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Summary record of the 2715th meeting

Topic:
Diplomatic protection

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2715th MEETING

Friday, 3 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Gallicki, Mr. Kateka, Mr. Kemičha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opretti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Tomka, Ms. Xue, Mr. Yamada.


[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (continued)

1. Ms. ESCARAMEIA, referring to the nature of the rule on the exhaustion of local remedies, an issue raised in connection with articles 12 and 13 in the second report (A/CN.4/514), and supplementing the comments she had made at an earlier meeting, said that, having learned more from the debate, she saw the rule, while being a procedural matter, as having substantive outcomes as well. Exceptions should accordingly be created to take account of situations where the application of the rule could be unfair, such as when there was a change of nationality or refusal to accept the jurisdiction of an international court. Once that had been done, it would be necessary to establish the time from which the right of the State to claim diplomatic protection ran, and that would probably be when the injury to the national of that State occurred. Turning to the third report (A/CN.4/523 and Add. 1) and to article 14, specifically its subparagraph (a) (futility), she said she agreed with the Special Rapporteur and the consensus that seemed to have emerged in favour of option 3, namely, that local remedies did not need to be exhausted when they provided no reasonable possibility of an effective remedy. She considered subparagraphs (e) (undue delay) and (f) (denial of access) of article 14 to be pertinent.

2. On article 15, she thought that paragraph 1 was useful and had a place in the draft. As for paragraph 2, she agreed with Mr. Gaja that what was important was the proof, not of the availability of local remedies, but of their effectiveness. She understood that that was what the Special Rapporteur thought as well, and the problem was simply one of drafting, which the Drafting Committee could look into.

3. Referring to the future direction of the draft articles and specifically to paragraph 16 of the third report, she said that she agreed in part with the Special Rapporteur’s conception of how to expand the scope of the draft articles. Some issues, for example the delegation by one State to another of the right to exercise diplomatic protection, were too specific and too unique to be considered in the draft articles. As for functional protection of international organizations, she had been impressed by the statement made by Mr. Momtaz at the preceding meeting. Even though the question had been taken up by courts, it had still not been resolved, although it was arising more and more frequently. It should be given in-depth study, perhaps even separate study. On the other hand, she thought that the issue of expanding the draft to cover the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers, irrespective of the nationality of the individuals concerned, deserved further consideration. She understood the reservations of the Special Rapporteur and Mr. Opretti Badan on that point. Nevertheless the M/V “Saiga” (No. 2) case justified giving the matter further study. Her main interest, however, was in diplomatic protection in the case where an international organization administered a territory, something which had happened in practice in Kosovo and East Timor. The international organization fulfilled all the functions of a State and must accordingly exercise diplomatic protection in respect of persons who might be stateless or whose nationality was not at all clear. That question should be included in the draft articles under consideration.

4. The link of nationality had been of some importance in the past, when States had been the sole actors on the international stage, but it had become less important now, in a world where international organizations and other actors had an increasingly large role to play alongside States. The Commission should take account of that fact.

5. Mr. PELLET said that he disagreed with Ms. Escarameia on two major points.

6. First, he thought that, in general terms, the Commission must give the Special Rapporteur clear guidance by agreeing with him that diplomatic protection was protection exercised by the State. The issue of protection exercised by international organizations should be deferred for later consideration or perhaps included in the topic of the responsibility of international organizations.

7. Second, having heard the arguments developed by Ms. Escarameia, he thought that the principle-exceptions approach she advocated was inappropriate. He could go along with that approach provided that the discussion remained focused on the topic. The topic was diplomatic
Mr. MOMTAZ, referring to the possible exercise of diplomatic protection by the State of nationality of a ship or aircraft raised by the Special Rapporteur in the context of the M/V “Saiga” (No. 2) case, which had been brought before ITLOS, asked whether that case had really been about diplomatic protection exercised on behalf of the members of the crew of a ship or about intervention with a view to their prompt release, as expressly provided for in article 292 of the United Nations Convention on the Law of the Sea (prompt release of vessels and crew). That issue was very sensitive and warranted further consideration.

Mr. DUGARD (Special Rapporteur) said that he endorsed Mr. Pellet’s comments. As for having a study of protection by international organizations, he was not unsympathetic to the idea, but the subject, although very important, came under the topic of the responsibility of international organizations. The draft articles under consideration were grounded in traditional principles of international law, and it would be unfortunate to go beyond that.

Mr. OPERTTI BADAN said that he was opposed to extending the exercise of diplomatic protection to international organizations. Diplomatic protection was based on the link of nationality, whereas officials acted expressly on behalf of international organizations which employed them and not as a function of their nationality.

