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Summary record of the 2626th meeting

Topic:
Diplomatic protection

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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.

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

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI noted that, in his first report (A/CN.4/506 and Add.1), the Special Rapporteur based the State's right to exercise diplomatic protection on the link of nationality between the injured individual and the State. That seemed to be the correct approach, since it provided a rather clear and quite exhaustive illustration of the impact of the institution of the nationality of individuals on the scope and practical extent of diplomatic protection.

2. In article 5, the Special Rapporteur's definition of the term "State of nationality" for the purposes of diplomatic protection was directly related to the methods of acquisition of its nationality by the individual to be protected. Three methods of acquisition were mentioned, birth, descent and bona fide naturalization, which were described by the Special Rapporteur in paragraph 101 of his report as connections generally recognized by international law. It had been suggested during the debate that other connecting factors recognized by general international law, such as habitual residence, should be included in article 5, but he thought that any such extension of the list was inadvisable. There were, in fact, many other ways of acquiring nationality, particularly naturalization, in respect of which legal writers drew a distinction between involuntary and voluntary naturalization, depending on whether a nationality was acquired by adoption, legitimation, recognition, marriage or some other means. Naturalization itself, even when limited by the Special Rapporteur to bona fide naturalization, remained a very broad concept, which assumed different forms based on different grounds. Among those grounds, habitual residence often played an important role, albeit generally in combination with other connecting factors. For instance, article 6, paragraph 4, of the European Convention on Nationality relating to categories of persons for whom a State party was to facilitate in its internal law the acquisition of its nationality specified seven categories, of which three were connected with lawful and habitual residence. In his view, however, aside from the exceptional situation provided for in article 8, habitual residence could not, under any circumstances, replace a link of nationality as a necessary factor connecting an injured person to a State entitled to exercise diplomatic protection on his or her behalf.

3. The Special Rapporteur attached a specific qualifier—"bona fide"—to the term "naturalization". As noted by Mr. Simma (2625th meeting), the "bona fide" formula required further consideration. The Special Rapporteur himself admitted that international law did not recognize naturalization in all circumstances. He had given examples of fraudulently acquired naturalization, naturalization conferred in a discriminatory way, forced naturalization and naturalization conferred in the absence of any link whatsoever. Those examples of "mala fide" naturalization did not, of course, exhaust the list of situations in which a

refusal to recognize naturalization could be justified. The grounds for the refusal could consist in the mala fides of the State concerned or in that of the individual. For example, article 7, paragraph 1 (b), of the European Convention on Nationality provided for loss of nationality in cases of "acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant". But despite the possibility of mala fide naturalization, it should be noted, as stated in paragraph 105 of the report, that there was, however, a presumption in favour of good faith on the part of the State. Moreover, he saw no good reason to limit the presumption of good faith exclusively to States and thought it should be extended to include individuals.

4. Although the bona fides requirement in article 5 referred only to naturalization, he found it hard to agree with Mr. Momtaz's view (*ibid.*) that it was impossible to contest nationality acquired on the basis of *jus soli* or *jus sanguinis*. In that case, the *raison d'être* of article 6 would be seriously threatened. Once again, he quoted the European Convention on Nationality, article 7, paragraph 1 (e), of which provided for the possibility of loss of nationality in the case of "lack of a genuine link between the State Party and a national habitually residing abroad".

5. Concluding his remarks on article 5, he said he was attracted by Mr. Kamto's proposal (*ibid.*) that the article should be shortened, ending with the word "acquired" and not referring to methods of acquiring nationality. In view of the differences of opinion expressed during the debate, including criticism of the omission of certain methods of acquisition of nationality such as repatriation, it seemed to be the best compromise solution. A shorter, more condensed version of article 5 should be sufficient to show the necessary linkage between the nationality of the injured person and the right of the State of nationality to exercise diplomatic protection on behalf of that person.

6. With regard to article 6, which dealt with the far more complex issue of the implications of multiple nationality for the right to exercise diplomatic protection, the Special Rapporteur was prepared to recognize the right of the State of nationality of an injured person to exercise diplomatic protection on his or her behalf vis-à-vis another State of nationality of the same person on condition that the nationality of the State exercising the protection was of a dominant or effective character. It had not been easy to reach that conclusion because the starting point for the analysis—article 4 of the 1930 Hague Convention—was somewhat discouraging, since it stated that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". Even at the current time, that principle continued to have its supporters.

