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Report of the International Law Commission on the work of its fifty-first session (1999)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat

Addendum

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F. Nationality of natural persons in relation to the succession of States

1. General comments

189. Several delegations welcomed the adoption by the Commission of the draft articles and referred to it as an illustration of the Commission's ability to complete its consideration of a topic in a timely and efficient manner.

190. Several delegations supported the changes which had been introduced by the Commission on second reading. However, a view was also expressed regretting that other proposed changes contained in document A/CN.4/493 had not been adopted by the Commission.

191. It was noted that a distinction had to be made between provisions of a customary nature and those that would constitute progressive development. Furthermore, it was stated that the provisions having the character of jus cogens should be separated from the rest.

192. It was considered that the draft articles struck an appropriate balance between the right of an individual to a nationality and the right of a State to grant its nationality.

193. Several delegations particularly welcomed the consistent focus throughout the draft articles on human rights, the prevention of statelessness, the prohibition of discrimination on any grounds and the provisions expressly prohibiting arbitrary decisions on nationality issues.

194. The view was expressed that, although decolonization had largely been completed, there were still some colonial situations to which the rules on nationality contained in the draft articles could apply.

195. The draft articles were deemed to reflect State practice as well as the latest developments in international law. Nonetheless, there was also the view that the draft articles did not always reflect the current state of international law. In particular, it was not clear that every person had a right to a nationality under general customary law, although such a right would be desirable.

196. A view was expressed against granting a person concerned the right to choose a nationality after a succession had taken place, as this could give rise to conflicts between States. Instead preference was voiced for the principle that a person who had the nationality of the predecessor State and who resided in the territory affected by the succession should acquire the nationality of the successor State on the date of the succession, with habitual residence as the vital factor linking the natural person and the successor State.

2. Comments on specific draft articles

197. Support was expressed for article 1, which reinforced the right to a nationality and also gave it a precise scope and applicability.

198. There was a view that the definition of "succession of States" contained in article 2, subparagraph (a), although taken from the 1978 and 1983 Vienna conventions, was not entirely appropriate since, in the case of the succession of States applied to nationality, the change in sovereignty over the territory in question is more important than the responsibility for the international relations of said territory. Furthermore, it was felt that a definition of "habitual residence" might be included in article 2.

199. As regards article 3, there was a view that, in the case of succession, the line between that which was legal and illegal was quite difficult to draw and that the implications of limiting the draft articles to situations of succession in accordance with international law required further reflection since the rules might be of paramount importance in irregular situations.

200. A strong objection was made regarding the inclusion in the commentary on article 3 of the ideas that had been contained in former article 27. In that connection, it was stated that the last paragraph of the commentary might lead to the conclusion that the aggressor could give its nationality to the victim population, something which was contrary to the two Vienna conventions on succession of States.

201. In the case of article 5, wherein the habitual residence constituted the criterion for the presumption of nationality, preference was expressed for adding the principle of effective nationality, which was based on the existence of an effective link between the individual and the State.

202. The view was expressed that there seemed to be a lack of consistency between article 6, which required States to adopt legislation on nationality and related

issues, and subsequent draft articles in which States were called upon to fulfil a variety of obligations. In that regard, the question was raised as to whether those obligations were supposed to be incorporated in national legislation or were to be fulfilled regardless of what the legislation provided.

203. The point was made that draft article 8, paragraph 2, could be redrafted since it was not appropriate to talk of attribution of nationality "against the will of the persons concerned" as though nationality could be imposed upon persons.

204. Support was expressed for articles 9 and 25, which entitled the successor State to make the attribution of its nationality dependent on the renunciation of nationality, and require the predecessor State to withdraw its nationality from a person who opted for the nationality of the successor State. It was noted that the same rule should apply *mutatis mutandis* in relation to the nationality of other successor States in the event of dissolution.

205. There was a view that more explicit, less debatable, criteria for determining the existence of an effective link was necessary since such an approach would help to prevent any misinterpretation that might adversely affect developing countries.

206. With regard to draft article 11, there was a proposal to precede paragraph 1 by a provision obliging the States concerned to take unilateral and collective measures to create conditions under which persons eligible to acquire the nationality of two or more States concerned could express their will freely.

