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Summary record of the 2515th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
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90. Mr. ROSENSTOCK said that it would create confusion to delete the phrase "As explained in paragraph (1)". The last sentence merely repeated in somewhat flamboyant terms what had been said in paragraph (1). He was prepared to accept it if the reference was maintained.

91. Mr. GALICKI (Rapporteur) said he supported the points made by the Chairman and Mr. Rosenstock. Paragraph (5) brought the analysis begun in paragraph (1) to a logical conclusion. The new attitude to habitual residence had only recently developed and the reference to the twentieth century, though it might be considered "flamboyant", was in his view quite appropriate.

92. The CHAIRMAN asked whether the Commission agreed to accept the following version of paragraph (5):

> "(5) Given this situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution. As explained in paragraph (1), the Commission was, however, firmly of the view that a succession of States as such could not, at the end of the twentieth century, affect the status of persons concerned as habitual residents."

It was so agreed.

The commentary to article 13, as amended, was adopted.

Commentary to article 14 (Non-discrimination)

93. Mr. DUGARD said that paragraph (2) rightly mentioned a number of conventions, but omitted a reference to the very pertinent International Convention on the Elimination of All Forms of Racial Discrimination. In particular, article 5, subparagraph (*d*) (iii), of that Convention required States parties to guarantee the right of everyone without distinction to enjoy the right to nationality as a civil right.

94. Mr. MIKULKA (Special Rapporteur) said he could not recall why he had omitted the reference and agreed on reflection that it was highly relevant.

95. The CHAIRMAN noted that a reference to the International Convention on the Elimination of All Forms of Racial Discrimination would be inserted in paragraph (2). He added that the commentary to article 14 had demanded a major effort of objectivity on the part of the Special Rapporteur and faithfully reflected the views of certain members of the Commission.

96. Mr. BENNOUNA said that he was unhappy with the reference in the third sentence of paragraph (4) to the jurisprudence of the Inter-American Court of Human Rights, according to which it was within the sovereignty of a State to give preferential treatment to aliens who would assimilate more easily. That was a highly controversial opinion and he disagreed with the last sentence of the paragraph, which stated that the principle applied by the Court appeared to be valid in the context of State succession. He viewed the Court's decision as a form of discrimination against aliens and proposed that the paragraph should end with the second sentence.

97. The CHAIRMAN, speaking as a member of the Commission, said that he, too, was in favour of deleting the last two sentences.

98. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) agreed with Mr. Bennouna that the Commission should not be seen as trying to promote discrimination through preferential treatment. The Drafting Committee had accepted the example in the light of the Special Rapporteur's explanation. Where a State's attitude was that everyone was welcome to its nationality but some were more welcome than others, there could be no objection.

99. The CHAIRMAN said it was precisely that attitude which seemed unacceptable.

100. Mr. MIKULKA (Special Rapporteur) said that, if the last two sentences were deleted, the preceding sentence would be left without any form of illustration or interpretation. He was surprised that the Commission experienced no difficulty with that sentence, which raised the question of whether a State could use the criteria referred to in article 14 to enlarge the circle of individuals entitled to acquire its nationality. It had even formed the basis of a proposal by Mr. Economides in another context. If members were happy with the truncated paragraph, the issue could be discussed later in the light of an amendment proposed by Mr. Economides.

The meeting rose at 1.05 p.m.

2515th MEETING

Wednesday, 16 July 1997, at 3.15 p.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Draft report of the Commission on the work of its forty-ninth session (*continued*)

CHAPTER IV. *Nationality in relation to the succession of States* (continued) (A/CN.4/L.539 and Add.1-7)

C. Text of the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading (*continued*) (A/CN.4/L.539/Add.1-7)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.539/Add.2-7)

Commentary to article 14 (Non-discrimination) (*concluded*) (A/CN.4/L.539/Add.4)

1. The CHAIRMAN informed members that the Special Rapporteur had agreed to keep only the first two sentences of paragraph (4).

2. Mr. DUGARD asked whether the reference to the jurisprudence cited in the deleted passage could not be placed in a footnote. It was important for the Commission to indicate that it was aware of the case even if it did not approve of the jurisprudence.

