirement of explicit consent would not be a practical solution, as it would put a heavy administrative burden on the successor State. The Commission considered it preferable to introduce a presumption of consent where persons concerned being offered an option to reject the nationality of the successor State remain silent. This is reflected in the expression “not ... against their will” used in paragraph 2.

(5) The restriction of the competence of the successor State under paragraph 2 does not apply when it would result in statelessness. In such case, that State has the right to attribute its nationality to a person referred to in paragraph 1, irrespective of that person's will.

Article 8 34/

Renunciation of the nationality of another State as a condition for attribution of nationality

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Commentary

(1) It is generally accepted that, as a means of reducing or eliminating dual and multiple nationality, a State may require the renunciation of the nationality of another State as a condition for granting its nationality. This requirement is also found in some legislations of successor States, namely in relation to the voluntary acquisition of their nationality upon the succession.

(2) It is not for the Commission to suggest which policy States should pursue on the matter of dual/multiple nationality. Accordingly, the draft articles are neutral in this respect. The Commission is nevertheless concerned with the risk of statelessness related to the above requirement of prior renunciation of another nationality. Similar concerns have been voiced in other forums. 35/

(3) The practice of States indicates that, in relation to a succession of States, the requirement of renunciation applied only with respect to the

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34/ Article 8 corresponds to article 5 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 52.

35/ Accordingly, experts of the Council of Europe concluded that "a State which gives an unconditional promise to grant its nationality is responsible at an international level for the *de jure* statelessness which arises from the release of a person from his or her previous nationality, on the basis of this promise". Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 56.

nationality of another State concerned, but not the nationality of a "third State". 36/ In any event, only the former aspect falls within the scope of the present topic. Article 8 is drafted accordingly.

(4) The first sentence underscores the freedom of each successor State in deciding whether to make the acquisition of its nationality dependent on the renunciation by a person concerned of the nationality of another State concerned. Such is the function of the word "may". The second sentence addresses the problem of statelessness. It does not prescribe a particular legislative technique. It just sets out a general requirement that the condition in question should not be applied in such a way as to render the person concerned stateless, even if only temporarily.

(5) The expression "another State concerned" may refer to the predecessor State, or, as the case may be, to another successor State, as the rule in article 8 applies in all situations of succession of States, except, of course, unification, where the successor State remains as the only "State concerned".

Article 9 37/

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Commentary

(1) As in the case of the preceding article, article 9 contains a provision that derives from a rule of a more general application, which has been adapted to the case of a succession of States. The loss of a State's

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36/ See the Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (31) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

37/ Article 9 corresponds to article 6 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 53.

nationality upon the voluntary acquisition of the nationality of another State is a routine provision in the legislation of States pursuing a policy aimed at avoiding dual or multiple nationality. In the same vein, the Montevideo Convention on Nationality of 26 December 1936 stipulates that any naturalization (presumably voluntary) of an individual in a signatory State carries with it the loss of the nationality of origin. 38/ Likewise, according to the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded within the framework of the Council of Europe, persons who of their own free will acquire another nationality, by means of naturalization, option or recovery, lose their former nationality. 39/

(2) Provisions of this kind are also to be found in legislations adopted in relation to a succession of States. Thus, Article 20 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 provides that "[t]he citizenship of the Republic of Belarus will be lost ... upon acquisition, by the person concerned, of the citizenship of another State, unless otherwise provided by a treaty binding upon the Republic of Belarus ... The loss of citizenship becomes effective at the moment of the registration of the relevant fact by the competent authorities ...". 40/

(3) Article 9 applies in all types of succession of States, except unification, where the successor State remains as the only "State concerned". It recognizes that any successor or predecessor State, as the case may be, is entitled to withdraw its nationality from persons concerned who, in relation to the succession of States, voluntarily acquired the nationality of another State concerned. It leaves aside the question of the voluntary acquisition of the nationality of a third State, as it is beyond the scope of the present topic.

38/ Article 1. Laws concerning nationality, op. cit., p. 585.

