

Document:-
A/CN.4/SR.2625

Summary record of the 2625th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

study, once the question of invalidity had been discussed. That would call for an examination of the possible material content of the act, the lawfulness of the act in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and described in detail, it would be easier to lay down appropriate rules governing invalidity.

62. He awaited with considerable interest the continuation of the Special Rapporteur's study of the topic, which would deal with extremely important issues such as the form, effects, binding character, interpretation, amendment, duration, suspension and revocation of unilateral acts. He had no doubt that, once the Special Rapporteur had submitted those components to the Commission, it would have a more comprehensive overview of the key components of the topic and would be better equipped to engage in a penetrating and mature discussion and to make headway in its work.

63. Mr. PAMBOU-TCHIVOUNDA paid tribute to the Special Rapporteur's fine achievement in reflecting the concerns of the members of the Commission and the representatives of States in the Sixth Committee. His third report was lively and well paced, although certain matters of substance, such as the reception of the manifestation of will by the addressee of the act, especially the form of reception, and the specification of the addressee or the whole circle of addressees, still had not been dealt with.

The meeting rose at 1 p.m.

2625th MEETING

Tuesday, 23 May 2000, at 10 .a.m.

Chairman: Mr. Chusei YAMADA

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

Diplomatic protection (*continued*) (A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of draft articles 5 to 8 contained in the first report of the Special Rapporteur (A/CN.4/506 and Add.1).
2. Mr. SIMMA said he wished to take issue with some of Mr. Brownlie's remarks (2624th meeting). In particular, he was unsure what Mr. Brownlie had in mind when he criticized the Special Rapporteur for failing to take due account of habitual residence in the list of factors connecting the State and the individual set forth in draft article 5. If he was referring to habitual residence as a means of acquiring nationality, it was an issue that had been discussed at length in the topic of nationality in relation to the succession of States and was out of place in the current discussion.
3. If, however, for argument's sake, habitual residence was examined in the context of diplomatic protection, two questions arose. First, did a person's habitual residence in a State give that State the right to exercise diplomatic protection? In his view, if the person concerned possessed another nationality acquired *jure soli* or *jure sanguinis* or through bona fide naturalization, the State whose sole connection with the individual consisted in his or her habitual residence there did not, by virtue of that fact alone, acquire the right to diplomatic protection. The situation would be different if the person concerned was stateless or a refugee, an issue that was addressed in article 8. The second question was whether a State whose nationality a natural person had acquired through *jus soli*, *jus sanguinis* or naturalization lost the right to diplomatic protection if the person concerned habitually resided in another country. Mr. Brownlie seemed to imply that it did. Habitual residence under those circumstances would become the natural enemy of diplomatic protection. He vehemently opposed that view, which at worst could lead to a revival of the Calvo clause,² and he strongly supported the Special Rapporteur's argument in paragraph 117 of the report, which had been severely criticized by Mr. Brownlie.
4. Again contrary to Mr. Brownlie, he considered that the Special Rapporteur's handling of the *Nottebohm* case was clever and appropriate. Given its status as the leading case of reference in the area of diplomatic protection, he could not agree that it had been overemphasized. He noted in passing that the words "and *jus soli* or *jus sanguinis*", in paragraph 112, should be altered to read "*jure soli* or *jure sanguinis*".
5. He urged the Special Rapporteur to expand on the subject of mala fide naturalization and its consequences in his comments on article 5 and would also welcome

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

² See *Yearbook . . . 1956*, vol. II, pp. 206–208, document A/CN.4/96.

further discussion of the distinction between bona fide and mala fide naturalization.

6. He agreed with the gist of article 6 and supported the inclusion of a reference to “dominant and effective” nationality. He also agreed with the suggestion that it be placed after article 7. The reference in paragraphs 155 and 156 to Bar-Yaacov’s treatise³ was somewhat misleading, since what was described as contemporary United States practice turned out to be nineteenth century practice. With reference to article 7, the Commission should make up its mind about how it wished to address the issue of gender-neutral language.

7. He supported article 8, although it clearly illustrated the overlap between State responsibility in respect of obligations *erga omnes* and diplomatic protection. The word “protection” in paragraph 181 was used in a loose sense which should be shunned in the context of diplomatic protection.

8. Mr. LUKASHUK informed the Commission that most of the members participating in the unofficial consultations which had taken place on the previous day had spoken in favour of the Special Rapporteur’s proposals.

9. While generally deferring to Mr. Simma’s views on Latin grammar, he remarked that the expressions *jus soli* and *jus sanguinis* were customarily used in the nominative case.

