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Summary record of the 2907th meeting

Topic:
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contribution to the literature. The Commission should take note of the results of the work on the topic, namely, the guiding principles and the commentaries thereto, as it had for the topic of fragmentation of international law.

53. Mr. KABATSI said that he shared Mr. Kateka's reservations about the reference to silence in the second preambular paragraph and Mr. Melescanu's reservations about the second sentence of guiding principle 9, even though he could see that, in some situations, the States concerned might incur obligations without having strictly speaking entered into treaty relations.

54. Mr. MANSFIELD said that the report of the Working Group, including the guiding principles contained therein, was a text that had been the subject of arduous negotiations and must be taken as a package. The preamble to the principles in its entirety and each of the principles themselves had had to be retained, for without each and every one of them there would have been no consensus. He hoped that, like the Working Group, the Commission could adopt them as a whole by consensus.

55. Mr. PELLET (Chairperson of the Working Group on unilateral acts of States) appealed to the Commission to heed Mr. Mansfield. Reaching a consensus within the Working Group had been extremely difficult and, if the Commission began trying to make changes, it might become embroiled in an interminable debate. It could very well adopt the guiding principles with the reservations of certain members. Moreover, the comments of members could be reflected in the commentaries, to be submitted to the Commission the following week.

56. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group on unilateral acts of States (A/CN.4/L.703) by consensus.

It was so decided.

The meeting rose at 1.10 p.m.

2907th MEETING

Monday, 7 August 2006, 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

Draft report of the International Law Commission on the work of its fifty-eighth session (*continued*)

CHAPTER IV. *Diplomatic protection (continued)* (A/CN.4/L.692 and Add.1)

E. *Text of the draft articles on diplomatic protection (continued)* (A/CN.4/L.692/Add.1)

2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)*

Commentary to draft article 1 (Definition and scope) (concluded)

Paragraph (4) (*concluded*)

1. The CHAIRPERSON recalled that at the previous meeting, some members of the Commission, initially in the minority, had proposed deleting the paragraph, but that the ensuing discussion had revealed the need to indicate that while an individual was not a full-fledged subject of international law, as was a State, he or she was accorded a panoply of rights by international law. Even though they were not exercised, implemented and upheld in the same way as those inherent to State sovereignty, paragraph (4) should be amended to reflect that state of affairs.

2. Mr. DUGARD (Special Rapporteur) said the paragraph should be retained because it explained why, despite important developments in the field of human rights, diplomatic protection was still necessary. Although many primary rules were now available to protect the individual, remedies were few. Mr. Gaja had proposed to delete the phrase "Although not yet a full subject of international law" at the start of the sixth sentence. Since it raised a controversial issue and added nothing of value, he could agree to its deletion. Another useful proposal by Mr. Gaja was to replace the words "may have", in the penultimate sentence, by "has", a more correct wording to which he could likewise agree. He suggested that, with those two amendments, the paragraph should be retained.

3. Mr. PELLET said the new text represented some improvement over the original but was still not entirely satisfactory. The reference in the second sentence to the prohibition of slavery was ambiguous and imprecise. Slavery had been prohibited fairly recently, not in the "early years of international law" mentioned in the preceding paragraph. In fact, the prohibition of the slave trade, and, for that matter, of piracy, had preceded the prohibition of slavery, and he did not see why the latter should be singled out. Accordingly, he proposed that the second sentence should be deleted. If, however, it was retained, the phrase "except perhaps those arising from the prohibition on slavery" should be deleted and the word "virtually" inserted between "There were" and "no primary rules".

4. A more serious problem concerned the antepenultimate sentence. It again raked up the *Mavrommatis* fiction, which draft article 1 had succeeded in adroitly circumventing. The sentence added nothing and could and should be deleted.

5. Mr. ECONOMIDES proposed replacing the second phrase of the second sentence with the phrase "except for a few very rare exceptions".

6. Mr. CHEE said that having the right to a remedy was one thing, but exercising it was quite another. Normally when an individual was involved in a case of an international character, it was better that the State should seek remedies. In view of that possibility, he would prefer to see the reference to the *Mavrommatis* fiction retained. However, if a majority of members favoured its deletion, he would not oppose such a decision.