7. However, as shown by the Special Rapporteur, the development of the principle of dominant or effective nationality had been accompanied by a significant change in approach to the question of the exercise of diplomatic protection on behalf of persons with dual or multiple nationality. The Special Rapporteur had given many examples, mainly judicial decisions, ranging from the *Nottebohm* case to the jurisprudence of the Iran-United States Claims Tribunal, of the application of the principle

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

of dominant or effective nationality in cases of dual nationality. His conclusion in paragraph 160 of the report was that the principle contained in article 6 therefore reflected the current position in customary international law and was consistent with developments in international human rights law, which accorded legal protection to individuals even against the State of which they are nationals. However, the situation did not seem to be so simple. First, developments in international human rights law had thus far stemmed exclusively from treaty regulations and were of limited scope, since they concerned only States that were bound by those regulations and the rights and freedoms they established. Furthermore, the Special Rapporteur frankly admitted in paragraph 146 of his report that jurists were divided on the applicability of the principle of dominant nationality. He cited many practical instances of States refusing to exercise diplomatic protection on behalf of their nationals against another State of nationality, as well as the advisory opinion of ICJ in the *Reparation* case, which described States' practice of not protecting their nationals against another State of nationality as "the ordinary practice" [see p. 16].

8. The Special Rapporteur noted that the European Convention on Nationality failed to take sides on the issue. That was so, but he pointed out that the draft European Convention on Nationality, as it had stood in 1995, had contained a special provision allowing the State of nationality to exercise diplomatic protection on behalf of a given person against another State of nationality of the same person on humanitarian or other similar grounds. However, as a result of strong criticism and vigorous opposition from many States, including Poland, the provision had been deleted from the final text of the Convention. It should also be borne in mind that, while States were currently more tolerant of multiple nationality than 30 to 50 years before, many still incorporated in their internal legislation the rule contained in article 3 of the 1930 Hague Convention, namely, that "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses". And it seemed that States, even at the current time, were not so eager to waive that right.

9. Summing up his observations on article 6, he said it should be stressed that the principle of dominant or effective nationality had its place in cases of dual nationality when diplomatic protection was exercised by one of the States of nationality of the person concerned against a third State. However, when it came to applying the principle against another State of nationality of the person concerned, there was as yet insufficient support in customary international law for the codification of such a rule. Furthermore, if draft article 6 was to be addressed in the context of the progressive development of international law, the key factor in determining whether a State of nationality could exercise diplomatic protection against another State of nationality should not be the dominant nationality of the claimant State, but, rather, the lack of a genuine and effective link between the person concerned and the respondent State.

10. Article 7 on diplomatic protection exercised on behalf of a person with dual or multiple nationality against third States left him feeling somewhat confused. The Special Rapporteur seemed to reject the principle of dominant or effective nationality that he had sought to apply in arti-

cle 6. In paragraph 173 of his report, he recognized that the respondent State was entitled to raise objections where the nationality of the claimant State had been acquired in bad faith. As he saw it, the bona fide link of nationality could not totally supplant the principle of dominant or effective nationality as set forth in article 5 of the 1930 Hague Convention and confirmed by subsequent jurisprudence, including the judgment of ICJ in the *Nottebohm* case. Of course, the question arose as to whether the concept of bona fides should be interpreted in broad or narrow terms. Did it include the requirement, for example, of an effective link? In the text of article 7, the Special Rapporteur adopted a strictly formal approach to nationality, without considering whether an effective link existed between the person concerned and the States in question. On that point, he took the view that, while the principle of dominant nationality might well be left aside, an escape clause should nevertheless be inserted in article 7 to prevent the article from being used by a State to exercise diplomatic protection on behalf of a person of multiple nationality with whom it had no effective link.

11. Lastly, he fully supported article 8, which, as noted by many members of the Commission, had two unquestionable merits. First, it reflected the humanizing trend in contemporary international law and the tendency to take humanitarian factors into account. Secondly, it demonstrated in exemplary fashion how the Commission could, at the right time and in an appropriate context, fulfil one of its primary tasks, that of the progressive development of international law. Although article 8 required further refining, that did not detract from its value.

12. Mr. KABATSI, commending the Special Rapporteur on the great amount of work he had done in producing the proposed draft articles, as shown by the many legal decisions and scholarly works cited in the footnotes, said that, in principle, he had no problems with article 5, even if it seemed to him that the Special Rapporteur had taken unnecessary risks and had invited criticism by going too far into the subject of nationality. For the purposes of article 5, it was not necessary to know how nationality had been acquired or whether or not it was valid. Article 5 followed on well to article 1 on the scope of diplomatic protection and article 3 on the right of a State to exercise diplomatic protection in respect of its nationals. Subject to the limits set by international law, the idea that it was for each State to decide who its nationals were under its internal law was not in dispute. Normally there was always a presumption that, when a State asserted that an individual was its national, such was indeed the case. In order to exercise diplomatic protection, a State did not have to prove that the individual's nationality was valid. As stated in paragraph 118 of the report, the onus of proof was on the respondent State to produce evidence that the nationality was not valid for reasons such as those referred to in paragraph 104, to which could be added naturalization in violation of the provisions of the internal law of the claimant State. If the principle underlying article 5 was that, for the purposes of diplomatic protection of natural persons, a State of nationality was the State of which the individual sought to be protected was a national, why confuse the issue by indicating the circumstances that would disprove the validity of the nationality? To do so would be to stray into the area of primary rules in connection with a topic which was

supposed to be premised on secondary rules. He agreed with earlier speakers that article 5 should not indicate the methods by which nationality could be acquired.

