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Summary record of the 2685th meeting

Topic:
Diplomatic protection

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SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-THIRD SESSION

Held at Geneva from 9 July to 10 August 2001

2685th MEETING

[Agenda item 3]

Monday, 9 July 2001, at 3.10 p.m.

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR
(continued)*

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Organization of work of the session (concluded)

[Agenda item 1]

1. The CHAIRMAN welcomed all the members of the Commission to the second part of the session and said that the Working Group on the commentaries to the draft articles on State responsibility would be making every effort to complete its review of the commentaries in a timely fashion so as to enable the Special Rapporteur to finalize them. Sufficient time must be accorded for the translation of the commentaries, which were voluminous.

Diplomatic protection¹ (continued)* (A/CN.4/506 and Add.1,² A/CN.4/513, sect. B, A/CN.4/514)³

* Resumed from the 2680th meeting.

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, para. 1.

² See *Yearbook . . . 2000*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

2. The CHAIRMAN invited the Commission to continue its consideration of chapter III (Continuous nationality and the transferability of claims) of the first report of the Special Rapporteur (A/CN.4/506 and Add.1).

3. Mr. DUGARD (Special Rapporteur) said that, although chapter III had been introduced at the first part of the session, he wished to make some brief additional comments. In his introductory statement (2680th meeting), he had indicated in respect of the principle of continuous nationality that the Commission had a choice to make between a traditional view and a more modern view. The traditional view was that a State could exercise diplomatic protection only on behalf of a person who had been its national at the time of the injury on which the claim was based and only if that person had continued to be its national up to and including the time of presentation of the claim. The traditional view was supported by some State practice, some attempts at codification, some judicial decisions and some writers. The rationale behind it was that it prevented abuse and “protection shopping”—the changing of nationality until a powerful State willing to espouse the individual’s claim was found.

4. The traditional view had come in for considerable criticism, many writers and judicial decisions taking the position that it was not a clearly established rule of customary international law. Criticism was also levelled on the grounds, inter alia, that it was not clear whether the injury began on the date of the actual injury or of a denial of justice and whether the date until which nationality was required was the date of initiation of diplomatic negotiations or of presentation of the claim. It had been argued that the rationale behind the rule had disappeared. At the current time, in the wake of the judgment of ICJ in the *Nottebohm* case, an individual could not engage in “protection shopping” because he or she would lack an effective link with the chosen protector State. The continuity rule had been described as unjust in that it failed to take account of involuntary changes of nationality. In the context of nationality in relation to the succession of States, the Special Rapporteur on that topic had already pointed to the need to adjust the continuity rule in regard to such involuntary changes.

5. For those reasons, the Commission might be wise to adopt a more flexible rule, which was set out in article 9. It allowed a State to bring a claim on behalf of a national who had acquired its nationality in good faith after the date of injury, where the injury was attributable to a State other than the previous State of nationality, provided the original State had not exercised or was not exercising diplomatic protection in respect of the injury. A number of safeguards were built into article 9, the most important being that the new nationality must have been acquired in good faith. It was also important that a claim could not be brought against the previous State of nationality.

6. He looked forward to hearing the debate and to seeing whether the Commission was to follow the traditional approach or a more progressive one that took account of changes in international law since the judgment of ICJ in the *Nottebohm* case.

7. Mr. GAJA said that the Special Rapporteur was making a major effort to reconsider the rules of diplomatic protection to ensure fuller protection of individual rights, especially human rights. In doing so, he was proposing some innovative solutions that enabled the Commission to revisit traditional rules and to discuss their rationale. The proposal in article 9, on continuous nationality, was moderately innovative in that it considered that a State was entitled to exercise diplomatic protection on behalf of a person who had not been its national at the time of the injury only if the person had not had the nationality of the allegedly responsible State. Other conditions stated in article 9 further limited the scope of the innovation. Even so, however, the article appeared to be in conflict with practice, as stated in the first report.

