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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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GE.97-62589 (E)

CONTENTS (continued)

Article 18 89/

Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

Commentary

(1) Paragraph 1 safeguards the right of other States not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link. International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals, but it allows "some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect", because "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question". 90/ In the final analysis, the role of international law concerning nationality in general - at least from the standpoint of general principles and custom - is in a certain sense a negative one. 91/

(2) The need to "draw a distinction between a nationality link that is opposable to other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State [in question]" 92/ has

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89/ Article 18 corresponds to article 16 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 98.

90/ Oppenheim's International Law, op. cit., p. 853.

91/ See Rezek, op. cit., p. 371; Paul Lagarde, La nationalité française, Paris, Dalloz, 1975, p. 11; Jacques de Burlet, "De l'importance d'un 'droit international coutumier de la nationalité'", Revue critique de droit international privé, 1978, vol. 67, p. 307 et seq. See also paragraph (4) of the commentary to the preamble.

92/ Rezek, op. cit., p. 357.

led to the development of the theory of effective nationality. 93/ As regards the specific situation of a succession of States, it is also widely accepted that "[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned". 94/

(3) A number of writers on the topic of the succession of States who hold the above view that the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned base their argument on the decision of the International Court of Justice in the Nottebohm case. 95/ In its judgment, the Court indicated some elements on which an effective nationality can be based. As the Court said, "[d]ifferent factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country

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93/ See Brownlie (1990), op. cit., p. 397 et seq.; H.F. van Panhuys, The Role of Nationality in International Law, Leyden, Sijthoff, 1959, p. 73 et seq.; Paul Weis, Nationality and Statelessness in International Law, second edition, Germantown, Maryland, Sijthoff-Noordhoff, 1979, p. 197 et seq.; de Burlet (1978), op. cit., p. 323 et seq. For Charles Rousseau, the theory of effective nationality is "a specific aspect of the more general theory of effective legal status in international law". (Rousseau, op. cit., p. 112).

94/ O'Connell (1967), op. cit., p. 499.

95/ According to the Court, "a State cannot claim that the rules [pertaining to the acquisition of its nationality that it has laid down] are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States". I.C.J. Reports, 1955, p. 23.

and inculcated in his children, etc". 96/ It is to be noted, however, that the Italian-United States Conciliation Commission, in the Flegenheimer case (1958), concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. 97/

(4) In practice, different tests for determining the competence of the successor State to attribute its nationality on certain persons have been considered or applied, such as habitual residence or birth. Thus, e.g., the Peace Treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence. 98/ But, as has been pointed out, "[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law". 99/ Some authors have favoured the test of birth in the territory affected by the succession as proof of an effective link with the successor State. 100/ In recent dissolutions of States in

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96/ Ibid., p. 22. The Court's judgment admittedly elicited some criticism. It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he or she had no effective link with the State of nationality but only with a third State.

97/ See United Nations, Reports of International Arbitral Awards, vol. XIV, p. 327.

98/ The Treaties of Peace of Saint-Germain-en-Laye and of Trianon, however, adopted the criterion of pertinenza (indigénat), which did not necessarily coincide with habitual residence.

99/ O'Connell (1967), op. cit., p. 518.

100/ In the case of Romana v. Comma, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national. Annual Digest and Reports of Public International Law Cases, vol. 3, No. 195.

Eastern Europe, the main accent was often put on the "citizenship" of the component units of the federal State that disintegrated, which existed in parallel to federal nationality. 101/

(5) The term "link" in paragraph 1 of article 18 is qualified by the adjective "effective". The intention was to use the terminology of the International Court of Justice in the Nottebohm case. 102/ Although the question of non-opposability of nationality not based on an effective link is a more general one, the scope of application of paragraph 1 is limited to the non-opposability of a nationality acquired or retained following a succession of States.