39/ Article 1. United Nations Treaty Series , vol. 634, p. 224. The possibility for a State to withdraw its nationality as a consequence of the voluntary acquisition of another nationality is also recognized under Article 7, paragraph 1 a, of the 1997 European Convention on Nationality. Council of Europe document DIR/JUR (97) 6.

40/ See the materials submitted by Belarus.

(4) The rights of the predecessor State (paragraph 1) and that of the successor State (paragraph 2) are spelled out separately for reasons of clarity. As regards paragraph 2, depending on the type of succession of States, the assumption is the voluntary acquisition of the nationality of another successor State (in the case of dissolution) or the voluntary retention of the nationality of the predecessor State (in the case of separation or transfer of part of the territory) or even both (in the event of the creation of several successor States by separation of parts of territory from a predecessor State which continues to exist).

(5) Article 9 does not address the question as to when the loss of nationality should become effective. Since it is for the State concerned itself to decide on the main question, i.e., whether to withdraw its nationality from a person upon the voluntary acquisition of the nationality of another State, it is also for that State to determine when such withdrawal becomes effective. This may occur upon the acquisition of the nationality of another State or later, e.g., after a person concerned has effectively transferred his or her habitual residence outside the territory of the State whose nationality he or she is to lose. 41/ In any event, the State concerned shall not withdraw its nationality from persons concerned who have initiated a procedure aimed at acquiring the nationality of another State concerned before such persons effectively acquire the nationality of the latter State.

Article 10 42/

Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have an appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

41/ This was for instance the case as regards the cession by Finland of a part of its territory to the Soviet Union in 1947. See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89.

42/ Article 10 corresponds to articles 7 and 8 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, pp. 55-56.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

Commentary

(1) Numerous treaties regulating questions of nationality in connection with the succession of States as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

(2) This was, for example, the case of the Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America of 2 February 1848, or the Treaty on the Delimitation of the Frontier between Mexico and Guatemala, of 27 September 1882. 43/ The Peace Treaties adopted after the end of the First World War provided for a right of option mainly as a means to correct the effects of their other provisions on the automatic acquisition of the nationality of the successor State and loss of the nationality of the predecessor State by persons habitually resident in the territories involved in the succession of States. 44/ A right of option was

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43/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (8) of the commentary to draft article 17 proposed by the Special Rapporteur.

44/ See articles 37, 85, 91, 106 and 113 of the Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919 (Materials on succession of States, op. cit., pp. 20, 28-32, and 489), articles 78-82 of the Treaty of Peace between the Allied and Associated Powers and Austria signed at Saint-Germain-en-Laye on 10 September 1919 (G.F. de Martens, Nouveau recueil général de traités , third series, vol. XI, pp. 712-713), respective articles 3 and 4 of the Treaty between the Allied and Associated Powers and Poland signed at Versailles on 28 June 1919, the Treaty between the Allied and Associated Powers and Czechoslovakia and the Treaty between the Allied and Associated Powers and the Serb-Croat-Slovene State, both signed at Saint-Germain-en-Laye on 10 September 1919, as well as the Treaty of Paris between the Allied and Associated Powers and Romania of

also granted in article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947. 45/

(3) Among the documents concerning nationality issues in relation to decolonization, while some contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after stipulating that the categories of persons specified in the First Schedule to that Act automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject. 46/ The free choice of nationality was also envisaged under 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. 47/ 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, as well contained provisions on the right of option. 48/

(4) In recent cases of succession of States in Eastern and Central Europe, where questions of nationality were not resolved by treaty but

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9 December 1919, (ibid., vol. XIII, p. 505, pp. 514-515, p. 524 and p. 531 respectively), articles 40 and 45 of the Treaty of Peace between the Allied and Associated Powers and Bulgaria signed at Neuilly-sur-Seine on 27 November 1919 (Materials on succession of States, op. cit., pp. 38-39), article 64 of the Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon on 4 June 1920 (Martens, op. cit, vol. XII, pp. 440-441), article 9 of the Peace Treaty of Tartu of 11 December 1920 concerning the cession by Russia to Finland of the area of Petsamo (see Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (20) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur), and articles 21 and 31-36 of the Treaty of Lausanne of 1923 (Materials on succession of States, op. cit., pp. 46-47).