3. The CHAIRMAN said that it could indeed be placed in a footnote which would read: "See Inter-American Court of Human Rights, advisory opinion OC-4/84 of 19 January 1984, *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (ILR, vol. 79, p. 282)."

4. Mr. ECONOMIDES proposed that a new sentence should be inserted after the first sentence in paragraph (5) to read: "They [some members] mentioned, *inter alia*, the Venice Declaration, which expressly deals with this case." Moreover, a footnote, would explain: "This provision provides that: 'Those persons to whom this nationality has been granted shall enjoy perfect equality of treatment with the other nationals of the successor State.'"

5. Mr. ROSENSTOCK said that, if he recalled rightly, only one member had mentioned the Venice Declaration. Moreover, article 1, the most important of the entire draft, already contained a very strong clause stipulating: "irrespective of the mode of acquisition of that nationality".

6. The CHAIRMAN suggested a middle course that would consist in reproducing the whole of the proposal in a footnote reading: "One member drew attention to provision 8 (*c*) of the Venice Declaration, which expressly deals with this case.", to be followed by an actual quotation of provision 8 (*c*).

7. Mr. MIKULKA (Special Rapporteur) proposed that the Commission should keep to the usual method for citing references that was employed in all other paragraphs.

8. The CHAIRMAN said he endorsed that view and, if he heard no objection, he would take it that the Commission agreed to insert a footnote reading:

> "See in this respect provision 8 (*c*) of the Venice Declaration which addresses this point expressly and provides that '[t]hose persons to whom [the nationality of the successor State] has been granted shall enjoy perfect equality of treatment with the other nationals of the successor State'."

It was so agreed.

The commentary to article 14, as amended, was adopted.

Commentary to article 15 (Prohibition of arbitrary decisions concerning nationality issues)

The commentary to article 15 was adopted.

Commentary to article 16 (Procedures relating to nationality issues)

9. The CHAIRMAN, speaking as a member of the Commission, said that the word "(unpublished)" should be inserted at the end of the first footnote to paragraph (2). Moreover, at the end of paragraph (2) of the French version, the phrase *n'est pas censée indiquer deux types de procédure qui s'excluent mutuellement* should be replaced by *ne signifie pas que les deux types de procédure s'excluent mutuellement.*

It was so agreed.

10. Mr. SIMMA, referring to the footnote to paragraph (1), proposed that the introductory phrase "It is interesting to note that", which seemed somewhat superficial in view of the gravity of the question, should be deleted.

It was so agreed.

11. Mr. BENNOUNA pointed out that the legal system in a number of countries comprised two categories of jurisdiction—administrative, and judicial within the strict meaning of the term. He proposed that, to give a better explanation of the meaning of "administrative review", the third sentence of paragraph (2) should be reworded to read: "The existence of a judicial review process did not exclude the possibility of a discretionary review by the administration".

12. Mr. THIAM said he endorsed that suggestion.

13. The CHAIRMAN pointed out that the question had not been taken up during the consideration of article 16. Moreover, in that connection he would point to the value of the adjective "prior", in the phrase "prior recourse to an administrative review process".

14. Mr. MIKULKA (Special Rapporteur) said that, needless to say, he had not reflected in the commentary discussions which had not taken place in the Commission.

15. Mr. GOCO said that the purpose of paragraph (2) was to enunciate the principle of exhaustion of administrative remedies before a matter was referred to a court. However, in the English version, the expression "two mutually exclusive processes" was redundant and the last part of the sentence should be reworded to read: "is not intended to suggest exclusive processes", since the basic idea was that the two types of processes could not be initiated simultaneously, but that one did not preclude the other.

16. Mr. SIMMA said the Special Rapporteur had certainly not wanted to enter into the subtleties of the French legal system and, in his opinion, had simply confined himself to stipulating, in article 16 and in the commentary, that there should be an effective administrative or judicial review process, irrespective of the system of municipal law. For his own part, he endorsed the Chairman's suggestion to recast the last sentence of paragraph (2) and pro-

posed that the English version might read "that the two possibilities exclude each other", so as to avoid the word "mutual".

