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Summary record of the 2730th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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an explanation of the kind of contractual stipulations in question. The thrust of the Calvo clause might be referred to in the commentary to article 10.

45. Mr. SIMMA said that he had a problem with the logic of the second sentence of article 16, paragraph 1, because, if it was stated in the first part of that sentence that diplomatic protection was defined as the right of the State of nationality of an alien injured by an internationally wrongful act to exercise diplomatic protection on behalf of that person, how could reference be made in the second part to the right of that State to exercise diplomatic protection when the injury to the alien was of direct concern to it, since that right already existed? That was another reason for dropping article 16.

46. Mr. MOMTAZ, reiterating the position he had expressed at the preceding meeting, asked whether it really had to be stated that there was a presumption in favour of local remedies, since that was a well-established rule of customary international law and it was referred to in article 10.

47. The CHAIR, noting that there was a clear majority in favour of not including article 16, asked whether a compromise might not be to recognize that a separate article on the Calvo clause was not widely supported, but not unsupported. The idea contained in article 16, paragraph 1, would be included in the commentary, either to article 10 or to article 14.

48. Mr. DUGARD (Special Rapporteur) said that that suggestion was not acceptable on procedural grounds. It was obvious that positions within the Commission had not changed, but the Commission still had to explain its view. An indicative vote would therefore be helpful.

49. Mr. KABATSI said he agreed with the Special Rapporteur that the split in the Commission still existed, but he did not think that an indicative vote would provide any indications at all.

50. Mr. DAOUDI said he also did not think that a vote would make the situation any clearer. Would its purpose be to decide on article 16, with the proposed amendments that had been submitted, or on article 16, as submitted by the Special Rapporteur? In the latter case, an indicative vote would not provide any indications because positions were unchanged. He therefore proposed that the Special Rapporteur should submit a new version of the article to the Commission for consideration before a final decision was taken.

51. The CHAIR said that the Commission did not have to decide how article 16 should be worded, but whether it should be referred to the Drafting Committee.

52. Mr. TOMKA said he did not think that article 16, paragraph 1, which provided that no contractual stipulation in a private law contract between an individual and a State affected the independent right of the State, under public international law, to exercise diplomatic protection, was justified in the present context. Perhaps that question related to the waiver of the right to exercise diplomatic protection. Article 16, paragraph 2, was unnecessary,

since it only reaffirmed a clearly established rule of customary law.

53. Mr. MANSFIELD said that he did not see how an indicative vote would be helpful in any way. He proposed that the question should be further discussed.

54. The CHAIR said that, following an indicative vote, the Commission was not in favour of referring article 16 to the Drafting Committee, on the understanding that, as a compromise, the content of the article would be incorporated in the commentary.

It was so decided.

The meeting rose at 11.55 a.m.

2730th MEETING

Wednesday, 5 June 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskeniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. YAMADA (Chair of the Drafting Committee), introducing the Drafting Committee's report on diplomatic protection (A/CN.4/L.613)*, said that the Committee

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

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

had devoted 11 meetings to the topic, from 30 April to 16 May 2002. He thanked the Special Rapporteur for his guidance, cooperation and readiness to provide alternative formulations, which had greatly facilitated the Committee's task. He also expressed his appreciation to the Committee members for their active participation and substantial contributions and acknowledged the invaluable support received from the Secretariat and the interpreters.

2. In introducing his third report (A/CN.4/523 and Add.1), the Special Rapporteur had announced that he would make every effort to help the Commission complete its work on the topic by the end of the quinquennium. That commendable commitment was welcomed, and the Drafting Committee had tried to consider as many articles as possible at the present session in order to achieve that purpose.

3. Since the Special Rapporteur had yet to produce draft articles on diplomatic protection of legal persons, the Drafting Committee had decided to structure the articles, at least for the time being, in three parts. Part One would contain general provisions applying to the diplomatic protection of both natural and legal persons. Part Two would contain provisions dealing with natural persons, and a future Part Three might include provisions on legal persons. The seven articles produced by the Committee at the present session fell into Parts One and Two.

4. The first article of Part One performed two functions. It defined diplomatic protection and set out the scope of the articles. It took into account comments made in plenary at the Commission's fifty-second session as well as recommendations made after informal consultations at the same session. There had been general agreement in the Commission on a number of issues: the articles on the topic should not deal with the so-called primary rules; the topic should not include functional protection by international organizations or protection of diplomats, consuls and other State officials acting in their official capacity; the topic should not cover the promotion of a national's interest not done under a claim of right; and the draft articles should stress that diplomatic protection was to be exercised by peaceful means.

5. Article 1, paragraph 1, incorporated those ideas. It provided that diplomatic protection consisted of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State. Diplomatic protection was given a broad meaning: it included "diplomatic action" or "other means of peaceful settlement". Diplomatic action referred to steps taken at the government-to-government level and encompassed a whole range of diplomatic procedures by which Governments contacted each other, negotiated with each other and informed each other of their views and concerns. The phrase "other means of peaceful settlement" covered all forms of dispute settlement, from negotiation and conciliation to judicial dispute settlement. The intention was not to limit modes of peaceful settlement, and the provision left it to the parties involved to decide on the most appropriate means of settling their dispute. The emphasis was on

lawful means of settlement. The words "or other means of peaceful settlement" were intended to qualify the phrase "diplomatic action" by indicating that diplomatic actions could only be of a peaceful character.

6. The phrase "a State adopting in its own right the cause of its national" was intended to support the view that, in the exercise of diplomatic protection, a State asserted its own legal interest. The Drafting Committee was of the view that, in exercising diplomatic protection, a State took up the claim of its national and adopted the cause of its national as its own. The injury was not just to the national but also to the State. For the wording, the Committee had been guided by the language used by ICJ in its judgment in the *Interhandel* case. When referring to the exhaustion of local remedies, the Court had stated that "the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law" [p. 27]. The words "arising from an internationally wrongful act of another State" underscored two points. First, the legal interest of a State in exercising diplomatic protection was derived from an injury to one of its nationals. Second, that injury was caused as a result of a wrongful act of another State.

7. The paragraph referred to diplomatic protection being exercised in respect of a "national". The use of that word left open the question whether the national was a "natural person" or a "legal person". It further emphasized that nationality was the most common link between an individual and a State creating a legal interest for that State. In addition, the link of nationality established a *locus standi* for a State. While nationality was the most common legal interest of a State in the exercise of diplomatic protection, it was not the only one. A State could have legal interests that were created by means other than nationality. Those were exceptions addressed in article 1, paragraph 2, in which it was recognized that in exceptional circumstances, a State was entitled to exercise diplomatic protection in respect of persons who were not its nationals.

8. The Special Rapporteur had raised the subject of diplomatic protection of stateless persons and refugees and had proposed an article on the subject, formerly article 8, now article 7. In addition, some members of the Commission were of the view that there were authorities that supported the right of a State to exercise diplomatic protection with respect to non-nationals in other circumstances. Examples had been given of the State of nationality of a ship or aircraft bringing a claim on behalf of the crew and possibly also the passengers, irrespective of the nationality of the individuals concerned. Reference had been made to the *M/V "Saiga" (No. 2)* case in that connection, and also to another possible exception in respect of non-national members of armed forces. Some members of the Drafting Committee were of the view that the language of that paragraph should not rule out those exceptions and would have preferred a form of language allowing for exceptions without reference to any particular article. Other members had been concerned that open-ended language on exceptions could be misleading if not supported by specific articles indicating precisely what those exceptions were, and they preferred to see specific references to the

articles dealing with exceptions. Ultimately, the Committee had agreed to follow that path, with the understanding that paragraph 2 might have to be reconsidered in case other exceptions were included. That understanding was indicated in a footnote to the paragraph. The commentary to the article would also explain the possibility of other exceptions. Article 1 was entitled “Scope”.