7. Mr. DUGARD (Special Rapporteur) said he could agree to the deletion of the second sentence for the reasons invoked by Mr. Pellet. He was not wedded to the antepenultimate sentence either and could agree to its deletion if the Commission so desired. Nevertheless, the *Mavrommatis* fiction had not yet been disposed of completely: there was still some tension between the rights of the individual and the fiction that an injury to a national was an injury to the State itself.

Paragraph (4), as amended by Mr. Gaja and the Special Rapporteur, was adopted.

Paragraph (5)

8. Mr. DUGARD (Special Rapporteur), responding to a question from Mr. GAJA, read out a written proposal from Mr. Matheson to amend the first sentence to read: “Article 1 is formulated in such a way as to acknowledge that a State, in exercising diplomatic protection, acts on behalf of its national as well as on its own behalf.” He would be happy to accept that proposal.

9. Mr. PELLET said the proposal completely altered the meaning of the paragraph and he strongly opposed it. It suggested that a State, in exercising diplomatic protection, acted simultaneously on its own behalf and on behalf of its national, whereas the original text was much more nuanced, acknowledging that one or the other scenario, or both, could obtain.

Paragraph (5) was adopted without amendment.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

10. Mr. PELLET pointed out that the second sentence of paragraph (9) implied that ambassadors and diplomats were political representatives, which was not the case; he suggested that the words “diplomatic or” should be inserted before the word “political”.

11. Mr. GAJA endorsed that proposal. He drew attention to a written proposal by Mr. Matheson, which had been endorsed by the Special Rapporteur, for the insertion of a new second sentence in paragraph (9), to read: “Diplomatic protection does not include *démarches* or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.”

12. Mr. PELLET, supported by Mr. MANSFIELD, endorsed the text but suggested that it should be inserted at the end of paragraph (8), which dealt with the means of exercising diplomatic protection, rather than in paragraph (9), which related to the distinction between consular assistance and diplomatic protection.

13. Mr. ECONOMIDES said that another possibility would be to replace the phrase “by the political representatives” with the phrase “on behalf of the political representatives”. Diplomatic protection always had an official character: it was a request by a State, not simply

by one of its consulates. However, he was prepared to accept Mr. Matheson’s proposal.

Paragraph (8), as amended, was adopted.

14. Ms. XUE (Rapporteur of the Commission) pointed out that in the second sentence of paragraph (9), the entire phrase “—ambassador, diplomat, foreign minister or minister of justice—” was superfluous and could be deleted, together with the adjective “political”. As to the final sentence, the discussion in plenary had clearly established that consular assistance was not only preventive but also remedial, mainly through recourse to domestic legal processes to achieve redress. The final sentence should reflect that fact.

15. Mr. CHEE cited article 3, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 5 of the Vienna Convention on Consular Relations as illustrating the overlapping of the functions of diplomatic protection and consular assistance. To make a clear-cut distinction went against the recent trend towards integration of consular and diplomatic functions. Accordingly, the final sentence should be retained unchanged.

16. Mr. DUGARD (Special Rapporteur) said that the use of the word “largely” had been intended to cover the point made by Ms. Xue. If that was not sufficient, however, the words “by recourse to domestic remedies” could be added at the end of the sentence.

17. Mr. KATEKA proposed replacing the words “largely preventive” with “both preventive and remedial”.

18. Mr. DUGARD (Special Rapporteur) said that Mr. Kateka’s proposed amendment would imply that the remedial aspect was one of the main functions of consular assistance. The Commission had been agreed, however, that the consular function was largely preventive, although it did have a remedial element. He therefore suggested that the word “mainly” might be inserted before the words “aims at”.

