cogens norm” or “breach of an erga omnes obligation”. Those two questions risked taking the Commission beyond the scope of its work and causing unnecessary confrontations.

The meeting rose at 1 p.m.

2627th MEETING

Thursday, 25 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Diplomatic protection (continued)
(A/CN.4/506 and Add.1)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. TOMKA said that article 5 was a definition of “State of nationality”. The need for such a definition was clear, for under article 3 the State of nationality had the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. But its placement in the draft was unusual, because a term used in article 3 was not defined until article 5. In actual fact, article 1, entitled “Scope”, was an attempt to define diplomatic protection, and it might therefore be useful, as was often done in such instances, to have an article exclusively on definitions of terms which would immediately follow upon article 1.

2. While the acquisition of nationality jure sanguinis or jure soli should not pose any particular problem in the context of diplomatic protection, the acquisition of nationality by naturalization might well do so. The Special Rapporteur rightly pointed out in paragraph 104 of his first report (A/CN.4/506 and Add.1) that international law would not recognize naturalizations in all circumstances. It seemed to emerge from the Special Rapporteur’s work that, in the majority legal view, the case of conferring nationality by naturalization required a closer link of attachment than that required by a genuine link of attachment between an individual and a State, usually formulated as a “genuine or effective link”. Yet the Special Rapporteur did not endorse that proposition, his main argument, in paragraph 117, being a concern for the millions of persons who would supposedly be excluded from the benefit of diplomatic protection if the genuine or effective link requirement proposed in the judgment of ICJ in the Nottebohm case was applied strictly, thereby undermining the traditional doctrine of diplomatic protection.

3. Personally, he was not fully convinced that, in today’s world of globalization and migration, there were millions of persons who had left their State of nationality and made their lives in States whose nationality they never acquired. If those people never acquired the nationality of a State to which they had moved, an article 5 that required bona fide naturalization would not provide them with any better protection, since they would never be naturalized.

4. Unfortunately, the Special Rapporteur had not elaborated on his assertion in paragraph 112 that it was difficult to limit the genuine link requirement to cases of naturalization. In his own view, the genuine link requirement had a role to play precisely in the case of naturalization. It was redundant to spell out the genuine link requirement in cases of acquisition of nationality jure sanguinis or jure soli, since the requisite attachment was contained, as generally recognized, in the principles of jure sanguinis and jure soli.

5. Instead of the requirement of a genuine link in cases of naturalization, the Special Rapporteur formulated the requirement of bona fide naturalization, which was to be assumed, and the onus of proof of bad faith lay with the respondent State. For his own part, he was unaware of any case in which a court had found that a sovereign State had acted in bad faith, and he would be grateful if the Special Rapporteur could provide examples from international judicial practice. The Special Rapporteur had himself acknowledged, in paragraph 108, the reluctance of ICJ to reach such a finding. Accordingly, it would be unjust to place an onus of proof of bad faith on the respondent State. It would be preferable in article 5 to use the words “valid naturalization”, as proposed by Mr. Economides (2625th meeting) and as had been done in the Flegenheimer case [see p. 377], cited in paragraph 111. The commentary could then explain what was meant by valid naturalization, i.e. naturalization in conformity with the requirements of international law, including the genuine link requirement.

6. Article 6 also raised a number of interesting issues. As pointed out by Mr. Galicki (2626th meeting) and other members, it departed from customary international law, which should form the basis of work on the topic. It was also the conclusion reached by the Institute of International Law at its Warsaw session, in 1965, at which it had adopted a resolution providing that the respondent State might reject an international claim presented by a State for injury suffered by an individual who possessed the nationalities of both the claimant and the respondent.
States at the same time. In the view of the Institute, such claims were inadmissible before the court seized of the claim. Mr. Galicki had usefully reminded members that the member States of the Council of Europe had taken a similar stance when they had adopted the European Convention on Nationality.

7. It was paradoxical that, in his comments on article 5, the Special Rapporteur rejected the genuine or effective link requirement and then, in article 6, introduced the notion of effectiveness in connection with nationality. If some countries, such as Switzerland and the United Kingdom, considered that the general rule was the non-exercise of diplomatic protection on behalf of dual nationals vis-à-vis the State of their second nationality and that the exercise of diplomatic protection was merely the exception in particular circumstances—in the case of the United Kingdom where the respondent State treated the claimant as a United Kingdom national, and consequently not as its own national, mentioned in paragraph 156—then that should be reflected in the language of article 6. The latter should be reformulated in negative terms to read: “The State of nationality may not exercise diplomatic protection on behalf of an injured national vis-à-vis a State of which the injured person is also a national unless that person was treated by the respondent State as a national of the former [or: claimant] State.”