The question of the protection of a ship’s crew was covered not only in the United Nations Convention on the Law of the Sea, but also in earlier international agreements, such as the Treaty concerning the Rio de la Plata and the corresponding maritime boundary, which had been concluded between Argentina and Uruguay and had entered into force in 1974; it thus called for a closer examination of other international instruments. In that connection, he noted that the monitoring of fishing grounds was primarily a matter for the police, the goal being to protect species and prevent the depletion of fishing grounds outside authorized areas. Clearly, that issue did not, stricto sensu, come under diplomatic protection.

For those reasons, he was opposed to expanding the subject under consideration to questions not within its scope.

Mr. TOMKA, referring to functional protection, said that it had initially been planned to focus solely on diplomatic protection exercised by the State of national-

He agreed with Mr. Momtaz on the need to be careful when considering the example of the M/V “Saiga” (No. 2) case, which had been brought before ITLOS under the special provisions contained in article 292 of the United Nations Convention on the Law of the Sea, and not as a general case of diplomatic protection.

Several members of the Commission had argued that delegation of the exercise of diplomatic protection, was beyond the scope of the subject under consideration, because delegation did not extend to claims concerning international acts. However, when State A delegated the exercise of diplomatic protection to State B because it did not have diplomatic relations with State X, why should State B refrain from requesting State X to cease a certain conduct once it became internationally wrongful?

Mr. GALICKI said that he was opposed to including questions relating to the nationality of a ship or aircraft in the draft articles. The legal principles regulating such a situation were already set out in international law, in particular in many instruments, such as the Convention on Offences and Certain Other Acts Committed on Board Aircraft, which laid down, for example, the obligation to allow crew and passengers to continue their journey. In that example, the determining factor was the special link between the State of nationality or the State of registry and a given ship or aircraft. It did not involve persons and, although the international instruments in question in certain instances granted a State the right to exercise prerogatives which might, at first glance, have a similarity with diplomatic protection, that protection was of another nature. Thus, such questions had no place in the consideration of the subject of diplomatic protection.

Mr. MANSFIELD said that he endorsed Ms. Escarameia’s comments on the importance of some of the questions linked to the nationality of claims referred to by the Special Rapporteur in paragraph 16 of his third report, i.e. the functional protection by international organizations of their officials and the case where a State or an international organization administered or controlled a territory. But he also shared the Special Rapporteur’s view that the Commission had started the topic in one direction and that, for a whole series of reasons, including drafting, it would probably be easier to stick with it. As to the delegation of competence, the example used by Mr. Gaja was interesting. From a practical standpoint, however, in that type of situation, although a State could take a range of actions on behalf of another State, they were likely to stop short of a formal lodging of a claim. He therefore re-

mained of the view that it was preferable to exclude those questions from the topic.

19. Ms. ESCARAMEIA said she feared that her comments had been misconstrued. Perhaps she had not expressed herself clearly enough, but she fully agreed with Mr. Pellet’s point that what was of interest to the Commission was the moment from which the right to formulate a claim arose. Thus, there was no disagreement on that question: it was, in fact, her view that articles 12 and 13 must relate to the moment at which the right to formulate a claim occurred and must simply mention that there could be exceptions in certain cases, namely, when the strict application of that rule would produce unfair results. With regard to Mr. Operitti Badan’s reference to international organizations, she did not know whether he had been alluding to something she had said previously, although he seemed to be saying that international organizations could exercise functional protection, although not diplomatic protection. Actually, she had wanted to make a point about relations between international organizations and persons resident in territories under their administration. The nationality of such persons was not always clearly established, and many were in fact stateless, as in the case of East Timor. That meant that in the event of an incident, such persons did not have any protection; international organizations might then exercise diplomatic protection on their behalf.

20. Mr. BROWNlie said that that was an important question, but that, as it might complicate the Commission’s work, it would be better not to include it in the topic.

21. The CHAIR said that the confusion might be due to the fact that a sufficiently clear distinction had not been made between the role of an administering authority in general and that of an international organization.