9. As to article 2, formerly article 3, the Drafting Committee had focused its discussions on the text that had emerged from the informal consultations held at the Commission’s fifty-second session. The Special Rapporteur had proposed article 2 to give effect to the Vattelian principle, as confirmed in the *Mavrommatis* case, according to which the right to exercise diplomatic protection belonged to the State and not to the injured national. The Committee had considered a number of options, including a choice between saying that the State of nationality “has the right” to exercise diplomatic protection and saying that it “is entitled” to do so. Bearing in mind that the purpose of the article was to give effect to the rule that it was a right of the State to exercise diplomatic protection, the Committee had preferred to emphasize that notion, which was also compatible with the wording used in the decision of ICJ in the *Mavrommatis* case. The words “is entitled” were more appropriate for inclusion in article 3, on the State of nationality. The Committee had also considered deleting article 2 altogether and covering the issue in the commentary to article 1 or merging the article with article 1, perhaps in an additional paragraph. In the end, it had decided to retain article 2 separately, since it set out an important principle.

10. The Drafting Committee had considered various alternative formulations for article 2 with a view to emphasizing the fact that diplomatic protection was a right of a State, not a duty. The formulations included the following: “the exercise of diplomatic protection is the right of the State of nationality of a person injured by the international wrongful act of another State”; “a State of nationality has the right to exercise diplomatic protection, in accordance with these articles, on behalf of a national injured by the internationally wrongful act of another State”; and, more simply, “a State has the right to exercise diplomatic protection under the conditions set out in these articles”. On balance, the Committee had preferred the last of the three formulations, with the concluding phrase being replaced by “in accordance with these articles”, which was the language used in the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.⁴ It had been felt that the first two formulations had largely been superseded by article 1. An advantage of the third formulation was that it made it clear that the right to exercise diplomatic protection was subject to other articles of the draft. The article left out any reference to the national, which was already contained in article 1 and subsequent articles, as it sought to emphasize that diplomatic protection was a right of the State.

11. Some members of the Drafting Committee had preferred to stress the nationality principle as being predominant in the area of diplomatic protection. However,

the Committee had adopted article 2 on the understanding that its purpose was not to omit nationality as a requirement, but rather to place emphasis on the right of the State. It was for article 3 to stipulate nationality as a basic condition for the exercise of diplomatic protection, subject to the exceptions and conditions covered in subsequent articles.

12. Finally, the Committee had decided to adopt “Right to exercise diplomatic protection” as the title of article 2.

13. As had been pointed out earlier, Part Two dealt with natural persons. The first article in it was article 3, based on the former article 5, and was entitled “State of nationality”. It highlighted the principle enunciated in article 2 and identified the State which had a right to exercise diplomatic protection in respect of natural persons, namely the State of nationality. It comprised two paragraphs.

14. Paragraph 1 enunciated the basic principle that a State of nationality was entitled to exercise diplomatic protection. The Drafting Committee had considered various ways of drafting the paragraph, the intention being to stress that the right to exercise diplomatic protection of natural persons belonged to the State of nationality and that such a right was discretionary. Various options had been considered, such as “the right to exercise diplomatic protection is vested in the State of nationality” and “a State of nationality is entitled to exercise diplomatic protection”. Concerns had been expressed with respect to both of those proposals. Some members felt that the phrase “is vested in the State of nationality” was too rigid to allow for exceptions. Others considered that a reference to the entitlement to the State of nationality to exercise diplomatic protection did not sufficiently emphasize the singular and most important position of the State of nationality in the exercise of diplomatic protection. The Committee had finally agreed on the version now before the Commission, which read “The State entitled to exercise diplomatic protection is the State of nationality”. The paragraph did not, of course, affect the fact that the exercise of diplomatic protection was a discretionary power of the State.

15. Paragraph 2 was based on the original draft by the Special Rapporteur and dealt with the nationality of natural persons. It defined a State of nationality for the purpose of diplomatic protection of natural persons. It did not attempt to provide comprehensive coverage of the rules of international law concerning nationality: instead, it highlighted the most important connecting factors for the exercise of diplomatic protection. Attention should be drawn to a number of important points.

16. First, the article did not adopt the effective link requirement enunciated by ICJ in the *Nottebohm* case. It did not require proof of effective link for the purposes of diplomatic protection. In the Drafting Committee’s view, proof of nationality was sufficient. Genuine or effective link would add yet another condition, and that was not necessary in the context of the article. The only time the question of effective link might have to be considered was in the context of dual nationality, where diplomatic protection was exercised against another State of nationality,

⁴ See 2712th meeting, footnote 13.

a matter which was addressed in a separate article. The approach was also consistent with the generally accepted policy of protection of human rights: namely, more opportunities should be provided by which individuals whose human rights had been violated could have access to remedies. It was also consistent with the general policy of international public order not to allow States that committed internationally wrongful acts to remain unaccountable for them.

17. Second, the paragraph recognized the right of a State to regulate who could become its national. The words “a State whose nationality the individual sought to be protected has acquired” meant acquired under the internal law of the State.

18. Third, the paragraph provided a non-exhaustive list of examples of how nationality was usually acquired. They included nationality by birth (*jus soli*), by descent (*jus sanguinis*), by State succession or by naturalization. The Drafting Committee had not used Latin expressions, since their translation into some of the official languages of the United Nations would create difficulties. The commentary to the article, however, would make it clear that nationality by birth and descent meant what were known in customary international law as *jus soli* and *jus sanguinis*. The words “in any other manner” emphasized the non-exhaustive character of the list. The Committee had recognized that, in some parts of the world, it was still difficult for natural persons to provide documents proving their nationality. Sometimes the mere fact that an individual had resided in a particular State was sufficient proof that he or she was a national of that State. Accordingly, “residence” was not a sufficient basis for the granting of nationality, but it could be proof of nationality. That issue would be clarified in the commentary.

19. Fourth, the Drafting Committee had found it unnecessary to qualify the word “naturalization” with the term “bona fide” as suggested by the Special Rapporteur. As long as naturalization had been acquired lawfully in a manner consistent with the internal law of the State, it should be recognized.

20. Fifth, the right of the State to regulate the acquisition of nationality was not absolute: it was qualified by the phrase “not inconsistent with international law”. The phrase was intended to prevent abuse and to avert situations in which the granting of nationality was done with the idea of purposely overlooking the interest of another State. The phrase covered all methods of the granting of nationality. The reasons why it had been formulated as a double negative were that, first, the granting of nationality was in principle within the competence of the State; second, the matters dealt with in the paragraph were not those on which there were clear rules of international law, but, to the extent that there were applicable rules of international law, national laws should not be inconsistent with them; and, third, it also shifted the burden of proof to those who challenged the granting of nationality. The Drafting Committee had thought that a double negative would be the best way of conveying those understandings.