13. Notwithstanding the classical rule of the non-responsibility of the State in respect of its own nationals, he endorsed article 6 for the reasons given by the Special Rapporteur in the report. Although, as pointed out in paragraph 153, there could be problems in determining the issue of effective or dominant nationality, it was nevertheless possible to do so. As between two States of nationality, the claimant State would in practice carry the day if the balance of the strength of the claims was manifestly in its favour. As indicated in paragraph 158, that was not an issue that had to be resolved, whether positively or negatively. Any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State would have to be resolved in favour of the respondent State. That was a most useful provision *de lege ferenda* and he supported it.

14. He also supported article 7, with which he had no problems, and article 8, especially after the deletion—with which he agreed—of former article 4. He would not support article 8 if diplomatic protection were to be considered a right of an individual vis-à-vis the State which accorded him or her diplomatic protection, since that would impose an additional burden on States of asylum or States hosting refugees and stateless persons. But as the State would exercise diplomatic protection only as a matter of its own discretion, he saw the provision not as imposing an additional burden on the State in respect of refugees and stateless persons on its territory, but, rather, as a useful human rights provision which afforded protection to persons already in a difficult situation. It was tempting to reject the proposal as being outside the scope of the project as defined in articles 1, 3 and, possibly, also 5, but, since there was some support for it in certain conventions and writings, as well as for humanitarian reasons, that was an area that deserved progressive development. There was probably a third category of persons who might be accorded protection under the article, especially if the principle of permanent residence championed by some in connection with article 5 were accepted, namely, permanent residents who were neither refugees nor stateless persons, but who were habitual residents of the host State, possibly with permanent residence status. That State should be able to exercise diplomatic protection on their behalf—always, of course, against third States—especially where, for various reasons, the nominal State of nationality was unable to do so. The idea might be carrying the progressive development of international law too far, but it was worth thinking about.

15. Mr. KATEKA said that he agreed with the philosophy underlying article 5, which was based on a liberal application of the effective link principle laid down in the judgment in the *Nottebohm* case. However, the Commission should avoid adopting an open-ended provision which could lend itself to misinterpretation. Any addition to article 5 should be specific and vague formulations such as “any other connecting link recognized by international law” should be eschewed. The criterion of “habitual residence”, whose addition some members of the Commission had suggested would be a relevant factor only if habitual residence was based on the free choice and will of the

individual concerned. But that was not always the case and the Commission should exercise caution in that regard.

16. Article 6 codified the concept of dominant or effective nationality in the case of dual or multiple nationality. That was a controversial concept which had been a subject of dispute among international lawyers and tribunals. The idea that the State of active nationality should be able to exercise diplomatic protection against the State of inactive nationality seemed to undermine the principle of the equality of States. Article 6 therefore needed some reconsideration in order to reduce the possibility of conflict among the States of which the individual concerned was a national.

17. Article 8 came under the heading of the progressive development of international law and clearly departed from the traditional wisdom which limited the right to exercise diplomatic protection to the State of nationality. In that connection, it had been asked whether habitual residence would entitle an individual to diplomatic protection. The answer had been that, if the person concerned was stateless or a refugee, then the host country could exercise diplomatic protection, but, in the real world, the situation was less straightforward. For example, Tanzania was currently hosting close to 1 million refugees from neighbouring countries. Some of those refugees had been in Tanzania for over 30 years while technically still retaining the nationality of the country of origin, although, for practical purposes, they had lost contact with that country. UNHCR still protected them in the sense of the Convention relating to the Status of Refugees. If article 8 as proposed were adopted, the United Republic of Tanzania would be called upon to exercise diplomatic protection on behalf of such refugees, who were habitually resident on its territory. In such a case, it was legitimate to ask why an additional burden should be placed on a host country which was already suffering because of insufficient burden-sharing by the international community. He did not subscribe to the view that article 8 left the exercise of diplomatic protection to the discretion of the State. He also thought that the suggestion that a third State could exercise its diplomatic protection against the host State on behalf of refugees and stateless persons in the event of an internationally wrongful act went much too far. If there had been a breach of an obligation *erga omnes*, it would be up to UNHCR, as the “protecting” authority, to take the matter up with the Government of the country concerned. If international organizations could exercise functional protection in respect of their personnel, there was no reason why the United Nations or UNHCR could not do likewise for refugees under their “protection”. That would reduce the burden on host States, which were, for the most part, developing countries faced with acute problems affecting not only their economic life, but also the environment and public order. He urged the Commission to proceed with caution on that issue.

18. Mr. HAFNER said that he generally agreed with the Special Rapporteur’s approach to the issues covered in articles 5 to 8.

19. In addition to requiring a few drafting changes, article 5 also gave rise to another problem, already mentioned by previous speakers, that of “bona fide naturalization”.

