

issues is based on the recognition of that fact. Its main focus, however, is on timeliness of internal legislation. It sets to a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States "without undue delay"

The Special Rapporteur had in his report pointed out that if "the legislation enacted after the date of the succession of States did not have a retroactive effect statelessness, if only temporary, could ensue"¹⁷ The Commission while recognizing the principle of non-retroactivity of legislation considered that in the case of succession of States the benefits of retroactivity justify an exception to that general principle. While draft article 6 on Effective Date, is thus closely connected to the issue dealt with in draft article 5, it has a broader scope of application as it covers "attribution of nationality" not only on the basis of legislation but also on the basis of a treaty. The retroactive effect of legislation or treaty extends to the acquisition of nationality following the exercise of option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of exercise of such option. Draft article employs the term "attribution of nationality" for the first time. The Commission preferred using this term rather than the term "granting" as it felt that the former expression best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization.

Draft articles 7 and 8 as adopted by the Commission must be read as exception to the basic premise concerning the attribution of nationality. Draft article 7 on attribution of nationality to persons concerned having their habitual residence in another State corresponds to paragraph 1 of draft article 4 as proposed by the Special Rapporteur place clear limitations on the power of the successor State to attribute its nationality to person concerned. Paragraph 2 of the draft article likewise restricts the power of a successor State to impose its nationality on persons who had their habitual residence in another state against the will of such persons, unless such persons would become stateless.

¹⁷ See Third Report On Nationality in Relation to The Succession of States. Document A/CN.4/480 p.45

Draft article 8 entitled Renunciation of the nationality of another State as a condition for attribution of nationality addresses the issue of elimination dual and multiple nationality. Introducing this draft article the Special Rapporteur had observed that "While it was not for the Commission to suggest which policy States should pursue in the matter of dual / multiple nationality, its concern should be the risk of statelessness related to the requirement of prior renunciation by the person concerned of his or her current nationality as a condition for the granting of the nationality of the successor State."

Draft article 9 on the Loss of nationality upon the voluntary acquisition of the nationality of another State incorporates a provision that derives from a rule of general application adapted to the case of succession of States. It recognizes that a successor or a predecessor State is entitled to withdraw its nationality from persons concerned who in relation to the succession of States voluntarily acquire the nationality of another State. The provisions of draft article 9 would apply in all types of succession of States save that of unification where the successor State remain the sole State concerned. For reasons of clarity the rights of the predecessor and the successor State are spelled out separately. It does not however deal with the question as to when the loss of nationality should become effective and also leaves aside the question of the voluntary acquisition of the nationality of a third State.

Draft article 10 on Respect for the will of the persons concerned establishes the general framework of the right of option and the consequences of the exercise of that right. The provisions of this draft article correspond to the Special Rapporteur's proposals on "the right of option" and "Granting and withdrawal of nationality upon option". The provisions of this draft article are in essence based on a number of treaties regulating nationality for questions in relation to the succession of States as well as national laws which provided for the right of option or an analogous procedure enabling the individuals concerned to establish their nationality by choosing either between the nationality of the predecessor State and that of the successor State or between the nationalities of two or more successor States.

The principle of family unity, in relation to the succession of States, is recognized by the draft articles as adopted on first reading which set out a

general obligation. Draft article 11 entitled the Unity of family provides that where the acquisition or loss of nationality would impair the unity of a family States concerned are to take "appropriate measures" to allow that family to remain together or to be united.

In dealing with the problem of children born to persons concerned after the date of the succession of States the Commission recognized the need to make an exception from the rigid definition *ratione temporis* of the draft articles. Draft article 12 entitled Child born after the succession of States corresponding to paragraph of draft article 1 as proposed by the Special Rapporteur envisages that a child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

The place of habitual residence is an important criterion for the determination of nationality particularly in specific categories 'of State succession. Draft article 13 on the Status of habitual residents, as adopted on first reading, incorporates the rule that the status of habitual residents is not affected by the succession of states. In other words persons concerned who are habitual residents on the date of the succession retain their status. In specific cases, addressed in paragraph 2, where succession of States is the result of events leading to the displacement of a large number of the population the State concerned is to take all necessary measures to ensure the effective restoration of the status of habitual residents.

The principle of Non-discrimination set forth in draft article 14 seeks to prohibit discrimination on "any ground" resulting in the denial of the right of a person to a Particular nationality or to an option. The forms of discrimination, the Special Rapporteur had observed, vary considerably.

