Document:-
A/CN.4/SR.2731

Summary record of the 2731st meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
2002, vol. I

International Significance. Nor was there any reference to the relationship between the two Conventions.

113. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) said that, in his personal view, article 2 of the new Inter-American Convention against Terrorism simply enumerated the universal conventions into which the new Convention needed to be integrated in the context of the more general process of strengthening inter-American mechanisms to combat terrorism and stimulating regional cooperation in that field.

114. The CHAIR thanked the Observer for the Inter-American Juridical Committee for his informative statement and for his patience and willingness to answer questions. The experience had been an enriching one for all concerned.

The meeting rose at 1.05 p.m.

2731st MEETING

Thursday, 6 June 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. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection[1] (*continued*) (A/CN.4/514,[2] A/CN.4/521, sect. C, A/CN.4/523 and Add.1,[3] A/CN.4/L.613 and Rev. 1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

1. The CHAIR invited the members of the Commission to continue their consideration, article by article, of the draft articles on diplomatic protection as adopted by the Drafting Committee (A/CN.4/L.613)*.

ARTICLE 4 (Continuous nationality)

2. Mr. TOMKA pointed out that the article's title in French (*Maintien de la nationalité*) did not correspond to its title in English (Continuous nationality) and suggested that the French title should be replaced by the words *Nationalité continue* or the words *Continuité de la nationalité*.

3. Mr. KAMTO said that he supported Mr. Tomka's remarks. Either wording was acceptable, although the concept of *continuité de la nationalité* presupposed, at least implicitly, that nationality was continuous, even in the case of a succession of States, whereas the concept of *nationalité continue* might simply refer to a change of nationality. If the words "continuous nationality" covered cases of succession of States, then they should be translated into French by the words *continuité de la nationalité*.

4. He recalled that, when the Chair of the Drafting Committee had introduced his report at the preceding meeting, he had said (para. 24) that the word *peut* ("may") in paragraph 2 was intended to draw attention to the exception to the principle stated in paragraph 1. He himself believed, however, that the exception was announced by the word "Notwithstanding", for the simple reason that the right to exercise diplomatic protection was and remained a discretionary right of the State.

5. Mr. GAJA said that, in paragraph 2, the words "for a reason" had been translated into French by the words *pour des raisons*. That changed the meaning because in the singular the word "reason" referred to the situation which had led to the change of nationality, such as a succession of States or naturalization, whereas in the plural the word "reasons" might refer to what had led the person concerned to change nationality, and that was difficult to determine. That was why the singular should be used.

6. Mr. CANDIOTI said he thought that, in the French text of paragraphs 1 and 2, it would be better to refer to *la reclamation* ("claim") rather than *sa reclamation*.

7. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted article 4, as amended, on first reading.

It was so decided.

ARTICLE 5 (Multiple nationality and claim against a third State)

8. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted article 5 on first reading.

It was so decided.

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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).

* Subsequently distributed as A/CN.4/L.613/Rev.1 (see 2732nd meeting).

ARTICLE 6 (Multiple nationality and claim against a State of nationality)

9. Mr. KAMTO said he thought that the end of the French text of paragraph 1, *que si la nationalité prédominante de celui-ci est celle du premier État en question*, should be brought into line with the English text ("unless the nationality of the former State is predominant") and replaced by the words *à moins que la nationalité prédominante de celui-ci ne soit celle du premier État en question*, thus giving full force to the derogation from the principle embodied in the first part of the sentence.

10. Paragraph 2 was superfluous, as it merely reproduced the wording of article 4, paragraph 3, without adding anything to it.

11. The CHAIR said he thought there would be no problem in implementing Mr. Kamto's proposal that the French text of the end of article 6, paragraph 1, should be brought into line with the English version.

12. Mr. TOMKA, pointing out that paragraph 1 opened with the words "A State of nationality may not exercise diplomatic protection", while paragraph 2 began with the words "A State of nationality shall not exercise diplomatic protection", asked whether they had been formulated differently for a reason or by chance. In that connection, he drew attention to the fact that the words "Diplomatic protection shall not be exercised" were used in article 4, paragraph 3, as well as in article 6, paragraph 2, and that the wording had not been translated into French in a uniform manner. Perhaps it should be.