(6) Paragraph 2 deals with the problem that arises when a State concerned denies a person concerned the right to retain or acquire its nationality by means of discriminatory legislation or an arbitrary decision and, as a consequence, such person becomes stateless. As already stated, international law cannot correct the deficiencies of internal acts of a State concerned, even if they result in statelessness. This, however, does not mean that other States are simply condemned to a passive role. There have indeed been instances where States did not recognize any effect to the legislation of another State aimed at denying its nationality to certain categories of persons, albeit in a context other than a succession of States: such was the position of the Allies with respect to the Nazi Citizenship Law denationalizing German Jews or of the international community vis-à-vis the establishment of "bantustans" by South Africa. 103/

101/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) to (10) of the commentary to draft article 20 proposed by the Special Rapporteur.

102/ It must be noted that, in the English version of the Judgment, the Court also uses the expression "genuine connection", the equivalent of which is "rattachement effectif" in the French version. I.C.J. Reports, 1955, p. 23.

103/ See Lauterpacht, op. cit. For the condemnation by the United Nations of the establishment of "bantustans", see General Assembly resolution 31/6 of 26 October 1976.

(7) The provision of paragraph 2 is, however, not limited to the case where statelessness results from an act of a State concerned. It also applies where a person concerned has, by his or her negligence, contributed to such situation.

(8) The purpose of paragraph 2 is to alleviate, not to further complicate, the situation of stateless persons. Accordingly, this provision is subject to the requirement that the treatment of such persons as nationals of a particular State concerned be for their benefit, and not to their detriment. In practical terms, this means that other States may extend to these persons a favourable treatment granted to nationals of the State in question. However, they may not, for example, deport such persons to that State as they could do with its actual nationals (provided that there would be legitimate reasons for such action).

(9) Some members expressed reservations with regard to article 18 as a whole, or with either of its two paragraphs. As regards paragraph 1, it was argued that it dealt with a problem of a more general character which need not be addressed in the specific context of the succession of States. Concerning paragraph 2, certain members were opposed to its inclusion as they considered that it gave too much prominence to the competence of other States. Some stated, however, that they could accept the paragraph if it were explicitly provided that other States could treat a stateless person as a national of a particular State concerned only “for the purposes of their domestic law”.

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Article 19

Application of Part II

States shall take into account the provisions of Part II in giving effect to the provisions of Part I in specific situations.

Commentary

(1) While the provisions of Part I are general, in the sense that they apply to all categories of succession of States, the provisions of Part II indicate how these general provisions may be applied in specific categories of succession. Articles 20 to 26 are mainly intended to provide guidance to States concerned, both in their negotiations, as well as in the elaboration of

national legislation in the absence of any relevant treaty. Thus, States concerned may agree among themselves to apply the provisions of Part I by departing from those in Part II if this would be more appropriate given the characteristics of the particular succession of States.

(2) The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of succession of States. As regards the criteria used for establishing the rules concerning the attribution of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option in Part II, the Commission, on the basis of State practice, has given particular importance to habitual residence. 104/ Other criteria such as the place of birth or the legal bond with a constituent unit of the predecessor State, however, become significant for the determination of the nationality of persons concerned who have their habitual residence outside the territory of a successor State, in particular when they lose the nationality of the predecessor State as a consequence of the latter's disappearance. To refrain from the use of these criteria in such a situation would not be justified, as it could lead to statelessness.

(3) The provisions in Part II are grouped into four sections, each dealing with a specific type of succession of States. This typology follows, in principle, that of the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts. Notwithstanding the fact that the Commission has duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in Part I, it decided to limit the specific categories of succession dealt with in Part II to the following: transfer of part of the

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104/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, paras. 50-81. See also paragraph (4) of the commentary to article 4. As regards the nationality laws of newly independent States, it must be observed that, while some countries applied residence as a basic criterion, others employed criteria such as ius soli, ius sanguinis and race. See Yasuaki Onuma, "Nationality and Territorial Change: In Search of the State of the Law", The Yale Journal of World Public Order, vol. 8 (1981), pp. 15-16; and Jacques de Burlet, Nationalité des personnes physiques et décolonisation (Brussels, Bruylant, 1975), pp. 144-180.

territory, unification of States, dissolution of a State and separation of part of the territory. It did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, mutatis mutandis, in any remaining case of decolonization in the future. Some members, however, would have preferred the inclusion of such additional section.