8. In article 7, paragraph 1, there was no need to refer expressly to “the criteria listed in article 5” and the word “also” should be deleted.

9. Article 8, submitted as a proposal de lege ferenda, should be treated with caution. In the report of the Commission to the General Assembly on the work of the session, it might be wise to seek comments from States. To some extent, article 8 changed the nature of diplomatic protection as a right appertaining to a State, a right to ensure, in the person of its subjects, respect for the rules of international law. The draft recognized a State’s right to ensure respect for international law with regard to its nonnationals.

10. Mr. AL-BAHARNA said that article 5 required the acquisition of State nationality by birth, descent or naturalization in order for the State of nationality to extend diplomatic protection to a natural person. However, the way the article was drafted suggested that its purpose was to define the term “State of nationality”, although that was not the case. Instead, the Commission needed to set the basis on which a national could claim the diplomatic protection of his State of nationality, that basis being birth, descent or naturalization. Therefore, the principle to be embodied in article 5 should be set out so as to read: “For the purposes of diplomatic protection, natural persons who have acquired their nationality on the basis of birth, descent or naturalization may be afforded diplomatic protection by their State of nationality”. It was a much less complicated wording. In his proposal, he had deleted the words “individual” and “means”, as well as the superfluous words “bona fide”. Naturalization and nationality laws were a source of nationality without qualification, just like the other two sources, namely birth and descent. But when the issue came before the court as a result of a claim filed by a naturalized person, the court could ask whether such naturalization was bona fide or not. That was in keeping with the Nottebohm case.

11. Those three sources constituted the link of nationality between the injured national and his State of nationality for the purpose of claiming diplomatic protection. That principle found support in a number of conventions and cases in international courts. Article 1 of the 1930 Hague Convention, referred to in the comments, stated that “It is for each State to determine under its own law who are its nationals”. The Special Rapporteur confirmed, in paragraph 100, that in the field of human rights States were required to comply with international standards in the granting of nationality, and he referred in the same paragraph to certain limits on the principle that the conferment of nationality fell within the State’s domestic jurisdiction. However, as far as article 5 was concerned, there seemed to be no question that the connecting factors of birth, descent and naturalization constituted the genuine or effective link that was generally recognized by international law for the purpose of diplomatic protection.

12. It might be asked whether there should be an additional genuine or effective link in the case of naturalization, as in the Nottebohm case. It appeared that it was not possible to generalize about the Nottebohm case, which should be limited in at least three respects. First, it applied to dual nationalities, one based on Nottebohm’s original Guatemalan nationality for a period of over 34 years, which had established for him an effective and genuine link with his State of nationality, and the other much weaker nationality based on his naturalization in Liechtenstein. According to ICJ, the facts had clearly established the absence of any bond of attachment between Nottebohm and Liechtenstein and the existence of a close long-standing connection between him and Guatemala, a link which his naturalization had in no way weakened. Hence the need to restrict the requirement of the principle of a genuine link to the special facts of the Nottebohm case and not to treat it as a general principle of international law that could apply to all cases of diplomatic protection without distinction. He therefore agreed with the Special Rapporteur, in paragraph 111, that the principle of an effective or genuine link could not be considered as a rule of customary international law applicable to cases not involving dual or multiple nationality. Secondly, the principle of an effective or genuine link seemed to be limited in its application to cases of dual or multiple nationality. The third issue to which the Nottebohm case could give rise was that, with the exception of birth and descent, naturalization was the only factor which led to confusion in diplomatic protection claims, because the nationality laws of States varied considerably in the conditions for conferring nationality by naturalization. Moreover, States might grant naturalization to an individual on the basis of abuse of right or for acting in bad faith, as the Nottebohm case had shown. The Court had found that Liechtenstein had waived some of its own rules on length of residence in order to accommodate the urgency of his naturalization application. Consequently, paragraph 104 of the report rightly stated that international law would not recognize naturalization in all circumstances. Fraudulently acquired naturalization and naturalization conferred in a manner that discriminated on grounds of
or sex were examples of naturalization that might not be recognized.

13. Article 6 dealt with dual nationality, which the Special Rapporteur regarded as a fact of international life, but agreed that dual or multiple nationality had given rise to difficulties in respect of military obligations and diplomatic protection. But in his comments in paragraph 122, the Special Rapporteur admitted that attempts by the Conference for the Codification of International Law, held at The Hague in 1930, and other international bodies to reduce or abolish dual and multiple nationality had failed. As a result, the 1930 Hague Convention had ended up by recognizing that a person having two or more nationalities could be regarded as its national by each of the States whose nationality he possessed. The principle of dual nationality would probably continue to gain ground as long as international law recognized it, despite the express prohibition under many national laws on simultaneously holding the nationality of another State.