21. Article 4, entitled “Continuous nationality”, was based on article 9 proposed by the Special Rapporteur. At the previous session, the Commission had held an extensive debate on the requirement of continuous nationality, in which views had diverged. While many members had supported the retention of the requirement, others had experienced difficulty with it. Finally it had been agreed that the requirement should be retained, together with the exceptions. The Drafting Committee had also worked on the basis of the results of an informal consultation held the previous year. As in the plenary, the views in the Committee had been divided. Some members had thought that the requirement of continuous nationality was well-established in practice and should be maintained. For others, the logic of the requirement was no longer defensible, because it simply helped a State that had committed an internationally wrongful act to remain unaccountable. As a result, a number of members had reserved their position on the article, objecting to the form of language in paragraph 2.

22. In terms of structure, paragraph 1 asserted the traditional position that, in order for diplomatic protection to be exercised, the injured person must be a national of the State that exercised it both at the time of injury and at the date of presentation of the claim. Paragraph 2 dealt with exceptions, while paragraph 3 limited the scope of those exceptions.

23. As to the continuous nationality rule, the emphasis in judicial decisions was on two key dates: the date the injury occurred and the date of the official presentation of the claim. State practice was not clear on the requirement of nationality between those two dates. The Drafting Committee had decided to opt for constructive ambiguity that reflected State practice in paragraph 1, where the language left a number of possibilities open that would have to be dealt with in the commentary. The references in paragraph 1 to the “time of the injury” and the “date of the official presentation of its claim” were intended to provide more precise and identifiable dates on which a person should be a national of the State exercising diplomatic protection. While the occurrence of a wrongful act normally coincided with the occurrence of the injury, that was not always the case. The date of injury to the person was more easily identifiable. The words “the date of the official presentation of its claim” referred to the date on which an official approach was made by the State exercising diplomatic protection, in contrast to informal diplomatic contacts on the subject.

24. The word “claim” meant the claim put forward by the State exercising diplomatic protection. It was intended to refer not only to a claim that might be submitted to a judicial body but also to any official notice. The Drafting Committee had decided not to enter into how notice of claim could be given, for that was an issue addressed in article 43 of the draft on State responsibility. There were various ways in which it could be done, and the matter should be dealt with not in the article but in the commentary. The Committee thought that the words “is entitled” should be used when referring to a rule and the word “may” when referring to exceptions to a rule. That applied to the use of those words throughout the draft articles.

25. Paragraph 2 related to exceptions to the continuous nationality requirement that allowed a State to exercise diplomatic protection in respect of a person who was its national at the date of official presentation of the claim but was not its national at the time of the injury. It set out three cumulative conditions for application of the exception: first, the person seeking diplomatic protection must have lost his or her former nationality; second, that person must have acquired the nationality of another State for a reason unrelated to the bringing of the claim; and third, the new nationality must have been acquired in a manner not inconsistent with international law.

26. The first condition, loss of the former nationality, might involve voluntary or involuntary loss. Nationality could be lost, for example, as a result of State succession or by marriage or adoption. Sometimes, as in the case of marriage, it was difficult to determine whether the loss of nationality was voluntary or involuntary. The Drafting Committee had therefore been of the view that the fact that the person had lost nationality sufficed and it was not also necessary to prove that the loss of nationality was involuntary.

27. The second condition, that the new nationality should have been acquired for a reason unrelated to the bringing of the claim, aimed to prevent forum shopping and emphasized good-faith acquisition. It was intended to exclude cases in which a new nationality was acquired solely for the purpose of pursuing diplomatic protection. The language used was intended to cover hardship cases, for instance, when a person automatically acquired a new nationality because of marriage, where the nationality of one of the spouses was imposed on the other, when a person was adopted by a national of another State and automatically acquired the nationality of the adopted parent, or when, as a result of State succession, a person had to opt for the nationality of one of the successor States. The provision was not limited to the cases mentioned: it was broader and could include other good-faith naturalizations that were not obtained just for diplomatic protection.

28. The Drafting Committee had been sharply divided on the need for the requirement that acquisition of a new nationality must be “for a reason unrelated to the bringing of the claim”. Some members objected to the requirement both in principle and on the grounds that the test adopted was unhelpful. Regarding the principle, they pointed out that a number of authoritative sources criticized the continuous nationality requirement. They argued that there might be cases in which a person was injured as a consequence of an internationally wrongful act of a third State, lost his or her nationality and then acquired a new nationality by lawful means. In such cases, the new State of nationality had a legal interest in protecting the individual, provided the acquisition of the new nationality was compatible with international law. In the view of those members, concerns about forum shopping were unjustifiable so long as the acquisition of the new nationality was not inconsistent with international law. Any requirement that denied the exercise of diplomatic protection in such cases only benefited the State that had committed the wrongful act. In view of the fact that paragraph 3 protected the former State of nationality by excluding the exercise of

diplomatic protection against it, they saw no rational basis for adding a further requirement linked to the intention of the individual in acquiring the new nationality. Those members also considered that the words “for a reason unrelated to the bringing of the claim” were too subjective and very difficult to ascertain in practice. They had reserved their position with regard to the requirement. The explanation he had given with regard to the words “in a manner not inconsistent with international law” in article 3, paragraph 2, applied to the use of the same phrase in article 4, paragraph 2.

29. Paragraph 3 set a limit on the exceptions in paragraph 2. It protected the former State of nationality against the exercise of diplomatic protection by the new State of nationality in cases where the injury had occurred at the time the person was a national of the former State and not of the new State of nationality. It was successive nationality cases and not dual nationality cases that were envisaged. The provision was a safeguard against any abuse of the exceptions in paragraph 2.

30. Article 5, based on article 7 as proposed by the Special Rapporteur, dealt with the exercise of diplomatic protection in cases of dual or multiple nationality. The scope of the article was limited to the exercise of diplomatic protection by one State of nationality against a third State of which the person in respect of whom diplomatic protection was exercised was not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality would be dealt with in a separate article.

31. Article 5, paragraph 1, supported the principle set out in article 3, namely that a State of nationality had the right to exercise diplomatic protection in respect of its national. It did not require a genuine or effective link between the national and the State exercising diplomatic protection.

32. Paragraph 2 dealt with the possibility of joint exercise of diplomatic protection by two or more States of nationality against a third State. The Drafting Committee had felt that the paragraph was sufficient to set out the general principle, but that the commentary should elaborate on the question so as to avoid the possibility of abuse when both States of nationality exercised diplomatic protection simultaneously through different channels. That could place an undue burden on the respondent State by requiring it to defend itself in different forums with regard to the same claim. The commentary should also make clear that the paragraph was not intended to allow one State of nationality to exercise diplomatic protection where the problem had already been settled by the exercise of diplomatic protection by another State of nationality. The commentary should also consider cases in which one State of nationality waived its right to diplomatic protection, while the other State of nationality continued with its claim. It should indicate that those were matters that were closely related to the context in which they occurred and should be evaluated on a case-by-case basis, taking into account the facts involved in each case. Article 5 was entitled “Multiple nationality and claim against a third State”.

