Document:-

A/CN.4/SR.2451

Summary record of the 2451st meeting

Topic:

Succession of States with respect to nationality/Nationality in relation to the succession of States

Extract from the Yearbook of the International Law Commission:-

1996, vol. I

It was simply unfortunate that the statement had been made at a time when the current term of office of the members of the Commission was coming to an end. It would have been better to hear it before the Commission had decided to deal not with the question of liability, but with that of prevention. While the work accomplished on that question was quite remarkable, it was still the question of the obligation to make reparation in the event of transboundary harm that was at the heart of liability. In that regard, he did not share the views of those who, in the Commission and in the Sixth Committee, had maintained that, once the rules of prevention had been stated, the only case in which the State of origin would be bound to compensate the State affected by transboundary harm would be that of a violation of those rules. That question did not involve the progressive development of the law; the point was, rather, to determine the content of what should be regarded as an obligation in public international law which the State of origin owed to the affected State. The Commission had, however, not yet examined the content of that obligation.

36. Was it simply an obligation of due diligence or did it go further? Was it an obligation not to cause damage or an obligation to make reparation for damage caused, somewhat along the lines of the obligation to provide compensation in the event of lawful expropriation by the State of property belonging to foreigners? It therefore had to be asked whether, at a time when lawful activities carried out by a State in its own territory could cause catastrophic damage in the territory of another State, there was an obligation of compensation in general international law. The legal counsel of Australia in the *Nuclear Tests (Australia* v. *France)* case[12] had answered that question by Mr. Waldock, judge at ICJ, in the affirmative with strongly convincing arguments, but, because the case had been settled, the Court had not had to make a ruling.

37. Another question that deserved consideration was at what stage and by what means the general principles of internal law could be transposed to the international level.

38. The CHAIRMAN said he gathered that the Commission wanted to establish a working group and indicated that the members would be Messrs. Bennouna, Crawford, de Saram, Eiriksson, Fomba, Kabatsi, Lukashuk, Robinson, Rosenstock, Szekely and Villagrán Kramer, as well as the Special Rapporteur, on the understanding that any member of the Commission who wished to do so could also participate.

It was so decided.

The meeting rose at 11.30 a.m.

[12] Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 253.

2451st MEETING

Tuesday, 2 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

State succession and its impact on the nationality of natural and legal persons (*continued*)* (A/CN.4/472/Add.1, sect. B, A/CN.4/474[1])

[Agenda item 6]

Recommendations of the Working Group on State succession and its impact on the nationality of natural and legal persons

1. Mr. MIKULKA (Special Rapporteur), reported that the Working Group on State succession and its impact on the nationality of natural and legal persons[2] had held four meetings from 4 June to 1 July 1996. At its first meeting, the Working Group had considered in depth the problem of the nationality of legal persons, the form that the work on the topic should take and the calendar of work. It had decided to recommend to the Commission that consideration of the question of the nationality of natural persons should be separated from that of the nationality of legal persons, as they raised issues of a very different order. While the first aspect of the topic involved the basic human right to a nationality, so that obligations of States stemmed from the duty to respect that right, the second aspect involved issues that were largely economic, centering on a right to establishment that could be claimed by a corporation operating in the territory of a State involved in succession. The Working Group had felt, moreover, that the two aspects did not need to be addressed with the same degree of urgency.

2. The Working Group considered that the question of the nationality of natural persons should be addressed as a matter of priority and had concluded that the result of the work on the subject should take the form of a non-

* Resumed from the 2435th meeting.

[1] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[2] See 2435th meeting, footnote 2.

binding instrument consisting of articles with commentaries. The first reading of such articles could be completed at the Commission's forty-ninth or, at the latest, fiftieth session. On completion of that work, the Commission would then decide, on the basis of comments to be requested from States, on the need to consider the question of the impact of State succession on the nationality of legal persons.

3. At its second to fourth meetings, the Working Group had embarked on an analysis of the impact of State succession on the nationality of natural persons. It had focused on the structure of a possible future instrument and the main principles to be included therein, basing its discussion on a working paper he had prepared for that purpose. That working paper envisaged the future instrument as being in two parts: part one, dealing with the general principles concerning nationality in all situations of State succession, and part two, containing more specific rules directed at specific situations of State succession.