14. According to the Special Rapporteur, in paragraph 123, the weight of legal authority seemed to support the rule advocated in article 6. Yet it was important to bear in mind that, pursuant to article 4 of the 1930 Hague Convention, a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. In proposing article 6, the Special Rapporteur had reversed the rule in the 1930 Hague Convention by couching it in an affirmative, rather than negative, form. Having done so, he had introduced the principle of the effective nationality as a solution. In other words, where diplomatic protection was exercised by a State of nationality against another State of nationality, the court should apply the principle of nationality where a third State of nationality declined. Paragraph 2 might be redrafted to read: “In accordance with article 5, two or more States may jointly afford diplomatic protection to a dual or multiple national for the purposes of these draft articles”. He had avoided the words “within the meaning”, which he felt were inaccurate, and also the words “on behalf of”.

15. Why should the principle in article 4 of the 1930 Hague Convention not be adopted instead of the reversed principle in article 6? If dual nationality caused conflicts and confusion in State practice, why should the Commission attempt to codify it in order to give it more credibility? The adoption of article 4 of the 1930 Hague Convention would be a useful step towards reducing the conflict arising from dual nationality in respect of diplomatic protection.

16. However, it might be cogently argued that that article found its basis in the Nottebohm case as well as in State practice. Accordingly, the Commission might take it that article 6 was acceptable. If it did, he wished to introduce some changes so that it would read: “Subject to article 9, paragraph 4, the State of nationality may afford diplomatic protection to an injured national in a State of which he is also a national where his effective nationality is that of the former State”. Such a reformulation had the advantage of avoiding the use of the words “against” and “on behalf” as well as repeating the words “injured national”, “injured person” and “individual”, and of giving preference to the word “effective”, which was more in line with the Nottebohm case than “dominant”. The two words were synonymous. The words “effective or genuine link” were the ones used in the Nottebohm case.

17. He would suggest that article 7, paragraph 1, should be reworded in such a way as to avoid the words “on behalf of”, “against a State”, “he or she” and “also”. It would then read:

“Any State of which a dual or multiple national is a national in accordance with article 5 may afford diplomatic protection to that national in respect of a claim of injury arising in another State of which he is not a national.”

The phrase “in accordance with the criteria listed” was replaced by “in accordance with article 5” because the criteria in question were not listed exhaustively. He agreed with the Special Rapporteur that the effective or dominant nationality principle did not apply where one State of nationality sought to protect a dual national in another State of which he was not a national. He also concurred with the statement in paragraph 170 of the report that the conflict over the requirement of an effective link in cases of dual nationality involving third States was best resolved by requiring the claimant State only to show that a bona fide link of nationality existed between it and the injured person.

18. Article 7, paragraph 2, allowed two or more States of nationality to exercise diplomatic protection on behalf of a dual or multiple national. It would strengthen the claim of such a national in the respondent State if two or more States of nationality espoused his claim by exercising diplomatic protection jointly on his behalf. But paragraph 2 would no longer be applicable if one State declined to do so in the case of a dual national, and only two States could exercise diplomatic protection jointly where a third State of nationality declined. Paragraph 2 might be redrafted to read: “In accordance with article 5, two or more States may jointly afford diplomatic protection to a dual or multiple national for the purposes of these draft articles”. He had avoided the words “within the meaning”, which he felt were inaccurate, and also the words “on behalf of”.

19. The Special Rapporteur was right to say that article 8 was in line with contemporary developments relating to the protection of stateless persons and refugees. It should also be welcomed as an exercise in the progressive development of international law. If adopted, it would reverse the principle, enunciated in the Dixon Car Wheel Company case cited in paragraph 175, that a State did not commit an international delinquency in inflicting an injury upon an individual lacking nationality. Such a harsh ruling ran counter to international norms and standards and equitable principles if it was applied to certain categories of political refugees and stateless persons. There was no reason to be concerned about the general principle set forth in the article because no obligation was imposed. The word “may” implied that the State had a choice in the matter and could examine each case on its merits. However, he suggested that the words “and/or” should be replaced by “or” and “legal resident” by “habitual resident”. The word “legal” was irrelevant and would only complicate matters for the persons concerned. The words within square brackets should be deleted and the semicolon replaced by a comma. Lastly, he was opposed to the idea of splitting the article into two parts, one dealing with refugees and the other with stateless persons.
20. Mr. LUKASHUK, taking up a comment by Mr. Al-Baharna regarding the scope of the draft articles, said that article 1 omitted the important question of territorial scope. It assumed that the injury to the person or property of a national occurred in the territory of the State. But the person or property might actually be present in the territory of another State. Hence a paragraph should be inserted, similar to the one in the draft on State responsibility concerning the area of sovereignty, jurisdiction or control of the State. The reference in article 1 to “an injury to the person or property of a national” gave the impression that a physical injury was involved. It would be more accurate to speak of “an injury to the rights of the person, including property rights, of a national”.