10. As to the substance of the report, too much attention was perhaps being given, both in the comments and in the draft articles themselves, to questions of nationality which related to a different area of international law. Article 5, for example, contained an attempt to define the lawful means of acquiring nationality “by birth, descent or ... naturalization”. In his view, it would be more correct to use the following wording: “... means the State whose nationality the individual seeking to be protected (lawfully) holds”.

11. While recognizing the relevance of questions of nationality to the topic of diplomatic protection and the desirability of resolving some of those questions in connection with the topic, he felt that the subject of diplomatic protection was complex enough in itself and that it would be appropriate to defer consideration of some of the nationality issues pending the completion of the draft as a whole. Article 5 would be acceptable if it was amended along the lines he had proposed.

12. Article 6 was designed to overturn a recognized standard of international law according to which the State of nationality could not exercise diplomatic protection against a State of which the injured person was also a national. Admittedly, some grounds did exist for introducing such a change, but the time was not yet ripe to do so. Clearly, the State of nationality could exercise some protection on behalf of a national in respect of a State of which that individual was also a national. However, that did not mean exercising the right of diplomatic protection to the full extent. He would therefore advocate that article 6, too, should also be held in abeyance.

13. While the substantial changes to existing practice proposed in article 7 were sufficiently well founded, they failed to take into account the rights of the third State on the territory of which the individual concerned was present. In his opinion, the article should be supplemented by a third paragraph making it clear that the third State was entitled to accord the right of diplomatic protection to only one of the States of nationality.

14. Lastly, article 8 represented progressive development of international law and it was warranted by international practice, as well as by instruments such as the European Convention on Consular Functions. The problem of the protection of stateless persons and refugees was extremely pertinent, for people in those categories numbered many millions worldwide. In his view, the expression “and/or” could be replaced by “or”. The passage in square brackets could be deleted, as legal residence in the claimant State was sufficient proof of an effective link.

15. Mr. HERDOCIA SACASA, thanking the Special Rapporteur for a well documented report, said that the topic of diplomatic protection presented the Commission with the formidable challenge of reaffirming the validity of an institution on which many complex decisions had been taken by arbitral tribunals, courts and special commissions, and of seeking to reflect in its proceedings not only established tradition but also recent developments such as the individual’s status as a subject of international law and a participant in the international legal order, especially in the areas of human rights and humanitarian law. A further challenge consisted in furthering the progressive development of diplomatic protection, especially on behalf of stateless persons and refugees.

16. Although article 5 went some way towards clarifying the term “State of nationality”, its scope might prove to be somewhat restrictive. The list of connecting factors could be extended to include other linkages recognized by international law, as noted by Mr. Brownlie. In particular, the case of stateless persons and refugees, mentioned in article 8, should be brought within the ambit of article 5. Some authors held that, in addition to nationals in the strict sense of the term, other persons could be represented or protected under special agreements by a State other than that of their nationality. For example, with reference to the advisory opinion of ICJ in the *Reparation* case, Oppenheim stated that there were cases in which protection might be exercised by a State on behalf of persons not having its nationality.⁴

17. Globalization and mass migration were contemporary phenomena that highlighted the need to adopt a practical approach to diplomatic protection. In paragraph 117, the Special Rapporteur recognized that the genuine link requirement proposed in the *Nottebohm* case could undermine the traditional doctrine of diplomatic protection if applied strictly, depriving large numbers of people who had been forced to leave their country and take up residence elsewhere of diplomatic protection. Therefore the door should be left open in article 5 to take account of the

³ N. Bar-Yaacov, *Dual Nationality* (London, Stevens and Sons, 1961).

⁴ See *Oppenheim's International Law* (2617th meeting, footnote 11), p. 515.

rights and aspirations of persons who had been uprooted and departed with only a tenuous link to a particular State. Circumstances had evolved since the *Nottebohm* case and its relevance should neither be overstated nor played down.