The “bona fide” criterion was a subjective one and would be very difficult to apply. It was certainly not the point at issue in the current context and neither was the concept of “effective nationality”, which would restrict the right of a State to exercise diplomatic protection in a manner contrary to the object of the exercise, that of acting in the interest of the individuals concerned. He was therefore prepared to support Mr. Kamto’s proposal that the words “by birth, descent or by bona fide naturalization” should be deleted from article 5. However, as a compromise between Mr. Kamto’s position and that of the Special Rapporteur, he suggested that the useful *jus soli* and *jus sanguinis* criteria should be maintained, as should the criterion of naturalization accompanied by the words “in conformity with international law”, it being understood that naturalization covered all methods of acquiring nationality other than the first two.

20. Article 6 dealt with a special case in the context of the provision in article 7 and should therefore follow that article instead of preceding it. A formal problem arose in connection with the lack of clarity of the word “injured”, to which the Drafting Committee would probably have to give some attention. In the light of globalization and of frequent cross-border movement of persons, there was a need for a very precise definition of the conditions in which the right covered in article 6 could be exercised. The two criteria being envisaged were those of dominant nationality and effective nationality. The question was whether they were different or synonymous. Case law seemed to proceed on the assumption that they were equivalent. But if the conjunction “and” was incorporated between the adjectives “dominant” and “effective”, that would mean that the two concepts were different from one another. That would run counter to the findings of case law and would modify the right of a State to exercise diplomatic protection. He personally preferred the concept of “dominant nationality” because it implied that one of the two nationality links was stronger than the other. The expression “effective nationality”, on the other hand, could mean that neither of the links of nationality would suffice to establish the right of a State to exercise diplomatic protection; in the case of a person having dual nationality, for example, it could be maintained that neither of the links of nationality was effective. It would then follow that neither State could exercise diplomatic protection.

21. Article 7, paragraph 1, merely reflected the contents of article 5 without adding anything more. As for paragraph 2, the question that arose was not only whether cases to which it could be applicable actually existed in practice, but also what was the link between the diplomatic protection exercised by one State and that exercised by the other. For example, if a State of nationality waived its right to exercise diplomatic protection or if it declared itself satisfied by the response of the responding State, would that have an effect on the other State or States of nationality entitled to exercise diplomatic protection? Diplomatic protection could not be exercised jointly and there was no real need to provide for the particular case envisaged.

22. Agreeing that the rule embodied in article 8 came under the heading of the progressive development of international law, he said that he subscribed to the purpose it was designed to achieve, but the problem was a thorny one and he thought it would be more convenient to deal sepa-

ately with stateless persons, on the one hand, and refugees, on the other. The two cases were not the same. For example, was the condition of legal residence in the territory of the claimant State relevant in the case of refugees? Like other members of the Commission, he believed that it was the State which had granted refugee status, and not the State of residence, that should be empowered to exercise diplomatic protection. Supposing that a State member of the European Union, acting in conformity with the latter’s general policy, granted asylum or refugee status to an individual, that individual would enjoy the right to reside legally in another country of the European Union. In that case, there was no need to transfer the right to exercise diplomatic protection to the State of which the person in question was a legal resident; that right should be exercised by the State which had granted refugee status. The situation would, of course, be different if the criterion of dominant or effective link were added as an additional criterion to that of ordinary legal residence. It could and did happen that persons who had settled in another country and had acquired refugee status there, returned to their country of origin once the situation there had improved. In such a case, the State of origin alone should be empowered to exercise diplomatic protection. That problem should be dealt with in a separate provision of the draft articles. Lastly, consideration should also be given to cases where the refugee had suffered injury before leaving the country of origin.

23. Mr. SIMMA, referring to Mr. Hafner’s analysis of article 8 and the hypothetical case he had mentioned, said that it was not unusual for a person who had acquired refugee status in the first member State of the European Union he or she had entered to settle in another member country and to reside there for many years. In the event that such a person should require diplomatic protection, should the right to exercise it be limited, as Mr. Hafner suggested, to the country which the person had first entered and with which he or she perhaps no longer had an effective link?

24. Mr. HAFNER said he agreed that, in the case described by Mr. Simma, it would certainly be reasonable for the State of legal residence to be empowered to exercise diplomatic protection. The problem was to define the moment at which that right of the country of residence was to be recognized. How many years of residence would the refugee have to prove in order for the State of residence to have the right to exercise diplomatic protection on his or her behalf? The problem was insurmountable, and that was precisely why he had suggested that by analogy with the State of nationality, the right to exercise diplomatic protection should be conferred on the State which had granted refugee status. It should be understood that the right was only a right and not an obligation. The State in question could always decline to exercise it if it felt that it represented a burden for it, as Mr. Kateka had explained.

25. Mr. KUSUMA-ATMADJA said that he wondered whether the topic under consideration was diplomatic protection or nationality, whether single, dual or multiple.

