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Nationality of natural persons in relation to the succession of States

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Note by the Secretariat

Addendum

Contents

Page

II. Comments received from Governments 2

El Salvador 2

A. General comments 2

B. Comments on the preamble and on specific articles 5

C. Advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, and the possible form of an instrument 8

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II. Comments received from Governments

El Salvador

[Original: Spanish]

A. General comments

In the context of the United Nations, we are pleased to note that the "succession of States" was one of the priority topics that the International Law Commission selected at its first session, in 1949, giving rise to two major instruments: the Vienna Convention on Succession of States in respect of Treaties (1978) and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983).[1]

These two instruments show that the succession of States has for many years been considered a truly international legal issue and not just a domestic issue of States. It is a topic that took on special significance in view of its recurrence in connection with the armed conflicts and decolonization processes that took place in the last century in particular.

We know that the International Law Commission undertook the process of codification in relation to State succession separately, establishing a distinction between succession in respect of treaties and succession in respect of non-treaty rights and obligations. Accordingly, those initial instruments — as their titles show — did not address the issue of nationality,[2] which was postponed for more than a decade until the International Law Commission started elaborating the draft articles on nationality of natural persons in relation to the succession of States, which were adopted on second reading in 1999.

It is important to make this clarification as to the evolution of the succession of States, as we believe that the late development of the topic of nationality as compared to other issues that were codified earlier should not lead to the disregard of one of the most tangible realities in cases of succession of States, namely the strong impact that the substitution of a State by another may have on the rights and obligations of the inhabitants of a territory, which are mostly determined by the link of nationality.

In that connection, the Special Rapporteur on State succession and its impact on the nationality of natural and legal persons rightly noted that State succession is a matter of importance because it occurs on a collective basis and has numerous serious consequences for the persons involved, as nationality is a precondition for the exercise of a number of political and civil rights. "Moreover, the loss of the nationality of the predecessor State and the difficulties connected to the acquisition

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[1] The Vienna Convention on Succession of States in respect of Treaties (1978) entered into force on 6 November 1996, after being ratified by 22 States. However, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983) has still not entered into force, as it has only been ratified by seven States, whereas it requires, pursuant to its article 50, ratification by a total of 15 States.

[2] See the first report on State succession and its impact on the nationality of natural and legal persons (A/CN.4/467), para. 29, quoting D. P. O'Connell: "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory concerned] is one of the most difficult problems in the law of State succession".

of the nationality of the successor State may lead to many human tragedies."[3] This is why El Salvador wishes to highlight the importance of nationality in cases of succession, not only for States that have had to grapple with succession in any of its forms, but also for the international community as a whole.

Moreover, to fully grasp this phenomenon, we believe that it is important to abandon any purely fragmentary view whereby the topic of nationality is treated as just one of the many ramifications of State succession or whereby the regulation thereof is overlooked.

In particular, nationality is by its very nature a significant aspect of cases of succession, as it has an impact on the population as a whole or a significant portion thereof, which should not be considered as just one more element of the State, but as a human element and hence the first and most important component of the State's structure.

For these reasons, El Salvador welcomed the completion of the discussion on the State property or debt regime, taken up more than 30 years ago, so that a much more important question could be considered: that of the inhabitants or other persons in the territory of a given State, whose human rights, including of course the right of every person to a nationality, must be fully respected and guaranteed even in situations of succession.[4]

This approach gives a different connotation to these new draft articles. which maintain due consistency with the various international instruments that recognize nationality as a human right, including the Universal Declaration of Human Rights, in its article 15; the American Convention on Human Rights, in its article 20;[5] and the American Declaration of the Rights and Duties of Man, in its article 19.