33. Article 6 dealt with the question whether a dual or multiple national might be protected by one State of nationality against another State of nationality. In terms of structure, the Drafting Committee had accepted the proposal made in plenary that article 6 belonged after former article 7, which was now article 5, on the general situation of diplomatic protection of dual or multiple nationals. During the discussion in plenary at the Commission's fifty-second session, the majority had rejected the traditional view, as espoused in the Convention on Certain Questions relating to the Conflict of Nationality Laws, of not permitting one State of nationality to exercise diplomatic protection on behalf of a national against another State of nationality. Instead, the prevailing view at that time had been that article 6, as proposed by the Special Rapporteur, reflected current trends in international law. The Committee had worked on the text of that article on the basis of that understanding.

34. Paragraph 1 had its origins in the text proposed by the informal consultations at the Commission's fifty-second session,⁵ together with the proposals for safeguards against abuse suggested by those consultations. The Drafting Committee had decided against attempting to define "dominant" or "effective" nationality, which would be very difficult to do given the wide range of possible factors that came into play. Different considerations had been resorted to by different tribunals such as the Iran–United States Claims Tribunal. It had been decided to leave it to the commentary to cover some of those factors.

35. Instead, the Drafting Committee had focused on whether the criterion should be one of "dominant" or "effective" nationality. Arguments in support of both criteria had been considered. It had been said that an individual might have two nationalities that were "effective", but only one that was "dominant". It had been felt that what was necessary was a term with a strong element of relativity, indicating that the individual had stronger ties with one State than with another. "Dominant" had been deemed too strong. While the term might work in cases involving dual nationality, it was less suitable in others, for example, cases of multiple nationality.

36. The Drafting Committee had considered other formulations such as "more effective", as well as the traditional reference to the place of the exercise of civil and political rights. But all this had not been considered sufficient. The proposal had also been made to use the phrase "genuine link", but it had not received majority support in the Committee. The Committee had settled for the term "predominant" in order to reflect the relative nature of the concept when two conflicting nationalities were involved. In addition, the Special Rapporteur would make it clear in his commentary to the article that it was the "predominant" nationality of the individual at the time of the exercise of diplomatic protection that was meant.

37. The Drafting Committee was aware that article 6 would be difficult for some countries to accept. Examples had been cited of national constitutions prohibiting dual nationality. At the same time, it had been recognized that

international law did not prohibit dual or multiple nationality and that there had been a shift in attitudes towards the acquisition of multiple nationalities, which had in some cases come to be viewed as a "right" of the individual. Hence, it was necessary to provide for situations where one State of nationality attempted to exercise protection *vis-à-vis* another State of nationality.

38. The Drafting Committee had considered two revised formulations designed to take into account the concerns of States that did not favour article 6. The difference between the two formulations had consisted in how the "exceptional" case of a predominant nationality was portrayed. The choice had been between saying "where the nationality of the latter State", namely the respondent State, "is predominant" and saying "unless the nationality of the former State", namely the claimant State, "is predominant". There was a difference between the two from the standpoint of the burden of proof. It had been thought that the second formulation, which placed the burden of proving predominant nationality on the claimant State, was the better approach. In addition, by framing the formulation in negative terms and using the term "unless", it suggested that the circumstances envisaged in article 6 would be exceptional.

39. With regard to paragraph 2, the Drafting Committee had accepted the proposal made in the informal consultations at the Commission's fifty-second session that a paragraph based on article 9, paragraph 4, be inserted in article 6. Therefore, the initial reference to "subject to article 9, paragraph 4" at the beginning of what was now paragraph 1 was no longer needed. The purpose had been to avoid abuse of article 6. Paragraph 2 dealt with the temporal aspect: where a State committed an international wrong against one of its nationals at a time when the individual was the national "only" of that State, and where the individual subsequently became a dual national, the new State of nationality was prohibited from exercising diplomatic protection against the other State of nationality.

40. The Drafting Committee had decided not to use the word "only" in respect of "the latter State", since doing so would restrict the provision to cases of dual nationality, leaving out situations where individuals held multiple nationalities. The Committee had decided to make the position clearer by stipulating that the person "was a national of the latter State and not of the former".

41. It was important to bear in mind that the provision dealt essentially with the situations of dual and multiple nationality and was presented as an exception to the latter half of paragraph 1, namely where the State exercising diplomatic protection was the predominant State of nationality. While paragraph 1 in principle prevented one State of nationality from bringing a claim against another State of nationality, it allowed for such a possibility where the nationality of the State purporting to exercise diplomatic protection was predominant. However, under paragraph 2, such a claim could occur only if the individual was a national of both States at the time of injury. Or, to put it in negative terms, as had been done in the provision, such a claim could not be entertained if the individual in respect of whom the State was attempting to exercise dip-

⁵ *Yearbook ... 2000*, vol. II (Part Two), p. 85, para. 495.

lomatic protection was not already one of its nationals at the time of injury.

42. The Drafting Committee had considered the potential overlap with article 4, paragraph 3, which had a similar purpose, albeit in the context of continuous nationality. There was a view in the Committee that either the issue could be better dealt with in the context of article 4, paragraph 3, perhaps reformulated in slightly more general terms, or an explicit cross-reference to the exceptions in article 4, paragraph 2, should be made in article 6, paragraph 2.

43. It had been argued that paragraph 2 could apply only in the context of the exceptions to article 4, because otherwise there would be no possibility for the State to bring a claim on behalf of an individual who was not one of its nationals at the time of the injury, simply by virtue of the operation of the continuous nationality rule in article 4, paragraph 1. Put differently, if the Drafting Committee had decided to adopt a strict application of the continuous nationality rule in article 4, the new paragraph 2 in article 6 would not be necessary because the State purporting to exercise nationality had not been a State of nationality at the time of injury and therefore could not exercise diplomatic protection.

44. However, the Drafting Committee had included several exceptions to the rule of continuous nationality in article 4, making it possible for a State of nationality, in certain circumstances, to exercise diplomatic protection even though it had not been the State of nationality at the time of injury. It had also said, in paragraph 3 of that article, that that would not, however, be possible if the claim was brought against a former State of nationality, to cover the scenario in which the individual had *changed* his or her nationality, in other words, given up his or her former nationality in favour of a new nationality, during the period between the injury and the presentation of the claim.

45. At issue in article 6, paragraph 2, was the scenario in which the individual had not given up his or her original nationality but had instead *acquired a further nationality* after the injury during the critical period between the injury and the presentation of the claim. Under article 4, paragraph 2, the new State of nationality could, in certain exceptional situations, exercise diplomatic protection in respect of an injury committed against its national by a *third State*, even though the claimant State was not a State of nationality of the person at the time of injury. However, it had been felt that such a possibility should be prevented if the injury was committed not by a third State but by *the other State of nationality* at the time of injury, a State of which the person was currently also a national because of his dual nationality, even if the claimant State of nationality was the predominant State of nationality at the moment of the exercise of diplomatic protection.

46. It had also been felt that article 4, paragraph 3, had not sufficiently covered the case of the dual national as just described. Hence, the Drafting Committee had considered it necessary to include a similar rule, in article 6, paragraph 2, to be applied in the context of dual nationality. Put succinctly, even in the cases under arti-

cle 4, paragraph 2, where the State of nationality of a dual national would be entitled to bring a claim in respect of an injury committed against the individual who had not been a national of that State at the time of the injury, that would not be possible against another State of nationality by virtue of the application of article 6, paragraph 2, even if the claimant State had been the predominant State of nationality.