26. While the problem might be easy to resolve within a well-integrated regional framework such as that of the European Union, it was less so in a less rigid regional

framework such as that of ASEAN, and still less on the world scale within the framework of an international community composed of sovereign States. The solution might consist, as had already been proposed, in carefully circumscribing the scope of diplomatic protection on the basis of the classical theory of the right of nationality.

27. He was convinced that, in his future work, the Special Rapporteur would take due note of the comments made.

28. Mr. KAMTO said that the compromise proposed in article 5 was surprising because it was not clear why some ways of acquiring nationality should be mentioned and others should not. It would be better if the words "by birth, descent or by bona fide naturalization" were replaced by the wording proposed by Mr. Hafner, with the addition of the words "in conformity with international law".

29. With respect to article 8, Mr. Hafner and other members had been right to say that the question of stateless persons should be separated from that of refugees. But the example of the European Union that he had given was not very convincing, since the rules which governed the movement of persons within the Union were not the same as those in other parts of the world. Any State member of the European Union where a person who held a passport from one of the Schengen countries and who had the status of refugee within the meaning of the Convention relating to the Status of Refugees resided could grant that person diplomatic protection. On the other hand, the idea that the State which had granted refugee status was entitled to offer diplomatic protection was a good one because it would at least create a link which was not only factual, but also legal. The State in question would thereby have acknowledged granting refugees a particular status.

30. He shared the legitimate concern that Mr. Kateka had expressed in his comments on countries which accepted large numbers of refugees. The proper legal response would be to stipulate that diplomatic protection was not an international obligation, but a subjective right of the State which the State was free to exercise or not.

31. Mr. CRAWFORD said that, in the context of functional protection, it would be reasonable to grant or to acknowledge to a State that had granted refugee status the right to exercise diplomatic protection in respect of losses arising after the refugee status had been granted. He saw that limitation as being built in to the debate, but it would mean that diplomatic protection would be wholly excluded with regard to events occurring prior to the granting of refugee status. At the risk of seeming reactionary, he was reticent to go even so far.

32. The problem in connection with the protection of refugees was that the better could become the enemy of the good. If States thought that the granting of refugee status was the first step towards the granting of nationality and that any exercise of diplomatic protection was in effect a statement to the individual that the granting of refugee status implied the granting of nationality, that would be yet another disincentive to the granting of refugee status. It seemed to him that refugee status in the classical definition of the term was an extremely important weapon for the protection of individuals against persecution or well-founded fear of persecution. If the Commission over-

loaded the boat, the serious difficulties that already existed in maintaining the classical system would be exacerbated.

33. Mr. GAJA, referring to article 6, said that he supported the views of those members who preferred the word "dominant" rather than the word "effective" because it was a question of comparing the respective links that an individual had with one State or another. However, he did not fully endorse the reasons given for that preference. Nationality acquired through birth might well be effective nationality: it depended on the meaning given to the word "effective". The prevailing view among members seemed to be that the word should be used in a way that would debar a State of nationality from exercising diplomatic protection only in extreme cases.

34. The Special Rapporteur and Mr. Hafner wanted to stretch the concept of diplomatic protection as far as possible because that was in the interests of the individual. The scope of the articles, which had not yet been defined, needed to be clarified. It had to be determined whether diplomatic protection was something that was intended solely to be part of the rules on the treatment of aliens or whether it was also designed for the protection of human rights and, if so, whether for that protection the State of nationality could put forward claims that other States were not entitled to advance. That was the root of the matter. If the answer was no, then the link of nationality was not relevant and there was no need to stretch diplomatic protection; if the answer was yes, that would mean reverting to the situation that had existed before the Second World War, when States only sought to protect the rights of their nationals.

35. Mr. SIMMA, referring to the comments made on article 8, which showed that some saw diplomatic protection as a discretionary right of the State, not an obligation, while others saw a trend in the Commission's deliberations to turn the right of a State into a right of an individual, said that a balance had to be struck between the work on diplomatic protection and that on State responsibility. The possibility of enforcing the rights of individuals could be considered in the context of State responsibility.

36. Mr. Kamto's proposal that article 5 should end after the words "sought to be protected" seemed to be endorsed by many members, but the proposed additional phrase, "in conformity with international law", had, in the Commission's practice, always referred to something which States had done. In the work on nationality of natural persons in relation to the succession of States, for example, it had been indicated that States could grant nationality "in conformity with international law".² If it was stated that an individual acquired nationality "in conformity with international law", that might create the impression that in choosing the wrong nationality, the individual was in breach of international law. That impression had to be avoided by careful drafting.