18. With regard to article 6, the Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, prepared by Harvard Law School,⁵ and the Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter “1930 Hague Convention”) had carried great weight in establishing the principle that a State could not accord diplomatic protection to one of its nationals against a State whose nationality such person also possessed, a rule derived from the *Canevaro* case and restated in the judgment of ICJ in the *Reparation* case. While there was certainly a school of thought in favour of discarding the principle, leading publicists continued to view it as a rule of customary international law. Other writers such as Combacau denied that the jurisprudence in the *Mergé* case, which gave precedence to the principle of effective or dominant nationality over the equality of rights as between States, had really overturned the traditional rule, but nonetheless conceded that its scope had been reduced.⁶ Notwithstanding the *Nottebohm* case, which continued to be perceived as the fundamental frame of reference, the principle of the sovereign equality of States continued logically to enjoy strong support. In cases in which dual nationality was well established, any indiscriminate application of the principle of dominant or effective nationality could have absurd implications and might even undermine State sovereignty. As noted in the *Alexander* case, “no government would recognize the right of another to intervene thus in behalf of one whom it regarded as a subject of its own” [see p. 2531]. It might therefore prove necessary to amend article 6 to take account of cases of well established dual nationality. In paragraph 158, the Special Rapporteur himself stated that a tribunal should be cautious in applying the principle of preponderance of effectiveness where the links between the dual national and the two States were fairly evenly matched, as that would seriously undermine the equality of the two States of nationality. He would take that argument even further and submit—at least in general terms—that it did not seem reasonable for a person who had voluntarily accepted a State’s nationality to refuse to align his or her conduct with the order and internal procedures resulting from that choice. It followed that article 6 could not serve as a general rule and had to take account of the dictates of common sense and practical necessity.

19. Article 7 took a step in the right direction by permitting any State of a dual or multiple national to exercise diplomatic protection vis-à-vis a third party. As noted by the Special Rapporteur in paragraph 170, the only requirement in such circumstances was to demonstrate the existence of a bona fide link of nationality between the State and the injured person.

⁵ See article 16, subparagraph (a) (*Yearbook . . . 1956*, vol. II, p. 230, document A/CN.4/96, annex 9).

⁶ See J. Combacau and S. Sur, *Droit international public*, 4th ed. (Paris, Montchrestien, 1999) pp. 327–328.

20. Article 8 constituted an example of progressive development of international law inasmuch as it allowed diplomatic protection to be exercised on behalf of stateless persons and refugees residing in the claimant State. Mr. Lukashuk was right to say that it should not be necessary to demonstrate the existence of a link with the State concerned. The article reflected the humanitarian character of international law, which could not be indifferent to the plight of such persons. It also reaffirmed the role of the institution of diplomatic protection in achieving a basic goal of international law, that of civilized co-existence based on justice.

21. Mr. GOCO said that article 5 cited the three links of birth, descent and bona fide naturalization in defining the State of nationality. The well-known principles of *jus solis* and *jus sanguinis*, together with naturalization, were thus deemed to constitute the only acceptable links. In his view, it was an unduly restrictive approach, since other factors might effectively connect an individual to a given State and entitle him or her to diplomatic protection. Take, for example, the case of persons who sought repatriation to their country of origin, a country whose formal citizenship they had lost through force of circumstances. Habitual residence was another example: a person might be naturalized in another country because of the political circumstances in his or her country of origin. Other factors had been cited by the Special Rapporteur in paragraph 153 of his report.

22. It was acknowledged that every State had the power to determine under domestic law who its nationals were. But international law could set limits on that power in the context of diplomatic protection, since other States might have a valid reason to question its determination. While the State of nationality had the right, as recognized in article 3, to exercise diplomatic protection on behalf of a national unlawfully injured by another State, it might refrain from exercising that right for a variety of reasons. It might also take into account other links of nationality binding an individual to it, unless valid objections were raised by other States. It was therefore inappropriate to view the links mentioned in article 5 as exclusive.

23. He related an incident of special relevance to the draft articles of which he had personal knowledge. The ambitions of a well-known healer in the Philippines, who had run for the office of mayor and won, had been thwarted by the questioning of his eligibility on the grounds that he had left the country during a period of turmoil and obtained a naturalization decree from another country. The Supreme Court had endorsed the Solicitor General’s objection to his eligibility and rejected his defence on the basis of the necessity of seeking refuge during an unsettled period in his country of origin. Having later pursued his healing activities in the Russian Federation, he had been imprisoned on charges of malpractice and fraud. He had sought and obtained diplomatic protection from the Government of the Philippines. That was an illustration of the discretionary powers of the State in exercising diplomatic protection. Although the existence of *jus sanguinis* had not been in dispute, the requirement of citizenship for the holding of public office had been strictly applied but diplomatic protection at the very highest level had been granted without question when the person concerned was incarcerated abroad.

24. It was not inferred that the incarceration in the Russian Federation had constituted a wrongful act, or indeed that the individual had suffered any injury. He had been imprisoned due to a misapprehension of his activities and once that issue had been cleared up, the man had been set free. The fact remained, however, that he had been incarcerated for several months before eventually being released and allowed to return home. The right of the Philippines to exercise diplomatic protection could, of course, be seriously questioned because the link of nationality was in doubt. But if the individual's request for protection had been denied, he would have had to fend for himself; and as the previous Special Rapporteur, Mr. Benouna, had pointed out in his preliminary report,⁷ the exercise of diplomatic protection was more a moral duty than a legal obligation, provided it was in keeping with the overriding interests of the State of nationality.