19. Mr. PELLET said that a sentence could not simultaneously say one thing and its opposite: if the aim was largely preventive, then the preventive and the remedial aspects could not be placed on an equal footing. The Commission was in agreement that consular assistance was in part remedial but mainly preventive. He fully endorsed the Special Rapporteur’s proposal to insert the word “mainly” before “aims” in the last sentence. Other solutions might be either to replace the words “while consular assistance is largely preventive” by “while consular assistance has both preventive and remedial aspects”, or to insert at the end of the sentence the words: “; it also has a remedial function”. All those alternatives made sense, whereas the formulation “both preventive and remedial” did not.

20. Mr. ECONOMIDES said he agreed with Mr. Chee that the sentence should be adopted as it stood; however, he could also go along with the Special Rapporteur’s proposal to insert the word “mainly”.

21. Ms. ESCARAMEIA said she also endorsed the Special Rapporteur’s proposal to insert “mainly” before “aims”. However, that left out the question of recourse to

domestic measures to which Ms. Xue had referred. Taking up Mr. Pellet's suggestion, Ms. Escameia proposed the insertion of the phrase "it also has a remedial function by recourse to domestic measures". That would cover all concerns, namely that consular assistance was largely preventive, but it was also remedial, and that when it was remedial, it mainly took the form of domestic measures.

22. Mr. KATEKA said that the consular assistance he had had personally to provide to his nationals in a number of countries had not been preventive: it had been provided after the damage had been done. He did not see how it could be asserted that consular assistance was preventive.

23. Mr. PELLET said that the task currently before the Commission was not to restate old positions, but to decide how to reflect them in the report. That said, he was not happy with Ms. Escameia's proposal to add the words "by recourse to domestic measures" to the end of his own proposal. The consular function did not consist mainly in referring matters to the courts, but in assisting persons brought before the courts. If the text became too detailed, it ran the risk of making vague, inaccurate assertions.

24. Mr. Sreenivasa RAO said that Mr. Kateka's point was well taken and did not reopen the debate. That particular language had arisen in connection with wrongful acts, and was acceptable in the context of consular functions. He agreed with the Special Rapporteur's proposal to insert the word "mainly" and with Mr. Pellet's suggestion, but it would be helpful if at some point the Special Rapporteur could add a footnote indicating what were traditionally regarded as consular functions outside the context of wrongful acts.

25. Mr. MELESCANU said that the text should not be radically altered. Inclusion of the word "mainly" would address the concerns of those who were thinking of a remedial function of consular protection. To try to achieve more would simply be to reopen a debate which would lead nowhere. He therefore endorsed the Special Rapporteur's proposal to insert the word "mainly", which clearly rendered the idea that there was a preventive function, but that a remedial function was not excluded. The remainder of the paragraph should stand.

Thus amended, paragraph (9) was adopted.

Paragraph (10)

26. Mr. GAJA said that the first part of the footnote seeking to clarify the undefined zone between diplomatic protection and consular assistance seemed to imply that the ICJ had been confused in its reasoning. That was not a fair comment or something which the Commission should presume to say. The reference to the *Avena* and *LaGrand* cases was also not clear. The text could simply mention the Treaty establishing a Constitution for Europe, which referred to something which was in fact probably consular assistance, although it related to diplomatic assistance. He proposed deleting the first two sentences and, in the third sentence, replacing the words "the confusion surrounding the distinction" by "the grey area", and deleting the words "still further". Moreover, in the penultimate sentence, the words "and consular assistance" should be inserted after

"the exercise of diplomatic protection": while it was true that, with regard to consular assistance, a State might not object so easily, he did not see how it could be asserted that the consent of the State against which consular assistance was exercised was not necessary when it was a question of a national of a third country.

27. Mr. ECONOMIDES said that the reference to "the protection of the diplomatic and consular authorities" in the text of the European Union had been misinterpreted, because it was not a reference to diplomatic protection. Instead, its intention was to cover the protection of nationals by the diplomatic or consular authorities—an area which still constituted consular assistance. As it stood, the text seemed to suggest that the European Union had made an egregious error, which was untrue. Consequently, he proposed deleting the reference to the European Union text. The protection offered by the diplomatic authorities was always consular protection, even when it was provided by embassy staff. It was not diplomatic protection in the strict sense.