45/ Materials on succession of States, op. cit., p. 59.

46/ Section 2, subsection (3). For the remaining provisions of section 2 on the right of option and its consequences, see also subsections (4) and (6); ibid., p. 146.

47/ Ibid., p. 80.

48/ Ibid., p. 87.

solely through the national legislation of the States concerned, the possibility of choice, to the extent permitted by internal law, was in fact established simultaneously in the legal orders of at least two States. Thus, the Law on the Citizenship of the Slovak Republic contained liberal provisions on the optional acquisition of nationality. According to article 3, paragraph 1, 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. 49/ No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.

(5) The function which international law attributes to the will of individuals in matters of acquisition and loss of nationality in cases of succession of States is, however, among the issues on which doctrinal views considerably diverge. 50/ Several commentators have stressed the importance of the right of option in this respect. 51/ While most of them consider that the legal basis of such right can be deduced only from a treaty, others, however, have asserted the existence of an independent right of option as an attribute of the principle of self-determination. 52/

(6) In the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount. However, this does not mean that every acquisition of nationality upon a succession of States must have a consensual basis.

49/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (30) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

50/ There is a substantial body of doctrinal opinion according to which the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. O'Connell (1956), op. cit., p. 250.

51/ See, e.g., Charles Rousseau, Droit international public, tenth edition, Paris, Dalloz, 1984, p. 169 et seq.

52/ See Joseph L. Kunz, “L'option de nationalité”, Recueil des cours ... 1930-I, vol. 31, pp. 109-172; “Nationality and Option Clauses in the Italian Peace Treaty of 1947", American Journal of International Law, vol. 41 (1947), pp. 622-631.

Accordingly, the Commission considered that a right of option has a role to play in resolving problems of attribution of nationality to persons concerned falling within a "grey area" of competing jurisdictions of States concerned.

(7) The term "option" used in the present draft articles does not only mean a choice between nationalities, but is used in a broader sense, covering also the procedures of "opting in", i.e., the voluntary acquisition of nationality by declaration, and "opting out", i.e., the renunciation of a nationality acquired ex lege. Such right of option may be provided under national legislation even without agreement between States concerned.

(8) Paragraph 1 of article 10 sets out the requirement of respect for the will of the person concerned where such person is qualified to acquire the nationality of two or several States concerned. The expression "shall give consideration" implies that there is no strict obligation to grant a right of option to this category of persons concerned. Paragraph 1 does also not prejudice the policy of single or dual nationality which each State concerned may pursue.

(9) Paragraph 2 highlights the function of the right of option as one of the techniques aimed at eliminating the risk of statelessness in situations of succession of States. Such approach was adopted, e.g., in the Burma Independence Act 53/ or in article 6 of the Czech Law on Acquisition and Loss of Citizenship. 54/ The Commission chose to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression "appropriate connection", which should be interpreted in a broader sense than the notion of "genuine link". The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.

(10) Some members, however, considered that, in the absence of objective criteria for determining the existence of an "appropriate connection", paragraph 2 introduced an undesirable element of subjectivity. They therefore believed that there was no justification for departing from the well-established notion of "genuine link". Others considered that what

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53/ See para. (4) of the present commentary.

54/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, footnote 161.

constitutes an “appropriate connection” in a particular case is spelled out in detail in Part II and that the use of the concept of “genuine link” in a context other than diplomatic protection raised difficulties. Still other members believed that an alternative to either expression should be found.

(11) The Commission decided to couch paragraph 2 in terms of an obligation, in order to ensure consistency with the obligation to prevent statelessness under article 3.

