Summary record of the 2869th meeting

Topic: Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
2006, vol. I
individual. As Mr. Pellet had pointed out earlier in the meeting, the Mavrommatis case was also responsible for the decision not to impose on States an obligation to exercise diplomatic protection. In his own view, it had to be admitted that the Mavrommatis case was undermined by a number of institutions relating to diplomatic protection, especially the continuous nationality rule and the requirement of the exhaustion of local remedies. Moreover, it did not apply to the payment of claims, since the damages claimed by a State were calculated on the basis of the damage suffered by the individual. It might therefore be argued that the obligation on States to consult the national had become a part of customary international law. That clearly showed that the Mavrommatis case was not sacrosanct. State practice in that area was, as explained in paragraphs 96 et seq. of the report, contradictory, but the trend was towards an erosion of the State’s discretionary power to bring a claim. For all that, it could not be said that that amounted to a rule of customary international law. Under the circumstances, he proposed that the Commission, in the interest of progressive development of the law, adopt a provision on the topic, the text of which appeared in paragraph 103 of the report.

50. Mr. PELLET, referring to his earlier statement, said that he did not entirely agree with the proposed new wording of draft article 1 that appeared in paragraph 21, since it contained the words “in its own right”, which had, in fact, been accidentally omitted from the French version.

Organization of the work of the session (continued)

[Agenda item 1]

51. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources) announced that the Working Group on Shared natural resources, which was to resume its work, was composed of the following: Mr. Yamada (Special Rapporteur), Mr. Baena Soares, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Mansfield, Mr. Matheson, Mr. Operti Badan, Mr. Sreenivasa Rao and Ms. Xue, who, as Rapporteur, was a member ex officio.

The meeting rose at 1.05 p.m.

2869th MEETING

Wednesday, 3 May 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemiha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. GALICKI said that, while the flexibility and spirit of compromise displayed by the Special Rapporteur in his seventh report (A/CN.4/567) were commendable, he should resist the temptation to accede too readily to some of the opinions and views expressed by Governments on the set of draft articles on diplomatic protection adopted by the Commission on first reading at its fifty-sixth session. As to the amendments proposed by the Special Rapporteur, he personally doubted whether introducing a reference to the concept of consular assistance alongside that of diplomatic protection in draft article 1 would really help to draw a clear distinction between those two institutions. He agreed with Mr. Gaja that the term “consular assistance” required more precise definition.

2. The principal difference appeared to reside in the fact that it was an internationally recognized right of States to exercise diplomatic protection, whereas not only was it the right of States to provide consular assistance, but it was also the unquestionable right of individuals to seek, enjoy and claim such assistance from their State of nationality, a right that was guaranteed constitutionally in some countries. Yet in practice the two institutions overlapped, as the LaGrand and Avena cases had illustrated. Furthermore, the argument in paragraph 20 of the report that “[s]uch assistance is preventive in the sense that it aims to prevent the commission of an international wrong” was unconvincing, for, although the commission of an international wrong was a precondition for the operation of diplomatic protection, the commission of such an act did not preclude the possibility of rendering consular assistance to persons injured by an internationally wrongful act committed by another State. Consular assistance did not therefore seem to be exclusively preventive in nature.

3. The addition to draft article 2 of a second paragraph pursuant to which a State was under an obligation to “accept” a claim of diplomatic protection made by another State was possibly contentious, as it was unclear whether “accept” referred to the right to exercise diplomatic protection, or to the substance of the claim brought by the State exercising that right. Care should therefore be taken in the formulation of such an obligation, and the meaning, scope and legal effects of such acceptance should be precisely defined. In practice, striking a proper balance between the right of a State to advance certain claims in the interests of its nationals and the obligation of other States to accept such claims might prove difficult.

4. The suggested amendments to draft article 5 concerning continuous nationality would greatly limit a State’s right to exercise diplomatic protection and might also adversely affect the potential benefits to individuals. For example, one possible consequence of the changes

35 See footnote 7 above.
proposed by the Special Rapporteur in paragraph 47 of his report was that persons who changed their nationality between the dies a quo and the dies ad quem might be totally deprived of the right to diplomatic protection. That situation could not be justified by a wish to prevent “nationality shopping” and might affect persons acting in good faith, for example those whose nationality changed automatically as a result of marriage. The Commission should review that issue when considering the proposed new provision concerning the right of the injured national to receive compensation.

5. The term “predecessor State” which figured in the proposed new version of draft article 5 needed some explanation and definition. Hence it might be useful to include in the commentary the definition of “predecessor State” to be found in the text of the draft articles on the nationality of natural persons in relation to the succession of States, adopted by the Commission at its fifty-first session. His comments on draft article 5 also applied, mutatis mutandis, to the amended version of draft article 10.