21. Mr. Sreenivasa RAO said that the material presented by the Special Rapporteur in articles 5 to 8 laid the basis for a fruitful exercise in both the codification and the progressive development of international law. He had admirably covered all the ground and should not take it amiss when contrary views were occasionally expressed with considerable force.

22. With regard to article 5, he recommended that issues such as a State’s right to grant nationality should be omitted, since they tended to distract attention from the core issues. The presentation of the requirements for the acquisition of nationality in article 5 as opposed to article 1 gave the impression that a State’s right to grant nationality was being questioned and that States were not entitled to grant nationality on what were not bona fide grounds. But that was essentially an issue of opposability rather than nationality. What mattered was the purpose for which a State exercised its right in filing a claim against third States. Viewed in that light, the question of bona fide nationality, the Nottebohm case and other issues fell into place. The Nottebohm case was not about the right of a State to grant nationality but about the right of Liechtenstein to file a claim against Guatemala. In his view, international law imposed no restrictions on the right of States to grant nationality save perhaps those referred to in paragraph 100, i.e. human rights treaties outlawing legislation that imposed no restrictions on the right of States to grant nationality but about the right of Liechtenstein to file a claim against Guatemala. In his view, international law imposed no restrictions on the right of States to grant nationality save perhaps those referred to in paragraph 100, i.e. human rights treaties outlawing legislation that would deny the granting of nationality to certain individuals. Hence paragraphs 97, 98, 101 and 102 referred to the issue of opposability rather than to a State’s right to grant nationality, which was virtually absolute. The conclusion drawn in paragraph 120 in the light of the Nottebohm case should be modified accordingly.

23. Article 6 sought to address the conflicts that sometimes arose when one State of nationality sponsored a claim against another, a highly sensitive area. In practice, for example in the case of the Iran-United States Claims Tribunal, they were handled on the basis of an agreement and not through the reconciliation of parallel principles of international law. He agreed with Mr. Economides that dual nationals who enjoyed certain benefits by virtue of that status should also be prepared to accept the possible denial of certain other extraordinary rights. In any case, States were more pragmatic than theoreticians of international law. They would only accept formulas that coincided with their interests in a particular context. Caution should therefore be exercised and the oddity of the implications of multiple nationality should not be reinforced. Wherever possible, the claims arising from such status should be handled on the basis of an agreement among States. In the absence of agreement, certain principles could perhaps be proposed by way of progressive development.

24. The word “also” in the phrase “of which he or she is not also a national” in article 7, paragraph 1, should be deleted. Paragraph 2 recognized the right of two or more States of nationality to sponsor claims jointly, but the State against which such claims were asserted might in some cases be subjected to undue pressure, especially by States with greater political or economic clout. He was not sure to what extent such conduct should be encouraged.

25. Article 8 was an important attempt at progressive development and had given rise to difficult legal matters. He wondered whether primary rules came into play when issues involving stateless persons and refugees were addressed. He looked for guidance from those of his colleagues who were more skilled at distinguishing between primary and secondary rules.

26. Article 6 allowed the State of nationality to exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national, but article 8 conferred on refugees and stateless persons virtually the same status as that of a national. It was therefore unclear whether the host State could raise claims on behalf of refugees with their State of nationality. That would create major practical problems. When refugees took flight, their property was usually left behind in the State of nationality and was liable to be confiscated. The host State would normally refrain from sponsoring claims not only for reasons of political expediency but also because it might harm the cause of the refugees themselves. Problems between refugees and third States, on the other hand, occurred very infrequently and need not be addressed.

27. When a host State felt compelled by moral or practical considerations to sponsor the claims of persons in its territory, within its jurisdiction or under its control vis-à-vis third States, such action should not be viewed as a legal duty but as a discretionary course of action. If the host State moved wisely, it would act in agreement with the other States concerned. He was sure that the Special Rapporteur had at no stage been suggesting that the granting of refugee status was the penultimate step in the process of granting a right of nationality. He had simply indicated that a State could, for humanitarian reasons, espouse certain claims of refugees, placing them on the same footing as nationals because there was no one else to take up their cause.

28. On the whole, article 8 dealt with human rights issues which should properly be handled on the basis of consent and through international forums such as UNHCR.

29. Mr. KATEKA said that it was currently fashionable to pay lip service to human rights, the rule of law and good governance. Anyone who failed to do so was viewed as a reactionary or an opponent of human rights. The Commission should not feel that it must follow the crowd on such an important issue. The host country had no legal duty to exercise diplomatic protection. In most cases, the recipients of refugees were developing countries that were heavily burdened with other problems and
hence unable, for practical reasons, to exercise diplomatic protection.