25. For those reasons, he wished to propose, subject to drafting changes, the following addition to article 5: "... provided, however, that the State of nationality may consider other links or ties to nationality in the exercise of diplomatic protection, unless valid objections are raised by any other State or States at the international level". He would comment on other draft articles later.

26. Mr. DUGARD (Special Rapporteur) remarked that the case described by Mr. Goco would appear to square with article 7, paragraph 1.

27. The CHAIRMAN said that, under Japanese law, someone who was a Japanese national by birth did not lose his nationality as a result of acquiring another nationality abroad. He wondered whether the same was true of the Philippines.

28. Mr. TOMKA said he doubted whether diplomatic protection could be exercised in the absence of an allegation of an internationally wrongful act.

29. Mr. GOCO agreed with the Special Rapporteur that the Philippine Government's action on behalf of the individual in question fell squarely within the ambit of article 7. Replying to the Chairman and Mr. Tomka, he said that, since the Philippine Government's representations had been accepted by the then Government of the Russian Federation, neither the question of whether or not an internationally wrongful act had been committed nor the issue of dual nationality had been pursued further.

30. Mr. GALICKI said Mr. Goco's statement confirmed his impression that there was still some misunderstanding about article 5. As he understood it, the purpose of the article was simply to define the means or methods of acquisition of nationality. The Special Rapporteur himself had undeniably complicated the issue by referring to those methods as connecting factors in paragraphs 101 and 102 of the report. While the granting of nationality on the grounds of birth or descent was well described and recognized in international law, naturalization—even if qualified by the words "bona fide"—left a great deal of room for differentiation, depending on the background of each case, which might be adoption, marriage, or for example, habitual and lawful domicile. Those factors had to be

considered by the State in the process of granting nationality to an individual. If his understanding of the object of article 5 was correct, it would follow that adding other connecting factors recognized by general international law would merely spoil the construction of the article.

31. Mr. GAJA, noting Mr. Lukashuk's suggestion that consideration of the issues covered by article 5 should be postponed, said that he would be inclined to go a step further. Was there any need to lay down criteria for determining whether an individual did or did not possess a certain nationality? It seemed unnecessary in the context of the draft on diplomatic protection. Rather, the point was to ascertain whether a State that had endorsed a claim on the part of an individual was entitled to do so. Nationality played a role, but it was not necessary to go into the elements that substantiated it.

32. Article 5 did not anyway attempt to provide comprehensive coverage of the rules of international law concerning nationality. It said that birth, descent and naturalization were appropriate criteria, but did not take into account the possibility that, under international law, a State could in certain circumstances be under an obligation to grant nationality to individuals, or else to refrain from doing so. On the other hand, article 5 would provide some grounds on which a State could challenge another State's conferral of nationality on an individual. By claiming that naturalization had not been effected bona fide, a State would be contending that naturalization had been granted in bad faith. That would be an unusual step for a State to take, and the accusation of bad faith would not be taken lightly. The Special Rapporteur had recalled in his introductory statement (2617th meeting) how sensitive States were to any suggestion of impropriety in the exercise of what they regarded as their sovereign prerogative: that of granting nationality to individuals.

33. It would, accordingly, be advisable to follow the safer course taken by ICJ in the *Nottebohm* case and to assume that States were in principle free to grant nationality to individuals. The question of whether a given individual had or did not have the nationality of a certain State was one that implied the application of that State's legislation and was best left to the State's own determination. According to the judgment in the *Nottebohm* case, the way to approach the nationality requirement was to allow other States, if they so wished, to challenge the existence of an effective link between a State and its national. That solution was similar to the one suggested by Mr. Brownlie (2624th meeting): to replace nationality with effectiveness. Nevertheless, he thought nationality should be retained as a requirement and should in principle be a matter for the claimant State to assess. Lack of effectiveness would simply entitle other States to object to a claim.

34. It was true, as the Special Rapporteur had pointed out, that there were few examples in State practice of challenges to the effectiveness of nationality. There were even fewer examples, however, of States challenging the way in which nationality had been granted by another State. The number of cases that illustrated one or the other challenge was not decisive: rather, it had to be ascertained whether States to which a claim was presented felt entitled to use lack of effectiveness as an objection.

⁷ See 2617th meeting, footnote 2.

35. If the Commission retained the effectiveness test, it should introduce some restrictions so as to make it workable. It should consider whether the lack of effectiveness of an individual's nationality was open to challenge by any other State, or whether it was only for a State that had the most significant links to contend that there were no genuine links with the claimant State. In paragraph 109 of his report, the Special Rapporteur rightly pointed out that some passages of the judgment in the *Nottebohm* case supported the existence of a relative test—the idea that only the State with the most significant links could object that there was no genuine link between the individual and the claimant State. Yet there were other passages in which the test of effectiveness or genuine link was described in a more general way.