13. Mr. DUGARD (Special Rapporteur) said he thought that the wording referred to by Mr. Tomka had not been chosen deliberately, but the choice could perhaps be justified by the desire to emphasize the restriction in paragraph 2 by the use of the words "shall not". For reasons of consistency, however, it might be wise for paragraph 2 to reproduce the words "may not exercise", as in paragraph 1.

14. Mr. DAOUDI said that the wording that the Drafting Committee had adopted for paragraph 2 on the proposal of one of its members would make the prohibition on the exercise of diplomatic protection by the State of nationality in the cases in question even stronger. The more flexible wording of article 6, paragraph 1, namely, "may not exercise", allowed the State of nationality to exercise diplomatic protection according to the predominant nationality of the injured person. If the text had to be consistent, however, it would be better to use the expression "A State of nationality shall not exercise diplomatic protection…" in both paragraph 1 and paragraph 2.

15. Mr. MOMTAZ said that he recalled that the Drafting Committee had used two different expressions in paragraph 1 of article 6 and paragraph 2 of the article, in order to stress the discretionary power of the State of nationality to exercise diplomatic protection in the situation referred to in paragraph 1 and the obligation imposed on the State of nationality not to exercise diplomatic protection in the situation referred to in paragraph 2.

16. Mr. GAJA said that, if it was necessary to ensure the uniformity of the text, the wording of article 6, paragraph 2, should be based on that of article 4, paragraph 3. In the light of article 4, paragraph 3, however, there was no need for article 6, paragraph 2. What should be emphasized in article 6 was that the predominant nationality should be taken into consideration not only on the date of the submission of the claim but also at the time the injury had been caused. He therefore suggested that paragraph 1 should be redrafted accordingly and that paragraph 2 should be deleted.

17. Mr. YAMADA (Chair of the Drafting Committee), replying to Mr. Tomka, said that the Drafting Committee had decided to use the words "may" or "may not" each time it was a matter of stating an exception to a rule—which was, to a certain extent, the case of article 6, paragraph 1. However, he agreed with the comments made by Mr. Daoudi and also with his proposal that the expression "A State of nationality shall not exercise diplomatic protection…" should be used in both paragraph 1 and paragraph 2.

18. Referring to the comments made by Mr. Kamto and Mr. Gaja, he recalled what he had said with regard to article 4, which dealt with the case of a person who had lost his nationality, when introducing the Drafting Committee's report, namely, that paragraph 1 established the principle of continuous nationality, while paragraph 2 referred to an exception to that principle and paragraph 3 to a limitation to the exception. However, article 6, paragraph 2, dealt with a different situation, that of a person who had not lost his nationality, but who had not yet acquired the new nationality at the time of the injury. That was why most members of the Committee had considered that paragraph 2 should be retained, at least when it had been considered on first reading. Whatever the final decision, the different points of view that had been expressed on the point would appear in the summary record of the relevant meetings, in the Commission's report and in the commentary. It would be dangerous to indulge in a drafting exercise during a plenary meeting.

19. Ms. XUE said that, as a member of the Drafting Committee, she would like to make some additional clarifications. Article 6, paragraph 1, should be retained as it stood, since the phrase "may not exercise" was called for by the "unless" clause which followed it and referred to the exercise of a discretionary right. Using the expression "A State of nationality shall not exercise diplomatic protection" would be tantamount to converting an obligation into a right.

20. Generally speaking, she agreed with Mr. Gaja's comments and in particular with his suggestion that the predominant nationality at the time the injury had been caused should be taken into consideration.

21. The CHAIR said that the problem was that article 6, paragraph 2, related not to the situation of dual nationality when one nationality was predominant, but to that of the possession, at the time of the injury, of the nationality of the responsible State and not that of the claimant State.

22. Mr. GAJA said he considered that paragraph 2 referred in substance to the situation in which the injured person did not have the nationality of the claimant State. Consequently, according to article 4, paragraph 3, that State was not in a position to bring a claim because the rule of continuous nationality came into play. Article 6, paragraph 2, was therefore illogical because it presupposed the existence of an element that was not present. He reiterated the proposal he had made regarding article 6, on the understanding that the Commission agreed to make a substantive change to the article.

23. Mr. KAMTO said that he was persuaded by Ms. Xue's arguments for the use of the words "may not exercise" in paragraph 1 and "shall not exercise" in paragraph 2.