4. The first provision in Part I would highlight the fact that every individual who possessed the nationality of the predecessor's State on the date of the succession had the right to the nationality of at least one of the States concerned. The term "States concerned" was intended to mean the States involved in the State succession, namely the predecessor and successor States, or simply the successor States. The second provision would address the corollary obligation of the States concerned to prevent the possibility that persons who possessed the nationality of the predecessor State on the date of the succession and had their habitual residence on the territory of one of the States concerned or in territories under their jurisdiction would become stateless as a result of the succession.

5. Another provision would deal with legislation on nationality and related issues and was intended to ensure that the States concerned enacted laws on nationality and related issues without undue delay and that they took all necessary measures to ensure that persons concerned would, within a reasonable time period, be apprised of the impact of such legislation on their nationality, their choices thereunder, and the consequences of the exercise of such a choice for their status.

6. A specific provision would be devoted to the principle of respect for an individual's will. It would be based on the premise that, without prejudice to their policy in the matter of multiple nationality, the States concerned should give consideration to the will of the persons concerned whenever those persons were qualified equally, either in whole or in part, to acquire the nationality of two or more of the States concerned.

7. The provision on non-discrimination would be drafted along the lines of the conclusions reached by the Working Group at the forty-seventh session.[3] The working paper also contained a provision whereby no one should be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor or predecessor State which he or she was entitled to retain or acquire in connection with State succession, and no one should be arbitrarily deprived of a right of option to which he or she was entitled. As for the procedures relating to nationality issues, the working paper envisaged that the State concerned should ensure that relevant applications were processed without undue delay and that decisions were issued in writing and were open to administrative or judicial review.

8. Another provision would envisage the obligation for the States concerned to take all necessary measures to make sure that the basic human rights and freedoms of persons who, after the date of the succession, had their habitual residence in their territory or in territories otherwise under their jurisdiction, and whose nationality had not yet been determined, were not adversely affected.

9. Under the provision on the right of residence, whenever the States concerned attached to the voluntary relinquishment of their nationality by a person acquiring or retaining the nationality of another State concerned an obligation for that person to transfer his or her residence out of their territory, those States would be required to grant a reasonable time limit for compliance with the obligation. An additional provision would require States to adopt all reasonable measures to enable a family to remain together or to be reunited whenever the application of internal law or treaty provisions would affect the unity of the family.

10. The penultimate provision of Part I would set out the obligation of States to consult in order to identify the possible negative effects of State succession on the nationality of individuals and other issues concerning their status and to seek a solution to those problems through negotiations. The final provision of Part I would address the difficult problem of the position of States other than the States concerned when they were confronted with cases of statelessness resulting from non-compliance by the States concerned with the provisions of the future instrument.

11. To facilitate negotiations between the States concerned, Part II would contain a set of seven other principles setting forth more specific rules for the granting or withdrawal of nationality or the granting of the right of option in different cases of State succession. They would be based on the conclusions reached by the Working Group at the forty-seventh session of the Commission, in 1995, and set out in its report.

12. He was confident that the Working Group would soon be able to complete its discussion of those issues and to submit its final report to the Commission.

13. Mr. LUKASHUK said that nationality in the event of State succession was a highly important, yet complicated and delicate problem, one that deeply affected the interests of many people. The draft articles prepared by the Special Rapporteur dealt with the problem expertly, reflecting positive international law.

14. Nationality had long been believed by States to be a matter falling within domestic jurisdiction. In 1923, in its advisory opinion with regard to the *Nationality*

[3] Ibid., footnote 3.

Decrees issued in Tunis and Morocco,[4] PCIJ had described questions of nationality as being within the "reserved domain" of domestic jurisdiction, yet it had also indicated that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending on the development of international relations.