8. The Special Rapporteur conceded that the continuity rule was well established in State practice and, in considering judicial decisions, suggested that the main trend was towards support of the rule. In that context, however, he quoted both the judgment of PCIJ in the *Panvezys-Saldutiskis Railway* case and the dissenting opinion of Judge van Eysinga,⁴ to which he gave almost equal weight. Personally, he wished to quote a passage in the judgment that seemed particularly clear in support of the continuity rule:

In the present case no grounds exist for holding that the Parties intended to exclude the application of the rule. The Lithuanian Agent is therefore right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality [pp. 16–17].

In another part of the judgment, PCIJ criticized the attempt of the Government of Estonia to discredit the rule.

9. As the Special Rapporteur stated in his comments on article 9, some doubts had been cast on the existence of the continuity rule by Sir Gerald Fitzmaurice in his separate opinion in the *Barcelona Traction* case. Both Belgium and Spain had reasserted the rule of continuity in reply to a question posed at the last stage of the oral pro-

ceedings by Judge Jessup. In his separate opinion, which the report did not quote, Judge Jessup had said:

Although the phraseology varies, there is general agreement on the principle that the claim must be national in origin, that is to say that the person or persons alleged to have been injured must have had the nationality of the claimant State on the date when the wrongful injury was inflicted. One might well admit that there is a certain artificiality in the whole notion since it rests basically on the Vattelien fiction, but I do not think the Court can change a long established practice on this matter [p. 202, para. 74].

10. Judge Jessup had been right to stress that the main rationale of the continuity rule was not the danger of abuse, but the *Mavrommatis* or Vattelien approach to diplomatic protection: that the State, in resorting to diplomatic action on behalf of an individual, was asserting its own rights, namely to ensure, in the person of its subjects, respect for the rules of international law. That seemed to imply that, at the time of the breach, the individual must have had the nationality of the State that brought the claim.

11. Should the Commission decide to go against existing practice and follow the Special Rapporteur's suggestion with a view to increasing the possibility of protection for the individual, one condition should be added to those currently listed in article 9. At the time of the breach, the obligation ought to have been in force between the allegedly respondent State and the State that brought the claim for an individual who had acquired a new nationality. An example was when a State contended that an individual's right to consular assistance in criminal proceedings under article 36 of the Vienna Convention on Consular Relations had been infringed. Without the suggested addition to article 9, the State of new nationality might bring a claim based on a breach when the allegedly responsible State had had no obligation at the time of the breach towards the State that was bringing the claim. Often, rules of diplomatic protection were considered simply in the context of customary international law and therefore the obligation would exist anyway. The judgment of ICJ in the *LaGrand* case was a useful reminder that diplomatic protection could also relate to breaches of obligations under treaties; hence the need to stipulate that the obligation must already be in existence.

12. Before moving away from nationality of claims concerning individuals, he thought that a number of further issues should be addressed. The first was when an international organization exercised both functional protection and diplomatic protection for an official. It would be useful to state a rule that applied when both an international organization and the State of nationality intended to exercise diplomatic protection on behalf of the same individual.

13. The second issue concerned the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned. An example of the assertion of such a right could be found in the judgment by the International Tribunal for the Law of the Sea in the *M/V "Saiga" (No. 2)* case, which stated that Saint Vincent and the Grenadines was "entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the

⁴ See 2680th meeting, para. 4.

Saiga, including all persons involved or interested in its operation” [para. 172]. It would be expedient for the Commission to state what the applicable rule was in such a case and to what extent the entitlement of the State of nationality of the ship or aircraft affected the entitlement of the individual’s State of nationality.

14. The third issue was a case in which one State exercised diplomatic protection for a national of another State because that State had delegated it to do so. It would be useful to set out the conditions under which diplomatic protection could be delegated. The presumed extent of delegation should also be specified, for even after having delegated protection, the State of nationality might wish to take up the case.