47. Ultimately, the Drafting Committee had decided not to include the suggested cross-reference to article 4, since it could be misconstrued and could lead to a confusing interpretation of article 6. Furthermore, it had been felt that the cross-reference was not strictly necessary since the same outcome sought would, in any event, be realized through the regular application of the draft articles as proposed. In addition, it had been felt that the linkage with article 4 on continuous nationality could be raised in the commentary. All that should be borne in mind was that article 6, paragraph 2, should be viewed in the context of the operation of article 4.

48. One member of the Drafting Committee had held the view that paragraph 2 was illogical because it concerned a situation that could never occur, in view of the provisions in article 4 on continuous nationality.

49. Finally, the Drafting Committee had decided to adopt as the title for the draft article "Multiple nationality and claim against a State of nationality".

50. Article 7, based on former article 8, provided for two exceptions to the rule established in article 3, namely that a State of nationality was entitled to exercise diplomatic protection in respect of one of its nationals. In deviating from the standard rule, article 7 allowed a State to exercise diplomatic protection in respect of a non-national where the latter was either a stateless person or a refugee. That exception had been approved in principle by the plenary when it had considered the Special Rapporteur's first report, and the draft article had been referred to the Drafting Committee in the form proposed by the Special Rapporteur. Therefore, the Committee's task had been to consider not whether those exceptions should or should not be included in the draft articles, but rather how they should best be formulated.

51. At the same time, it had been taken into account that some Governments had expressed reservations about including those exceptions, particularly with regard to refugees, as this could be seen as a ground for a claim of nationality. However, it should be clear that that was not the intention of article 7. Instead, all it asserted was that there were circumstances in which a non-national might be protected, and that doing so was entirely within the discretion of the State. In no way did it oblige the State to protect such individuals.

52. Having said so, the Drafting Committee had discussed the scope of the exceptions as well as the general policy underpinning them with a view to reaching a generally acceptable formulation that would be coherent in relation to the other articles and to the existing bodies of law regulating stateless persons and refugees. The

purpose, therefore, had not been to embark on a consideration of the legal position of stateless persons or refugees *per se*. Instead, the Committee had focused on the narrower issue of the discretionary exercise of diplomatic protection in respect of such individuals, regardless of the fact that they were not nationals of the State purporting to exercise such protection.

53. The Drafting Committee had thus started its work on the basis of the Special Rapporteur's proposal with the above factors in mind. Besides some drafting refinements, including correcting the tenses in what were now paragraphs 1 and 2, the Committee had opted for the wording "may exercise diplomatic protection" to emphasize the discretionary nature of the provision. The reference to "claimant State" had been replaced by "that State", meaning the State exercising diplomatic protection. Furthermore, the original reference to an "injured" person had been deleted so as to conform to the text of the previous articles. Likewise, the Committee had further rationalized the text by including the phrase "when that person at the time of the injury was a lawful and habitual resident of that State", which had led to the deletion of the original proviso contained in the last phrase. That last amendment had subsequently been refined further in the context of paragraph 1.

54. The Drafting Committee had then proceeded on the basis that, since the considerations relating to stateless persons were not entirely the same as those applicable to refugees, it would be preferable to separate them into two different paragraphs, albeit still within the same draft article.

55. Paragraph 1 dealt with the question of stateless persons, and the Committee had taken as its basis the definition of a stateless person contained in article 1 of the Convention relating to the Status of Stateless Persons, in which a stateless person was defined as "a person who is not considered as a national by any State under the operation of its law". Consequently, it was not deemed necessary to include a definition or to examine the reasons for the statelessness or whether an individual had become stateless in bad faith. Instead, the focus had been on the possibility of exercising diplomatic protection of an individual who was considered stateless under international law. In addition, the provision envisaged the exercise of diplomatic protection after the individual had become a lawful and habitual resident, thus further minimizing the need to consider the reasons for the statelessness.

56. As to the wording "lawfully and habitually resident", the original version had used the phrase "ordinarily a legal resident". Other suggestions had included "acquired legal residence" and "lawful and principal residence". The Drafting Committee had noted that the term "ordinarily" did not appear in existing texts relating to nationality and that the term "habitual" had been used in several treaties. It had decided on "lawfully and habitually resident" following the example of the European Convention on Nationality, which used the same phrase in article 6, paragraph 4 (g), in relation to stateless persons and refugees. It had been felt that that was the most modern way of referring to the legal situation of stateless persons and refugees

and that it avoided some of the difficulties of speaking of "ordinary" legal residence. Furthermore, habitual residence had a connotation of permanence, as in the case of the Convention relating to the Status of Refugees, which was to be preferred.

57. Similarly, it had not been considered sufficient to refer simply to "lawful residence" or "habitual residence". Instead, both "lawful" and "habitual" residence had to co-exist and should be applied in combination. Likewise, the criterion of "residence" itself was necessary for the element of permanence.

58. The Drafting Committee had also felt that the criterion of "lawful" residence would not necessarily be too high a barrier for undocumented individuals. A State could still consider them to be lawful residents. At the same time, some members had been of the view that the word "lawfully" was superfluous because the defendant State could not conceivably challenge the claimant State about the individual's being "lawfully" resident in its State. However, the combined requirement of "lawful" and "habitual" residence was thought to be the closest approximation to the criterion of nationality in the regular situation of the exercise of diplomatic protection. Indeed, one positive effect of the decision to speak of "lawful and habitual" residence was that it eliminated the need for the reference to the existence of an "effective link", which had been proposed by the Special Rapporteur.

59. The Drafting Committee had also considered a lower threshold by using the phrase "lawfully staying", which was the terminology used in the existing instruments on refugees. Although the view was held that a lower threshold was advisable to provide the best possible protection for stateless persons, the Committee had refrained from using such language because that article essentially dealt with a very specific exceptional situation. Thus, a higher threshold was deemed preferable.

60. Furthermore, the Drafting Committee had been of the opinion that such lawful and habitual residence must exist at the time of the injury and at the date of the official presentation of the claim in order to avoid a situation in which, subsequent to the injury, the person no longer maintained his or her habitual and lawful residence in the State purporting to exercise diplomatic protection. The formulation was based on the same temporal formula provided for in article 4 in the context of continuous nationality. Indeed, it had been considered necessary to maintain parallelism between article 7 and article 4 so as to ensure the same treatment for non-nationals as that prescribed for nationals. The text had initially referred to the "formal" presentation of the claim, but that had been considered too restrictive as there were no prescribed forms for the presentations of such a claim. Instead, the Committee had settled for "official" presentation so as to suggest an actual point in time when the issue reached the stage of a claim for the exercise of diplomatic protection being made *vis-à-vis* another State. His earlier comments on the notion of "official presentation" in the context of article 4 were applicable to article 7 as well.

61. The text of paragraph 1 had been further refined to read “in respect of a stateless person who, at the time of injury and at the date of the official presentation of the claim, is” lawfully and habitually resident.

62. Paragraph 2 was concerned with the situation of the exercise of diplomatic protection in respect of refugees. The Drafting Committee had approached the paragraph from the standpoint that it raised issues similar to those in the case of stateless persons, and had therefore opted for language similar to that used in paragraph 1.