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20 105/

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

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

Commentary

(1) Section 1 consists of a single article, namely article 20. As indicated by the opening phrase "When part of the territory of a State is transferred by that State to another State", article 20 applies in the case of cessions of territory between two States on a consensual basis. While this phrase refers to standard modes of transfer of territory, the substantive rule embodied in article 20 also applies mutatis mutandis to the situation where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State.

(2) The rule in article 20 is based on the prevailing State practice: 106/ persons concerned who have their habitual residence in

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105/ Article 20 corresponds to article 17 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 8.

106/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (27) of the commentary to draft article 17 proposed by the Special Rapporteur.

the transferred territory acquire the nationality of the successor State and consequently lose the nationality of the predecessor State, unless they opt for the retention of the latter's nationality. 107/

(3) As to the effective date on which persons concerned who have not exercised the right of option become nationals of the successor State, the Commission believed that it depended on the specific character of the transfer: thus, when a transfer of territory involves a large population, such change of nationality should take effect on the date of the succession; on the contrary, in cases of transfers involving a relatively small population, it may be more practical that the change in nationality take place on the expiration of the period for the exercise of the option. The latter scenario is not inconsistent with the presumption in article 4 of automatic change of nationality on the date of the succession, since the said presumption is rebuttable as explained in the commentary to that article.

(4) Whatever the date of the acquisition of the nationality of the successor State, the predecessor State must comply with its obligation to prevent statelessness under article 3, and shall therefore not withdraw its nationality before such date. 108/

107/ See also article 18, paragraph (b) of the 1929 Harvard Draft Convention on Nationality which provided that "[w]hen a part of the territory of a State is acquired by another State [...], the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof." (American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15).

108/ In the same spirit, article 12 of the Venice Declaration provides that "[t]he predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State" (Council of Europe document CDL-NAT (96) 7 rev.)

The 1961 Convention on the Reduction of Statelessness addresses the problem of statelessness in case of a transfer of territory from a different perspective: article 10, paragraph 2, provides that, should a person concerned become stateless as a result of the transfer, and in the absence of relevant treaty provisions, the successor State shall attribute its nationality to such person.

(5) Although there have been instances where the right to opt for the retention of the nationality of the predecessor State was granted only to some categories of persons residing in the transferred territory, the Commission considered that all such persons should be granted this right, even if this clearly entailed a progressive development of international law. Some members, however, considered that this approach was too great a departure from existing practice and that the right of option should be granted only to those persons concerned who had certain specific links with the predecessor State. On the other hand, the Commission did not believe that it was necessary to address in article 20 the question whether there are any categories of nationals of the predecessor State having their habitual residence outside the transferred territory who should be granted a right to opt for the acquisition of the nationality of the successor State. Naturally, the successor State remains free, subject to the provisions of Part I, to offer its nationality to such persons when they have an appropriate connection with the transferred territory.

(6) In the Commission's view, persons concerned who have opted for the nationality of the predecessor State under the terms of article 20 should be deemed to have retained such nationality from the date of the succession. Thus, there would be no break in the continuity of the possession of the nationality of the predecessor State.

SECTION 2

UNIFICATION OF STATES

Article 21 109/

Attribution of the nationality of the successor State

Without prejudice to the provisions of article 7, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

109/ Article 21 corresponds to article 18 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 22.

Commentary

(1) Section 2 also consists of one article, namely article 21. As indicated by the phrase "when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united", article 21 covers the same situations as those described in the commentaries to the draft articles on succession of States in respect of treaties and in respect of matters other than treaties concerning the case of unification of States. 110/ The Commission found it preferable to spell out the two possible scenarios in the text of the article itself.