24. In his view, paragraph 2 dealt not with the case of multiple nationality but rather with a situation already covered by article 4, paragraph 3, namely the situation where the new nationality of the injured person did not compete with his previous nationality and was not concomitant with it. He would nevertheless go along with the decision on paragraph 2 adopted by the Commission in plenary.

25. The CHAIR asked whether paragraph 2 could be placed in square brackets.

26. Mr. YAMADA (Chair of the Drafting Committee) said that it would not be appropriate to take a hurried decision in plenary to make substantive changes to a text prepared by the Drafting Committee. If the Commission in plenary wished to amend article 6, paragraph 2, it should give the Committee instructions to that effect and request it to review the text.

27. The CHAIR said that he saw no drawback to placing article 6, paragraph 2, in square brackets because that would simply indicate that, without being either rejected or adopted, the text would be reviewed by the Drafting Committee in due course, taking into account all the comments that had been made.

28. If he heard no objection, he would take it that the Commission adopted article 6, paragraph 1, on first reading, on the understanding that paragraph 2 would be placed in square brackets for further consideration by the Drafting Committee in the light of all the comments that had been made.

It was so decided.

ARTICLE 7 (Stateless persons and refugees)

29. Mr. KOSKENNIEMI said that he had serious reservations about the policy direction of article 7. He was particularly concerned about two issues. The first related to the application of the rule of continuous nationality. The Chair of the Drafting Committee had already pointed out that there had been a difference of opinion on that subject. He was among those who thought that the rule was not a rule of customary law and that there was no policy rationale compelling the Commission to include it in either article 4 or article 7.

30. The second issue related to stateless persons and refugees. He believed that the requirement in article 7, paragraphs 1 and 2, that a stateless person or a refugee should be habitually resident in the State in question was unduly restrictive and quite unnecessary. It would prevent the State in which the stateless person or refugee resided from providing diplomatic protection in certain cases, which, from the policy perspective, was completely unacceptable. When a person became a refugee, as in most cases where a person had been divested of his nationality and became stateless, the reason was that the State in which he had previously resided was or had become a totalitarian State. He had the most need of protection precisely at the time when he had taken up legal residence, but had not yet established a habitual residence, in the new State. The problem had often arisen over the course of time. He drew attention to the case of those German Jews who, not being in Germany at the time that the Nazi laws had been enacted, had subsequently been stranded in other countries, such as France or Switzerland. They had been the victims of Nazi legislation passed both before and after their arrival in those other States, and, for purely policy reasons, it would have been extremely important that their new State of residence could exercise diplomatic protection for them against the Nazi regime. The same problem had arisen more recently, for example, in the case of refugees from the Soviet Union or the German Democratic Republic. He suggested that that concern should be expressed in the text of article 7 through deletion of the words "and habitually" in paragraphs 1 and 2. There was no policy reason to retain the requirement of a habitual residence, although there might be a case for retaining that of a lawful residence. Otherwise, the discretion by the State of residence to take up the plight of refugees and stateless persons residing in its territory who were victims of oppression by their own Government would be unduly restricted. He added that his suggestion did not imply that a stateless person or refugee had the right to diplomatic protection; simply, the matter should be left to the discretion of the person's new State of residence. Finally, he emphasized that conceptual concerns were not in question.

31. Ms. ESCARAMEIA said that she entirely endorsed the comments made by Mr. Koskenniemi, who had raised two important points. The first, concerning the question of continuous nationality and the moment at which harm was caused, was also very sensitive. Applying the rule of continuous nationality to refugees or stateless persons could cause very unfair situations. The very moment when such persons had the most need of protection was when they risked losing it.

32. She also fully endorsed Mr. Koskenniemi's view regarding the second point that he had raised. The "habitually resident" threshold was extremely high. It seemed that the Commission had relied on the European Convention on Nationality, which actually had nothing to do with diplomatic protection. Like Mr. Koskenniemi, she stressed that there was no question of imposing a requirement; but no obstacles should be placed in the way of a State's wish to provide refugees or stateless persons in its territory with diplomatic protection.

33. The CHAIR said that the issue was not whether the draft articles would or would not diminish the sufferings of innocent persons who found themselves in very difficult situations. It was important not to stray from the subject of diplomatic protection, which was essentially founded in the right of States. If the Commission allowed itself to be carried away by the concern to respond to the tragic situations facing some people, it risked losing sight of the point of the exercise.