28. Mr. PELLET said that the phrase "as this assistance takes place before the commission of an internationally wrongful act", at the end of the third sentence of paragraph (10), was incorrect. That was not always the case, and the word generally should therefore be inserted before "takes place".

29. Mr. CANDIOTI said he agreed with Mr. Economides on the need to delete the reference to the Treaty establishing a Constitution for Europe from the footnote. He was concerned that the commentaries to article 1 would lead the reader to conclude that diplomatic protection was a concept imbued with grey areas. There was no grey area between diplomatic protection as defined in article 1 and the activities of diplomats and consuls who defended their nationals; they were two quite different matters. Diplomatic protection as defined in article 1 was a way of invoking the responsibility of a State for an injury caused by an internationally wrongful act to a national of another State, whereas diplomatic and consular activities were clearly defined in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The commentary should not lead the General Assembly to conclude that a grey area existed. The Commission was in danger of reintroducing a lack of clarity into the notion of diplomatic protection. It must not confuse the invocation and implementation of responsibility with the activities of ambassadors, diplomats and consuls, who protected their nationals and whose functions were clearly defined. Thus, it would be sufficient for the footnote to refer only to the 1961 and 1963 Vienna Conventions.

30. Mr. VALENCIA-OSPINA, referring to the proposal to delete the first two sentences of the footnote to the penultimate sentence of paragraph (10), said it would be odd for the Commission to ignore the two recent cases heard by the ICJ in which both consular assistance and diplomatic protection had been invoked by the claimants. The Commission was not asserting that the Court had taken a decision on the matter, but only that the claimants had invoked both. By including that reference, it would show that it was aware of the work of the Court; such

a reference would not be discourteous, because the Commission was not commenting on what the Court had said, but only on what the claimants had said. It would be sufficient to say that in the *LaGrand* and *Avena* cases, the claimants had invoked both consular assistance and diplomatic protection.

31. The CHAIRPERSON said that that proposal reflected more accurately what had actually taken place.

32. Mr. PELLET begged to differ. The States concerned, Germany and Mexico, had complained that they had been unable to exercise consular assistance. That had been the subject of the dispute. The grey area was not between diplomatic protection and consular assistance. The uncertainty arose because it was not clear from a reading of the decisions of the ICJ in *LaGrand* and *Avena* whether the Court had accepted that the United States or Mexico had exercised both diplomatic protection and their right to invoke the provisions of the Vienna Convention on Consular Relations. Those were two completely different matters. It was not a question of consular assistance being invoked before the Court: that made no sense. Mr. Gaja was right that there was a problem with grey areas, but there was no grey area in the Court's decisions or between consular assistance and diplomatic protection. Diplomatic protection was perhaps at issue, but that did not emerge from the Court's decisions. It might be at issue at the level of the referral of the case to the ICJ. The subject of the referral was the refusal of consular assistance. The grey area existed, but did not relate to paragraph (10).

33. Ms. XUE (Rapporteur) proposed deleting the footnote in question and the last sentence of paragraph (10). No additional elements needed to be added.

34. Mr. DUGARD (Special Rapporteur) said that in his seventh report (A/CN.4/567), he had suggested that the Commission should include a provision in article 1 dealing with consular assistance; however, it had been decided that the whole question was too confusing and should not be addressed. Mr. Valencia-Ospina was absolutely right: the Commission could not fail to refer to the two decisions of the ICJ, because although the situation might be clear to Mr. Pellet, the fact of the matter was that many commentators on the two decisions had shown considerable confusion, and if the Commission failed to refer to the decisions, the inference would be that it was simply unaware of the debate surrounding them. Similarly, while it might well be that he had misinterpreted the Treaty Establishing a Constitution for Europe, as Mr. Economides had claimed, there was nevertheless considerable debate in the literature on those provisions. Perhaps the issue could be avoided by referring in the footnote to articles on the subject in academic journals. The Commission could not simply pretend that it was not aware of the two decisions. The same applied to the last sentence: the distinction between diplomatic and consular functions had disappeared in many embassies, and he did not see why the text should make no mention of that fact.