The principle of Prohibition of arbitrary decisions concerning nationality issues set out in draft Article 15 had first been included in the Universal Declaration on Human Rights. In its present application to the specific situations of succession of States it contains two elements viz. (i) the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from, persons

concerned who were entitled to retain such nationals following the succession of States and of the arbitrary refusal by the successor State attribute its nationality to persons concerned who were entitled to acquire such nationality; and (ii) the prohibition of the arbitrary denial of a person's right of option, that is an expression of the right of the person to change his or her nationality.

Draft article 16 sets out the Procedures relating to nationality issues and the States concerned to process applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right to option without undue delay and to issue relevant written decisions. The processing of applications is to be open to effective administrative and Judicial review. The provision represents minimum requirements in procedural matters.

The provisions on the Exchange of information, consultation and negotiation set out in draft article 17 incorporates the obligation of States concerned in this regard in very general terms. The precise scope of the questions which are to be the subject of 'consultations between States concerned is not indicated. The aim of the Special Rapporteur was to provide for the obligation to consult and through negotiations seek a solution a broad spectrum of problems not merely statelessness. The recommendation of the Working Group to expand the scope of the negotiations to such questions as dual nationality; the separation of families; military obligations; pensions and other social security benefits; and the right of residence had met with the approval of the Commission. It is to be noted however that the obligation to negotiate to seek a solution does not exist in the abstract and it is not presumed that every negotiation must lead to the conclusion of an agreement.

Draft article 18, the last of Part I of the draft articles as adopted on first reading, 'is concerned with the problem of the attitude of Other States where a State concerned did not cooperate with the others concerned and where the effects of its legislation conflicted with the provisions of the draft articles. Paragraph 1 of draft article 18 safeguards the right of and requires other States not to give effect to nationality attributed by a State concerned in disregard of the requirement of an effective link. In this it sets out the principle of non-opposability of nationality acquired or retained following succession of States.

Introducing Part II of the draft articles the Special Rapporteur had said that it set out the principles applicable in specific situations of succession of States, in contrast to the draft formulations of Part I, which applied in all cases of State succession. The specific cases of State succession envisaged were: (i) "Transfer of Part of the Territory"; (ii) the "Unification of States"; (iii) the "Dissolution of States"; and (iv) the "Separation of Part of the Territory." Part, II of the Draft articles termed Provisions Relating to Specific Categories of Succession of States as adopted by the Commission comprises the text of 9 draft articles (draft articles 19-26) and is divided into the above mentioned four sections. This typology followed is in principle that of the Vienna Convention on the Succession of states in respect of State Property, Archives and Debts, 1983.

Whilst draft article 19 relates to the application of Part II of the draft articles, the draft articles 20 - 26 are intended to furnish guidance to states concerned both in their negotiations as well as in the elaboration of national legislation in the absence of a treaty.

Section 1, the Transfer of Part of the Territory of Part II of the draft articles consists of a single draft article incorporating the rule relating to the Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State. Draft article 20 provides that when part of the territory of a State is transferred by that State to another State, the successor State shall attribute to, and the predecessor State shall withdraw its nationality from, persons concerned who have their habitual residence in the transferred territory unless otherwise indicated by the exercise of the right of option which such persons shall be granted.

Section 2, Unification of States, of Part II of the draft articles whilst consisting of one article spells out the two possible scenarios i.e. where following the unification of two or more States the successor State (i) is a new State; or (ii) has a personality identical to that of one of the States which have united. Draft article 21 provides that in either case in principle the successor State shall attribute its nationality to all persons who, on the date of the succession of States had the nationality of a predecessor State. The provision however makes an exception in respect of persons who have their habitual residence in

another State and also have the nationality of that or any other State. This exception is borne out by the use of the phrase "Without prejudice to the provisions of Article 7".

The specific case of Dissolution of a State is dealt with in Section 3 of part II of the draft articles. The case of dissolution of States has been carefully distinguished from that of the separation of part or parts of the territory. This is by reason of the fact that the nationality of a State is extinguished or disappears with the dissolution of that State. On the other hand, in the case of a separation of part of the territory both the predecessor State and its nationality continue to exist.

The texts Of draft articles 22 and 23 together with commentaries thereto comprise this section. While draft article 22 deals with the issue of the Attribution of the nationality of the successor State, by the successor State, the provisions of draft article 23 relate to the Granting of the right of option by the successor State. Read together these provisions provide for the attribution of nationality of the successor State to persons concerned and the granting of the right of option to certain categories of persons concerned. The core body of nationals of each successor State has been defined by reference to the criterion of habitual residence. Rules have also been formulated for the attribution of the nationality of States to persons concerned having their habitual residence outside the territory of the successor state. The criterion employed is an "appropriate legal connection with a constituent unit of the predecessor State" that has become a part of the successor State.

The fourth and last section of Part II of the draft articles addresses the issue of the Separation of Part or Parts of the Territory. Section 4 consists of 3 draft articles. Draft article 24 on the Attribution of nationality of the successor State lays down the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory. For the rest it follows the formulation of draft article 22.