36. The *Barcelona Traction* case had concerned a corporation, not an individual, but ICJ had nonetheless referred to the *Nottebohm* test. Although it had not explicitly endorsed that test, the Court had looked into whether it worked with regard to Canada and had concluded that there were sufficient links between *Barcelona Traction* and Canada. It had not compared those links with those of Spain, where the subsidiary companies operated, or of Belgium, of which the company that held the *Barcelona Traction* shares was considered to be a national.

37. Aside from the support provided by those judgments of ICJ, the absolute test also seemed preferable for policy reasons. Diplomatic protection was based on the idea that the State of nationality was specially affected by the harm caused or likely to be caused to an individual. It was not an institution designed to allow States to assert claims on behalf of individuals, even though it could be used to protect human rights, namely, those of the State's nationals. The lack of a genuine link was an objection that a State could raise if it wanted to, irrespective of whether a stronger link existed with that State itself. If there was no genuine link, the State of nationality was not specially affected. That meant going back to the judgment in the *Nottebohm* case, and specifically, the words quoted by the Special Rapporteur in paragraph 106 of his report: "Conferred by a State, [nationality] only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national." [see p. 23].

38. As to article 8, there were perhaps alternatives to nationality that should be taken into account in particular circumstances, and the case of refugees and stateless persons was certainly one that demanded careful consideration. It was necessary to see whether a parallel with nationality could be drawn when habitual residence was involved. However, the Commission would not go very far if the exercise of diplomatic protection was admitted, because a refugee or stateless person had usually suffered an injury on the part of the State of residence, and that State was not likely to intervene. It was more a question of protecting human rights and trying to find out whether States other than the State of residence were entitled to bring a claim.

39. Mr. KAMTO, referring to Mr. Gaja's comment on the possibility of using diplomatic protection for the protection of human rights, asked whether an internationally

wrongful act alone could serve as a trigger for diplomatic protection, or whether an act that was merely likely to be internationally wrongful could do so.

40. Mr. GAJA said there was some division of views on that point. He himself thought that diplomatic protection should be linked with an internationally wrongful act, but that preventive action to stop a wrongful act from occurring might also be envisaged. Others believed that diplomatic protection could be exercised only after an internationally wrongful act had taken place.

41. Mr. ECONOMIDES said that article 5 was closely related to article 3 and set out the definition of a national, rather than of the State of nationality. The criteria for granting nationality—birth, descent or naturalization—were appropriate and generally accepted. Just one of those criteria was enough to establish an effective link between the State of nationality and its national, even if the national habitually resided in another State. He did not agree with the statement in paragraph 117 of the report that the genuine link requirement proposed by the judgment in the *Nottebohm* case seriously undermined the traditional doctrine of diplomatic protection. On the contrary, as long as an individual had the nationality of a State, on the basis of one of the criteria in question, the door was open for the exercise of diplomatic protection by that State.

42. The Special Rapporteur pointed out in paragraph 104 that nationality was not recognized in the case of forced naturalization. While that comment was pertinent, it appeared not to take account of State succession, an institution which accorded to the successor State the right to grant its nationality *en masse* and in an authoritarian manner, in particular to persons who held the nationality of the predecessor State and whose habitual residence was in the territory of the State that was the object of the succession. It was an important and recognized exception in international law to the rule of voluntary naturalization.

43. The use of the phrase *objet de la protection*, at least in the French version, should be avoided, owing to its pejorative connotation. The reference to "bona fide" naturalization was also dubious: it would be better to speak of "valid" naturalization.

44. Article 6, on dual nationality, represented a major innovation. The standard in such matters was that of the 1930 Hague Convention, which provided that a State could not afford diplomatic protection to one of its nationals against a State whose nationality that person also possessed. Article 6, on the other hand, gave the State of the individual's most effective or dominant nationality the right to exercise diplomatic protection against another State. Was the major modification proposed by the Special Rapporteur justified? He agreed with Mr. Herdocia Sacasa and Mr. Lukashuk that it was not. First, it would run counter to the principle of sovereign equality of States and would permit interference in the internal affairs of the respondent State in respect of a person who was legally a national of that State. Secondly, it would be hard to distinguish dominant from non-dominant or less dominant nationality. Thirdly, the cases in which a State of nationality brought a claim against another State of nationality

in exercising diplomatic protection for a person holding dual nationality were few and far between. Finally, dual nationality conferred a number of advantages on those who held it. Why should they not suffer a disadvantage as well?