63. As to the phrase “lawfully and habitually resident”, the Drafting Committee had taken note of article 28 of the Convention relating to the Status of Refugees, which referred to the issuance of travel documents to refugees “lawfully staying” in their territory. However, it was important to stress that, if a State did give travel documents to a refugee, that had no implications for nationality or for diplomatic protection, as was clear from paragraphs 15 and 16 of the schedule attached to article 28. The Committee had considered the *travaux préparatoires* of article 28, which indicated that the term “residence” was not used because it was considered too strict. Thus, there had been, at that time, a preference for “lawfully staying” (*résidant régulièrement*).

64. The Drafting Committee had not, however, decided to adopt the phrase “lawfully staying”, preferring instead to retain the proposed wording “lawfully and habitually resident”. As in the case of paragraph 1, it had been felt that, since it was an exception to the rule that only the State of nationality might exercise diplomatic protection, the more appropriate course was to set a threshold higher than that in the Convention relating to the Status of Refugees. Similarly, the Committee had decided to include the phrase “at the time of injury and at the date of the official presentation of the claim”, as had been done in paragraph 1.

65. The Drafting Committee had considered an alternative proposal for the paragraph making reference to the right of the State which had issued a travel document to a refugee to exercise diplomatic protection, notwithstanding the right of a competent international organization to protect the refugee. However, the proposal had not enjoyed the same level of support as the text now before the Commission, since it had risked comparing the rights of international organizations *vis-à-vis* refugees with the right of a State to exercise diplomatic protection. Again, it would necessarily require the adoption of the standard of “lawfully staying”, which the Committee had decided not to accept.

66. The exact scope of the term “refugees” had been the subject of some discussion in the Drafting Committee. Concern had been expressed that, if “refugees” meant only those persons covered by the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, it would exclude displaced persons, and therefore the provision should be made applicable to them as well. Furthermore, a State might confer the status of “refugee” on individuals who did not strictly meet the definition of the Convention relating to the Status of

Refugees. It had been considered that the plenary had preferred a broader conception of the term “refugee” and that, as a matter of policy, such broader application was to be welcomed. It had thus been suggested that a further paragraph be included containing a more general wording, such as that of “recognized refugees”, in accordance with article 6 of the European Convention on Nationality. Under such a provision, the term “refugees” would have included, but not been limited to, refugees under the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees. It had been noted that several regional treaties had also followed that approach. However, the Committee had subsequently decided against adopting such an express provision, preferring instead to discuss the matter further in the commentary.

67. In regard to paragraph 3, the Drafting Committee had not thought it possible for a State to exercise diplomatic protection in respect of a refugee lawfully and habitually resident in that State against the State of nationality of the refugee. That would run counter to the basic approach of the draft articles, in which nationality was the predominant basis for the exercise of such protection. Indeed, the Committee had considered including a provision with an additional subparagraph to that effect in the context of paragraph 2 on refugees. Although there had been some reluctance to include a specific prohibition in such a scenario, on balance it had been decided to include the provision to cover the concerns that member Governments might have if it were not included. However, it had been agreed that the matter would be further discussed in the commentary.

68. Finally, the Drafting Committee had decided to adopt the article title “Stateless persons and refugees”.

69. The Drafting Committee was submitting the seven draft articles to the plenary for adoption.

70. The CHAIR, thanking Mr. Yamada for his lucid report, said that the Commission would now proceed with the adoption of the report of the Drafting Committee article by article.

PART ONE

ARTICLE 1 (Scope)

71. Ms. ESCARAMEIA said that she did not agree with the phrase “in accordance with article 7” at the end of paragraph 2. It was very restrictive and went against the evolution of international law, something that was emphasized further on by article 3, paragraph 1. Attention had frequently been drawn to developments in the course of the Commission’s discussions, particularly in connection with the *M/V “Saiga” (No. 2)* case, which was very clear. It was not logical that the Commission should rigidly follow ICJ, but not ITLOS. That was all the more important since the Commission was focusing on the fragmentation of international law. In the *M/V “Saiga” (No. 2)* case, the judges had ruled that it was irrelevant that the State bringing the claim was not the State of nationality of the injured persons, and, pointing to the evolution of interna-

tional law, they had called attention to an important aspect which “relates to two basic characteristics of modern maritime transport: the transient and multinational composition of ships’ crews and the multiplicity of interests that may be involved in the cargo on board a single ship” [p. 44]. When there was a clear judicial precedent, the Commission should follow it.

72. The CHAIR said that Ms. Escarameia’s remarks would be noted in the commentary. If he heard no objection, he would take it that the Commission agreed to adopt draft article 1.

Article 1 was adopted.

ARTICLE 2 (Right to exercise diplomatic protection)

Article 2 was adopted.

PART TWO

ARTICLE 3 (State of nationality)

73. Mr. CANDIOTI pointed out that the words “State succession” had been omitted from the Spanish text of the draft article.

74. Mr. TOMKA noted that in order to bring the text of the article into line with the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and with the Commission’s own work in other areas, the words “State succession” should be replaced by “the succession of States” in paragraph 2.

75. Mr. YAMADA (Chair of the Drafting Committee) said that he had no objection to the proposed amendment.

76. Ms. ESCARAMEIA said that, since the Drafting Committee had chosen to list several ways in which nationality could be acquired (art. 3, para. 2), marriage and adoption should be included. A reference to marriage was particularly important because the paragraph stipulated that, for the purposes of diplomatic protection, nationality must have been acquired in a manner not inconsistent with international law. However, article 9 of the Convention on the Elimination of All Forms of Discrimination against Women stipulated that States parties must ensure that neither marriage to an alien nor a change of nationality by the husband during marriage would automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. Since many women did, in fact, acquire their husband’s nationality automatically upon marriage under domestic law, it might be argued that they had done so in a manner inconsistent with international law—as embodied in the Convention—and so were not entitled to diplomatic protection.

77. Mr. YAMADA (Chair of the Drafting Committee) said it was his understanding that acquisition of nationality by marriage usually took the form of naturalization.

Any exceptions should be covered by the words “or in any other manner not inconsistent with international law”.

78. The CHAIR said that those words left considerable leeway, bearing in mind what the draft instrument was, and was not, intended to cover.

79. Mr. CHEE noted that several years previously he had had occasion to refer to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women in the Sixth Committee, pointing out that in some cases a woman’s acquisition of nationality was automatic as a result of succession of States. He therefore endorsed Ms. Escarameia’s proposal that a reference to marriage should be included in paragraph 2.

80. Ms. ESCARAMEIA said that there were a number of States, including her own, in which the acquisition of nationality by marriage took a form which might be viewed as outside the scope of naturalization and, in fact, might be deemed inconsistent with international law. In no circumstances must women be left without diplomatic protection because of such a situation.

81. The CHAIR said he found it difficult to imagine that the present wording of the draft article would not be adequate in such cases.

82. Mr. BROWNLIE said he agreed that the wording was probably sufficient. However, Ms. Escarameia’s point was well taken, and it might seem anomalous not to include a mention of marriage as a form of acquired nationality.

83. Mr. Sreenivasa RAO said that, having listened to Ms. Escarameia, he agreed that a distinction should be drawn between the acquisition of nationality by marriage and the naturalization process.

