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DRAFT EXPLANATORY REPORT ON THE DECLARATION ON THE CONSEQUENCES OF STATE SUCCESSION FOR THE NATIONALITY OF NATURAL PERSONS

Drafted by the Secretariat following the meeting in Geneva on 30 August 1996

I. INTRODUCTION

1. At its 20th meeting in Venice on 9 and 10 September 1994, acting on a proposal by Ms *Buure-Hogglund*, the Chair of the CDCJ, the Commission asked Mr *Economides* and Mr *Malinverni* to draw up a draft questionnaire on the consequences of state succession for nationality. In 1995 the questionnaire was sent to all the members and associate members of the Committee as well as its observers.

2. The Commission received replies from the following European countries which have a practice in the field of State succession: *Albania, Austria, Belarus, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine*, as well as the two non-European States represented in the Commission, *Japan and Kyrgyzstan*. The *United States of America* have provided some information on their domestic legislation in this field[4].

3. At its 24th meeting in Venice on 8 and 9 September 1995, the Commission asked the rapporteurs, Mr *Economides*, Mr *Klucka* and Mr *Malinverni* to finalise the draft report on the consequences of state succession for nationality and draw up principles for practical action and national legislation.

4. Based on the replies to the questionnaire, a consolidated report was prepared (CDL-NAT (96) 5 rev.2). This report demonstrates the legal models of regulation which have been adopted, either independently or pursuant to obligations under international law, to deal with the effects of territorial transfers on the nationality of natural persons.

5. In the course of its work, the Commission took note of the draft European Convention on Nationality[5] which had been prepared by the Committee of experts on nationality of the Council of Europe (CJ-NA). Two members of this Committee, Mr *Kojanec* (Italy) and Mr Sch?rer (Switzerland), have participated in the work of the Commission.

6. The Commission also took note of the work of the International Law Commission of the United Nations on the topic of "State succession and its impact on the nationality of natural and legal persons"[6].

7. At its 9th meeting held in Venice on 15 May, the Sub-Commission on International Law examined some draft guidelines for State practice (CDL-NAT (96) 1 rev.) and a draft declaration drawn up by Mr Economides (CDL-NAT (96) 3). After an extensive exchange of views, it was decided to retain the draft declaration proposed by Mr Economides as a basis for the Commission's future work. Following this, Mr Steinberger submitted an extremely useful working document to the rapporteurs.

8. It should be noted that for the nationality of *legal persons* the following provision was proposed in the draft declaration submitted by Mr Economides (CDL-NAT (96) 3): "Legal persons whose headquarters are located in the transferred territory shall acquire upon succession the nationality of the successor State". However, considering that the practice of States is very limited in this area, the Commission decided not to include it in the text of the present declaration, which therefore concentrates exclusively on the nationality of natural persons.

9. The final version of the declaration was drawn up by the Sub-Commission on International Law at its ..th meeting in Venice on ... and adopted by the plenary Commission at its ..th meeting in Venice on ....

II. COMMENTS ON THE PROVISIONS OF THE DECLARATION

I.

1. The definition of the expression "State succession" is taken from Article 2.1. *b* of the Vienna Convention of 1978 on Succession of States in respect of Treaties and Article 2.1.*a* of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. Temporary occupations or annexations of territory which occur during a state of war do not entitle the occupant to change the nationality of the inhabitants. The same applies *a fortiori* to occupations or annexations which result from resort to the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. The two Vienna Conventions on State succession provide that they apply only to the effects of a State succession occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

2. Questions of nationality fall within the national jurisdiction of each State[7]. The *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* of 12 April 1930[8] stipulates that it is "for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality" (Article 1).

3. In a State governed by the rule of law it is essential for there to be a legal basis for the conditions of acquisition and loss of nationality as well as an effective right of appeal against decisions involving the deprivation, revocation or refusal of nationality. In periods of State succession it is even more important to tackle the uncertainty experienced by those involved in the succession, by guaranteeing that the legislation meets certain substantial standards: laws must be clear, coherent and non-retroactive; they must be published, exclude any unforeseeable surprises and comply with fundamental rights and freedoms.