17. The CHAIRMAN, taking up the proposal made by Mr. Simma, suggested that the French version should read: *ne signifie pas que ces deux procédures s'excluent l'une l'autre.*

18. Mr. PAMBOU-TCHIVOUNDA said he supported that suggestion. In addition, a footnote indicating that the Commission's comment was made regardless of the particular features of systems of municipal law, might meet Mr. Bennouna's concern.

19. Mr. LUKASHUK said that the Russian version of the commentary was perfectly accurate and, moreover, tied in very well with the last footnote to paragraph (2). He was not opposed to the Chairman's suggestion, but would point out that the definition of administrative procedure was a matter of the internal competence of States. Over and above the language problem, it was French law that was interfering with the work of the Commission, which should not continue along that path.

20. Mr. BENNOUNA pointed out that more than half of the countries in the world had two kinds of jurisdiction. Accordingly, the word "judicial" should be replaced by "jurisdictional", particularly in the second sentence of paragraph (2), which would read "In some cases this encompassed jurisdictional review; in others it did not". Moreover, the word "effective" in article 16, was superfluous. He would also emphasize the relevance of Mr. Goco's remark, which was in keeping with a general principle of law, namely, the administration should be allowed the opportunity to redress the consequences of its act before the matter was brought to court.

21. The CHAIRMAN said there could be no question of reconsidering the article itself, which had been adopted and which included the words "judicial" and "effective".

22. Mr. ADDO said that, as far as he was concerned, the expression "administrative or judicial review" was very clear and meant that the adoption of one kind of process did not preclude the adoption of the other. He was opposed to replacing "judicial" by "jurisdictional", which could well be a source of confusion, especially as there was nothing comparable in common law to a "jurisdictional review" in the context of article 16.

23. Mr. LUKASHUK said that he wholeheartedly supported the comments by Mr. Addo. In Russian law, jurisdiction meant the State's recognized authority to adopt rules and to ensure that they were respected, not necessarily through the courts. The use of the term "jurisdictional" in the commentary to article 16 would be meaningless.

24. Mr. THIAM said that, in the absence of administrative jurisdictions, the notion of "judicial review" might be clear in common law. However, from the standpoint of legal systems based on the French system, it was preferable to use the adjective "jurisdictional", which related to contentious proceedings, regardless of the court or tribunal concerned. That should be made clear in the commentary.

25. Mr. RODRÍGUEZ CEDEÑO said that, in Spanish, the text was perfectly clear and did not call for any change.

26. Mr. ROSENSTOCK, supported by Mr. ADDO, pointed out that the expression "administrative or judicial review" appeared in the quotation from article 12 of the European Convention on Nationality contained in the last footnote to paragraph (2). It was difficult to see why the same expression could not be used in the commentary to article 16.

27. The CHAIRMAN said that it was not simply a problem of language but, for Francophones, genuinely a conceptual problem.

28. Mr. PAMBOU-TCHIVOUNDA suggested that a formulation should be inserted at the end of the last footnote to paragraph (2) to indicate that the word "judicial" signified the judge competent to conduct the review, whether administrative or judicial.

29. Mr. ECONOMIDES proposed that, in order to settle the problem, the wording of paragraph (2) should be changed by deleting the second sentence and replacing the third sentence by a new one reading: "This review, depending on the legislation of each country, may be conducted by the administration itself or by jurisdictions of an administrative or judicial character".

30. Mr. DUGARD said it appeared that Mr. Economides' proposal was satisfactory to Francophones and acceptable to Anglophones. It might therefore be a suitable compromise.

31. The CHAIRMAN asked Mr. Economides to prepare, together with Mr. Pambou-Tchivounda, a written proposal for the Commission to examine later.

It was so agreed.

Commentary to article 17 (Exchange of information, consultation and negotiation)

The commentary to article 17 was adopted.

Commentary to article 18 (Other States) (A/CN.4/L.539/Add.5)

32. The CHAIRMAN, supported by Mr. MIKULKA (Special Rapporteur) and Mr. Sreenivasa RAO (Chairman of the Drafting Committee) proposed that the meaning of the phrase "the right of other States", in the first line of paragraph (1), should be made clear by saying "the right of States other than the State which attributed nationality".

It was so agreed.

33. Mr. BENNOUNA observed that paragraph (3) started with the words "A number of writers", when only ICJ was quoted in the relevant footnotes. In his opinion, both of those footnotes should be expanded by citing other sources and other writers.