As a corollary to the acquisition of the nationality of the successor State, draft article 25 deals with the question of Withdrawal of the nationality of the predecessor State. The withdrawal of the nationality of the predecessor

State is subject to two conditions viz. (i) that the persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State ; and (ii) that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. It aims at reducing statelessness, howsoever, temporarily which could result from withdrawal of nationality.

Draft article 26 on the Granting of the right of option by the predecessor and the successor State. It covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities between two or more successor States.

Finally draft article 27 identifies the Cases of succession of States covered by the present draft articles. It will be recalled that article 6 of the Vienna Convention on the Succession of states in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts explicitly limit the scope of their application to succession of States occurring in conformity with international law. Although it is very evident that the present draft articles address the question of nationality of natural persons in relation to the succession of States which take place in conformity with international law, the Commission decided for the purposes of consistency with the aforementioned Conventions, to include a similar provision in the present draft articles. As mentioned earlier the Commission has deferred the decision on its final placement In the draft articles, until the second reading.

5. DIPLOMATIC PROTECTION

In the report on the work of its forty eighth session the International Law Commission had proposed to the General Assembly that the item Diplomatic Protection be included as a topic for progressive development and codification of international law. By its resolution 51/160 the General Assembly inter alia invited the ILC to examine the topic "Diplomatic Protection" and to indicate its scope and content.

At its forty ninth session the Commission established a Working Group to further examine the topic of "Diplomatic Protection" and "to indicate the scope and content of the topic in light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit."

The Working Group in its consideration of the scope and content of the topic took the view that subject Diplomatic Protection was "appropriate" for consideration by the Commission. In its consideration of the item the Working Group had been mindful of the customary origins of diplomatic protection whose exercise had been characterized by the Permanent Court of International Justice as 'an elementary principle of international law'.¹⁸ In its report to the Commission the Working Group observed that:

"Given the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest."

The Working Group attempted to (1) clarify the scope of the topic to the extent possible ; and (11) identify issues which should be studied in the context of the topic. It did not take a position on issues which require careful study of State practice, Jurisprudence and doctrine.

While recommending that the study could follow the traditional pattern of articles and commentaries thereto the Working Group left for future decision the question of its final form. Thus, the outcome of its the Work Of the Commission on the subject may the form of a convention or guidelines.

The topic Diplomatic Protection, in the view of the Working Group, is primarily concerned with the basis, conditions modalities and consequences of claims brought by States on behalf of their nationals against another State. It observed that a similar mechanism has been extended by analogy to

¹⁸ Mavrommatis Palestine Concessions Case, Series A, No.2, 30 August 1924.

claims by international organizations for the protection of their agents. Thus the scope of the topic does not cover damage derived from direct injury caused by one State to another. It would only address indirect harm i.e. harm caused to natural or legal persons whose case is taken up a State. The study would not cover direct harm or harm caused directly to the State or its property.

The Working Group was agreed that the title "Diplomatic Protection" should remain for it has become a "term of art" in all official languages of the United Nations. It drew distinction between diplomatic protection properly so called, i.e. a formal claim made by State in respect of an injury to one of its nationals which has not been redressed through local remedies, and certain diplomatic and consular activities for the assistance and protection of nationals as envisaged in article 3 of the Vienna Convention on Diplomatic Relations, 1961 and article 5 of the Vienna Convention on Consular Relations, 1963.

Scope and Content of the Study

The Commission endorsed the recommendation of the Working Group that the study of diplomatic protection should focus on the consequences of an internationally wrongful act - whether of omission or commission - which has caused an indirect injury to the State, usually because of injury to its nationals. Thus, the topic will be limited to the codification of secondary rules of international law.

While addressing the requirements of an internationally wrongful act of the State as a prerequisite the study will not address the specific content of the international, customary or treaty legal obligation which has been violated.

Diplomatic Protection has been defined by international jurisprudence as a right of the State. Historically, the link of nationality has furnished the basis of a right of protection by the State although in some cases a State has, by means of an international agreement, been invested with the right to represent another State and act for the benefit of its nationals.