22. Mr. BROWNlie said he thought that the Commission should avoid raising difficult issues such as that of East Timor. It was risky to assume that the special and temporary functions which were transferred to the United Nations were analogous to the administration of a territory by a State. With regard to the question of the crews of ships and aircraft, he regretted that some members found it inconvenient to look at real experience, such as the M/V “Saiga” (No. 2) case. As Mr. Gaja had pointed out, that case could not be set aside; it did indeed come within the scope of the draft articles on diplomatic protection. During the previous quinquennium, the Commission had often been tempted to convert nearly every subject into a human rights topic. There was, in fact, an analogy between human rights and diplomatic protection since the latter was part of the broad set of possibilities by means of which individuals’ rights might be protected. Moreover, there was a proliferation of international human rights instruments which sometimes overlapped in order to provide additional protection. Similarly, if crew members could receive protection from the State of nationality of the vessel or aircraft, that merely provided increased protection and should be welcomed.

23. Mr. CHEE, referring to paragraph 16 of the third report on diplomatic protection, said that, in theory, the question of the nationality of a ship or aircraft might appear relatively simple; in practice, however, all kinds of difficulties might arise. For example, the crew members might be of various nationalities, or the ship might have several owners. Thus, it would be extremely difficult to develop rules applicable to all cases, and it would be more reasonable not to deal with those issues in the context at hand. For the sake of clarity, moreover, it might be preferable to refer to the type of protection provided by international organizations as something other than “diplomatic protection”.

24. Mr. KOSKENNIEMI, commenting on the statement made by Ms. Escarameia, said that it might be useful to at least consider the proposal to deal with international organizations’ protection of persons in the territories they administered. Clearly, such protection was different from functional protection, which did not come within the scope of the topic. On the other hand, he did not fully agree with the Special Rapporteur’s statement that a major departure from traditional international law would not be advisable. The Commission should take up new topics linked to current events, and there was no reason that that could not be done in the light of traditional international law. Furthermore, States could not divest themselves of their obligations to their citizens by delegating to international organizations the right to exercise diplomatic protection.

25. Mr. DAOUDI said that he had devoted several years to a study of the delegation of competence and had noted that there were various types of such situations in different areas of public international law. Such cases did not constitute a derogation from the rules of international law, but rather an application and a confirmation of these rules. Moreover, such situations were mentioned in various instruments, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In the field of diplomatic protection it should be stressed that the nationality link with the first State was unchanged; the second State merely exercised a right belonging to the first State. Functional protection, on the other hand, covered quite different situations and should indeed be considered in a context other than that of diplomatic protection.

26. Ms. XUE said that the question was not whether persons in the type of situations mentioned should be protected under international law, but why that issue should be raised in the context of diplomatic protection. For diplomatic protection, the presumption was that, normally, every State had the duty to protect foreigners in its territory; it was when such protection proved insufficient or impossible that international law would come into play and that the State of nationality could come to the aid of its citizens. Since those situations referred to in paragraph 16 were different, the question of protection did not fall within the context of the topic.

27. Mr. CANDIOTI said he agreed with members who thought that the question of functional protection by international organizations of their officials should be consid-
Rapporteur’s article 12 was useful. The word “procedural” was complied with. On that score, and despite some other the condition precedent to a State’s bringing a claim on codification exercise in which it was engaged. In his view, cern itself unduly with that question in the context of the dies was a procedural rather than a substantive rule. How-

30. In his view, the rule on the exhaustion of local remedies was a procedural rather than a substantive rule. However, he did not think that the Commission should concern itself unduly with that question in the context of the codification exercise in which it was engaged. In his view, what was important was that the rule determined whether the condition precedent to a State’s bringing a claim on the international plane on behalf of one of its nationals was complied with. On that score, and despite some other members’ eloquent assertions to the contrary, the Special Rapporteur’s article 12 was useful. The word “procedural” should, however, be deleted from that provision, so as to meet the concerns of ardent proponents of the view that the rule on the exhaustion of local remedies was substantive. Subject to that reservation, he suggested that article 12 should be referred to the Drafting Committee.

31. He had not yet made up his mind about article 13, although he was inclined to think that it should be deleted, since it might lead the Commission into pointless disputation, creating more problems than it solved.

32. Subparagraphs (a), (c) and (f) of article 14 were, in his view, perfectly in order and useful. The requirement that local remedies must be exhausted was not an absolute rule and could not be met where domestic remedies were manifestly ineffective or non-existent. The test of ineffectiveness must, however, be an objective one. Such was the case, for example, where local remedies were unduly and unreasonably prolonged or unlikely to bring effective relief, or where local courts were completely subservient to the executive branch.

33. With regard to article 15, he agreed with the Special Rapporteur that the burden of proof was difficult to codify; accordingly, the best course would be to refrain from any attempt at codification. If, however, it were to be codified, he would favour Kokott’s formulation,5 which was to be found in paragraph 103 of the third report.