This does not mean, however, that nationality is not a fundamental right and determinant of the legal status of persons that is governed primarily by domestic law, but that the right balance should be struck between sovereignty and respect for international human rights obligations, which are incompatible, for instance, with practices that are discriminatory[6] or that lead to statelessness.[7]

This is how the International Law Commission interpreted the issue, indicating in its commentaries to the draft articles that "although nationality is essentially governed by national legislation, the competence of States in this field may be exercised only within the limits set by international law".[8] For that reason, we take the view that, because they are based on both those aspects, the draft articles offer a balanced approach for dealing appropriately with State succession scenarios, which

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[3] See A/CN.4/467, para. 30.

[4] Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, judgement of 8 September 2005, Series C, No. 130, para. 138.

[5] United Nations, *Treaty Series*, vol. 1144, No. 17955.

[6] Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, judgement of 8 September 2005, Series C, No. 130, para. 141.

[7] Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, judgement of 8 September 2005, Series C, No. 130, para. 142.

[8] See para. (3) of the commentary to the preamble, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 27.

are generally inevitable given the various political, social, economic and other changes occurring in different regions around the world, leading to veritable transformations in the configuration of the international community.

Practice of El Salvador in respect of nationality in the succession of States

While the succession of States is a highly important topic for international scholars and jurists, it also represents a reality for many States which, in recent times, have undergone these types of transformations and have had to deal effectively with their serious consequences.

This has been the case of El Salvador, which, following the judgment of the International Court of Justice on 11 September 1992 in the border dispute between El Salvador and Honduras, saw part of its territory transferred to another State, affecting not just the territory but also the inhabitants of the delimited areas.

Following the delimitation between El Salvador and Honduras, a considerable number of Salvadorians in a total of five border areas found themselves living in Honduran territory, while a small number of Hondurans found themselves living in Salvadorian territory. This shows that even if a dispute concerns only the boundary line between two States, the rights of hundreds of people, including the rights of nationality and property, might be affected.

For that reason, in implementing the Court's judgment, and aware of the need to resolve the issues arising from such a situation in an orderly and humanitarian manner that fully respects acquired rights, Honduras and El Salvador ratified the Convention on Nationality and Acquired Rights in the Areas Delimited by the Judgment of the International Court of Justice of 11 September 1992, article 3 of which sets out the obligation of both States to respect the right of persons in the territories delimited by the judgment of the International Court of Justice to choose their nationality, fully respecting internationally recognized human rights.[9]

The Convention contains a specific chapter intended to regulate matters related to nationality, which starts with the express recognition of the right of all persons born in the territories of each State delimited by the judgment of the International Court of Justice to opt for either Salvadorian or Honduran nationality. It also regulates the general procedure for choosing either nationality, which should be decided upon within 60 days from the date of submission of the corresponding application.

Furthermore, the Convention includes specific provisions concerning minors under the age of 18, who retain the nationality of their parents, but may also choose either Salvadorian or Honduran nationality within two years after reaching the age of majority. It also stipulates that minors whose parents are unknown shall have the nationality by birth of the State in which they reside, in order to ensure that they are not stateless.

The Convention between El Salvador and Honduras was complemented by a handbook of procedures for the exercise, by the people of the Nahuaterique region, of the right to choose their nationality. The handbook was drafted in order to detail those aspects of the option procedure that were still to be determined.

[9] The text of the Convention is available in the Codification Division of the Office of Legal Affairs of the Secretariat.

The Convention also sets out the working methods to be followed by the relevant authorities and institutions, covering preliminary activities such as information campaigns and meetings, as well as actions related to the option procedure concerning the collection of applications, verification of requirements, decision and subsequent registration. All these procedures are to be carried out free of charge, by express provision.

We believe that the Convention and the handbook are highly relevant legal instruments for studying the topic, which show that norms referring to the right of nationality, family unity, non-discrimination and, in particular, the granting of the right of option by both the predecessor State and the successor State — which have been included in the draft articles — are fully applicable in practice in cases of State succession and help, to a large extent, to reduce the adverse impact of these transformations.*

B. Comments on the preamble and on specific articles

Article 17. Procedures relating to nationality issues

As indicated earlier, we believe that the draft articles are still subject to some amendments or adjustments that will not alter their object and basic structure. We therefore propose adding language to draft article 17 on procedures relating to nationality issues, in order to bring it in line with international human rights standards.