The Working Group recalled that the Hague Convention of 1930 stipulates that State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses" and pointed out

that the question may arise as to whether this rule is still applicable and whether the criterion of effective nationality should not also be applied in this case.¹⁹ The situation in the opinion of the Working Group, may change in case of protection claimed by international organizations. In the Reparations case the International Court of Justice stated that the protection claimed by the United Nations is based not upon the nationality of the victim but upon his status as an agent of the organization²⁰ Therefore it does not matter whether or not the State to which the claim is addressed regards the victim as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

A number of issues identified by the Working Group need to be considered These include whether diplomatic protection is based solely on Jurisdiction *ratione personae* over the beneficiary. A related question is whether a State can exercise diplomatic protection even when an individual declines such protection from its State of nationality. Yet another issue identified by the Working Group in this regard is whether diplomatic protection may be exercised at the discretion of the State or whether there is a right of a national to diplomatic protection. Consideration needs also to be given to the question whether the topic should cover forms of protection other than claims and whether the rules of diplomatic protection in instances of State succession should be included in the purview of the study.

The injury suffered by a national which is espoused by a State is termed indirect in as much as such an espousal makes it possible to circumvent the lack of direct access of the nationals to the international sphere. The State intervenes "to ensure, in the person of its subjects, respect for the rules of international law"²¹ When the injury is suffered by an agent of an international organization, the organization may exercise functional protection on his behalf (to protect his rights), without prejudice to the possibility of the national State acting for his benefit by virtue of diplomatic protection.

¹⁹ Iran-United States case, Series A, No. 18, 6 April 1984

²⁰ I.C.J., Advisory Opinion 11 July 1949, "Reparations for Injuries Suffered in the Service of the United Nations" 1949, I.C.J. Reports.

As to the type of injury for which an international Organization is allowed to exercise protection. in the Reparations Case the International Court of Justice limited the injury for which the organization could demand reparation to one arising from a breach of an obligation designed to help an agent of the organization perform his or her duties. The Working Group did not take a position on whether the topic of "diplomatic protection" should include protection claimed by international organizations for the benefit of their agents. Taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the Working Group agreed that the latter should be studied, at the initial stage of the work on the topic, in order to enable the Commission to make a decision, one way or another on its inclusion in the topic.

The espousal of the claim by the State of nationality of the person gives it some freedom in the determination with the other State on the form of settlement for reparation, which may also include a lump sum for a group of persons.

As regards the content of the topic, the Commission has accepted the view of the Working Group that diplomatic protection deals with at least four major areas:

- (i) the basis for diplomatic protection, the required linkage between the beneficiary and the States exercising diplomatic protection;
- (ii) claimants and respondents in diplomatic protection, that is who can claim diplomatic protection against whom;
- (iii) the conditions under which diplomatic protection may be exercised; and
- (iv) the consequences of diplomatic protection.

The Working Group has identified a number of issues under each of the four main areas for study by the Commission.. The outline of the study prepared by the Working Group is as follows:

Chapter One: Basis for diplomatic protection

A. Natural persons.

1. Nationals, continuous nationality
2. Multiple nationals: dominant nationality, genuine link, effective nationality, bonafide nationality:
 - (a) As against third States
 - (b) As against one of the States of nationality
3. Aliens in the service of the State
4. Stateless persons
5. Non-nationals forming a minority in a group of national claimants
6. Non-nationals with long residence in the State espousing diplomatic protection
7. Non-nationals in the framework of international organizations of integration.

B. Legal persons

1. Categories of legal persons
 - (a) Corporations, and other associations in varying forms in different legal systems
 - (b) Partnerships
2. Insurers

3. Right of espousal in multiple nationality and in special cases (factors: nationality of legal persons, theories of control or nationality of share holders)

C. Other cases (ships, aircrafts, spacecrafts. etc.)

D. Transferability of claims

Chapter Two: Parties to diplomatic protection (claimants and respondents in diplomatic protection)

A. States

B. International Organizations ("functional" Protection)

C. Regional economic integration Organizations

D. Other entities

Chapter Three: The conditions under which diplomatic protection is exercised

A. Preliminary considerations

1. Presumptive evidence Of violation of an international obligation by a State

2. The "clean hands" rule

3. Proof of nationality

4. Exhaustion of local remedies

(a) Scope and meaning

(b) Judicial, administrative and discretionary remedies

(c) Exception to the requirement of exhaustion of local remedies

(i) Demonstrable futility in utilizing local remedies

(ii) Absence of safety for the claimant in the site where remedies may be exercised

(iii) Espousal of large numbers of Similar claims

5. Lis alibi pendens (non-Proliferation of the same action in diverse fora)

6. The impact of the availability of alternative international remedies

(a) Right of recourse to human rights bodies

(b) Right of recourse to international tribunals in the field of foreign investment

(c) Other procedural obligations

7. The question of timeliness; effect of delay in the absence of rules on prescription

B. Presentation of an international claim

1. The relevance of damage as an incidence of the claim

2. The rule of nationality of claims

C. The circumstances under which a State is deemed to have espoused a claim for diplomatic protection

D. Renunciation of diplomatic protection by an individual

Chapter Four: Consequences of diplomatic protection.