4. Although questions of nationality can be settled between successor States, the latter are required to comply with the limits imposed by international standards for the protection of human rights. In an Advisory Opinion of 1984, the Inter-American Court of Human Rights stated that the powers of States in respect of nationality were limited by their obligation to guarantee full protection of human rights[9]. States must also ensure that any agreements they reach comply with the provisions contained in Chapter II of the Declaration.

II.

5. The principle that everyone has the right to a nationality is already found in the Universal Declaration of Human Rights (Article 15, paragraph 1). It was confirmed by the Inter-American Court of Human Rights[10] and reiterated in the American Convention on Human Rights (Article 20, paragraph

1) and the draft European Convention on Nationality. The 1966 International Covenant on Civil and Political Rights (Article 24, paragraph 3) and the 1989 UN Convention on the Rights of the Child stipulate that children have a right to acquire citizenship. Provision No.5 is linked to provision No.8 (on granting the nationality of the successor State).

6. The principle that statelessness must be avoided now forms part of international law. The *Convention on the Reduction of Statelessness* of 30 August 1961 lays down rules for giving effect to this principle. As regards the definition of statelessness, reference should be made to the first article of the *Convention on the Status of Stateless Persons* of 28 September 1954 which stipulates that "the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.". Provision No. 6 is linked to provisions No. 10 to 12 which are aimed at reducing the number of cases of statelessness.

7. The need to take account of the individual's wishes implies in particular that the persons concerned are given rights of option and that they are not forced to adopt a nationality against their will. This provision is directly linked to provisions No. 13-16 on the right of option. In a sense it represents an exception to the rule set out in provision No. 8.

III.

8. This provision is in keeping with the practice of States in this area. It is also in harmony with the principles of general international law. All cases of State succession involve a transfer of territory which inevitably affects the nationality of those persons who, with the territory, pass from one sovereignty to another.

As a rule, successor States have adopted specific legislation conferring their nationality on former nationals of the predecessor State who continued to have their habitual residence in the transferred territory. Under this legislation, the conferment of nationality operates automatically and only exceptionally upon application or registration.

In this way, all the nationals of the predecessor State, who are genuinely resident in the transferred territory - the condition of attachment to this territory is of paramount importance - lose the nationality of the predecessor State and acquire that of the successor State. It follows that the successor State may choose not to confer its nationality on nationals of the predecessor State who do not have effective links with the transferred territory, or on those who are resident in this territory for reasons of public service: such as civil servants of the predecessor State, members of the armed forces etc.

Finally the principle of non-discrimination on grounds such as ethnic origin, colour, religion, language or political opinion applies both to the granting of nationality by the successor State and to the enjoyment by those who acquire this nationality of all the rights and interests attaching to this nationality. This provision, which is aimed at ensuring equality before the law, lists the main forms of discrimination which are prohibited in the area of nationality. It was decided not to include the other grounds listed in Article 14 of the European Convention on Human Rights because they are less relevant in cases of State succession.

9. This provision constitutes a recommendation made in the interest of the persons mentioned and on the condition, of course, that they wish to acquire the nationality of the successor State on an individual and voluntary basis. In State practice it is comparatively rare for nationals of a third country, who are often known as foreign residents, to acquire the nationality of the successor State. However it may be worthwhile to make provision for the acquisition of this nationality upon application, particularly for a newly created State.

IV.

10. This provision gives effect to the obligation to avoid cases of statelessness. Article 10 of the *1961 Convention on the Reduction of Statelessness* provides that:

> "Every treaty between Contracting States providing for the transfer of territory shall include provisions to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition".

11. Provision No. 11 is aimed at reducing the number of cases of statelessness already existing prior to a State succession. It is simply a recommendation. It would be desirable for new legislation adopted following the transfer of sovereignty of a territory to enable stateless persons who permanently reside in or originate from this territory to apply for the nationality of the successor State.