(12) Paragraphs 3 and 4 spell out the consequences of the exercise of the right of option by a person concerned as regards the obligations of the States concerned mentioned therein. The obligations of various States involved in a particular succession may operate jointly, when the right of option is based on a treaty between them, but also separately, when the right of option (in the form of both opting-in or opting-out) is granted solely by the legislation of these States. Thus, acquisition upon option of the nationality of one State concerned does not inevitably imply the obligation of the other State concerned to withdraw its nationality. Such obligation exists only if provided in a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounces the nationality of the other in accordance with the provisions of the latter's legislation.

(13) Paragraph 5 stipulates the general requirement of a reasonable time limit for the exercise of the right of option, irrespective of whether it is provided in a treaty between States concerned or in the legislation of a State concerned. State practice shows that the length of the period during which persons concerned were granted the right of option varied considerably. For example, under the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France, of 2 February 1951 the right of option was provided for a period of six months, 55/ while the Treaty between Spain and Morocco of 4 January 1969 regarding Spain's retrocession to Morocco of the Territory of Ifni established a three months period. 56/ In some cases, the

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55/ Ibid., pp. 77-78.

56/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (28) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

right of option was granted for a considerable period of time. 57/ What constitutes a "reasonable" time limit may depend upon the circumstances of the succession of States, but also on the categories to which persons concerned entitled to the right of option belong. In the view of the Commission, a "reasonable time limit" is a time limit necessary to ensure an effective exercise of the right of option.

Article 11 58/

Unity of a family

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Commentary

(1) There are a number of examples from State practice of provisions addressing the problem of the common destiny of families upon a succession of States. The general policy in the treaties concluded after the First World War was to ensure that the members of a family acquired the same nationality as the head of the family, whether the latter had acquired it automatically or upon option. 59/ Article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947, on the contrary, did not envisage the simultaneous acquisition by a wife of her husband's nationality following his exercise of an option. Minor children, however, automatically acquired the nationality for which the head of the family had opted. 60/

(2) The principle of family unity was also highlighted, albeit in a broader context, in the comment to article 19 of the 1929 Harvard Draft Convention on Nationality, where it was stated that "[i]t is desirable in some

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57/ See the Evian Declaration (Algeria-France) of 19 March 1962, United Nations, Treaty Series, vol. 507, pp. 35 and 37.

58/ Article 11 corresponds to article 9 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 72.

59/ See the provisions cited in footnote [44] above.

60/ Materials on succession of States, op. cit., p. 59.

measure that members of a family should have the same nationality, and the principle of family unity is regarded in many countries as a sufficient basis for the application of this simple solution". 61/

(3) The approach usually followed during the process of decolonization was to enable a wife to acquire the nationality of her husband upon application, as evidenced by relevant legal instruments of Barbados, Burma, Botswana, Guyana, Jamaica, Malawi, Mauritius, Sierra Leone and Trinidad and Tobago 62/, or by various treaty provisions, such as annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960 63/ and article 6 of 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. 64/

(4) A concern for the preservation of the unity of the family is also apparent in some national legislations of successor States that emerged from the recent dissolutions in Eastern and Central Europe. 65/

(5) The Commission concluded that, while it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, it is not necessary to formulate a strict rule to this end, as long as the acquisition of different nationalities by the members of a family did

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61/ Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law , vol. 23 (Special Suppl.) (1929), p. 69. The main deficiency of provisions envisaging the simultaneous change of nationality of all the members of a family following the change of the nationality of the head of the family was the fact that they were placing the woman in a position of subordination. In an attempt to overcome this problem, article 4 of the resolution adopted by the Institute of International Law on 29 September 1896 stipulated that, "[u]nless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant." Cited in ibid., p. 75.

62/ Ibid., p. 124, pp. 137-139, pp. 145-146, pp. 203-204, p. 246, pp. 307-308, p. 353, pp. 389-390, and p. 429 respectively.

63/ Ibid., pp. 173-177.

64/ Ibid., p. 87.