37. Mr. ECONOMIDES said that economic refugees who worked in a foreign country, but retained perfectly

² See paragraph (2) of the commentary to article 3 (*Yearbook . . . 1999*, vol. II (Part Two), p. 27).

normal relations with their own State should be excluded from the scope of article 8. The State of nationality was capable of exercising diplomatic protection on behalf of such individuals if that proved necessary. In his view, article 8 applied to political refugees. Unlike economic refugees, political refugees no longer had any relationship with the country of origin, were not seeking its protection and thus required the protection of a third country. To enjoy diplomatic protection, it was not enough for a refugee to reside in the country that exercised it. He must also have been legally recognized by the State in whose territory he resided as a refugee within the meaning of the Convention relating to the Status of Refugees. Although that solution was a bit more restrictive than the one provided for in article 8, he thought that the two conditions had to be met.

38. Mr. GALICKI drew attention to the humanitarian character of article 8 and expressed his general satisfaction with it, although he thought that its legal *raison d'être* was not connected with human rights. Its real purpose was to cover cases when a given person in a given situation was deprived of the possibility of seeking diplomatic protection. For a stateless person, who could appeal to no State at all, and for a refugee, who could not appeal to the States of which he was theoretically a national, article 8 provided a replacement for the State of nationality for the purpose of diplomatic protection. There was no competition or confusion with the protection of human rights. The basis of the draft article was something entirely different.

39. Mr. KAMTO said that he was sympathetic to the argument put forward by Mr. Crawford, whose viewpoint was in no way reactionary. The situation of refugees was however, by definition, a temporary one and must remain so. While political refugees could remain refugees for as long as the regime that had expelled them was in place, other categories of refugees—not economic refugees, who did not come within the scope of the topic and who were in a controversial category, but refugees displaced by war or disaster—could be expected to return rapidly to their homes. They kept the nationality of their country. A refugee stayed in a foreign country for two to five years, on average, and even if it were for a longer period, the length of time alone should not carry legal consequences without the will of the host State, and, while he or she was waiting to return and, if necessary, request diplomatic protection, the protection conferred by refugee status was sufficient. In any event, Mr. Crawford's comment deserved to be taken into account in the future consideration of article 8.

40. Mr. SIMMA said that, in article 8, the term "refugee" could not possibly be understood as comprising what Mr. Economides had called economic refugees. It referred only to refugees within the meaning of the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees. The term "economic refugee" should be avoided, as it was not a legal term proper.

41. Mr. MOMTAZ said that, although he was extremely sensitive to the concerns expressed by Mr. Kateka because, according to UNHCR statistics, his own country, the Islamic Republic of Iran, had the largest number of refugees, he did not share those concerns because article 8 simply accorded a State a right and established no obligation for it. The receiving State remained free to give or

not to give its diplomatic protection to persons who sought refuge there.

42. In addition to the political and economic refugees that had been mentioned, there was a third category of refugees which comprised those who had been displaced by armed conflict or natural disasters. It might be worth giving further thought to what Mr. Economides had proposed, namely, that diplomatic protection should be accorded under article 8 only to persons having acquired refugee status as such, for political or any other reasons.

43. Mr. HAFNER said that the concept of the interests of the individual went beyond that of human rights. He shared Mr. Simma's view that the concept of economic refugee did not exist and was a contradiction in terms. The term "refugee" must be used within the meaning given in the relevant international instruments.

44. Mr. Crawford's argument had its merits, but the problem was to decide precisely from which moment residence was legal. If the right to exercise diplomatic protection was accorded only to the State where the refugee had legal residence, the individual was being deprived of the right to enjoy diplomatic protection by another State. Cases in which the individual would be injured would certainly occur most often in the country where he had legal residence because that was where he was supposed to be. If only that State was given the right to exercise diplomatic protection, it would certainly not be entitled to exercise that right against itself. Another State must be accorded the possibility to exercise diplomatic protection and that certainly would be, in the first instance, the State which had granted refugee status. The issue was thus a complex one and justified making a distinction between the situation of stateless persons and that of refugees by devoting two different paragraphs to them, if not two separate articles.

45. Mr. SEPÚLVEDA, commenting on all the draft articles submitted, said that the Special Rapporteur had been able deftly to bring together a number of legal concepts that would help define the nature and scope of diplomatic protection in the modern-day world. In that regard, the Commission could help give a process that had created a great deal of hostility in Latin America some credibility and respectability. That antagonism was the result of nearly two centuries of bitter experiences in which armed intervention and pressures of every kind had distorted the very meaning of diplomatic protection. The Commission now had an opportunity to establish a new foundation for principles which had been negotiated and agreed on and which would serve the interests of all States. He would prefer not to take a position yet on whether there should be a chapter on general definitions, but he did think that the scope of diplomatic protection should be defined from the outset and proposed that a number of basic criteria should be borne in mind.