30. Mr. GOCO said Mr. Sreenivasa Rao’s earlier remarks on the subject of denial of justice applied to refugees and stateless persons in their country of origin. From the practical standpoint, diplomatic protection was not an effective institution in such cases, since the responsiveness of the State of origin could not be assured. As to article 6, he failed to see why the State of nationality should want to exercise diplomatic protection on behalf of someone who was a national of another State.

31. Mr. KABATSI said that thanks were due to Mr. Sreenivasa Rao for raising the issue of the exercise of diplomatic protection in respect of stateless persons or refugees by the host State against the State of nationality. He would not wish to extend his support for article 8 if the provisions of that article were broadened to encompass the property rights of stateless persons or refugees in the home country. Such a reading of the article should be firmly ruled out and he hoped that the Special Rapporteur would include an appropriate clarification in the commentary.

32. Mr. ECONOMIDES said that Mr. Sreenivasa Rao should be congratulated on bringing out the points that articles 6 and 8 had in common. As already stated, he had doubts about granting the State of nationality the right to exercise diplomatic protection on behalf of a national who was also a national of the other country concerned. The provision contained in article 8, which went even further than did article 6, seemed still more open to doubt. It should be made quite clear that a host State could exercise diplomatic protection only when the refugee status of the individual concerned had been officially recognized. That was already the situation in practice and it should be spelled out clearly in the law.

33. Mr. ROSENSTOCK said that the point he had wished to make about the temporal limits to the right of host States to exercise diplomatic protection in respect of stateless persons or refugees on its territory had been covered by the remarks made by Mr. Economides. As to the comments by Mr. Kateka and other members who had expressed fears that the provision in article 8 might place an additional burden on host countries, he would point out that there was no question of host countries being under an obligation to exercise diplomatic protection; they simply had a discretionary capacity to do so.

34. Mr. SIMMA said he concurred. While sympathizing with members who had expressed fears that the option offered to host States might, in practice, turn into a burden, he nevertheless felt that States of residence should not be denied the right to exercise diplomatic protection on behalf of stateless persons or refugees on their territory. Such a right might not be exercised very frequently, but it should on no account be withheld. Subject to dividing article 8 into two separate provisions dealing with stateless persons and with refugees respectively, he was in favour of maintaining the Special Rapporteur’s text. As for article 6, which he also supported, the principle it formulated was important enough not to be left to bilateral regimes or arrangements. Lastly, with reference to Mr. Sreenivasa Rao’s remarks concerning article 5, he wondered whether the opposability aspect could be entirely excluded from the topic under consideration. Whether the point at issue was opposability or invalidity, something had to be said about an issue which had played such an important role in, say, the Nottebohm case. He was not sure whether Mr. Sreenivasa Rao was suggesting that the point should be excluded altogether or given a more limited role.

35. Mr. RODRÍGUEZ CEDEÑO said that, in view of the vast numbers of displaced persons and refugees round the world, article 8 was important and should be maintained whether or not the provision it contained was a primary or a secondary rule. The status of refugees was clearly defined in the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, and the idea of extending diplomatic protection to stateless persons and refugees was obviously appropriate. He did not believe that granting host countries the right to exercise diplomatic protection in respect of stateless persons or refugees on their territory was tantamount to a first step towards the acquisition of nationality, and he agreed with those members who had emphasized that the provision did not impose an obligation but merely offered a right or a capacity to be exercised at the discretion of the host State. While conceding that such a capacity would not be easy to exercise in practice, he was convinced that the norm set forth in the article was an important one and formed part of the progressive development of international law.

36. Mr. HE said he recognized that the problem of protection of injured persons who were stateless and/or refugees was an important one that had to be tackled, but wondered whether the proper institutions for the purpose were not the existing human rights organizations, UNHCR and international agencies set up under human rights treaties. Countries, especially developing ones, which hosted hundreds of thousands of refugees might find that exercising diplomatic protection in respect of those persons merely increased the burden upon them.