207. The point was also made that State practice did not confirm the general duty of States concerned to grant an option to individuals affected by State succession. In that regard, it was noted that those proposals constituted an expression of the progressive development of international law in that field.

208. The view was expressed that the formulation of article 11, paragraph 2, was particularly significant and fully reflected the importance ascribed to the prevention of statelessness.

209. As regards the prevention of statelessness, the point was raised that some domestic legislations recognized a right of expatriation and the right to revoke fraudulently obtained naturalization, even if the result was statelessness.

210. Several delegations voiced their support for article 12, which seeks to promote family unity. As regards the wording "appropriate measures", preference was expressed for a more precise and affirmative drafting of the provision which would state the principle of family unity and address the matter of unreasonable demands as the exception that it would be. The point was also made that the provision could have contained even stricter wording allowing all members of a family group to acquire the same nationality if they would otherwise have difficulties being united.

211. As regards article 13 on the right to a nationality of a child born after the succession of States, the view was expressed that, in lieu of providing for the right to the nationality of the State on whose territory the child was born, it would have been preferable to allow the child to acquire the nationality of its parents. Furthermore, the point was made that article 13 did not deal properly with cases where the child of a person concerned who had not acquired any nationality was born on the territory of a third State and that the criterion of birthplace should not be the only one applied to children.

212. As regards the use of habitual residence as the main criterion for establishing a presumption of nationality, it was noted that habitual residence per se did not form a sufficient basis for the legal ties between a State and an individual which resulted from having a nationality, and that therefore it was quite fortunate that the draft articles allowed for the rebuttal of the presumption. Furthermore, it was also suggested that making habitual residence the dominant criterion would be counter to the recognition in the second preambular paragraph that nationality matters were essentially governed by internal law.

213. Endorsement was also expressed for the general principal that the status of persons concerned as habitual residents should not be affected by the succession of States.

214. Some delegations took the view that, in the case of the dissolution of a federal State, the main criterion for attribution of nationality should be the citizenship of the former constituent republics. In that connection, a proposal was made to include a provision, possibly as a new article 22, stipulating the recognition of the nationality of constituent units of federal States in the event of their dissolution. In that regard, it was noted

that habitual residence would nonetheless serve as an auxiliary criterion, subject to the domestic legislation of the successor State. The status provided for in article 14 was thus considered to be too general.

215. In connection with article 15, there was a proposal to replace the phrase "by discriminating on any ground" with "by applying to them any rules or practice that discriminate on any grounds whatsoever".

216. The point was made that clarification was called for on whether the provision in article 17 requiring effective review of decisions on nationality applied also to discrimination in matters of nationality, which was covered by article 15, and to arbitrary deprivation of nationality, contemplated in article 16.

217. As regards article 19 of the draft articles adopted on first reading, the view was expressed that its deletion had resulted in presenting the remaining provisions as binding.

218. It was stressed that article 19 of the draft articles adopted on second reading protected the right of other States not to recognize the nationality of a person who had no effective link with a State concerned. One matter of potential concern that was pointed out regarding article 19 was the narrow issue of the treatment of stateless persons by third countries. In that regard, it was felt that there should be no implication that a third country could not deport a stateless person to a successor State whose nationality he could acquire.

219. The deletion of article 19 was suggested in the light of the fact that it seemed to give third States the right to intervene in a matter in which they had no competence.

220. The flexibility of the application of the draft articles in part two was highlighted.

221. The view was expressed that the wording of draft articles 20, 22, subparagraph (a), and 24, subparagraph (a), should clearly reflect that their applicability extended to concerned persons who had their habitual residence in the concerned State "on the date of the succession of States". Draft articles 22, paragraph (b) (i), and 24, paragraph (b) (i), could also be improved. There was a proposal for the text to read: "... connection with a constituent unit of the predecessor State, the territory of which has become the territory of the successor State or part of that territory". That would avoid the limitations on applicability contained in the aforementioned provisions.

222. There was a view that the approach of the draft articles to the different ways in which States united did not correspond to State practice.

223. A question was raised as to the reasoning behind article 26 whereby the predecessor State gave a right of option even to that part of its population which had not been affected by the succession.