46. First of all, diplomatic protection must be regarded as a procedure, and not as a measure or an action, which a State adopted in respect of another State, thereby excluding proceedings which an individual might institute against a State in the case, for example, of an investment or commercial agreement to submit disputes to international arbitration. That protection originated in an

act or omission constituting an internationally wrongful act, which meant that it was exercised when a State breached its international obligations. Such protection also presupposed the existence of injury caused to the person or property of a foreigner and a causal link between the injury and the internationally wrongful act or omission. At issue was the principle of imputability or attribution which could trigger the diplomatic protection procedure. For an injury to be attributable to a State there must be denial of justice, i.e. there must be no further possibilities for obtaining reparation or satisfaction from the State to which the act was attributable. Once all local administrative and legal remedies had been exhausted and if the injury caused by the breach of the international obligation had not been repaired, the diplomatic protection procedure could be started. The exercise of that procedure was of a particular nature, in that the State of nationality had a discretionary power which did not give rise to an automatic and inevitable obligation in international law. It was also preferable for the draft articles to refer essentially to the treatment of nationals and, more particularly, natural persons. The notion of legal persons should be discarded, given obvious difficulties in determining their nationality, which might be that of the State where a legal person had its headquarters or was registered, that of its stockholders or perhaps even that of the main decision-making centre. Lastly, on no account could diplomatic protection include the threat or use of force. Only peaceful means could be used to obtain reparation of the injury caused to a foreign private individual who was the victim of an internationally wrongful act and who approached the State of his nationality to request diplomatic protection once all other available remedies had been exhausted.

47. Consequently, article 2 should be completely recast because the prohibition of the use of force in the context of diplomatic protection must be categorical and must not admit of any exception. The too generous interpretation of Article 2, paragraph 4, and Article 51 of the Charter of the United Nations had given rise to many abuses of power; often the facts had shown afterwards that self-defence had been improperly invoked. In an article of that kind, when the life or security of the nationals of a State were threatened, it would be more reasonable to allow the international community to take effective measures collectively than to authorize the unilateral use of force.

48. The key question raised by article 3 was: who was the holder of the rights claimed when the State of nationality held another State responsible for the injury caused to one of its nationals? It must be borne in mind that it was the individual, and not the State, who suffered the injury and that he had remedies other than diplomatic protection to obtain reparation. He could not only institute legal proceedings or bring the case before an administrative court, but could also turn to an international arbitral tribunal or a human rights body, depending on the nature of the dispute and the injury suffered. The State which submitted a claim on his behalf had only a residual function and not an exclusive or absolute right. What was more, it exercised that function in a discretionary manner and there was no automatic and necessary correlation between the injury caused to the national and diplomatic protection. Article 3 also gave rise to a problem of wording: when it said that “the State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully *injured** by

another State”, it must be remembered that article 1 provided that the injury in question must have been caused “by an internationally wrongful act or omission attributable to [another] State”. If the requirement for exercising the right of diplomatic protection was that the injury suffered should have resulted from an internationally wrongful act, perhaps that should also be specified in article 3 or in a chapter on definitions.

49. Article 4 raised several important questions, first and foremost whether a State really had the “legal obligation” to exercise diplomatic protection, as provided in paragraph 1. Although a State had a moral duty to protect the interests of its nationals on its own territory and abroad, that was more a political obligation of perhaps limited scope than a moral obligation in the strict sense. Presenting diplomatic protection as a way of reacting to a grave breach of a *jus cogens* norm was perhaps not a very good idea either. Such breaches called instead for the adoption by the community of States of coercive measures under Chapter VII of the Charter of the United Nations. Lastly, article 4 contained so many exceptions and escape clauses that it became inapplicable in practice.

50. He proposed that the end of article 5 should be amended to read: “ ‘... State of nationality’ means the State which has granted its nationality to a person whom it intends to protect on the basis of his place of birth, the nationality of one or the other of his parents or an effective naturalization”. He insisted on the words “of one or the other of his parents” because legislation varied in that regard. There seemed to be good reason to make it a precondition for a State exercising diplomatic protection to have effectively recognized that the person to be protected had its nationality. In the event of naturalization, the State would not agree to exercise diplomatic protection unless the applicant had a genuine and effective link to it.

51. The problem posed by article 6 was complex because many States allowed their nationals to retain their nationality of origin and considered that they could not lose it, even when they subsequently acquired another nationality. That implied that the State of origin (i.e. the first State of nationality) conserved in all cases the power to exercise its diplomatic protection on behalf of one of its nationals vis-à-vis the State whose nationality that national had acquired (the second State of nationality). It would be better for the Commission to confine itself to the principle set out in article 4 of the 1930 Hague Convention which provided that “A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses”. It was not legitimate for a dual national to be able to apply for a remedy (or have it applied for) against a State to which it owed loyalty and fidelity.

52. Another essential question to which it would be necessary to return was that of the denial of justice, which was of great importance in the framework of diplomatic protection.

53. He had appreciated the fact that the Special Rapporteur had referred in his report to the work of two great Latin American jurists, García Amador and Orrego Vicuña, but many other Latin American authors had also

written on the subject of diplomatic protection; apart from the ubiquitous Carlos Calvo, he was thinking of Podestá Costa, Jiménez de Aréchaga and César Sepúlveda. He would be delighted to provide the Special Rapporteur with a relevant bibliography.