35. Mr. PELLET said that a number of commentators had rightly pointed out that the ICJ had been unable to decide whether an exercise of diplomatic protection or a direct recourse had been involved. If the Special

Rapporteur could cite commentators who had placed consular protection on an equal footing with diplomatic protection in the two cases, then those commentators, who had introduced confusion in the literature, should be cited as having done so. Just because there was confusion in the literature did not mean that the Commission should make a grave error.

36. Ms. XUE (Rapporteur) noted that the conventions on consular relations and on diplomatic relations made virtually no distinction between diplomatic and consular functions. That was the practice. The sentence simply created more confusion, because even when an embassy exercised consular protection, that was still not diplomatic protection. There was no need to mention consular protection, because only diplomatic protection and international law were at issue. The grey area between diplomatic protection and consular assistance was irrelevant, and the sentence should be deleted.

37. Mr. DUGARD (Special Rapporteur) said he was happy to go along with Ms. Xue's proposal. He suggested that the footnote might simply refer to the *Avena* and *LaGrand* cases, without any discussion.

38. Mr. ECONOMIDES said that paragraph (10) contained a number of imprecisions. For example, the third sentence stated that "Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act". That was very strange, for, as Mr. Kateka had noted, consular assistance was generally exercised after the commission of the act. He proposed reducing the paragraph to a bare minimum. The first two sentences would remain unchanged. The third and final sentence would then read: "Clearly there is no need to exhaust local remedies in the case of consular assistance, whereas this condition is required for the exercise of diplomatic protection, subject to the exceptions described in article 15". The rest of the paragraph would be deleted. What had to be retained was the distinction between the two areas with regard to the criteria for the exhaustion of local remedies. Everything else was dangerous and not entirely accurate.

39. The CHAIRPERSON, responding to a request for clarification by Mr. GAJA, confirmed that a written proposal submitted by Mr. Matheson had not been taken up and that two footnotes in the paragraph were to be deleted.

40. Mr. DUGARD (Special Rapporteur) said that the proposal by Mr. Economides failed to take into account the fact that, in its debates, the Commission had expressed doubts about the *Avena* and *LaGrand* cases and had had a long discussion about the Treaty Establishing a Constitution for Europe. He found it very strange that all references to those two matters should simply be deleted. However, if that was what the Commission wished, he would go along with it, albeit under protest.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

41. Mr. PELLET, referring to the phrase “and not with the protection afforded by an international organization to its agents, recognized by the International Court of Justice”, said that it was not the protection that had been recognized, but the capacity of international organizations to protect their agents. He suggested replacing that phrase by “and not with the protection afforded to its agents by international organizations, whose capacity in that regard has been recognized by the International Court of Justice”.

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

The commentary to draft article 1, as amended, was adopted.

Commentary to draft article 2 (Right to exercise diplomatic protection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

42. Mr. DUGARD (Special Rapporteur), drawing on a written proposal submitted by Mr. Matheson, suggested that the last sentence should read “The discretionary right of a State to exercise diplomatic protection should therefore be read with article 19 which recommends to States that they should exercise that right in appropriate cases”.

43. Mr. PELLET said that, just as the Special Rapporteur had given examples of case law in the footnote on judicial decisions, he should cite examples of legislation in the preceding footnote, rather than simply referring to his own first report.³⁷⁰

44. Mr. DUGARD (Special Rapporteur) said that, in that footnote, he had referred to his first report for convenience's sake, since it contained a detailed discussion on the complexities of the existing legislation. He would, however, be happy to add more information to the footnote on domestic legislation so that it corresponded to the footnote on judicial decisions.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft article 2, as amended, was adopted.

Commentary to draft article 3 (Protection by the State of nationality)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

45. Mr. PELLET said that, as currently worded, the commentary could give rise to a broad interpretation whereby the circumstances in which diplomatic protection might be exercised in respect of non-nationals was only one set of circumstances among others. The wording should make it clear that article 8 constituted a limitation on the exception in question. He therefore suggested that the paragraph should be reformulated to read: “Paragraph 2 refers to the exception provided for under article 8”.

Paragraph (2), as amended, was adopted.

The commentary to draft article 3, as amended, was adopted.