34. Mr. MANSFIELD said that, although he was aware that the Commission had been considering the topic of diplomatic protection for some time and, as a new member, he was wary of treading on ground that had already been covered, he believed that Mr. Koskenniemi had raised a very important question. A State should have the right to take up the case of a person who was placed in one of the extremely serious situations that had been mentioned. He therefore supported Mr. Koskenniemi's proposal.

35. Mr. KABATSI said that the idea of ensuring that refugees and stateless persons whose situation had changed only recently should also be protected was appealing, but there might be a conflict of interests among States. It often happened that a person was accepted as a refugee in a country and therefore had his habitual residence there, but then found employment in another country and lived there for some time. If the word "habitually" were deleted, the question arose as to which State would have the right to act on his behalf: the State in which he happened to be resident or the State in which he habitually resided. The provision would need to be made clear.

36. Mr. YAMADA (Chair of the Drafting Committee) noted that he had said in his report that there had been various views concerning the threshold that should be required for refugees or stateless persons to receive diplomatic protection, but ultimately the Drafting Committee had opted for the higher threshold, as expressed in the current formulation of article 7. He understood and respected the views expressed by some members, but, given that the article related to exceptions to the fundamental rule of diplomatic protection, whereby the right to exercise diplomatic protection belonged to the State of nationality, the Commission was entering the area of progressive development, and the question was how far it wished to go. It should not lose sight of the fact that the draft articles were only at the stage of the first reading. Minority views could be recorded in the commentary.

37. Mr. SIMMA said that, if Mr. Yamada's proposal was acceptable to members who had raised the problem, he himself would say nothing more on the subject. The Drafting Committee had made great efforts to reach the best possible compromise.

38. Mr. GALICKI said that he shared the view expressed by Mr. Yamada and Mr. Simma. It should not be forgotten that article 7 dealt with a specific exception to the general rule relating to diplomatic protection. The text had been carefully formulated. The threshold was not particularly high; it was comparable to that required for acquiring nationality. Refugees and stateless persons should enjoy the same measure of diplomatic protection as nationals. He noted that the entitlement to provide refugees or stateless persons with diplomatic protection would always be disputed by other States. It would be interesting to hear the opinion of States on that point. Meanwhile, it would be wiser to retain the current text until States had expressed their views.

39. Mr. KAMTO said that article 7 did not codify a customary rule—there being none on that question—and posed a real intellectual problem for jurists. First, it disrupted the whole structure of the right to diplomatic protection by disregarding nationality, which was precisely the condition for implementation of that right. Second, it offered a State the possibility of invoking a breach of international law on the basis of a legal instrument—particularly in the case of a bilateral treaty—to which it was not a party. Third, it was intended to regulate a problem that each State could regulate through its own national legislation concerning the granting of nationality. To go beyond the formulation adopted by the Drafting Committee and delete the word "habitually" would constitute premature rather than progressive development of international law.

40. Mr. DAOUDI said that he favoured retaining the existing text because diplomatic protection must not be confused with protection of human rights. The provision constituted progressive development of international law, and the Drafting Committee had been guided by the principle that refugees and stateless persons should not be granted more favourable treatment than was accorded to nationals and should thus not be exempted from the requirement of effectiveness applicable in matters of nationality, to say nothing of complex specific situations such as the one in which a person had the status of refugee in one State and his habitual residence in another State. The criteria applied by the Committee were a good reflection of the compromise achieved by the Commission at the preceding session.

41. Mr. BROWNLIE said that the liberal premise posed problems in its application to the facts, particularly in situations involving refugees. In many catastrophic situations, the victims included not only refugees but also the Government and population of the recipient country, which, more often than not, was a developing country. Furthermore, the refugee flows were not necessarily all caused by intolerance or bad governance in the original State. Why, then, was it necessary to assume that the refugee wished to hasten the curtailment of his links with the State he had just left? It was difficult to create norms on the basis of very specific situations such as that of the German Jews, particularly because, even in that case, when it had come to sorting out questions of property, the Jewish refugees had often insisted that they still had the German nationality that the Nazi regime had illegally taken from them. To link the whole question of nationality as such with the question of the status of refugees might lead to a situation in which even the acquisition of that modest status would become more difficult.