37. Mr. SEPÚLVEDA, referring first to Mr. Sreenivasa Rao’s remarks on article 5, said he was not sure that primary rules had to be excluded in all circumstances. Moreover, the question of denial of justice and exhaustion of local remedies had to be taken up, for they were indissolubly linked to diplomatic protection. As to article 8, he was inclined to press for separate treatment of stateless persons and of refugees, respectively. Moreover, the question of the diplomatic protection a State might or should give to refugees against the State of nationality or origin should be spelled out more specifically and linked to existing rules governing claims against States of origin. In that connection, he recalled that in 1981 and 1982, Mexico had taken in some 50,000 refugees fleeing the then political regime in Guatemala. Instead of exercising diplomatic protection against Guatemala, a step which would have been regarded as contentious, the Mexican Government had preferred to seek a diplomatic solution. Such a solution had eventually been found and the majority of the refugees had now returned home. Greater emphasis should be placed on ways in which countries faced with large refugee influxes could deal with the problem while avoiding the exercise of diplomatic protection. That question was briefly touched upon in paragraph 184 of the report.
38. Mr. AL-BAHARNA, noting that article 8 had given rise to considerable differences of opinion, said he continued to be in favour of the article but wondered whether a compromise might not be reached by amending the beginning of the text to read: “Without prejudice to article 5, a State may, in exceptional circumstances, exercise diplomatic protection …”. The addition of a second paragraph to article 5 might also be called for. With reference to Mr. Sreenivasa Rao’s point that a host State might be reluctant to exercise diplomatic protection in respect of refugees, he drew attention to the last part of article 8, which read: “… provided the injury occurred after that person became a legal resident of the claimant State”. It might be useful to have a separate article on refugees, who in some cases had left their country of origin as a result of the crime of genocide, but he pointed to the difficulty of distinguishing between refugees who had no papers to prove their nationality, on the one hand, and stateless persons, on the other.

39. Mr. GALICKI said that he supported the idea of dividing article 8 into two parts, one to deal with the slightly simpler issue of stateless persons and the other with the thornier problem of refugees. Article 8, as drafted, failed to resolve the problem of possible injury to the property of a refugee after he or she had left the country of origin. Article 6, if adopted, should also say something about the possibility of exercising diplomatic protection against a refugee’s State of nationality. In that connection, it would be remembered that there was a tendency in contemporary international law to avoid situations involving loss of nationality or, where possible, to eliminate them. For example, the European Convention on Nationality contained a special provision imposing upon the State of residence the obligation to facilitate the acquisition of its nationality by refugees (art. 6, para. 4 (g)). It was the type of solution likely to be sought in the future, and the Commission should not close its eyes to possibilities of that kind.

40. Mr. SIMMA referring to Mr. Sepúlveda’s point about the possible exclusion of the issue of denial of justice from the topic under consideration, said it was his hope that, in such a case, the issue of exhaustion of local remedies would be treated separately. As for the question of protection of persons fleeing from genocide raised by Mr. Al-Baharna, the problem was situated, as it were, on the interface between diplomatic protection and State responsibility, and could perhaps be considered more closely in connection with the latter topic. Lastly, regarding the point raised by Mr. He, UNHCR was undoubtedly the agency most directly concerned with refugees. However, to his knowledge it was concerned not with diplomatic protection in the technical sense but, rather, with more direct forms of assistance.

41. Mr. LUKASHUK said that he was prepared to endorse the main thrust of article 8, subject to some amendments. He was also in favour of Mr. Economides’ proposal concerning the rights of the State of origin in respect of persons having ethnic, cultural or other ties with that State. The problem was likely to become increasingly important as time went on, and he believed that an appropriate provision should be formulated and included in the draft.

42. Mr. RODRÍGUEZ CEDEÑO said that the question of stateless persons, which was governed by the criterion of legal residence, was completely different from that of refugees, whose status had to be expressly granted. The two situations were not the same and should not be bracketed together in one article. He agreed with Mr. Simma that the work of UNHCR was in no way related to diplomatic protection.

43. Mr. Sreenivasa RAO thanked the members of the Commission who had formulated excellent ideas on the basis of his own modest contribution. He had described article 5 as posing essentially an issue of opposability, rather than of challenging the validity of nationality, and Mr. Simma had asked what the difference was. Opposability was a procedural device that enabled States to prevent claims being brought without going into the substantive question of the validity of the foundation for the claims. The basis upon which a State could grant nationality was not the question, and indeed, it was not part of the topic. What needed to be determined was for what purposes, once nationality was granted, it could be used in foreign countries in dealing with other States.

44. Mr. BAENA SOARES said that, as other members had pointed out, the wording of article 5 could be improved by deleting the last phrase, “by birth, descent or by bona fide naturalisation”. To list the methods of acquiring nationality seemed merely to complicate the text. A more concise version would be better suited to the purpose. He supported the proposal to add the words “holds or” before “has acquired”, and Mr. Hafner’s proposal for the last phrase was acceptable. The State retained the right to determine nationality, although it would be exercised within the limitations established by the rules of international law.

45. Article 6 was controversial and its fate would to some extent be determined by the decision to be taken on article 9, paragraph 4. He was in favour of retaining the idea conveyed in article 6, as long as the Drafting Committee kept in mind the circumstances to which he had drawn attention and accepted the possibility of reformulating the article.