3. Comments on the final form of the work on the topic

224. Several delegations voiced their support for the Commission's recommendation that the draft articles should be adopted in the form of a declaration. Among the practical reasons cited was the speed and flexibility which a declaration would have over a treaty, since the latter could not be invoked in the most pressing situations, such as the case of a new State which had not had the time to ratify it.

225. The question was raised as to why the Commission had decided to recommend that the General Assembly should adopt the draft articles in the form of a declaration, when the articles themselves were unmistakably normative.

226. However, other delegations voiced their preference for considering the possibility of drafting a convention. This course of action would present the advantages of: defining a number of rules which would be imposed upon States concerned by a succession, a matter that would be appropriate since some of the rules envisaged in the draft articles would modify some rules of customary origin; the main goal of drafting a new binding instrument would thus be achieved; it would avoid the situation of having some States dispute the rules, which might occur if the draft articles were adopted as a declaration.

227. Some delegations also noted that the eventual adoption of the draft articles in the form of a declaration should not preclude the ulterior elaboration of a binding multilateral instrument based on the same principles.

228. Most delegations also concurred with the Commission's view that the work on the topic by the Commission should be considered concluded. Nonetheless, some delegations expressed regret at the Commission's decision not to pursue the topic of nationality of legal persons, while others called for its

inclusion as a topic in the Commission's programme of work.

G. Jurisdictional immunities of States and their property

1. General comments

229. Several delegations commended the Commission for its progress on the topic, especially its useful, balanced and realistic suggestions on the following five outstanding and contentious issues: the concept of a State for purposes of immunity; the criteria for determining the commercial character of a contract or transaction; the concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property. Those reflected the core issues which domestic courts had to consider in cases involving the sovereign immunity of a foreign State.

230. It was noted that the report of the working group of the Commission would be the basis for consideration of the topic by the working group of the Sixth Committee, which should consider only the five substantive issues highlighted by the Commission and not reopen discussion of questions on which consensus had been achieved.

231. Although many years had passed since the General Assembly had first turned its attention to the draft articles submitted to it by the Commission, it was emphasized that the topic of State immunity had lost none of its importance for international law and continued to divide opinion among Member States, with some advocating more restrictive rules and others espousing absolute immunity. During the cold-war era, those differences had been understandable, but on the threshold of the twenty-first century, they no longer had a rationale. The fading of the system of State-controlled economies, rather than limiting the scope of State activities, had in fact coincided with an extension of the public sphere to many branches of the private sector as a result of changes in the nature of the State. Those changes had undermined the doctrine of absolute immunity.

232. Accordingly, the general trend in State legislation and practice had been to turn away from the tradition of absolute immunity and to restrict the civil immunity of States. It was therefore the task of the Sixth Committee to follow up on the work done by the Commission and to give legal expression to the new forms the conduct of the State might take in the future by formulating a universally acceptable, restricted doctrine of immunity.

233. It was also noted that, since a growing number of States gave a restrictive interpretation to the concept of immunity, the course adopted by the Commission in order to reach a compromise solution seemed realistic and wise.

234. As regards the desirability of the codification of the topic, one view was expressed that the absence so far of codification meant that the subject had been dealt with in a piecemeal way in the domestic legislation of States and under customary law. Moreover, the precise details of such provisions were not generally known, creating a particular disadvantage for small countries, especially developing countries, which did not have the relevant legislation or jurisprudence.

235. A number of delegations stressed that the question of the codification of the law of State immunity remained controversial and that State practice in the key areas of disagreement remained widely divergent. It was noted that the work was still far from being completed, despite the desire for agreement on a code that would cover all aspects of the problem. Sincere efforts should nevertheless be made to harmonize the rules of international law governing the topic as far as possible without jeopardizing the right of private parties to legal protection in their transactions with foreign States.

236. As regards the draft articles as a whole, a view was expressed to the effect that sovereign States should be immune from legal proceedings for their acts, whether they were of a private or public nature. According to that view, that was the key principle to be taken into account in the provisions of bilateral, regional and multilateral agreements governing the topic.

237. According to one view, since it was the nature of the activity that determined whether immunity applied, commercial transactions should not be immune from local jurisdiction even in the case of transactions between States, and therefore the exception to that effect should be eliminated from the draft articles.