65/ For relevant examples, see Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (20) and (21) of the commentary to draft article 9 proposed by the Special Rapporteur.

not prevent them from remaining together or being reunited. Accordingly, the obligation set out in article 11 is of a general nature. For example, whenever a family faces difficulties in living together as a unit as a result of provisions of nationality laws relating to a succession of States, States concerned are under an obligation to eliminate such legislative obstacles. The expression “appropriate measures”, however, is intended to exclude unreasonable demands of persons concerned in this respect.

(6) Some members of the Commission were of the view that article 11 goes beyond the scope of the present topic. Others, however, believed that it is closely connected to nationality issues in relation to the succession of States, as the problem of family unity may arise in such context on a large scale.

(7) Doubts were expressed by some members regarding the applicability of the principle embodied in article 11 due to the different interpretations of the concept of “family” in various regions of the world. Others were of the view that a succession of States usually involves States from the same region sharing the same or a similar interpretation of this concept, so that the said problem did not arise.

Article 12 66/

Child born after the succession of States

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Commentary

(1) Article 12 deals with the problem of children born to persons concerned after the date of the succession of States. It follows from its title that the present topic is limited to questions of nationality solely in relation to the occurrence of a succession of States. Questions of nationality related to situations which occurred prior or after the date of the succession are therefore excluded from the scope of the present draft

66/ Article 12 corresponds to article 1, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 35.

articles. However, the Commission recognized the need for an exception from the rigid definition *ratione temporis* of the present draft articles and for addressing also the problem of children born after the succession of States from parents whose nationality following the succession has not been determined. Given the fact that, in a considerable number of legal orders, the nationality of children depends to a large extent on that of their parents, the uncertainty about the parents' nationality may have a direct impact on the nationality of a child. The latter is generally determined after the final resolution of the problem of the parents' nationality, but, in exceptional situations, can remain undetermined if, for example, a parent dies in the meantime. That is why the Commission considered that a specific provision concerning the nationality of newborn children was useful.

(2) The inclusion of article 12 is justified in the light of the importance that several instruments attach to the rights of children, including their right to acquire a nationality. Thus, principle 3 of the Declaration of the Rights of the Child provides that "[t]he child shall be entitled from his birth to a name and a nationality". Article 24, paragraph 3, of the International Covenant on Civil and Political Rights guarantees every child the right to acquire a nationality. Article 7, paragraph 1, of the Convention on the Rights of the Child provides that "[t]he child shall be registered immediately after birth and shall have [...] the right to acquire a nationality". 67/ From the joint reading of this provision and article 2, paragraph 1, of the Convention, according to which "States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction* without discrimination of any kind" (emphasis added), it follows that, unless the child acquires the nationality of another State, he or she has, in the last instance, the right to the nationality of the State on the territory of which he or she was born.

(3) It is also useful to recall that, according to article 9 of the 1929 Harvard Draft Convention on Nationality, "[a] State shall confer its nationality at birth upon a person born within its territory if such person

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67/ Paragraph 2 of the same article provides, moreover, that "States Parties shall ensure the implementation of these rights [...] in particular where the child would otherwise be stateless".

does not acquire another nationality at birth". 68/ Likewise, article 20 of the American Convention on Human Rights (the "Pact of San José, Costa Rica") of 22 November 1969 stipulates that "[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality".

(4) There is a strong argument in favour of an approach consistent with the above instruments, namely that, where the predecessor State was a party to any such instruments, their provisions could be applicable, by virtue of the rules of succession in respect of treaties, to the successor State, including as regards the situation envisaged in article 12.

(5) Article 12 is limited to the solution of the problem of the nationality of children born within the territory of States concerned. It does not envisage the situation where a child of a person referred to in article 12 is born in a third State. Extending the scope of application of the rule set out in article 12 to situations where the child was born in a third State would mean to impose a duty on States other than those involved in the succession. While it is true that those third States that are parties to the Convention on the Rights of the Child may already have such obligation in any event, it is also true that this problem exceeds the scope of the present draft articles which should remain limited to problems where a "person concerned" is on one side of the legal bond and a "State concerned" on the other.

68/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 14.

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