45. Article 7 was also an innovation compared with article 5 of the 1930 Hague Convention which permitted a third State to apply the theory of the dominant nationality. Article 7 specified that a State of nationality could exercise diplomatic protection on behalf of a dual or multiple national against a third State. There the innovation was acceptable, since it involved a normal legal relationship between a State of nationality acting in the interest of its national and a third State to which an internationally wrongful act against that national was attributed. The concept of joint exercise of diplomatic protection by two or more States of nationality was likewise acceptable, as long as those States did not apply the solution of exclusive nationality. Nevertheless, provision should be made, in either article 7 or the commentary, for the possibility of two States of nationality exercising diplomatic protection simultaneously but separately against a third State on behalf of a dual national. In such a case, the third State must be able to use the traditional solution, namely to apply the dominant nationality principle in order to non-suit one of the claimant States.

46. He agreed with the general ideas set out in article 8, but in order to benefit from diplomatic protection, refugees must have been granted the right of asylum beforehand and must have had legal residence for a certain period of time—for example, at least five years. The effective link mentioned in square brackets was not a relevant criterion in the context of article 8.

47. Mr. MOMTAZ thanked the Special Rapporteur for the useful information in his report, which would surely help the Commission to pinpoint a very controversial topic. Article 5 presented no major problems, although a clearer distinction should be drawn between nationality that was granted automatically, by *jus soli* and *jus sanguinis* under existing domestic legislation, and nationality granted by naturalization. In the first instance, the absence of an effective link between the individual and the State of nationality could not be challenged and he therefore had difficulty in accepting the opposite view expressed by the writers mentioned in paragraph 112 of the report. True, in a certain number of cases, the lack of such a link rendered nationality granted on the basis of *jus soli* and *jus sanguinis* without practical effect. That was precisely why, in recent legislation a number of States required an individual whose nationality had been granted by *jus soli* to request confirmation of his or her nationality from the competent authorities, and in some cases such confirmation was subjected to certain conditions, including the existence of an effective link. In naturalization, however, the existence of an effective link between the individual and the State conferring nationality was essential. It was only in that context that one could speak of good faith, or rather that naturalization could be contested on the grounds of bad faith.

48. Article 6 posed some difficulties. He was grateful to the Special Rapporteur for his intellectual honesty in discussing the two schools of thought on dual nationality. The

codification efforts surveyed revealed a clear trend towards the rule of non-responsibility of States for claims brought by dual nationals. The literature was highly divided on that issue, despite the fact that many well-known modern writers cited in paragraph 145 of the report considered that diplomatic protection was applicable to cases of dual nationality. Court decisions, too, revealed no consensus on the issue.

49. The Special Rapporteur referred repeatedly to the precedents set by the Iran-United States Claims Tribunal, which had considered an impressive number of dual national cases and had clearly favoured the dominant nationality principle. Yet those precedents should be treated with caution. The Algiers Declarations of 1981, mentioned in paragraph 148, were in fact declarations by the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran.⁸ The purpose of the Declarations was to resolve legal disputes between nationals of the United States and of the Islamic Republic of Iran. That fact was mentioned by the Tribunal itself in its award in the *Esphahanian* case, the first of many that were based on the principle of dominant nationality.

50. The Special Rapporteur referred in paragraph 148 to the institutional peculiarity of the Iran-United States Claims Tribunal and cited a passage from the award in the *Esphahanian* case which stated that it was not a typical exercise of diplomatic protection of nationals. The problem could be analysed further by a look at article III, paragraph 3, of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran which stated that if the amount of the claims exceeded US\$ 250,000—as had been true in the *Esphahanian* case—the individual could resort directly to the Tribunal.⁹ It was interesting to note that, because of his Iranian nationality, Mr. Esphahanian had been able to become a shareholder, under extremely favourable conditions, in a United States company operating in Iran.

51. The question had arisen several times in the Iran-United States Claims Tribunal whether, in expropriating the property of its nationals without knowing that they had American nationality, Iran had committed an internationally wrongful act. The same issue had come up in other cases. He wished to point out that under Iranian law, only Iranian nationals had the right to own real estate. In other words, persons with dual nationality had greatly benefited from their Iranian nationality to acquire real estate and stocks.

52. For claims under US\$ 250,000, article III of the Declaration specified that in such cases the State of nationality could espouse the case of its national. In such instances, the procedure had greater similarities with diplomatic protection. Consequently, it might be preferable to develop the jurisprudence of the Iran-United States Claims Tribunal further, more particularly on the basis of

⁸ See ILM, vol. XX, No. 1 (January 1981), p. 223.

