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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS FIFTY-FOURTH SESSION**

**Rapporteur: Mr. Valery Kuznetsov**

**CHAPTER V**

**DIPLOMATIC PROTECTION**

**Addendum**

**C. Texts of draft articles 1 to 7 of the draft articles on diplomatic protection  
provisionally adopted by the Commission (continued)**

**2. Text of the draft articles with commentaries thereto (continued)**

**Article 7 [8]**

**Stateless persons and refugees**

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

### Commentary

(1) The general rule is that a State may exercise diplomatic protection on behalf of its nationals only. In 1931 the United States - Mexican Claims Commission made it clear in *Dickson Car Wheel Company v. United Mexican States* that a stateless person could not be the beneficiary of diplomatic protection when it stated:

“A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.”<sup>1</sup>

Insofar as this rule fails to take account of the position of both stateless persons and refugees it is out of step with contemporary international law, which reflects a concern for the status of both these categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness (1961)<sup>2</sup> and the Convention on the Status of Refugees (1951).<sup>3</sup>

(2) Article 7, an exercise in progressive development of the law, departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although the Commission has acted within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954<sup>4</sup> which defines a stateless person “as a person who is not considered as a national by any State under the operation of its law”.<sup>5</sup> A State may

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<sup>1</sup> 4 R.I.A.A., p. 678 (1931).

<sup>2</sup> 989 U.N.T.S., p. 175.

<sup>3</sup> 189 U.N.T.S., p. 150.

<sup>4</sup> 360 U.N.T.S., p. 117.

<sup>5</sup> Article 1.

exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim.

(4) In deciding on the requirement of lawful and habitual residence the Commission followed the language used by the 1997 European Convention on Nationality.<sup>6</sup> The requirement of both lawful residence and habitual residence sets a high threshold. Whereas some members of the Commission believed that this threshold is too high the majority took the view that the combination of lawful residence and habitual residence approximates to the requirement of effectiveness invoked in respect of nationality and is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim contained in article 4 are repeated in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim. This ensures that non-nationals are subject to the same rules as nationals in respect of the temporal requirements for the bringing of a claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of Nationality]”<sup>7</sup> and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain the decision of the Commission to allocate a separate paragraph to each category.

(7) The Commission decided to insist on lawful residence and habitual residence as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention Relating to the Status of Refugees<sup>8</sup> sets the

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<sup>6</sup> E.T.S. No. 66, article 6 (4) (g). See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State” (art. 21 (3) (c)).

<sup>7</sup> Article 1 (A) (2) of the Convention Relating to the Status of Refugees, 189 U.N.T.S., p. 137.

<sup>8</sup> 189 U.N.T.S., p. 150.

lower threshold of “lawfully staying”<sup>9</sup> for Contracting States in the issuing of travel documents to refugees. The Commission was influenced by two factors in reaching this decision. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.<sup>10</sup> Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda* - a consideration that was opposed by some members of the Commission.<sup>11</sup>

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover in addition persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in the 1997 European Convention on Nationality,<sup>12</sup> which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>13</sup> widely seen as the model for the international protection of refugees,<sup>14</sup> and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America approved by the General Assembly of the O.A.S. in 1985.<sup>15</sup>

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<sup>9</sup> The *travaux préparatoires* of the Convention make it clear that “stay” means less than durable residence.

<sup>10</sup> See paragraph 16 of the Schedule to this Convention.

<sup>11</sup> Some members of the Commission argued that the threshold of lawful and habitual residence as preconditions for the exercise of diplomatic protection was too high in the case of both stateless persons and refugees. See above paragraph 4.

<sup>12</sup> Article 6 (4) (g).

<sup>13</sup> 1001 U.N.T.S., p. 45. This Convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

<sup>14</sup> Note on International Protection submitted by the United Nations High Commissioner for Refugees, G.A.O.R., forty-fifth session, document A/AC.96/830 of 7 September 1994, p. 17, para. 35.

<sup>15</sup> O.A.S. General Assembly, XV Regular Session (1985), Resolution approved by the General Commission held at its fifth session on 7 December 1985.

However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it considered and treated as a refugee. This would be of particular importance for refugees in States not party to the existing international or regional instruments.

(9) The temporal requirements for the bringing of a claim contained in article 4 are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge “*may* exercise diplomatic protection”. This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national: see article 2 and the commentary thereto. *A fortiori* it has a discretion whether to extend such protection to a stateless person or refugee.

(12) The Commission stresses that article 7 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. *A fortiori* the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

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