15. The fourth issue involved cases when a State or an international organization administered or controlled a territory. For example, was the United Nations entitled to exercise diplomatic protection on behalf of the East Timorese pending the birth of a new State? Could the United Nations bring a claim for the benefit of Yugoslav nationals who were resident in Kosovo?

16. He looked forward to hearing the Special Rapporteur’s views on those questions.

17. Mr. ROSENSTOCK said he wished to comment on the intertemporal issue raised by Mr. Gaja. One might take, for instance, a case in which, at the time the injury occurred, the individual affected was a German national and Germany and the host country were parties to the Vienna Convention on Consular Relations. The individual then changed nationality, becoming, say, a national of Zimbabwe, but Zimbabwe had not been a party to the Convention at the time of the incident. It would be unreasonable to hold Zimbabwe and the host country to obligations to which they had not been committed at the time of the incident. The State of new nationality, although not at that time entitled to claim, became so entitled when the individual changed nationality. Where was the unfairness in the subsequent State of nationality asserting its right, as an inherited right? At the time the obligation had been breached, it had been breached not *vis-à-vis* a non-party, namely Zimbabwe, but *vis-à-vis* a party, namely Germany. Where was the injustice in allowing Zimbabwe to take over the obligation that had been valid at the time? That sort of issue addressed the conception of the Commission of the topic: was it looking for a way of protecting the individual or was the focus to be on State-to-State relations?

18. Mr. GAJA said Mr. Rosenstock had introduced a new element into his own example, in that the State of new nationality had acquired the obligation between the time of the original breach and the time of the submission of the claim. That case, too, had to be considered. The element of unfairness was that, in the suggested example, Zimbabwe would be able to bring a claim for infringement of an obligation that had occurred at a time when Zimbabwe would not have had any obligation.

19. Mr. HAFNER, pursuing the line of questioning raised by Mr. Rosenstock, asked what would happen if a State ceased to exist—for example, because of dismemberment, and persons who had already been injured became nationals of a new State? If the new State was

required to be entitled by law in order to claim a right *vis-à-vis* the injuring State, the individuals would suffer because no State would be entitled to exercise diplomatic protection on their behalf.

20. Mr. HE drew attention to two points in connection with article 9. First, the original State of nationality had priority in exercising diplomatic protection. Only if it did not institute a claim following an injury could the new State of nationality do so. He wondered, however, what the position would be if the injury occurred during the period of transition from one nationality to another and continued to exist after the acquisition of the new nationality. Would priority for making a claim still belong with the original State of nationality or could the injured person call on the new State of nationality to put forward the claim? Since the article was intended to establish a flexible regime, it might be necessary to cover the possibility of such an eventuality and explain in the commentary whether the priority still lay with the original State of nationality.

21. Secondly, the statement that only the new State of nationality may institute a claim and only when it—the State—elects to do so, in the conclusions on article 9 contained in the first report of the Special Rapporteur, seemed to give the new State of nationality wide discretionary powers, taking no account of priorities. In practice, both the original State and the new State of nationality had the discretionary power to institute a claim.

22. Mr. ECONOMIDES said that he could not support the proposal to do away with the traditional, classic rule of continuous nationality and the transferability of claims, which had long been the bedrock of the exercise of diplomatic protection, as borne out by State practice, mixed claims commissions and international jurisprudence. It was an established principle of international law. In that context, the practice of the United States and the United Kingdom, as described in the Special Rapporteur’s comments on article 9, was most revealing. The same practice existed in Greece. The reasons for maintaining the continuous nationality rule and the concern to prevent abuses of all kinds by individuals and States, particularly in view of the enormous power wielded by the multinational corporations, were currently greater than had been the case at the time of the *Barcelona Traction* case. Accordingly, he could not agree with the separate opinion of Sir Gerald Fitzmaurice. That was not to say improvements to the rule could not be made, and some essential exceptions should be admitted. In that context, he agreed with the statement also quoted in the report by his countryman Politis.⁵ If an individual or legal person changed nationality involuntarily, there should be a provision that diplomatic protection could be exercised by the new State of nationality but not against the original State of nationality. Such an exception would apply above all in cases of State succession when the successor State automatically granted its nationality to the persons who came under its sovereignty. Exceptions should also be made in other cases, such as a change of nationality by reason of marriage or when a person was stateless. Otherwise, the application of the rule should remain unchanged. Article 9, paragraph 1, did not cover all cases.