⁹ *Ibid.*, p. 231.

amounts of less than US\$ 250,000 for claims instituted by the State or States of the national concerned.

53. He had doubts about the relevance of the Iran-United States Claims Tribunal's jurisprudence. He noted in that connection that article 6 was not in conformity with customary international law, and he endorsed the points made on that question by Mr. Economides, Mr. Herdocia Sacasa and Mr. Lukashuk.

54. Article 7 moved in the right direction and article 8 was welcome. The only drawback was that article 8 called into question to some extent the fiction underlying the institution of diplomatic protection. He agreed with the argument set out by the Special Rapporteur in paragraph 178.

55. Lastly, he would point out that, pursuant to article 2 of the International Covenant on Civil and Political Rights, each State party undertook to respect and to ensure to all individuals within its territory the rights recognized in that instrument. Needless to say, that also covered refugees and stateless persons.

56. Mr. HE said that, while article 1 purported to be a description of the term "diplomatic protection" as understood in the language of international law, and article 3 worked on the assumption that the State of nationality had the right to exercise diplomatic protection on behalf of the national injured by the internationally wrongful act of another State, article 5 went on to expound the principle that it was the nationality link that provided the basis of a right to protection by the State. It was a recognized fact that each State had the right to determine under its own laws who its nationals were. Nevertheless, States had to comply with international standards in the granting of nationality. Birth, descent and naturalization were the generally accepted connections under international law, but in the case of naturalization, there must be a genuine and effective link between the State and the individual, not only in the case of dual or plural nationality, but also where the national had only one nationality. The conferment of nationality recognized for the purpose of diplomatic protection should be made in good faith. Thus, the conclusion drawn in paragraph 120 was logical and had enjoyed wide support.

57. However, questions might still be raised in connection with article 5. Paragraph 94 of the report, after pointing out that a State's right to exercise diplomatic protection was based on the link of nationality between the injured person and the State, stressed that except "in extraordinary circumstances", a State might not extend its protection to or espouse claims of non-nationals. That raised two questions. First, could stateless persons and refugees for whom diplomatic protection was provided in article 8 be included under "extraordinary circumstances"? He did not think so, as diplomatic protection could be exercised only at the discretion of a State on behalf of its own nationals. Secondly, could a State, by means of an international agreement, be vested with the right to represent another State and to act on behalf of the nationals of that State? It was a question which could not be answered without further study. Clarification was needed on both those issues.

58. Another question was whether the content of diplomatic protection should cover forms of protection other

than claims, since article 2, on the use of force, was to be deleted. It had been argued that diplomatic protection was by nature an international proceeding constituting an appeal by one State to another State for the performance of the obligations which the one owed to the other. In his preliminary report, the previous Special Rapporteur had also held that, in principle, the State retained the choice of means of action to defend its nationals, but could not resort to the threat or use of force in the exercise of diplomatic protection. Thus, the issue of whether other forms of protection could be available merited further consideration.

59. Article 6 contained the principle that in cases of dual nationality, the right to bring a claim was to be exercisable by the State to which the alien had stronger and more genuine legal or other ties. Although opinions were divided on that issue, the weight of authority supported the dominant nationality principle in matters involving dual nationals. The key words in article 6 were "dominant or effective" nationality, and in paragraph 153, a number of factors were cited from the jurisprudence of the Iran-United States Claims Tribunal. All those factors could be taken into account in determining the effectiveness of the individual's link with the State of nationality. Elucidation of those factors would be a major contribution to the implementation of article 6, and the Tribunal should be cautious in applying the principle of dominant nationality by balancing all the relevant factors so as to resolve that difficult issue in a satisfactory way.

60. Article 7, paragraph 2, was indisputable in principle, but it would be better if a specific case could be cited to substantiate its application. Article 8 as introduced by the Special Rapporteur was an exercise in progressive development, rather than codification, of the law. As a general rule, diplomatic protection was confined to nationals. Although human rights treaties afforded stateless persons and refugees some protection, most States did not intend to extend diplomatic protection to those two groups. A number of judicial decisions stressed that a State could not commit an internationally wrongful act against a stateless person, and consequently, no State was empowered to intervene or enter a claim on his behalf. The Convention relating to the Status of Refugees made it clear that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic and consular authorities of the country of issue, nor did it confer on those authorities the right of protection. The Convention on the Reduction of Statelessness was silent on the subject of protection. In spite of the developments in recent years relating to the protection of refugees and stateless persons, the time did not yet seem ripe to address the question of diplomatic protection for such persons.