Currently, draft article 17 reads as follows:

> Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay. Relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.[10]

First, we believe that the scope of the provision should be clearly indicated, because while the heading refers to “procedures”, the draft article does not contain a procedure as such, in the sense of a set of rules or steps regulating the mechanism for deciding on a given application. Rather, it stipulates a set of principles governing the procedure that each country’s legislators must consider when establishing internal norms on the topic and that must subsequently govern the actions of the competent authorities.

Draft article 17 contains the principle of expeditiousness, which requires the procedures to be designed in such a way that it is possible, through a variety of mechanisms, to decide cases within the shortest possible time. It also guarantees the right of review, which makes it possible to effectively protect rights.

Draft article 17 also refers to the principle of written decisions, which is useful for achieving legal certainty. Nonetheless, it should be borne in mind that this is not the only method of achieving such certainty, given that the principle of oral proceedings, which exists in most legal systems, is a highly useful instrument that

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* The annexes are available in the archives of the Secretariat.

[10] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 64.

facilitates challenges, publicity, concentration, immediacy and expeditiousness in any proceedings. Consequently, we are of the view that each State should have the freedom to design its own system for achieving the objective of providing just and timely responses.

Generally speaking, all these principles established in draft article 17 are of vital importance, which has justified their inclusion in the Salvadorian legal order and in a number of international treaties. For this reason, we do not question their inclusion in the draft articles, but only the fact that they appear under the heading "procedures", which is inconsistent with the content of the draft article. A more appropriate heading for the draft article would be "Principles governing procedures relating to nationality issues".

On the other hand, although the principles in question constitute highly acceptable action parameters, we find that the draft article still lacks an element which, in our opinion, is just as relevant as those already stipulated, namely the duty to state grounds for decisions, which has been widely recognized by international human rights jurisprudence and the domestic laws of many States.

We know that, as the International Law Commission noted in its commentary, "the enumeration of requirements in article 17 is not exhaustive".[11] Nonetheless, we understand that, although each State will still have the discretion to establish a process with stronger guarantees, the obligation to issue reasoned decisions concerning nationality must be included in any international minimum standard and must not be subject to limitations in domestic law.

In that connection, the Inter-American Court of Human Rights has consistently pointed out in its judgements that decisions adopted by domestic bodies that could affect human rights should be duly justified; otherwise, they would be arbitrary decisions.[12] Moreover, a reasoned decision demonstrates to the parties that they have been heard and, when the decision is subject to appeal, it affords them the possibility to argue against it, and of having such decision reviewed by an appellate body. On account of all the foregoing, the duty to state grounds is one of the "due guarantees" to safeguard the right to due process.[13]

It should be noted that the Court refers to the duty to state the ground for any decision that might affect a human right, which means not just the right to freedom which could be affected in criminal proceedings, but also the other inherent rights of the human person. Hence, once the right to nationality has been recognized as a human right, all that remains to be done is to stipulate the duty to state grounds as a guarantee that is closely linked to that right, which would be intended to prevent

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[11] See para. (3) of the commentary to article 17, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 65.

[12] Inter-American Court of Human Rights, *Case of Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, judgement of 23 June 2005, Series C, No. 127, paras. 152 and 153; and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, judgement of 21 November 2007, Series C, No. 170, para. 107.

[13] Inter-American Court of Human Rights, *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, judgement of 5 August 2008, Series C, No. 182, para. 78; and *Case of Tristán Donoso v. Panamá*, Preliminary Objections, Merits, Reparations and Costs, judgement of 27 January 2009, Series C, No. 193, para. 153.

arbitrary decisions and afford an aggrieved person the possibility of a truly effective administrative or legal recourse.