42. Mr. DUGARD (Special Rapporteur) said that Mr. Koskenniemi was right from an ethical point of view, but that the comments of other members of the Commission and the views expressed by States in the Sixth Committee illustrated the need to move with caution. As it stood, the provision represented a hard-won compromise, and a more liberal formulation would be unacceptable both to the Commission and to the General Assembly.

43. The CHAIR said that, in the light of the comments by the Special Rapporteur and the Chair of the Drafting Committee, the Commission might wish to retain the existing text of article 7 and to state in the commentary that a substantial number of members had raised that point and had stressed the need to ensure that the persons covered by the provision were not unduly disadvantaged by the use of the term "habitually".

44. Mr. KOSKENNIEMI said that he had doubts as to the relevance of the opposition between facts and concepts. Where it was relevant, he himself would always favour the former. However, while the situations of refugees certainly differed widely and each must be considered on its own merits, that was precisely the intended purpose of the discretionary system that the Commission was seeking to establish, namely, that it was up to States themselves to decide whether or not to take up a person's cause. That being the case, why was it necessary absolutely to prohibit them from taking up claims of refugees? The same was true of the opposition between rules and exceptions; the two terms could easily be transposed. He himself could easily conceive of the whole exercise as relating to the great rule that it was up to the State to decide whether or not to exercise diplomatic protection, the exception—which must be interpreted narrowly—being that it could do so only with regard to its own nationals. Thus, it was not necessarily true that article 7 dealt with an exception which, for some metaphysical reason, must be interpreted limitatively, with that limitation happening to coincide with situations in which refugees were left in the lurch.

45. The CHAIR said that the views expressed seemed to concern the rationale of the basic rule of diplomatic protection and the extent to which that rule must be a matter for the State and must not be approached from the individual human rights perspective, important though that perspective was.

46. Mr. SIMMA, referring to the example of the situation of the German Jews who had emigrated to France or Switzerland in the 1930s, said he wondered whether it would have been realistic, or even conceivable, to ask those two countries not only to admit those refugees—itself no easy feat—but also to exercise diplomatic protection on their behalf against Nazi Germany. Admittedly, times had changed, and the world was now permeated by "human rights thinking", but examples could still be found of countries with grave human rights problems, towards which neighbouring countries and the rest of the world adopted a very cautious stance. As it stood, article 7 represented a reasonable balance from which human rights considerations were not absent. Perhaps the Chair's proposal could be expanded by putting a specific question to member States on that issue.

47. Mr. Sreenivasa RAO said that he supported Mr. Simma's comments.

48. Mr. BROWNLIE said that Mr. Koskenniemi had not been the only member to express views on the policy question and that, on the facts, some members had felt that the policy question was not as clear as Mr. Koskenniemi took it to be. It should thus also be stated in the commentary that, while some members had raised the policy question, others had considered that, given the facts, the policy premise was not justified.

49. Mr. KAMTO said that the provision under consideration had initially provoked strong opposition, until the situation had changed, resulting in the current formulation, which had been supported by a majority in the Drafting Committee. There was thus no reason to refer to specific opinions in the commentary to that provision, particularly because all the views expressed were recorded in the summary records. Furthermore, while facts prevailed over concepts, concepts conferred a structure on the facts and guided the codification exercise. The rules of diplomatic protection could not be changed to accommodate particular circumstances.

50. Mr. DAOUDI said that he supported Mr. Kamto's remarks.

51. The CHAIR said that it was not unusual, on first reading, to indicate in the commentary differences of opinion that had arisen in the Commission. He thus suggested retaining the text as it stood; indicating in the commentary that a "substantial" (or, perhaps, "significant") number of members had favoured deleting the word "habitually"; summarizing the arguments for and against; and requesting States' views on the matter by means of a question addressed to the Sixth Committee.

It was so decided.

52. The CHAIR said that the Commission had thus completed its consideration of articles 1 to 5 and 7 on first reading.

53. Mr. TOMKA asked whether the Drafting Committee might reconsider the title of article 1, which, in his view, should be entitled "Definition" or "Definition and scope" so as to better reflect its contents.

54. The CHAIR said that the Drafting Committee would look into that question when it met to consider draft article 6.

The meeting rose at 11.25 a.m.

2732nd MEETING

Friday, 7 June 2002, at 10.05 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.