238. It was noted in paragraph 2 of the Commission's commentary on article 2 that the draft articles did not

cover criminal proceedings. According to one view, it would be better to include that provision in article 1, which dealt with the scope of the articles. The proponent of that view wondered to what extent the draft articles would apply to civil law claims presented in connection with criminal proceedings, and also considered that article 12 should apply to situations of armed conflicts; that article 16 should cover aircraft owned or operated by a State; and that, as regards article 17, which dealt with the effect of an arbitration agreement, there was no reason why its operation should be limited to differences relating solely to commercial transactions.

239. In another view, business transactions, the key element of the text, should be defined clearly and the objective and nature of such transactions should be taken into consideration. It was also considered that equality between the entities participating in commercial activities must be ensured and that the practice of developing countries should be taken into account.

240. More generally, the view was expressed that, given the importance and complexity of the topic, it was important to take into account the concerns of all categories of States, bearing in mind the diversity of legal systems, the legitimate interests involved and the economic interests of each category.

2. The five outstanding substantive issues identified in the report of the working group of the International Law Commission

(a) Concept of a State for purposes of immunity

241. Several delegations supported the Commission's suggested reformulation of subparagraph (b) of paragraph 1 of article 2 of the draft articles as a way of harmonizing the concept of a State for purposes of immunity with the concept of a State contained in the draft articles on State responsibility. Those delegations considered that the Commission's suggested reformulation was worth considering and a good basis for further discussion.

242. According to one view, since the proposed new wording specifically mentioned "constituent units of a federal State and political subdivisions of the State" but the State responsibility articles did not, the most appropriate solution would be to follow the approach adopted by the European Convention on State Immunity, whereby the immunity of a constituent unit would be recognized on the basis of a declaration by the State. Such an approach would allow greater flexibility, in the light of differences between national systems, while facilitating application of the provisions by national courts.

243. Another view was expressed that the provisions of article 2 were an important step in the right direction and it was thus regrettable that the Commission had proposed eliminating portions of them.

244. A number of delegations made drafting suggestions. It was proposed that, since the concepts of "constituent units of a federal State" and "political subdivisions of the State" were not clearly differentiated and appeared to overlap, the following wording would be preferable: "constituent units of a federal State or other political subdivisions of the State called upon to exercise sovereign authority".

245. As regards the bracketed phrase in the Commission's proposal relating to subparagraph (b) (ii), namely "provided that it was established that such entities were acting in that capacity", some delegations viewed it as raising more problems than it solved. According to one view, the criterion "in the exercise of the sovereign authority of the State" would be sufficient. According to another view, the text in brackets raised the problem of the burden of proof. In that opinion, the problem might be rectified by indicating where necessary in the draft articles that, unless there was proof to the contrary, States were assumed for the purposes of draft article 2 to have acted in the exercise of their lawful powers.

246. On the other hand, the view was also expressed that the brackets should be deleted. The proposal was also made to replace the bracketed text with the words "whenever performing such acts" and to add the same words to paragraph 1 (b) (iii).

247. A number of delegations preferred the reference to "sovereign authority" rather than "governmental authority" since the latter expression might be given too broad an interpretation.

248. One view questioned the meaning of draft article 2, paragraph 1 (b) (iii), which, in that view, might overextend the concept of immunity.

(b) Criteria for determining the commercial character of a contract or transaction

249. Several delegations supported the Commission's approach to dealing with the important and sensitive issue of the criteria to be applied in determining whether an activity was commercial or not.

250. It was noted that, in view of the different criteria applied in different States, it would be necessary for the parties to a commercial transaction to come to an understanding in advance of the applicable criteria, and that would be a difficult task.

251. It was noted that, in some jurisdictions, the purpose of a transaction was hardly taken into consideration and that retaining a reference to such a test would be a step backwards.

252. Some doubts were expressed as to whether the debate on the nature and purpose tests was actually useful to the judges who would render decisions in that area. In view of the diversity of State practice, it might be wiser to recognize that international law in the area was still evolving without trying to decide which practices were too radical or too conservative.

253. It was, however, observed that deleting any reference to the nature or purpose test might leave room for different interpretations.