For their part, Salvadorian courts have developed extensive jurisprudence concerning the duty to state grounds, which has been inferred from articles 1 and 2 of the Constitution of the Republic regulating legal certainty and protection in the preservation and judicial and extrajudicial defence of constitutional rights. The courts have argued that "one way of ensuring that law enforcement officials protect the constitutional rights of citizens is to issue reasoned decisions which, by virtue of the reasons and arguments expressed therein, would allow citizens to know the reasons for the decisions and would afford them the opportunity to challenge those decisions".[14]

Thus, the duty to state grounds is not considered a mere procedural formality, but one that requires "the arguments set out in the decision to be based on legal logic whereby the actions related to the case are supported by relevant legal provisions", and that "if the reasons for the decisions taken by the authorities are not stated, the parties cannot ensure that public officials comply with the law or have the opportunity to defend themselves using specific procedural instruments".[15]

To ensure that the duty to state grounds is not satisfied by merely invoking legal or factual justifications, the Constitutional Chamber of the Supreme Court of Justice of El Salvador has stipulated the requirement to "indicate the procedure or method used to establish the need to restrict the rights of the person affected".[16]

In that connection, Salvadorian jurisprudence, following the trend established by international human rights law, maintains that the duty to state grounds is "an inevitable obligation for any judge when issuing a decision; this obligation increases […] when the decision taken by the judge in any way restricts fundamental rights",[16] a criterion that would be fully applicable to the right to a nationality owing to its nature, as indicated earlier.

For the reasons already given in respect of the heading of the draft article, and to ensure that the draft article is in keeping with the duty to state grounds, we propose the following text for the heading and for inclusion in draft article 17, paragraph 2:

Article 17. **Principles governing procedures relating to nationality issues**

Relevant decisions **[shall be reasoned]**, shall be issued in writing and shall be open to effective administrative or judicial review.

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[14] Constitutional Chamber of the Supreme Court of Justice of El Salvador, *Amparo* Judgement No. 750-2004 of 7 June 2006 and Judgement No. 609-2005 of 14 December 2006.

[15] Constitutional Chamber of the Supreme Court of Justice of El Salvador, *Amparo* Judgement No. 308-2008 of 30 April 2010.

[16] Constitutional Chamber of the Supreme Court of Justice of El Salvador, Ref. 88-2003, judgement of 14 November 2003.

C. Advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, and the possible form of an instrument

Final form of the draft articles

The draft articles on nationality in relation to the succession of States clearly represent a highly noteworthy exercise in the codification and progressive development of international law, which would lead to the codification of important norms that have not been uniformly applied to date, leaving a large number of people stateless in the twentieth century.

At present, international law relating to nationality has evolved to the point where there is a more comprehensive understanding of the problems arising from statelessness, leading to a conception intended "to protect and assist those individuals who were already stateless, and to try to eliminate, or at least reduce, the incidence of statelessness",[17] an idea that also underpins the draft articles.

In that connection, we consider the draft articles to be of special significance, given that, as the Inter-American Court of Human Rights has indicated, "nationality […], as the political and legal bond that connects a person to a specific State, […] allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights".[18] It is for this reason that the question of nationality is generally linked to the expression "the right to have rights".

In our view, the regulation of an issue of such importance to human rights as nationality should be supported by the entire international community. We therefore believe that, with respect to the final form of the draft articles, significant efforts must be made to avoid situations where there is little consensus and/or attention, as was the case with the first two instruments in relation to State succession.

In view of the foregoing, El Salvador has a special interest — which has been clearly indicated in previous sessions[19] — in seeing the nationality of natural persons in relation to the succession of States regulated in an international instrument. For this reason, we reiterate our intention to support the establishment of a binding convention on the topic.

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[17] Office of the United Nations High Commissioner for Refugees and Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, No. 11, Geneva, 2005.

[18] Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, judgement of 8 September 2005, Series C, No. 130, para. 137.

[19] See general comments of El Salvador in A/59/180.