Commentary to draft article 4 (State of nationality of a natural person)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

46. Mr. PELLET asked whether the Special Rapporteur would be willing to delete the footnote at the end of the paragraph.

The footnote was deleted.

Paragraph (5), as amended, was adopted with, in addition, an editing amendment to the English version.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

47. Mr. PELLET said that the paragraph belonged in the commentary to article 5 rather than in that to article 4, since it dealt with the question of the change of nationality rather than the right to nationality.

48. Ms. ESCARAMEIA said that the paragraph belonged in the commentary to article 4. It related not to article 5 and continuous nationality but to the fact that a married woman might acquire her husband's nationality by virtue of a given domestic law, even though such acquisition might be inconsistent with international law.

49. Mr. DUGARD (Special Rapporteur) said that the issue had been discussed at considerable length in the Drafting Committee and it had been decided to locate the paragraph in the commentary to article 4.

Paragraph (8) was adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 5 (Continuous nationality of a natural person)

Paragraph (1)

Paragraph (1) was adopted.

³⁷⁰ Yearbook ... 2000, vol. II (Part One), document A/CN.4/506 and Add.1, p. 205.

Paragraph (2)

50. Mr. DUGARD (Special Rapporteur) read out a written proposal by Mr. Matheson that the last sentence should be reworded to read: “Continuity is presumed if that nationality existed at both these dates, but this presumption is, of course, rebuttable.” He himself was happy to accept the amendment.

51. Mr. GAJA said that, in the interest of clarity, the proposed amendment should be preceded by the following phrase: “Given the difficulty of providing evidence of continuity,”.

52. In response to a concern raised by Mr. KATEKA, Mr. DUGARD (Special Rapporteur) confirmed that the amendment proposed by Mr. Matheson merely clarified the point that there could be no break in nationality between the two dates discussed in the paragraph.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were adopted.

Paragraph (10)

53. Mr. DUGARD (Special Rapporteur) read out a written proposal by Mr. Matheson that the final phrase (“connected with the bringing of the claim”) should be deleted. He could accept that proposal.

54. Mr. GAJA said that the proposed amendment contradicted the text of the draft article.

Paragraph (10) was adopted without amendment.

Paragraphs (11) to (14)

Paragraphs (11) to (14) were adopted.

The commentary to draft article 5, as amended, was adopted.

Commentary to draft article 6 (Multiple nationality and claim against a third State)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 6 was adopted.

Commentary to draft article 7 (Multiple nationality and claim against a State of nationality)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

55. Mr. MOMTAZ said that the paragraph laid too much emphasis on the issue of dominant nationality, given that the article itself concerned multiple nationality and claim against a State of nationality. All that was necessary was to stress that the jurisprudence of the United Nations Compensation Commission was in conformity with

article 7. By the same token, there was no need for the references to the third report on State responsibility³⁷¹ or to Mr. Orrego Vicuña’s report to the International Law Association.³⁷² Neither was relevant to the provisions of article 7.

56. Mr. GAJA said that, for his part, he was unhappy with the inclusion of the reference to the United Nations Compensation Commission, which also concerned multiple rather than dominant nationality. Accordingly, the two sentences referring to the United Nations Compensation Commission should be deleted.

57. Mr. DUGARD (Special Rapporteur) said that the commentary claimed only that the references in question gave support to the dominant nationality principle.

58. Mr. GAJA said that the principle applied by the United Nations Compensation Commission was merely that a person with dual nationality could avail himself or herself of a bona fide nationality of another State.

59. Mr. DUGARD (Special Rapporteur) said that he would not oppose the deletion of the two sentences relating to the United Nations Compensation Commission. He had serious misgivings, however, about deleting the references to the third report on State responsibility and on the report of Mr. Orrego Vicuña in the footnotes, which had, for the first time, discussed at some length the problem of effective nationality. He conceded, however, that the word “dominant” had not been used in either case.