34. Mr. MIKULKA (Special Rapporteur) explained that, for the purposes of brevity, he had not wished to cite the very many authors, in European bodies alone, who

referred to the *Nottebohm* case. If the Commission thought it worthwhile he would give other bibliographical references in the footnotes.

It was so agreed.

35. Mr. ECONOMIDES proposed the insertion of a new sentence between the first and second sentences of paragraph (9), reading: "It was stated, in particular, that it would be difficult to apply the article in practice and that this disposition would allow States to take the law into their own hands".

It was so agreed.

The commentary to article 18, as amended, was adopted.

Commentary to article 19 (Application of Part II)

36. The CHAIRMAN, speaking as a member of the Commission, said there appeared to be two lacunae in paragraph (1). First, it did not explain what was meant by the fact that States "shall take into account" the provisions of Part II. Secondly, it did not draw a clear distinction between the articles in Part I, which set out principles which were obligatory for all States, and those in Part II, which simply provided States with general guidelines. Perhaps it would be possible to add a sentence stating that "The purpose of articles 20 to 26 is essentially to guide States".

37. Mr. ECONOMIDES said that he had experienced the same concern. It should be made plain that the essential difference between Parts I and II of the draft articles was that Part II did not contain recommendations properly speaking, but guiding principles on which States could draw in a case of State succession.

38. Mr. ROSENSTOCK said that the confusion to which the Commission's attention had just been drawn lay in the fact that the original distinction between Parts I and II had changed in the course of the deliberations. In the beginning, it had been a distinction in the normative value: Part I had included compulsory provisions, and Part II optional provisions. That distinction had then given way to a difference between general situations and particular situations. At the current stage in the work, it would be difficult to revert to the initial normative distinction.

39. Mr. MIKULKA (Special Rapporteur) said that the distinction between the two parts was not so clear. First, Part I in the English version often contained the "should" form of the verb, which clearly showed that recommendations were sometimes involved. Secondly, some provisions in Part II were plainly a reflection of rules of law that were in force. In the introduction to his third report (A/CN.4/480 and Add.1)[1] he had shown the very marked difference between Parts I and II at the normative level. However, he had been convinced by the subsequent deliberations and currently considered that there was a kind of continuum between Parts I and II.

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

40. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) added that the interpenetration of the two parts lay in the confusion regarding the use of the words "shall" and "should" in the English version. Some mystery should be allowed to remain, in his opinion. States would thus enjoy full latitude in defining their position in a real case of State succession.

41. The CHAIRMAN, speaking as a member of the Commission, said it was his understanding that the English-speaking members had agreed on a strict use of "shall" and "should". It was regrettable to learn that there was some artistic confusion in that regard.

42. He said that, if he heard no objection, he would take it that the Commission agreed to adopt the commentary to article 19.

The commentary to article 19 was adopted.

Commentary to article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

43. Mr. ECONOMIDES said that the first sentence of paragraph (5) should be corrected, for it stated that there were "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. Actually, history showed that, in the overwhelming majority of cases, the right of option was limited.

44. He proposed that the second sentence should be replaced by the following:

> "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 have incontestable effective connections with the predecessor State which imply a will to retain the nationality of that State. On the other hand, it would not be appropriate to grant the right of option to persons who have the same links with the successor State."

That addition was intended to explain why the right of option should be limited.

45. Further to a brief exchange of views in which Mr. SIMMA, Mr. ROSENSTOCK, Mr. ECONOMIDES and Mr. MIKULKA (Special Rapporteur) took part, it was proposed that the beginning of the first sentence, "Although there have been instances ", should be replaced by "Although there have been a number of instances".

It was so agreed.

46. Further to a brief exchange of views in which Mr. ROSENSTOCK, the CHAIRMAN, Mr. Sreenivasa RAO (Chairman of the Drafting Committee) and Mr. GALICKI (Rapporteur) took part, it was proposed that, in Mr. Economides' proposal, the phrase "Some members, however, considered that . . ." should be replaced by "According to one view . . .".

It was so agreed.

47. Mr. MIKULKA (Special Rapporteur) said that, in Mr. Economides' amendment, the two really new

elements that could pose a problem were, first, the "incontestable effective connections", terms which the Commission had never used in the draft, and above all, the expression "which imply a will to retain the nationality", which added yet another level of presumption to an already complex situation.