34. Mr. FOMBA said that he wondered whether article 15 covered all the concerns of States, or at least their major concerns, and to what extent the content of the rules proposed therein was anchored in positive international law. The Special Rapporteur considered the question of the burden of proof in the light of all the sources of information available and concluded, in paragraph 117 of his third report, that it was difficult—and unwise—to state any concrete rule other than that the burden of proof should be shared by the parties, shifting between them continuously throughout the case, and that the burden lay on the party which made a positive claim to prove it. In his view, the Commission must do its utmost to draw the lessons of that conclusion. As for the questions on which the Special Rapporteur invited the Commission to take a position in paragraph 118, he himself did not yet have a firm position in that regard. Nonetheless, he broadly endorsed the preliminary conclusions reached by the Special Rapporteur.

35. On the question whether the general principle set forth in article 15, paragraph 1, should be codified, he recalled the definition of codification given in article 15 of the Commission’s statute: “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”. It was true that that definition had been adopted for reasons of convenience. But it was legitimate to ask whether or to what extent the criteria adopted therein, for lack of a better option, were met in the present case. The Special Rapporteur appeared to deem them to have been fulfilled, since he stated in

5 See 2712th meeting, footnote 9.
paragraph 102 of his third report that it was generally accepted that the burden of proof was on the party which made an assertion. On the other hand, the question arose whether there was in fact any need for such a provision, which, in the absolute, seemed to be dictated by the litigated and adversarial nature of the question of local remedies and also by the desire to ensure a sound and balanced administration of justice. More thought should thus be given to the matter, though much depended on the extent to which it was considered necessary to mark out a path for judges and parties, with a view to facilitating their work.

36. With regard to the question whether the Commission should content itself with codifying article 15, paragraph 2, his first impression was that, in the absence of agreement on paragraph 1, it might envisage a provision along the same lines as that appearing in paragraph 2, provided that any problems of substance or form were resolved. However, he did not yet have any specific proposal in that regard.

37. As to the proposal by Kokott, he noted that the Special Rapporteur described it as “concise” and “not inaccurate”. Insofar as it offered a useful and less problematic solution in terms of both substance and form, that proposal could be adopted. But other formulations could also be envisaged. He had no marked preference for any one solution proposed by the Special Rapporteur and thus reserved his position on the question.

The meeting rose at 11.30 a.m.

2716th MEETING

Tuesday, 7 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.


[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. SIMMA said he was aware that, in commenting on articles 14, subparagraphs (a), (e) and (f), and article 15, he was traversing ground that was already well trodden. It seemed to him, however, that in the interests of achieving consensus on the draft articles, the risk of repeating points already made was one worth taking.

2. All in all, the proposals made with regard to article 14 were sound and well balanced. The Special Rapporteur followed the principle that relief from the obligation to exhaust local remedies should not be made too easy: wrongs committed against foreigners should, as far as possible, be remedied by a State’s own legal and judicial machinery. Option 2 in Article 14, subparagraph (a), namely, that local remedies need not be exhausted where they offered no reasonable prospect of success, did not require the rule on the exhaustion of local remedies to be taken sufficiently seriously, excluding the claimant too readily from compliance with that rule. The statement by Fitzmaurice cited by the Special Rapporteur in paragraph 35 of the third report (A/CN.4/523 and Add.1), that “the mere fact that there is no reasonable possibility of the claimant obtaining that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule”,\(^4\) was highly pertinent in that regard. There must be a reasonable possibility, not of obtaining a remedy, but of an effective remedy’s existing.

3. According to paragraph 31 of the report, option 1, namely, that local remedies need not be exhausted where they were obviously futile, meant that it must be “obviously and manifestly clear that the local remedy would fail”. If that criterion were to be applied, the threshold would be too high and the risk for the claimant too great. Thus, option 3, according to which local remedies need not be exhausted if they provided no reasonable possibility of an effective remedy, covered an adequate middle ground and offered a balanced view, though the somewhat repetitious wording stood in need of editing changes.

4. Article 14, subparagraph (e), relating to undue delay was not, in his view, rendered superfluous in the light of article 14, subparagraph (a). The cases covered by article 14, subparagraphs (a) and (e), were in a sense consecutive in time: an existing local remedy which might at first appear to be a “reasonable possibility” from the standpoint of article 14, subparagraph (a), might sub-

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\(^1\) For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

\(^2\) See *Yearbook ... 2001*, vol. II (Part One).

\(^3\) Reproduced in *Yearbook ... 2002*, vol. II (Part One).