84. Mr. GALICKI said that the situation to which Ms. Escarameia had referred had not occurred to him or to the other members of the Drafting Group. Upon reflection, he supported her proposal, particularly as nationality by marriage might occur not only through naturalization but also automatically as a separate method of acquisition, a fact recognized in the European Convention on Nationality as a justification for holding multiple nationalities. Now that the Commission had women members, it should pay heed to them.

85. Mr. DUGARD said that he, too, supported Ms. Escarameia’s proposal. However, it would be anomalous to include a reference to marriage without also mentioning adoption.

86. The CHAIR wondered whether a reference to marriage and adoption would not rob the words “in any other manner, not inconsistent with international law” of any meaning. Moreover, the issues raised by Ms. Escarameia in relation to marriage did not arise in the case of adoption.

87. Mr. DUGARD said that marriage and adoption were normally treated in the same manner. If the Commission included a reference to one, it might as well add the other. Of course, the difficulty was that the article might then be

taken to include an exhaustive list of methods by which nationality could be acquired.

88. Mr. YAMADA (Chair of the Drafting Committee) said there must be a clear understanding that the acquisition of nationality by marriage should take place in a manner not inconsistent with international law. Thus, he believed that marriage was covered by the article in its present form. However, it was for the Commission to decide whether to make the proposed change.

89. Mr. AL-BAHARNA suggested that a reference to marriage should be included in paragraph 2 and that the issue of adoption should be dealt with in another of the draft articles.

*The meeting was suspended at 11.35 a.m.
and resumed at 11.50 a.m.*

90. Mr. YAMADA (Chair of the Drafting Committee) announced that, after consultations with Ms. Escarameia and the Special Rapporteur, it had been decided that the wording of paragraph 2 was adequate and that the Special Rapporteur would address the important point raised by Ms. Escarameia in the commentary. He therefore recommended that the article should be adopted in its present form.

91. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to adopt article 3 subject to the drafting changes proposed by Mr. Candiotti and Mr. Tomka.

Article 3 was adopted on that understanding.

Cooperation with other bodies

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE
INTER-AMERICAN JURIDICAL COMMITTEE

92. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) described the work of the Inter-American Juridical Committee at its fifty-ninth and sixtieth sessions, held in July–August 2001 and February–March 2002, respectively. At its fifty-ninth session, the Committee had focused on only one of its numerous agenda items, democracy in the inter-American system, because the General Assembly of OAS was scheduled to adopt the draft Inter-American Democratic Charter at its twenty-eighth special session in September 2001. The Committee had been considering the topic since 1995 and had made numerous contributions that had been welcomed by the General Assembly of OAS and the Permanent Council.

93. At the beginning of its fifty-ninth session, the Chairman of the Permanent Council had invited the Committee to participate in the activities of the Council's working group responsible for preparing the text of the Inter-American Democratic Charter. To that end, the Committee had adopted a resolution containing in annex its observa-

tions and commentaries on the draft Charter on the assumption that the latter would ultimately be adopted as an OAS resolution. In view of the limited time available and the fact that the draft was already at an advanced stage of preparation, it had been deemed inappropriate to propose amendments to the text. The Committee had noted that such resolutions were generally designed to contribute to the progressive development of international law by interpreting the provisions of conventions, providing proof of the existence of customary norms, setting forth general principles of law or proclaiming common aspirations. It had pointed out that some of the resolutions of an international organization's bodies could be made binding on its members when so provided by the Statute of the organization and had noted that such resolutions should include programmatic guidelines.

94. The Committee had then made observations and comments on the organization of the provisions of the draft Inter-American Democratic Charter, the topics covered in it and, in particular, its compatibility with previous resolutions of the General Assembly and the OAS Charter. Article 9 of the OAS Charter provided that a Member of the Organization whose democratically constituted Government had been overthrown by force could be suspended from the exercise of the right to participate in the sessions of the General Assembly of OAS, the Meeting of Consultation, the Councils of the organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established; it also described the mechanism by which such suspension would be imposed and lifted. OAS General Assembly resolution 1080 (XXI-O/91) of 5 June 1991 was compatible with that article but had a broader scope. It covered the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected Government in any of the Organization's member States; it did not envisage the suspension of a member State but authorized the Permanent Council and the General Assembly to take certain measures in response to the situation. The Third Summit of the Americas, held in Quebec from 20 to 22 April 2001, had adopted the "democracy clause", which stated that any unconstitutional alteration or interruption of the democratic order in a member State of OAS constituted an insurmountable obstacle to the participation of that State's Government in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies.

95. The Committee had held a lengthy discussion of that provision, which had essentially been incorporated into the draft Inter-American Democratic Charter, and had made various recommendations regarding the need to bring it into line with the OAS Charter and related instruments. It was probably necessary and politically acceptable, at least for the present, but from the legal viewpoint it might not be compatible with the OAS Charter, depending on the manner in which it was interpreted and applied. Certainly, its scope was broader than the Committee would have wished. In any event, it was proof of the collective will to prevent and punish disruptions of the constitutional and democratic order through non-violent but equally illegal

means, a situation which had occurred in the past in the Americas.

96. The Inter-American Democratic Charter had been adopted by consensus at the twenty-eighth special session of the OAS General Assembly on 11 September 2001. Hence there had been no further negotiations on the text.

97. At its sixtieth session, the Committee had taken note of the adoption of the new Charter and had adopted a resolution stating that it largely reflected the Committee's comments and suggestions and mentioning the appreciation of the Committee's contributions which had been expressed by the Secretary-General and other high-level participants in the special session.

98. In its resolution 1774 (XXXI-O/01) of 5 June 2001, entitled "Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance", the OAS General Assembly had requested the Committee to prepare an analytical document for the purpose of contributing to and furthering the work done by the Permanent Council on that question. In consequence, the Committee had dealt extensively with the topic at its most recent session and had adopted resolution 39 (LX-O/02), of 6 March 2002, expressing its concern with regard to the increase in the number of acts of racism and intolerance throughout the world and confirming the need to make common cause in opposition to such manifestations by intensifying cooperation among States in order to eradicate those practices. It also endorsed the conclusions contained in document CJI/doc.80/02 rev.3, which was transmitted to the Permanent Council together with the resolution. Those texts were available for members to consult. In that connection, it should be mentioned that the Committee had conducted an extensive review of the general and regional normative framework in that sphere, on the basis of a compilation of treaties and legislation and of the replies to a questionnaire circulated to member States. The conclusions reached by the Committee were set forth in document CJI/doc. 80/02 rev.3 and expressed some caution as to the advisability of negotiating a new convention, but specified that, if it was decided to proceed with a new convention, it should be an instrument complementary to the existing universal and regional conventions, covering any general aspects of the question not covered by those conventions, or characterizing forms of racism, racial discrimination or intolerance not yet dealt with in specific international instruments.