46. He experienced difficulties with article 7, paragraph 2, which envisaged joint exercise of diplomatic protection by two or more States with which the person concerned had ties of nationality. The material merited further consideration because of the questions, including practical problems, it could raise, and because of its inter-relationship with other provisions in the draft. Article 8 was a major step forward in the progressive development of international law, in keeping with the concerns of the international community, but its effectiveness and solidity would be enhanced if the situations envisaged were described in greater detail and the scope of the article was delineated more clearly. The realities, the practical circumstances and imperatives surrounding the application of the provision, must be kept in mind. The difficulties pointed to by Mr. Sreenivasa Rao must also be taken into account. Thought must be given to the need to fine-tune the distinction between stateless persons and refugees by tightening up the drafting of the article.
47. Lastly, the draft articles should explicitly mention the need for domestic remedies to have been exhausted before diplomatic protection was exercised. He did not see it as unnecessary duplication if the same principle was incorporated in work being done by the Commission under another topic. The draft should explicitly enunciate the principle that an injured person must have exhausted the domestic legal remedies of the State against which it had a claim before resorting to diplomatic protection by the State of nationality.

48. Mr. ROSENSTOCK said he agreed that exhaustion of domestic remedies was an essential part of the topic, but it should not be construed as meaning that, in all cases, nothing could be done until some non-useful process was exhausted: the effect of exhaustion of domestic remedies was inherently limited in instances when there was no internal process whereby injustice could be righted.

49. Mr. ECONOMIDES said he agreed with Mr. Baena Soares and Mr. Rosenstock that the exhaustion of domestic remedies was an essential part of the topic. Certainly, there must be exceptions to the requirement that domestic remedies be exhausted, including cases of denial of justice, mentioned by Mr. Sepúlveda. The Special Rapporteur had said that the issue might be covered under the topic of State responsibility, or alternatively, that he himself would take it up. The matter was important enough for the Commission to need to know exactly where and when it was to be addressed.

50. The CHAIRMAN, speaking as a member of the Commission, said he had conceptual difficulties with the reference in article 5 to nationality acquired by “birth, descent or bona fide naturalization”. In paragraph 102 of his report, the Special Rapporteur defined birth as being a case of *jus soli* and descent as being one of *jus sanguinis*. Yet nationality according to the principle of *jus sanguinis* was also conferred on the basis of and at the time of birth. Birth should thus be construed to include both *jus soli* and *jus sanguinis*.

51. In article 6, he preferred the term “dominant” to “effective”, since it carried the notion of prevailing over others. Further thought should be given to cases where an injured person made use of the benefits of the nationality of the wrongdoing State and when such use was of relevance to the injury suffered. He agreed that the concept of dominant nationality could also have a role to play in regard to article 7. Articles 6 and 7 must, in any event, be considered together to ensure that they covered all cases of multiple nationality.

52. As to article 8, diplomatic protection was traditionally limited to nationals and nationality was thought to be a strong bond linking the State and the individual. In recent times and in special cases, other factors like habitual residence had created much stronger ties than nationality. The discussion on refugees had revealed the complex nature of the issue. The existence of refugees was caused by political conflicts and each case presented special characteristics. It was not certain that a general rule would cover abnormal political situations.

53. One such political abnormality was represented by the 800,000 Koreans now in Japan. In 1910, Japan had annexed Korea and had made all the inhabitants Japanese nationals.³ The 1943 Cairo Declaration⁴ by the leaders of Great Britain, China and the United States had indicated that the three great Powers, mindful of the enslavement of the people of Korea, were determined that in due course Korea would become free and independent. When the Allied Forces had occupied Japan in 1945, that principle had been implemented and, as a result, all of the 2,500,000 residents of Japan of Korean origin had lost Japanese nationality. Three quarters had opted to return to Korea but the remainder had stayed on in Japan because they had no livelihood on the Korean Peninsula.

54. Since Japan applied the *jus sanguinis* rule, there were six generations of Koreans in the country who did not have Japanese nationality. Technically, two Governments on the Korean peninsula claimed them as their nationals. As they had no passports, they travelled abroad using a Japanese travel document that guaranteed re-entry. Japanese consular assistance was provided to them in cases of need. Should Japan be given the right to exercise diplomatic protection on their behalf against a third State?

55. The question, he believed, could not be solved by a general rule such as the one being developed by the Commission. It had to be solved by the political normalization of the situation on the Korean Peninsula. So, while the question of diplomatic protection of refugees must be addressed, he was not sure that a general rule of diplomatic protection was the proper place to do that.