12. This provision also aims at avoiding cases of statelessness. Inhabitants of a territory which has undergone a change of sovereignty generally lose the nationality of the predecessor State and gain that of the successor State. However, as explained in point 8, successor States may opt not to regard certain persons as permanent residents (particularly civil servants, members of the armed forces and other persons with the nationality of the predecessor State who reside in the transferred territory for professional reasons). In this case, predecessor States would be required not to revoke the nationality of these persons, who would otherwise become stateless.

V.

13. The right of option is understood as the right of persons affected by territorial changes to choose, by making a declaration, between either the nationality of the successor State and that of the predecessor State or between the nationalities of several successor States (*option of nationality*). It is used in a broad sense, covering both the positive choice of a certain nationality and the refusal of a nationality acquired *ex lege*.

Regarding the right of option, it proved necessary to draw a distinction between cases where the predecessor State continues to exist (e.g. cession of part of the territory of a State, separation), and cases where one or several States succeed to a predecessor State which disappears (e.g. dissolution or uniting of States). In the first hypothesis arises not only the question of acquisition of the new nationality, but also that of the loss of the old one. In the second hypothesis, the nationality of the predecessor State ceases to exist, but the attachment of the persons concerned with one or the other of the successor States may give rise to problems.

14. The right of option is not obligatory for all persons who pass from one sovereignty to another but only for those who have effective, and in particular ethnic, linguistic or religious, links with a predecessor or successor State. This solution is based largely on the practice of States in this area as well as on the principle that persons may not be deprived of their nationality against their will.

The notion of an "effective link" was used by the International Court of Justice in the *Nottebohm* case. The Court defined nationality as "a legal bond having as its basis a social fact of attachment, a effective connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties"[11]. As far as the right of option is concerned, the term "genuine links" implies "substantial links" between the person concerned and the State, which may be based in particular on ethnic, linguistic or religious links. Generally these links are with the predecessor State but sometimes they are with other States.

In the circumstances envisaged in point 13.b (two or more States succeeding to a predecessor State which ceases to exist), links based on citizenship of a subdivision of the predecessor State may also be taken into account. This criterion has been applied in particular in recent cases of State succession in central and eastern Europe in order to grant the right of option (during the dissolution of *Czechoslovakia*, the *Soviet Union*, and *Yugoslavia*).

15. This provision is aimed at avoiding potentially damaging uncertainty as to the nationality of persons affected by State succession (for example in respect of enjoyment of diplomatic protection). The Commission did not consider it appropriate to establish a precise time limit. However the time limit should be reasonable in the light of the circumstances of each individual case.

The choice made by persons exercising parental authority will usually prevail over that made by unmarried minors provided that the choice so made is in the best interests of the minor and that, where appropriate, the minor has been granted the right to be heard.

16. In the past, exercising the right of option has often had adverse consequences for those who have availed themselves of it. In certain cases it entailed an obligation to leave the transferred territory. Today, such an obligation would be incompatible with international human rights standards. All persons who have the right of option must be allowed to choose their nationality freely.

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[4] Sections 301 et seq. of the US Immigration and Nationality Act.

[5] A draft Convention has been declassified by the Committee of Ministers of the Council of Europe (Doc. DIR/JUR (96) 8 of 12 July 1996). When the European Committee on Legal Co-operation has finalised the text, it will be submitted to the Committee of Ministers for adoption.

[6] *V. Mikulka*, First report on State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/467, 17 April 1995; Second report on State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/474, 16 April 1996; Report of the Working Group of State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/L.507, 23 June 1994.

[7] International Court of Justice, *Nationality Decrees issued in Tunis and Morocco* , Advisory Opinion of 7 February 1923, Series B, No.4, p.24.

[8] LNTS, Vol. 179, p. 89.

[9] Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No.4, p.94.

[10] *Ibid.*

[11] *Nottebohm case (Second Phase)* , Judgment of 6 April 1955, I.C.J. Reports 1955, p.23.