60. Mr. MOMTAZ said that he was not opposed to the reference to the United Nations Compensation Commission, inasmuch as it concerned a claim against another State of nationality, namely Iraq. The Special Rapporteur, however, seemed to think that the issue before the United Nations Compensation Commission had been dominant nationality, and that was not the case. The reference to Mr. García Amador’s third report on State responsibility, on the other hand, concerned only the issue of dominant nationality.

Paragraph (3), as amended by Mr. Gaja, was adopted.

Paragraphs (4) and (5)

61. Mr. PELLET said that the first sentence of paragraph (5) implied that the words “effective” and “dominant”, used in relation to nationality, were identical in meaning, whereas they were clearly different, the word “dominant” having comparative force.

62. The CHAIRPERSON suggested that an explanation of the distinction might be inserted in paragraph (4).

63. Mr. DUGARD (Special Rapporteur) said that the authorities did indeed use the terms interchangeably, despite the difference in their meanings. That was why he had used the word “predominant”, in order to emphasize the element of relativity.

³⁷¹ *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 47.

³⁷² F. Orrego Vicuña, “Interim report on the ‘The Changing Law of Nationality of Claims’” in *International Law Association, Report of the Sixty-ninth Conference held in London 25–29th July*, p. 631.

64. Mr. PELLET suggested that the phrase “Although the two concepts differ, the authorities use the terms ‘effective’ and ‘dominant’ interchangeably” should be inserted at the beginning of paragraph (5).

65. Mr. GAJA said that paragraph (4) was inconsistent with the new wording of paragraph (5) and should therefore be deleted.

Paragraph (4) was deleted.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

The commentary to draft article 7, as amended, was adopted.

Commentary to draft article 8 (Stateless persons and refugees)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

66. Mr. DUGARD (Special Rapporteur) read out a proposal by Mr. Matheson that the last sentence should be deleted. He concurred with that proposal.

67. Ms. ESCARAMEIA said that the paragraph had been the subject of much debate, in the course of which it had been agreed that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto no longer reflected common practice. That was the reason why the last sentence had been included in the commentary. If it were deleted, the commentary would fail to explain what constituted “internationally accepted standards”. The danger would then arise that this phrase would be understood to refer to the 1951 Convention, whereas many members of the Commission held that the numerous subsequent conventions on the subject had introduced more advanced standards. She was therefore against deletion of the last sentence.

68. After a drafting discussion in which Mr. RODRÍGUEZ CEDEÑO, Mr. KATEKA, Mr. MANSFIELD, Ms. XUE (Rapporteur), the CHAIRPERSON and Mr. CHEE took part, it was proposed that the last sentence should read: “This term emphasizes that the standards expounded in different conventions are applicable, as well as the legal rules contained in the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and other international instruments.”

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

The commentary to draft article 8, as amended, was adopted.

Commentary to draft article 9 (State of nationality of a corporation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

69. Ms. ESCARAMEIA said that, in many national jurisdictions, the capital of corporations that were profit-making enterprises with limited liability was not always represented by shares. She therefore proposed the insertion of the word “generally” before the word “represented”, for the sake of consistency with paragraph (1) of the commentary to draft article 13.

70. Mr. PELLET proposed that in the first sentence in the French version, the adjective “*anonymes*” should be deleted, because the article applied to other forms of corporations as well. In the same sentence in the French version the word “*représenté*” should be replaced with “*constitué*”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

71. Mr. GAJA, referring to the second citation of the *Barcelona Traction* case in that paragraph, noted that the Court had “stated” (in an *obiter dictum*), rather than “decided”, that international law attributed the right of diplomatic protection of a corporate entity to the State under the laws of which it was incorporated and in whose territory it had its registered office. A footnote should be added to indicate that the Court had said that other elements could also be of relevance. In the sentence citing the *Nottebohm* case, the phrase “it refused to require” was too strong; it would be more appropriate to say “did not reiterate the requirement of a genuine connection”, since the Court had examined elements akin to a genuine connection.

72. After a drafting discussion in which Mr. DUGARD (Special Rapporteur), Mr. GAJA, the CHAIRPERSON and Mr. PELLET took part, it was proposed that that sentence should read “Although it had not reiterated the requirement of a ‘genuine connection’ as applied in the *Nottebohm* case ...”. In the sentence commencing “As the laws of most States require”, it was suggested that the word “sham” should be replaced with the word “fiction”.

