



General Assembly

Distr.
LIMITED

A/CN.4/L.539/Add.7
10 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
12 May - 18 July 1997

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

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PREAMBLE		

Draft articles on Nationality of natural persons
in relation to the succession of States

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States are of concern to the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

Commentary

(1) The title "Draft articles on Nationality of natural persons in relation to the succession of States" is in conformity with the mandate which the General Assembly entrusted to the Commission under the terms of resolution 51/160, in which the Assembly invited the Commission to undertake a substantive study of the topic entitled "Nationality in relation to the succession of States" and to give priority to the consideration of the question of the nationality of natural persons.

(2) In the past, the Commission generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. In this instance, however, the Commission decided to follow the precedent of the two Draft Conventions on the Elimination of Future Statelessness, and on the Reduction of Future Statelessness, which were both submitted with a preamble. ¹

(3) The first preambular paragraph indicates the raison d'être of the present draft articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. Such concerns have re-emerged in connection with recent cases of succession of States. A number of international bodies have been dealing with this question. ²

(4) The second preambular paragraph expresses the point that, although nationality is essentially governed by national legislation, it is of direct concern to the international legal order. The existence of limits to the competence of States in this field has been established by various authorities. In its advisory opinion in the case concerning

¹See Yearbook ... 1954, vol. II, p. 143. The Draft Declaration on Rights and Duties of States also included a draft preamble. See Yearbook ... 1949, p. 287.

²Thus, the Council of Europe adopted on 14 May 1997 a European Convention on Nationality containing, inter alia, provisions regarding the loss and acquisition of nationality in situations of State succession, Council of Europe document DIR/JUR (97) 6. Another organ of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), adopted in September 1996 a Declaration on the Consequences of State Succession for the Nationality of Natural Persons (hereinafter "Venice Declaration"), Council of Europe document CDL-NAT (96) 7 rev. As for the problem of statelessness, including statelessness resulting from a succession of States, it appears to be of growing interest to the Office of the United Nations High Commissioner for Refugees (UNHCR). For a review of the recent activities of UNHCR in this field, see Carol A. Batchelor, "UNHCR and Issues Related to Nationality", Refugee Survey Quarterly, vol. 14, No. 3, pp. 91-112. See also the report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1, para. 20), and the report of the Subcommittee of the Whole on International Protection (A/AC.96/858, paras. 21-27), as well as General Assembly resolution 51/175 of 12 December 1996, entitled "Office of the United Nations High Commissioner for Refugees".

Nationality Decrees Issued in Tunis and Morocco , ³ the Permanent Court of International Justice emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending upon the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion might be restricted by obligations which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law. ⁴ Similarly, article 2 of the 1929 Harvard Draft Convention on Nationality asserts that the power of a State to confer its nationality is not unlimited. ⁵ Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only "insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality". ⁶ Moreover, the Commission considered that, in the specific context of a succession of States, international law has an even larger role to play, as such situation may involve a change of nationality on a large scale.

(5) Further international obligations of States in matters of nationality emerged with the development of human rights law after the Second World War, although the need for the respect of the rights of individuals had also been pointed out in connection with the preparations for the 1930 Hague Conference. ⁷ As it was stated more recently by the Inter-American Court of

³P.C.I.J., 1923 , Series B, No. 4, p. 24.

⁴See also Sir Robert Jennings and Sir Arthur Watts, eds., Oppenheim's International Law , 9th ed., vol. I (London, Longman, 1992), p. 852.

⁵American Journal of International Law , vol. 23 (Special Suppl.) (1929), p. 13.

⁶See Laws concerning nationality, United Nations Legislative Series , ST/LEG/SER.B/4, p. 567.

⁷"The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." League of Nations Conference for the Codification of International Law, Bases for Discussion , vol. I (Nationality), C.73.M.38. 1929.V, Reply of the United States of America, p. 16.

Human Rights, "the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; [the powers enjoyed by the States in that area] are also circumscribed by their obligations to ensure the full protection of human rights".⁸

(6) As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided. Accordingly, the Commission found it appropriate to affirm in the third preambular paragraph that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account.⁹

(7) The fourth, fifth and seventh preambular paragraphs recall international instruments which are of direct relevance to the present draft articles. The instruments referred to in the seventh preambular paragraph are the product of the earlier work of the Commission in the two fields of nationality and of succession of States.

(8) The sixth preambular paragraph expresses the fundamental concern of the Commission in the protection of the human rights of persons whose nationality may be affected following a succession of States. State practice has focused on the obligation of the new States born from the territorial changes to protect the basic rights of all inhabitants of their territory without distinction.¹⁰ The Commission, however, concluded, that, as a matter of principle, it was important to safeguard basic rights and fundamental freedoms of all persons whose nationality may be affected by a succession, irrespective of the place of their habitual residence.

(9) The eighth preambular paragraph underlines the need for the codification and progressive development of international law in the area under consideration, i.e. nationality of natural persons in relation to the

⁸Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, vol. 79, para. 32.

⁹See also the first preambular paragraph of the Venice Declaration, Council of Europe document CDL-NAT (96) 7 rev. and the fourth preambular paragraph of the European Convention on Nationality, Council of Europe document DIR/JUR (97) 6.

¹⁰ See Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (1) to (3), and (5) of the commentary to draft article 11 proposed by the Special Rapporteur.

succession of States. It is interesting to note that, as early as 1956, D.P. O'Connell, while recognizing that "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory affected by the succession] is one of the most difficult problems in the law of State succession", stressed that "[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is urgently demanded".¹¹ The wording of this preambular paragraph is essentially based on the equivalent paragraphs of the preambles to the Vienna Conventions on Succession of States of 1978 and 1983.

¹¹ D.P. O'Connell, The Law of State Succession (Cambridge, United Kingdom, Cambridge University Press, 1956), pp. 245 and 258.