54. Mr. LUKASHUK said that he was still concerned that the draft articles did not contain any provision on the rights of citizens or nationals. Although the right to exercise diplomatic protection was a right of the State and not of the individual, in speaking of the individual as the “object” of the protection, the Commission would end up, in spite of itself, establishing analogies with conventions such as those on the protection of migratory birds and other endangered species. As stressed by Mr. Simma, it was important for the draft to strike a balance between the rights of the State and those of citizens. With that in mind, he proposed the introduction of three provisions in the draft which might be worded in the following way: first “a citizen has the right to request a State of which he is a national to afford him diplomatic protection”; secondly, “a citizen has the right to refuse the diplomatic protection of a State of which he is a national”; and, thirdly, “all persons who are nationals of two or more States have the right, during their stay in the territory of another State, to express an opinion in declaring what their effective nationality is. This opinion must be taken into consideration by the other State”. Perhaps those provisions did not constitute a very remarkable step forward from the point of view of the progressive development of international law, but they were in step with a concrete reality and should be very well received by States.

55. Mr. HERDOCIA SACASA, referring to Mr. Sepúlveda’s comments, said that the question of the exhaustion of local remedies (or of the denial of justice) was in fact very important. Account must be taken of the fact that the means of and procedures for local remedies differed enormously from one country to another; diplomatic protection must not be automatic because it might encroach on the prerogatives of States in that area and violate their sovereignty.

56. He fully shared Mr. Sepúlveda’s view on the need to rule out the use or threat of the use of force categorically and in all cases. The Commission must attempt, through its codification work, to strengthen the credibility of the sometimes disputed principle of diplomatic protection, but it must also clearly establish that the right of diplomatic protection must be exercised only by peaceful means. That should be expressly stated in an article.

57. Mr. GOCO said that the question of the denial of justice raised by Mr. Sepúlveda was particularly troublesome in the context of diplomatic protection. As pointed out by Mr. Herdocia Sacasa, each court had its own rules of procedures, its own criteria of admissibility, etc., and, when a State considered that one of its nationals had been the victim of a denial of justice, the other party (i.e. the other State) might disagree entirely. What was done in such cases?

58. Denials of justice were very frequent and it was important to establish an international minimum standard which should be a moral standard observed by all civilized societies in terms of respect for the rights of the defence.

For the needs of the subject under consideration, however, the Commission should begin its reasoning from the moment the local remedies available to the injured national had already been exhausted. If it tried to go back further, it would automatically go beyond the scope of its mandate.

59. Mr. DUGARD (Special Rapporteur) warmly thanked Mr. Sepúlveda for offering to make available a bibliography of Latin American authors, which would certainly be very useful. As to the problem of the denial of justice, he pointed out that that fell within the domain of primary rules. If the Commission embarked on a study of the subject, it would probably take several decades to complete it. He would thus confine himself to considering further the question of the exhaustion of local remedies, which was a difficult subject in its own right.

60. Mr. TOMKA said that the main reason why the Commission had failed to codify the rules of State responsibility in the 1950s and 1960s had been that the Special Rapporteur had focused too heavily on the question of the treatment of aliens. In its consideration of diplomatic protection, the Commission must not stumble once again over the problem of the rights and obligations of States vis-à-vis aliens and should decide not to examine the denial of justice, which clearly constituted a primary rule.

61. Mr. ROSENSTOCK said that he fully agreed with Mr. Tomka. The Commission had decided not to venture onto the terrain of primary rules and should abide by that decision. The question of the denial of justice could not be addressed in the framework of the subject under consideration.

62. On the whole, articles 5 to 8 seemed satisfactory and he would merely make a few brief remarks. The words “bona fide naturalization” in article 5 were in fact debatable and the last part of the sentence could simply be deleted after the word “acquired”; it might very well be asked whether the enumeration that followed did not complicate rather than clarify matters. Mr. Brownlie’s comment on the need to take the real world into account by giving place of residence greater importance seemed relevant, but Mr. Kateka’s concerns should also be borne in mind in terms of placing additional burdens on host countries, which might be discouraged from granting asylum to refugees.

63. Article 6 was very much in keeping with the modern world, in which increased emphasis was placed on the individual, as seen for example in current efforts to eliminate the consequences of statelessness. The Special Rapporteur’s approach in that article was consistent with recent international court decisions.

64. Article 7 did not pose any problem and might be sent directly to the Drafting Committee. He agreed, however, with those members who had suggested reversing the order of articles 6 and 7. Paragraphs 175 et seq. of the report contained compelling arguments in favour of article 8, which should also be sent to the Drafting Committee.

65. He looked forward to the subsequent reports of the Special Rapporteur, whom he asked not to react too much like Pavlov’s dog to the concepts of “breach of a *jus*

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 Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, 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 (*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 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

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