73. Mr. PELLET endorsed Mr. Gaja’s proposal to include a footnote after the second reference to the *Barcelona Traction* case and said that the phrase after the words “*Barcelona Traction*” should read “when it stated *inter alia* ...”, since the Court had also adopted a stance on a number of other factors.

Paragraph (3), as amended, was adopted.

Paragraph (4)

74. Mr. DUGARD, (Special Rapporteur) read out a proposal by Mr. Matheson that the second sentence of paragraph (4) should be amended to read: “However,

it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection.” He was happy to accept that proposal.

75. Mr. GAJA supported Mr. Matheson’s proposal and also suggested the deletion of the last sentence of the paragraph.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Continuous nationality of a corporation)

Paragraph (1)

76. Mr. GAJA proposed that the third sentence should be amended to state that “... corporations generally change their nationality only by being re-formed ...”, and that the last sentence should be modified to read: “The most frequent instance in which a corporation changes nationality without changing legal personality is that of State succession”, in order to allow for the possibility, which existed in private international law, of a corporation changing nationality without necessarily being reincorporated.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft article 10, as amended, was adopted.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/560, sect. I, A/CN.4/L.704)

[Agenda item 12]

REPORT OF THE PLANNING GROUP

77. Mr. GAJA (Chairperson of the Planning Group), presenting the report of the Planning Group (A/CN.4/L.704), said that the Planning Group had held three meetings. Its agenda had included the consideration of the proposed strategic framework concerning Sub-programme 3, Progressive development and codification of international law; the consideration of the report of the Working Group on the Long-term Programme of Work; the question of the Commission’s documentation; the holding of a meeting with United Nations human rights experts; and the date and place of the fifty-ninth session of the Commission.

78. With regard to the proposed strategic framework for the period 2008–2009, the Planning Group recommended that the Commission take note of Sub-programme 3 concerning the progressive development and codification of international law.

79. The Chairperson of the Working Group on the Long-term Programme of Work had presented a report to the Planning Group. After thoroughly debating that report, the Planning Group recommended that the Commission include in its long-term programme of work the five topics enumerated in paragraph 4 of the report. The consolidated list of topics recommended over the last three quinquennia was to be found in paragraph 7 of the report. Paragraph 8 acknowledged the assistance rendered by the Secretariat in the preparation of some of the papers considered by the Working Group on the Long-term Programme of Work.

80. The Planning Group’s views and recommendations on the Commission’s documentation were set out in paragraphs 9 to 14. The Planning Group had also examined the question of convening a meeting with United Nations experts in the field of human rights, including those from human rights monitoring bodies, in order to discuss issues concerning reservations to human rights treaties. An appropriate recommendation was contained in paragraph 15.

81. Lastly the Planning Group recommended that the Commission’s fifty-ninth session should be held in Geneva from 7 May to 8 June and from 9 July to 10 August 2007. Should the recommendations of the Planning Group be accepted by the Commission, they would be reproduced as chapter XIII of the Commission’s report on the work of its fifty-eighth session, subject to any necessary adjustments.

82. Mr. DUGARD said it had been past practice to refer to the question of honoraria in the Planning Group’s report. While he realized that there was little possibility of honoraria being reinstated, he felt that the Commission should place on record its dissatisfaction with the current situation.

83. Mr. VALENCIA-OSPINA drew attention to a typographical error in paragraph 2 of the English version of the report, which should refer to “paragraphs 6, 7, 8, 13 and 16 on the Report of the International Law Commission”.

84. Mr. GAJA (Chairperson of the Planning Group), supported by Mr. PELLET, said that it would not be possible to incorporate Mr. Dugard’s proposal in the report as the Planning Group had not dealt with the matter of honoraria. It was open to the Commission to raise that question when it came to adopt chapter XIII of its report.

The Commission took note of the report of the Planning Group, and of the drafting amendments recommended thereto.

The meeting rose at 1 p.m.