254. A number of delegations took the view that the controversy surrounding the criteria for determining the commercial character of a contract or transaction could not be resolved simply by eliminating the provisions of the draft articles relating to the issue.

255. According to one view, deleting the reference to the nature and purpose tests would only perpetuate the status quo. The draft articles should not be silent on the issue of the criteria to be applied since that was the crux of the debate. The proponent of that view also considered that, while not perfect, article 2 afforded a good basis for negotiations in that it sought to strike a balance between the nature and purpose test and reflected variations in State practice. To refuse to allow the purpose test to be applied in addition to the nature test in some cases was to impose a practice far from enjoying broad recognition even among the members of the Sixth Committee.

256. According to another view, eliminating any reference to nature or purpose would not guarantee the application of uniform objective criteria, despite the guidance available to national courts in the recommendations of the Institut de Droit International. The choice not to define any criteria for identifying commercial transactions should at least be made in a consistent context compatible with the basic rationale for recognizing restrictive immunity, namely the distinction between activities *jure imperii* and *jure gestionis*.

257. Another delegation took the view, while considering that the determining factor should be the nature of the contract or transaction, that account should be taken of the fact that, in accordance with the practice and jurisprudence of some States, the purpose of the contract or transaction was an important criterion. Consequently, any formulation that would make it possible to include that concept in the draft, with a view to promoting the objective of legal certainty, should be considered. Moreover, according to that view, if the determination of the commercial character of a contract or transaction was left to the courts, the result in practice would be a multiplicity of regimes.

258. According to one view it was questionable whether national courts could base their judgements on mere recommendations from private institutions, such as the Institut de Droit International. The proponent of that view considered that the best solution was that suggested in footnote 42 of the working group's report, with one amendment: in the last sentence "may" should be replaced by "shall" and a phrase should be added stating that the other party to the contract must be aware of the nature of the contract or transaction in question.

(c) Concept of a State enterprise or other entity in relation to commercial transactions

259. Several delegations supported the Commission's suggestions regarding the matter. It was observed that some State enterprises were financially independent and legally separate from the State and that denying them immunity did not imply a denial of State immunity; however, there were cases, as the working group had rightly noted, in which the State could not invoke immunity, such as when a State enterprise engaged in a commercial transaction as an authorized agent of the State or when the State was acting as guarantor of an enterprise.

260. In support of the Commission's proposed redrafting of the concept of a State enterprise, the view was expressed that, in the past decade, numerous States of Central and Eastern Europe had shifted to a market-oriented economy, which had led to a reduction in the number of State companies and entities involved in international commercial relations; however, the frequency with which States, through their entities, became parties to international transactions or contracts had not diminished. It was therefore as important as ever to arrive at a definition of State organs and bodies involved in such activities.

261. Other delegations had some concerns about the Commission's proposal relating to the matter. Thus, in one view, there appeared to be some differences of interpretation between the text of article 10, paragraph 3, and the commentary in the working group's report. Although agreeing with the working group that State immunity should not apply in the circumstances indicated, the proponent of that view felt that the principle set out in paragraph 3 had a broader meaning, namely, that the immunity of the State should not be affected by the transactions or activities of legally separate State enterprises. According to that view, the principle should be applied more generally and should not be limited to commercial transactions, and should therefore appear in part two of the draft.

262. The proponent of another view considered that article 10, paragraph 3, should be replaced with the text contained in footnote 74 of the working group's report and that it should be moved from part three, where it did not belong, and be incorporated in draft article 5.

(d) Contracts of employment

263. Delegations generally endorsed the Commission's proposals on draft article 11 relating to contracts of employment. It was noted that the Commission's decision to leave the primary jurisdiction for contracts of employment to the forum State seemed wise, since it preserved the delicate balance that should exist between the protection of the rights of local employees and respect for the immunity of the foreign State.

264. The view was expressed that the best way to deal with the issue raised with respect to article 11, paragraph 2, was to provide a non-exhaustive list of employees performing functions in the exercise of governmental authority.