56. Mr. DUGARD (Special Rapporteur), summing up the debate, said that the question of whether denial of justice should be included in the study could be discussed in informal consultations. He agreed entirely that exhaustion of local remedies was a matter that must be dealt with in the work on diplomatic protection, even if it was also being addressed under the topic of State responsibility.

57. With regard to article 5, Mr. Kusuma-Atmadja had aptly pointed out that it was diplomatic protection, and not acquisition of nationality, that was the subject of the Commission’s study. Article 5 perhaps failed to make that distinction clearly enough. Mr. Simma had rightly said that the real issue was whether a State of nationality lost the right to protect an individual if that individual habitually resided elsewhere—in other words, what was involved was a challenge to the right of a State to protect a national, not the circumstances in which a State could grant nationality. As Mr. Sreenivasa Rao had pointed out, opposability came into play and that should be addressed in the redrafting of the article. Mr. Gaja and Mr. Kamto had made helpful drafting proposals which would remove from the articles the references to birth, descent and naturalization. Objections had been raised to the use of the term “bad faith”, and that, too, was a question of drafting.

58. Mr. Brownlie had made a more substantial attack on article 5, saying that it reflected a middle-class world by ignoring the fact that many people had no identity papers

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or passports and had only residence or habitual residence to connect them with a particular country. That, of course, was correct, but surely, in such a case, if a State wished to exercise diplomatic protection on behalf of a person who habitually resided within its territory, it could grant that person nationality. Nationality was open to all persons habitually resided within its territory, it could grant that exercise diplomatic protection on behalf of a person who was correct, but surely, in such a case, if a State wished to connect them with a particular country. That, of course, or passports and had only residence or habitual residence suggested that the Nottebohm rule was an absolute one that should be codified. He therefore thought the article could usefully be referred to the Drafting Committee.

59. Article 6 presented greater difficulties and had created a clear division of opinion. He agreed it would be more appropriately placed after article 7. He did not, unlike some members, see it as a clear case of progressive development of international law. Two points of view existed, both backed by strong authority, and it was for the Commission to make a choice between the competing principles. Mr. Momtaz had made a strong plea for the principle of non-responsibility on the part of the respondent State. On the other hand, Mr. Sepúlveda had made the cogent point that many States did not allow a national to denounce or lose his or her nationality. Cases might therefore occur in which a person had relinquished all ties with the original State of nationality and acquired the nationality of another State yet was formally bound by a link of nationality with the State of origin. That would mean that, if the individual was injured by the State of origin, the second State of nationality could not provide protection. Clearly, the draft must contain a provision covering the material in article 6. Since views were so divided, however, and it seemed unlikely that the division could be remedied in the Drafting Committee, he proposed that article 6 be discussed in informal consultations.

60. There was widespread support for article 7, some helpful drafting suggestions had been made and the principle set out in the article had not been seriously questioned. He was therefore proposing that it could be referred to the Drafting Committee.

61. Article 8 was clearly an exercise in the progressive development of international law and an overwhelming majority of members had expressed support for it. The objections raised were not really well founded. First, the State reserved the right to exercise diplomatic protection and thus had discretion in the matter. Secondly, there was no suggestion that the State in which the individual had obtained asylum could bring an action against the State of origin. That was made very plain in paragraphs 183 and 184 of the report, although it could perhaps be made clearer in the article itself. Thirdly, the provision was not likely to be abused: stateless persons and refugees residing within a particular State were unlikely to travel abroad very often, as the State of residence would be required to give them travel documents, something that in practice was not done frequently. Only when a person used such documents and had suffered injury in a third State other than the State of origin might diplomatic protection be exercised. Mr. Kabatsi had brought out that point with the example he had given. A number of suggestions for improvements had been made, including the suggestion that the article should be split into one part on stateless persons and another on refugees. Such matters would best be dealt with by the Drafting Committee, and he proposed that the article be referred to it.

62. All in all, articles 5, 7 and 8 could be referred to the Drafting Committee, but only if, after hearing the report on the informal consultations on articles 1 to 3, the Commission so decided. Article 6, on the other hand, should be considered in informal consultations.

63. The CHAIRMAN announced that the Commission had concluded its discussion of articles 5 to 8. He said that, if he heard no objection, he took it that the Commission wished, as recommended by the Special Rapporteur, to discuss article 6 in informal consultations and would take a final decision on referral of the remaining articles to the Drafting Committee after the report on the informal consultations on articles 1 to 3.

It was so agreed.

The meeting rose at 1 p.m.

2628th MEETING

Friday, 26 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)1 (A/634/504, sect. D, A/634/509,2 A/634/5103)

[Agenda item 4]

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1 For the text of the draft articles provisionally adopted by the Commission on first reading, see Yearbook . . . 1998, vol. II (Part Two), p. 21, para. 55.
3 Ibid.