⁵ *Ibid.*, para. 5 and footnote 14.

23. Article 9, paragraph 4, was acceptable, but its provisions should be broadened to exclude diplomatic protection by the new State of nationality against the original State of nationality. He also had strong doubts about the necessity or the relevance of paragraph 3: it was inappropriate to disassociate the general interest of the requesting State from the interest of the injured individual. Classic diplomatic protection covered only protection of the individual. The transferability of claims, a delicate question not adequately dealt with in the report, should be much more restrictive than was allowed for in paragraph 2. The continuity rule should apply except in the case of the involuntary transfer of claims, more particularly upon the death of the injured person.

24. Mr. MELESCANU said that he was speaking, without preparation, in order to obviate the impression that the dominant trend within the Commission was in opposition to the changes proposed in article 9 by the Special Rapporteur, who had given new life to a particularly important aspect of public international law. State responsibility was, after all, largely expressed through diplomatic protection, whether of individuals, company shareholders, ships or aircraft. At a time of globalization, problems involving property or capital investment took on ever greater importance. Another factor was the high concentration of power in the State, which was the only protector of private interests, whether of individuals or legal entities. It had to be conceded, however, that the exercise of diplomatic protection was, unfortunately, largely subordinate to political considerations. It was a fact of life and must be accepted as the premise for constructing an answer to the question of how individual interests could best be protected.

25. As could be seen from the comments by Mr. Rosenstock and Mr. Hafner, even from a practical point of view, there was some point to positive development of the law. The reservations expressed by Mr. Gaja and Mr. Economides were based on theory and precedent. Even in the theory, however, cracks had appeared in the edifice of diplomatic protection. Umpire Parker had clearly said that the injury was to the State only in the sense that the State was entitled to make sure that the provisions of international law were applied to its citizens.⁶ Logically, means should be made available to make good the injury, and the Commission should consider what those means were if, for political reasons, a State decided not to extend diplomatic protection. Article 9, paragraph 1, provided the answer: the protection could be provided by another State. International practice and doctrine thus came together to provide support for the Special Rapporteur's views. Despite the sound arguments for the old rule on continuous nationality, there was a stark choice between staying with that rule or encouraging the progressive development of the law. He would opt for the latter.

26. Mr. GOCO said that diplomatic protection was discretionary not obligatory. Cases existed in which, despite every reason to extend it, a State refrained from doing so. His country had extended diplomatic protection even in cases where the change of nationality had taken place

following an injury, but that practice was by no means universal.

27. The article should address another phenomenon of current international life: that of dual or multiple nationality, which was accepted internationally by virtue of the principles of *jus sanguinis* and *jus soli*, yet had been subjected to attempts to abolish them. Certain conditionalities were set out in paragraph 1 for the exercise of protection in a case of change of nationality in good faith by reason of marriage or naturalization. However, it was important that the rule should not be inflexible and could apply in cases where another State of nationality might also exercise diplomatic protection.

The meeting rose at 4.20 p.m.

2686th MEETING

Tuesday, 10 July 2001, at 10.10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma.

Diplomatic protection¹ (*continued*) (A/CN.4/506 and Add.1,² A/CN.4/513, sect. B, A/CN.4/514³)

[Agenda item 3]

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that article 9 proposed by the Special Rapporteur in his first report (A/CN.4/506 and Add.1), addressed interesting problems, including that of change of nationality of an injured person who wished to bring claims for injuries suffered under his or her old nationality. According to the well-established basic rule of continuous nationality, the injured person must have the

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, para. 1.

² See *Yearbook . . . 2000*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

⁶ *Ibid.*, para. 4.