15. In 1930, the Hague Codification Conference had recognized that nationality was no longer within a State's sole jurisdiction. The Universal Declaration of Human Rights[5] had proclaimed the right to nationality, while the Convention on the Reduction of Statelessness imposed upon States parties the obligation to prevent statelessness upon territorial transfer. In an advisory opinion of 1984, the Inter-American Court of Human Rights had stated that matters bearing on nationality could not be deemed to be within the sole jurisdiction of States and had described the powers of States as being circumscribed by their obligations to ensure the full protection of human rights. Nationality had thus become closely linked with protection of human rights, and that had to be the main idea behind the draft under consideration.

16. On the whole, the draft articles conformed to that criterion, though article 9, paragraph 2, by indirectly legalizing the expulsion of persons acquiring or retaining the nationality of another State, seemed at variance with the need to preserve human rights. The Special Rapporteur himself had rightly pointed out that the provision was contrary to the draft European Convention on Nationality, which indicated that nationals of a predecessor State habitually resident in the territory, over which sovereignty was transferred to a successor State and who had not acquired its nationality had the right to remain in that State. That was a good example of progressive development of international law. The Human Rights Committee, moreover, had stated that an alien, once lawfully admitted, could not be arbitrarily expelled.

17. The Special Rapporteur had rightly proposed the form of a General Assembly declaration for the draft, and he himself hoped it would be adopted on the fiftieth anniversary of the Universal Declaration of Human Rights. With the perspective gained over a half-century, the Commission's task must not be restricted solely to codification of existing law on human rights. Rather, it should proclaim the right of every person—whether a national of a country, a stateless person, or a foreigner—to live at the place of his or her birth or habitual residence.

18. Mr. MIKULKA (Special Rapporteur) said there appeared to be a misunderstanding. He wished to point out that the only materials before the Commission were his second report (A/CN.4/474) and the progress report he had just given on the deliberations of the Working Group. Mr. Lukashuk's remarks might be construed as implying that a set of draft articles had been submitted for the Commission's consideration, but that was definitely not the case. He had indeed proposed some draft articles, but for the Working Group alone, as a means of eliciting the views of members of the Working Group, and he was intending to use the Working Group's reactions as a basis for the preparation of his third report. At no time, however, had he projected an in-depth discussion in plenary of the very preliminary drafts he had prepared. He appealed to all members of the Commission to respect the status of an internal document circulated in the Working Group and to focus on his second report or on his verbal progress report.

19. The CHAIRMAN confirmed that the Commission should be discussing the Special Rapporteur's second report and the progress made by the Working Group.

20. Mr. LUKASHUK said he fully understood the Special Rapporteur's position, but given the overriding importance of the subject for a great many countries and peoples, the Commission should express its views on that topic, though he took the point that the specifics of the draft articles submitted to the Working Group should not be addressed.

21. Mr. BENNOUNA said he welcomed the fact that the Special Rapporteur had taken account of the opinion, voiced by himself and other members of the Commission that the nationality of natural and of legal persons related to two different fields, namely human rights and the law on economics, and should be treated separately. He likewise endorsed the intention to prepare within, at most, two years a draft declaration, in the form of articles, on the nationality of natural persons in the event of State succession—an assignment that he believed was quite manageable—and only then, after the text on natural persons was adopted, to look into the nationality of legal persons. A proposal had been made to the General Assembly that it should approve consideration by the Commission of the topic of diplomatic protection, one that covered both natural and legal persons. The drafting of an interesting outline, which could form the basis for essential codification work, if the Assembly endorsed the proposal, was now well advanced. Accordingly, he proposed that, at that time, the Commission should discuss the question of the relationship between the nationality of legal persons in the event of State succession and the protection of legal persons, and that some thought should be given to scheduling the work on the first issue so as to coincide with that on the second. There was plainly a close link between those two matters.

22. Mr. THIAM said it was indeed gratifying to see that the Special Rapporteur had taken into account the views of those, who, like himself, had advocated dealing separately with the issues of the nationality of natural and of legal persons in cases of State succession.

The meeting rose at 10.45 a.m.

[4] *P.C.I.J. 1923, Series B, No. 4*, p. 24.

[5] General Assembly resolution 217 A (III).