48. The CHAIRMAN said it was his understanding that the Commission was ready to approve paragraph (5) with the addition proposed by Mr. Economides, as orally amended.

It was so agreed.

49. Mr. ECONOMIDES said he wondered why the commentary included current paragraph (6), for the expression "should be deemed" introduced a presumption that had nothing to do with the text of the article. Article 20 said, in substance, that the successor State attributed its nationality to persons who had their habitual residence in the transferred territory, unless they otherwise indicated in exercising their right of option. The mere mention of a right of option implied that a change of nationality had already taken place, since the rule was that attribution of the nationality of the successor State was automatic; the right of option was exercised a posteriori. He did not see which "magic presumption" made it possible to consider that the persons concerned had not changed nationality at the time of the transfer of the territory and therefore retained the nationality of the predecessor State. In his view, paragraph (6) should be deleted or entirely recast in accordance with the letter of article 20.

50. Mr. MIKULKA (Special Rapporteur) said he failed to see why Mr. Economides considered that paragraph (6) contradicted article 20. According to the article,

> ". . . 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 meant that if the persons in question otherwise indicated by exercising their right of option, the provisions of article 20 did not apply to them, in other words, the successor State did not attribute them its nationality and the predecessor State did not withdraw its own.

51. The use of the expression "should be deemed to have retained such nationality" in paragraph (6) of the commentary had been thought necessary in order to link it with article 4 of Part I, which, on the initiative of Mr. Brownlie, was currently entitled "Presumption of nationality". The general presumption of nationality in article 4 was taken to be "subject to the provisions of the present draft articles", in other words, subject to the case envisaged in the second part of article 20.

52. Mr. HAFNER said he was in favour of deleting paragraph (6). The question of the link with article 4, mentioned by the Special Rapporteur, could be left aside for the time being, on the understanding that the Commission would revert to it on second reading.

53. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that it was to reflect the debate in the Drafting Committee that it had been thought necessary to establish some continuity with article 4 and the Special Rapporteur had therefore drafted paragraph (6) in those terms. He saw no reason to delete it.

54. The CHAIRMAN suggested it could be made clear that the question was an exception to the presumption set out in article 4.

55. Mr. ROSENSTOCK suggested that it might be possible to insert a formulation after "article 20" stating "thereby cancelling the presumption in article 4".

56. Mr. CANDIOTI said that, like Mr. Hafner, he would prefer the whole of the paragraph to be deleted. However, if the Commission decided to keep it, he hoped it would be made more explicit by adding a formulation of the type proposed by Mr. Rosenstock.

57. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) proposed another explanatory formula which might also be inserted after "article 20", reading "and thus placing themselves outside the purview of article 4".

58. Mr. MIKULKA (Special Rapporteur) said that he preferred the formulation proposed by Mr. Rosenstock, which seemed more precise and had the advantage of echoing paragraph (2) of the commentary to article 4, under the terms of which the general presumption of nationality contained in that article was a rebuttable presumption involving some exceptions.

59. Mr. ECONOMIDES said that such an explanation, however useful, did not solve the problem of the "reasonable time limit" provided for in article 10, paragraph 5, for the exercise of the right of option. The existence of that time limit, and hence of a gap between the date of the succession and the time at which the persons concerned were called upon to opt for a particular nationality, seemed to have been totally overlooked.

60. The CHAIRMAN noted that it was a question in paragraph (6) of an exception not to article 10 but to article 4. Consequently, the provisions of article 10 concerning a reasonable time limit still applied.

61. Mr. MIKULKA (Special Rapporteur) said he wished to confirm the Chairman's statement. Actually, the question of a time limit did not arise in article 20 and hence there was no need to discuss the matter in the commentary to the article. In view of the discussion, he was in favour of retaining paragraph (6), with the addition of the proposal by Mr. Rosenstock, which made things much clearer.

62. The CHAIRMAN, speaking as a member of the Commission, said that he shared the Special Rapporteur's view, something which also seemed to be true of most members of the Commission.

It was so agreed.

The commentary to article 20, as amended, was adopted.

The meeting rose at 6.10 p.m.