61. Mr. KAMTO noted that two factors triggered diplomatic protection: an internationally wrongful act, and the link of nationality. It was therefore fully understandable that the Special Rapporteur, in a work involving impressive research, should proceed from the nationality link which must exist between the beneficiary of diplomatic protection and the State exercising that protection. But it was not for the Commission to consider, in the framework of the codification of diplomatic protection, the question of nationality or to enter into the methods for the acquisition of nationality. He fully agreed with Mr. Gaja's views

in that regard. The question should be left to States, for the matter was governed by national legislation and the principle of State sovereignty obviously applied.

62. He was of two minds about whether to retain article 5 and, if so, in what form. If it should be retained, it might be recast to read: “For the purposes of diplomatic protection of natural persons, the ‘State of nationality’ means the State whose nationality the individual has or has acquired”. It would then be left to national legislation to explain how the individual could acquire that nationality. But that was only satisfying at first glance, because the other hypotheses advanced, in particular by Mr. Herdocia Sacasa, were not fully covered by that definition. Mr. He had pointed to the situation of a State which, on the basis of an agreement, was led to ensure the interests of another State in another country. But if the Special Rapporteur wanted to rule out that case, perhaps he should also explain in the commentary to what extent that did not fall within the scope of diplomatic protection and clearly indicate that he was discarding it. If any part of article 5 was to be retained, the article should be recast as he had suggested.

63. Regarding the effective link, the judgment in the *Nottebohm* case could not be dismissed entirely. Mr. Momtaz had referred to diplomatic protection in respect of legal entities, but it could also be seen concerning individuals. In certain cases, the effective link would still be necessary to determine whether another State could exercise diplomatic protection. After all, the Special Rapporteur had himself reintroduced the concept of effective link when he spoke of the dominant nationality. What determined the dominant nationality, if not the effective link. Thus, in view of the judgment in the *Nottebohm* case, the concept of effective link should be tempered, but not wholly discarded.

64. As to article 6, the concept of dominant nationality should perhaps be retained. The question was whether the State of the dominant nationality could exercise diplomatic protection vis-à-vis the State of the other “weaker” nationality. Did the dominant State have the right to do so? The Special Rapporteur needed to clarify that point.

65. He had no objections to article 7 and article 8 was very appealing, because it concerned the progressive development of international law, which he supported. The Special Rapporteur had attempted to give a much sounder line of reasoning to article 8 than to some of those preceding it. He personally favoured retaining the words “effective link”, because the advance was sufficiently important for it to be fenced in by a number of precautions. Diplomatic protection could not so easily be exercised on behalf of refugees without adding a number of extremely precise conditions, including the effective link. He was even inclined to include in the draft article or at least in the commentary the idea expressed by Mr. Economides, namely that a certain period of time must elapse before such protection was exercised. Of course, the Commission was aware of the humanitarian dimension to article 8. But one could not precisely in the name of protecting the rights of refugees, and hence of upholding humanitarian law or human rights, fail to lay down a number of conditions, especially since a well-established concept was at issue.

66. A more important question was whether, in the case of diplomatic protection exercised on behalf of refugees,

the State of refuge could exercise diplomatic protection vis-à-vis the refugee’s State of nationality. The Special Rapporteur quite rightly pointed out, in paragraph 184, that it would be improper for the State of refuge to exercise diplomatic protection on behalf of the refugee when the refugee had fled to avoid persecution. In his opinion, not only the commentary, but also article 8 itself should include the idea that regardless of the circumstances contemplated, the State of refuge could not exercise diplomatic protection on behalf of a refugee vis-à-vis the refugee’s State of nationality. But once that was said, the question then arose of the purpose of diplomatic protection, and he found it difficult to imagine in such a case that diplomatic protection could be exercised vis-à-vis another State other than the State of nationality, i.e. the State which the refugee had left—unless it was considered that the refugee in question was, for example, a businessman who could work internationally from the State of refuge. For one thing, the situation of refugees was generally regarded as temporary, and for another, refugees were subject to a number of restrictions which did not allow them to work elsewhere or to enjoy such protection. Thus, although the idea was unquestionably a move forward in the law it should be better illustrated and, if the idea was to be retained, it must emerge clearly from article 8 that such protection could not be exercised vis-à-vis the State of nationality of the refugee.

67. Mr. LUKASHUK said that he had doubts about one point. The beneficiaries of diplomatic protection were individuals, whereas the draft articles made no mention of the rights of the individual. When an individual resided in another State, he decided which of his two passports to present. In other words, he already determined his status. Did he have the right to do that? Did the individual have the right to refuse the diplomatic protection of a given State? He was not so certain about that, but it seemed to him that attention needed to be given to the rights of the individual.

The meeting rose at 12.45 p.m.

2626th MEETING

Wednesday, 24 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

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