265. The view was also expressed that the distinction between acts *jure imperii* and acts *jure gestionis* could be valuable in relation to contracts of employment. In that view, the distinction between sovereign and commercial acts was more complex in relation to employment for two reasons. The first had to do with the context or the nature of the location of an embassy or diplomatic mission, which was viewed as an extension of the territory of the foreign State. The second was related to the subjective nature of the criteria to be applied in defending the position of an employee in an immunity case. According to that view, the latter point was also relevant to the reworked version of paragraph 2 (a) and it would be helpful to create a distinction based on the employee's place of work.

266. With regard to the principle of non-discrimination based on nationality, it was noted that nationality did not provide grounds for denying legal protection or the right to bring a claim against a State, particularly when the interested party was a permanent resident of the forum State.

(e) Measures of constraint against State property

267. A number of delegations considered that the Commission's proposals on that complex and sensitive issue could serve as a sound basis for further discussion. Some delegations expressed their support for one or another of the alternatives presented in the working group's report.

268. It was observed that, while it was possible to bring proceedings against a foreign State in a national court, it was not easy to enforce judgements against it. Great prudence must be exercised in enforcing judgements against a State: efforts must be made to convince the State to execute the judgement voluntarily, and it should be given a period within which to comply before any measures of constraint were contemplated, although at present no national legal system seemed to have such a provision. Moreover, as the working group had noted, even greater caution was required when a national court dealt with prejudgement measures, since they were taken before any ruling on the merits of the case were made.

269. According to one view, article 18 was much more restrictive than the current case law of some national courts and the Commission should take a less

restrictive approach. According to that view, the requirement in paragraph 1 (c) of article 18 that there must always be a connection between the property subject to the measure of constraint and the claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed should be deleted.

270. The view was also expressed that the court should be able to proceed without limitation against property not destined for the fulfilment of sovereign functions. According to that view, it might be appropriate, as the working group had suggested in alternative I, to grant the State a grace period of two or three months to designate property available for execution, thereby avoiding doubts as to the intended use of the property. If the State did not comply within the grace period, it would be for the national court to ensure that execution was not levied against property destined for the fulfilment of sovereign functions. According to that view, there was no reason to resort automatically to inter-State dispute settlement, as suggested by the working group in its alternative II.

271. Another view was that a role for international dispute settlement should be provided in the draft articles dealing with that issue.

272. It was also observed that the draft articles should include provisions specifying the cases in which measures of constraint could be taken against the property of a State. According to that view, without such a provision, the draft articles would have little impact. There would be little point in listing the cases in which a State could not oppose jurisdictional immunity if there were no provisions for enforcing the judgement. It was suggested that the number of cases should be limited. In that connection, it was noted that the distinction between prejudgement and post-judgement measures was useful and the proposed cases of exclusion from immunity from execution were satisfactory.

273. With regard to the term "prejudgement measures", the suggestion was made that it could be replaced by the better-known term "interim measures".

274. According to one view, the bracketed text in paragraphs 127 and 128 of the working group's report should be deleted.

275. The suggestion was also made that it would be useful to add a non-discrimination clause in relation to measures of constraint.

276. Support was expressed for article 19, defining specific categories of property which would be immune from measures of constraint. In that connection, it was suggested to add the words "held by it for central banking purposes" at the end of paragraph 1 (c). According to one view, the list of categories of excluded property was questionable since property excluded from execution should be limited to government non-commercial property.

3. Possible form of the outcome of the work on the topic

277. Delegations were divided along two possible outcomes of the Commission's work on the topic.

278. Some delegations stressed that a draft convention would make a great contribution to the codification and development of international law. For those delegations, a convention on the topic would be very useful in limiting the multiplication of national legal rules and in clarifying and supplementing international law. It would also be a useful tool for modifying internal practice.

279. Other delegations advocated the elaboration of a "model law" on the topic. It was observed that, in view of the rapid changes occurring in the system of international trade, it was appropriate to ask whether the Commission should continue its work along the same lines and codify that important branch of international trade law at the risk of freezing it and limiting its scope to certain issues, thereby creating a gap between reality and law, or whether the Commission should instead be realistic, recognizing that State immunity was closely linked to the development of a modern system of international trade, and turn to the elaboration of a model law, which, without being binding, would allow States that wished to modernize their legislation to do so and would leave room for practice to develop. It was further noted that a model law would preserve the invaluable work that the Commission and the Sixth Committee had achieved in that area and would be an attractive way of completing the work on the topic.