99. The Committee was of the clear opinion that it was not advisable to undertake to negotiate and conclude a general convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance, insofar as to do so might duplicate existing conventions, producing overlaps that would lead to serious problems of interpretation and application. Nevertheless, the Committee had identified some themes that might be of relevance to work on the topic, namely: strengthening mechanisms for monitoring compliance with human rights treaty obligations; studies on specific groups such as indigenous populations and ethnic minorities; and contemporary forms of racism and racial discrimination. The Committee had also concluded that, if it was decided to develop an inter-American convention aimed at some particular aspect of the matter, it should be developed within the framework

of the International Convention on the Elimination of All Forms of Racial Discrimination and other universal and regional conventions on the matter. The Committee had also pointed to other possible procedures for regulating matters relating to racism and racial discrimination, such as the adoption of amendments to existing conventions and interpretative declarations and the conclusion of additional protocols. It would also be possible to have recourse to political procedures such as those recommended by the first and second Summits of the Americas, held respectively in Miami (Florida), United States, on 9–11 December 1994 and in Santiago de Chile on 18–19 April 1998, and by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban (South Africa) from 31 August to 7 September 2001. Last, the Committee had indicated that the organs of OAS might consider urging those member States that had not yet done so to ratify or accede to the existing conventions, and to recommend States parties to the conventions against racism and racial discrimination to take the necessary steps to comply with their obligations under those conventions, *inter alia*, by adopting national laws and regulations.

100. That topic had been considered at the thirty-second regular session of the OAS General Assembly, held in Bridgetown on 2 June 2002, and would certainly continue to be considered in other forums of the organization. The draft agenda of the thirty-second regular session was available to members for consultation. One extremely important topic on the agenda had been the Inter-American Convention against Terrorism, which had just been adopted by the General Assembly. The text of the Convention was available for members to consult.

101. At its sixtieth regular session, the Committee had also considered the results of the sixth Inter-American Specialized Conference on Private International Law, held in Washington, D.C., from 4 to 8 February 2002. The Conference had adopted two model laws, on negotiable and non-negotiable uniform through bills of lading for the international carriage of goods by road. The Conference had also adopted a model inter-American law on secured transactions, aimed at reducing the cost of loans, encouraging international trade and investment in the region, and assisting small and medium-sized enterprises in the hemisphere. A third topic before the Conference had been liability for transboundary pollution. No agreement had been reached on that topic. The Committee had been entrusted by the Conference with the tasks of contributing to the study of the topic "Applicable law and competent international jurisdiction in matters of extracontractual civil liability" and to the preparation of the agenda of the seventh Inter-American Specialized Conference on Private International Law.

102. Last, he drew the Commission's attention to the preparations for the commemoration of the centenary of the Inter-American Juridical Committee, to be celebrated in 2006. Preparations for the event had begun in 2001, and there were plans to involve many inter-American and other regional organs and bodies. It was also hoped to involve the International Law Commission and other organs of the United Nations and its specialized agencies, as well as academic institutions and eminent international

lawyers, in the celebrations. Particular account had been taken of the preparatory work undertaken in the context of the commemoration in 1999 of the centenary of the first Hague Peace Conference. In addition to meetings and special events, the programme would include publications and other academic activities.

103. The Course on International Law had been held each year since 1974 and lasted four weeks, usually coinciding with the Committee's August meeting in Rio de Janeiro, Brazil. The course was attended by some 37 students from member States, 30 of whom were funded by grants. The participants were young graduates working in universities, the public sector or their country's diplomatic service. They studied full-time throughout the course and were assessed. Classes were taught by members of the Committee, international officials and staff members of international bodies, as well as teachers from universities in the Americas and other regions, especially Europe. About 30 teachers participated in the course each year. Various past and present members of the International Law Commission had taught on the course, thereby contributing to its prestige. Each course focused on a main theme. In 2001 the theme had been "The human person in contemporary international law" and in 2002 it would be "Natural resources, energy, the environment and international law".

104. The most recent Joint Meeting with Juridical Advisors of the Ministries of Foreign Affairs of the member States of OAS had been held in Washington, D.C., in March 2000, during the Committee's fifty-sixth regular session. The next meeting would be held in 2003, and its agenda would include an item on the International Criminal Court, which had ceased to be an item on the Committee's agenda. The purpose of the meetings was to exchange information and views on juridical issues of significance for member States.

105. Article 103 of the OAS Charter mandated the Inter-American Juridical Committee to establish cooperative relations with universities, institutes and other teaching centres, as well as with national and international committees and entities devoted to study, research, teaching or dissemination of information on juridical matters of international interest. He was confident that the Committee had made a contribution towards fulfilling that mandate.

106. The CHAIR thanked the Observer for the Inter-American Juridical Committee for his statement. It had been impressive to learn of the extensive achievements of an older and bolder institution, one in which his country was proud to participate. He had been particularly struck by the discussion of the issue of the fragmentation of international law and would welcome further details of the approach the Committee had adopted with regard to that issue, given that the Commission was itself embarking on a consideration of the question of fragmentation.

107. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) said that the need to avoid the fragmentation of international law had been a particular concern in the context of consideration of a possible convention against racism. While that concern had not precluded the adoption of an inter-American convention

against racism, particular attention had been devoted to the desirability of integrating it into existing universal conventions.

108. Mr. Sreenivasa RAO thanked the Observer for the Inter-American Juridical Committee for his excellent overview of the work being done in that extremely important body, work which was also of great interest to jurists, international law students and scholars in other regions of the world. The lead taken by the Committee in the recent preparation of the Inter-American Convention against Terrorism was of particular interest, given the worldwide concern to ensure that funds were not placed at the disposal of terrorist organizations. Closer links should be forged between the Inter-American Juridical Committee and the Asian-African Legal Consultative Organization, since the two bodies shared common concerns.

109. Mr. KAMTO thanked the Observer for the Inter-American Juridical Committee for his comprehensive presentation of his organization's admirable contribution to codification and knowledge of international law. With regard to the draft Inter-American Convention against Terrorism, he asked what significant contribution a new regional convention could make, over and above those of existing conventions on the matter. He also wondered whether the Convention's laudable objective of eliminating terrorism, which was essentially a political rather than a legal concern, was realistic. Last, he asked whether the absence of a title to article 14 of the new Convention, dealing with discrimination, was inadvertent or intentional.

110. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) said that the Inter-American Convention against Terrorism had been an initiative by political organs of OAS, responding to the need to rid the hemisphere of the scourge of terrorism. While, for obvious and regrettable reasons, a need had been felt to intensify inter-American cooperation in that field, special attention had also been paid to ensuring that the new Convention was compatible with existing conventions. The Committee had played a technical and advisory role in the process of negotiating the Convention. The absence of a title to article 14 of the Convention was a minor editing matter that would be rectified in due course.

111. Mr. NIEHAUS thanked the Observer for the Inter-American Juridical Committee for his excellent overview of the Committee's activities. The exchange of experiences between the two bodies had been of great value. The Inter-American Democratic Charter served as an example not just for the region but for the entire world. The Committee was also to be congratulated on the success of the sixth Inter-American Specialized Conference on Private International Law and on the Conference's adoption of two model laws. In celebrating its centenary in 2006, the Committee would be able to look back on 100 extremely fruitful years.

112. Mr. GALICKI said that the catalogue of universal conventions to be found in article 2 of the new Inter-American Convention against Terrorism made no reference to the Committee's own very important Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes against Persons and Related Extortion That Are of

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

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

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

The meeting rose at 1.05 p.m.

2731st MEETING

Thursday, 6 June 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev. 1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

1. The CHAIR invited the members of the Commission to continue their consideration, article by article, of the

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

draft articles on diplomatic protection as adopted by the Drafting Committee (A/CN.4/L.613)*.

ARTICLE 4 (Continuous nationality)

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

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

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

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

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

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

It was so decided.

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

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

It was so decided.

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