(2) The unification of States envisaged in article 21 may lead to a unitary State, to a federation or to any other form of constitutional arrangement. It must be emphasized, however, that the degree of separate identity retained by the original States after unification in accordance with the constitution of the successor State is irrelevant for the operation of the provision set forth in this article. 111/ It must also be stressed that article 21 does not apply to the establishment of an association of States which does not have the attributes of a successor State. 112/

(3) As the loss of the nationality of the predecessor State or States is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of such State or States, the main problem addressed in this article is that of the attribution of the nationality of the successor State to persons concerned. In this case, the

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110/ Yearbook ... 1974, vol. II (Part One), p. 253 et seq., document A/9610/Rev.1, commentary to draft articles 30 to 32; Yearbook ... 1981, vol. II (Part Two), p. 43, document A/36/10, commentary to draft article 15.

111/ This was also the view expressed by the Commission in relation to draft articles 30 to 32 on the succession of States in respect of treaties, Yearbook ... 1974, vol. II (Part One), p. 253, document A/9610/Rev.1, para. (2) of the commentary to those articles.

112/ This is for instance the case of the European Union, despite the fact that the Maastricht Treaty on European Union established a "citizenship of the Union". Under the terms of article 8, "[e]very person holding the nationality of a member State shall be a citizen of the Union". The question whether an individual possesses the nationality of a member State is to be settled solely by reference to the national law of that State. International Legal Materials, vol. XXXI (1992), pp. 259 and 365.

term “persons concerned” refers to the entire body of nationals of the predecessor State or States, irrespective of the place of their habitual residence.

(4) Accordingly, article 21 provides that, in principle, the successor State has the obligation to attribute its nationality to all persons concerned. As regards, however, a person concerned who has his or her habitual residence outside the territory of the successor State and also has another nationality, whether that of the State of residence or that of any other third State, the successor State may not attribute its nationality to such person against his or her will. This exception is taken into account by the inclusion of the phrase “Without prejudice to the provisions of article 7”.

(5) The provision in article 21 reflects State practice. Where unification has involved the creation of a new State, such State attributed its nationality to the former nationals of all States that merged, as did, for instance, the United Arab Republic in 1958. 113/ Where unification has occurred by incorporation of one State into another State which has maintained its international personality, the latter extended its nationality to all nationals of the former. 114/ This was the case, for example, when Singapore

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113/ Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that “[n]ationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect.” (Text reproduced in Eugène Cotran, “Some legal aspects of the formation of the United Arab Republic and the United Arab States”, The International and Comparative Law Quarterly, vol. 8 (1959), p. 374.) This provision was re-enacted in article 1 of the Nationality Law of the United Arab Republic.

114/ The 1929 Harvard Draft Convention on Nationality only dealt with the case of unification by incorporation. Paragraph (a) of article 18 provided that, “[w]hen the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State.” (American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15). The comment to this provision stressed that this rule “is applicable to naturalized persons as well as to those who acquired nationality at birth”. (Ibid., p.61.)

joined the Federation of Malaya in 1963. 115/ The Commission believed that the rule set forth in article 21 is sufficiently broad as to cover the obligations of a successor State under both scenarios.

(6) The Commission was of the view that article 21 embodies a rule of customary international law. In any event, the successor State, which after the date of the succession, is the only remaining State concerned cannot conclude an agreement with another State concerned which would depart from the above provision. It would be, moreover, difficult to imagine how the successor State could "give effect to the provisions of Part I" in a different manner.

115/ Upon unification, persons who had been citizens of Singapore acquired the citizenship of the Federation, but also maintained the status of citizens of Singapore as one of the units constituting the Federation (Goh Phai Cheng, Citizenship Laws of Singapore (Singapore, Educational Publications), pp. 7-9. See the materials submitted by Singapore.) For other cases of unification by incorporation, namely the incorporation of Hawaii into the United States and the reunification of Germany, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paragraphs (2), and (5) to (6), respectively, of the commentary to draft article 18 proposed by the Special Rapporteur.