6. Mr. GAJA said that the new definition of the local remedies rule suggested in paragraph 74 of the seventh report was rather unusual in that the injured person was not required to exhaust local remedies. The reference to the ELSI case in paragraph 72 in support of that position was, however, misleading. All that the Court’s ruling had stated was that a certain local remedy could be regarded as ineffective on the strength of the result of proceedings initiated by the receiver of ELSI. There was no reason to require the injured shareholders to exhaust a remedy that had proved to be unsuccessful in a case which was in substance parallel. The Court had found that the essence of the claim had been brought before the competent tribunals and concluded that the defendant State had not been “able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI’s trustee in bankruptcy, ought to have pursued and exhausted” (para. 63 of the decision). That conclusion made it clear that the Court's sole concern had been whether there was an effective remedy for the injured aliens. The Court had not held that local remedies could be regarded as exhausted because someone else had done so. In his opinion, draft article 14 as adopted on first reading was both more traditional and more accurate and should be retained.

7. The same was true of draft article 16 (a), because the words “available and” in the amended version were superfluous: effective redress was impossible if no remedies were available. Moreover, the alternative text proposed in paragraph 81 of the report was contradictory. On the one hand, it made the exhaustion of local remedies requirement more stringent by stipulating that a remedy should be exhausted unless it was obviously futile or manifestly ineffective, a test expounded in the Finnish Ships Arbitration, and one that had been abandoned in practice. On the other hand, it weakened the rule by stating that a forum should be reasonably available to provide effective redress, which was more or less what had been said in the original text.

8. He was strongly in favour of retaining draft article 17, because it was a useful reminder that States other than the State of nationality were entitled to put forward claims if infringements of erga omnes obligations caused injury to individuals. The article also served as a reminder that under certain treaties, especially some human rights treaties, injured individuals had direct access to remedies. The relationship between the remedies open to individuals and diplomatic protection varied according to the instrument governing those remedies. There would therefore be no basis for stating, as a general rule, that exhaustion of the remedies directly accessible to an individual at the international level was a precondition for the exercise of diplomatic protection on behalf of that individual.

9. He also preferred the text of draft article 18 adopted on first reading, which envisaged the eventuality of special treaty provisions derogating from the rules set forth in the draft articles. He was opposed to restricting the scope of that draft article to investment treaties because, although most of the multilateral or bilateral treaties containing provisions of that nature might be defined as investment treaties, there were also other treaties concerning the treatment of aliens.

10. Paragraph 2 of the new draft article 20 on the right of the injured national to receive compensation, to be found in paragraph 103 of the report, could form part of a set of recommendations indicating what action should be taken by claimant States. Further recommendations could be formulated on the role that the injured individual should play in the choice between restitution and compensation and the need for the individual’s consent in order for a settlement to become effective. He therefore advocated the use of the word “should” rather than “shall”. Furthermore, such a recommendation would reflect the growing role of the individual in international law and would make for more satisfactory practice, although arguably it already reflected the practice followed by many States.

11. Mr. DUGARD (Special Rapporteur) said that, notwithstanding the fact that he had proposed the word “should” rather than “shall” as an alternative wording of what might eventually become draft article 20, paragraph 2, the latter formulation would create an imperfect obligation of the kind contained in other treaties, rather than a recommendation. He wondered what form the recommendations envisaged by Mr. Gaja would take.

12. Mr. GAJA said that he had been under the impression that the use of the term “should” did not imply the imposition of an obligation. He would not insist on the term “recommendation”. The main body of the text could set out the existing legal rules and the contents of draft article 20 could be placed in a separate set of final provisions whose purpose would be to encourage States to follow desirable patterns of conduct.

13. Mr. DUGARD (Special Rapporteur) said that Mr. Gaja’s proposal was most helpful: the Commission might

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36 Yearbook ... 1999, vol. II (Part Two), pp. 20–21, para. 47, article 2 (Use of terms).
38 Ibid. p. 20.
be less reluctant to support a number of *de lege ferenda* provisions in the draft articles if they were to take the form of recommendations. That was true not only of his proposed draft article 20, but also of Italy’s proposed formulation of draft article 2. He asked whether Mr. Gaja would be prepared to accept such a solution with regard to the latter proposal.

14. Mr. CANDIOTI said he agreed with the substance of draft article 20 as proposed but was unhappy with the idea of establishing an imperfect obligation or recommendation in a text intended to codify legal rules. Perhaps it would be better to include such provisions in an annex or guide to practice, rather than in the main body of the text.

15. Mr. CHEE endorsed the suggestion made by Mr. Candiotti. The Commission should clearly distinguish between recommendations and guidelines. Recommendations were stronger than guidelines, but a provision in the form of an article clearly had greater force than such soft law provisions.

16. Mr. ECONOMIDES said that, pursuant to its mandate, the Commission engaged both in the codification and in the progressive development of international law; when engaging in the latter exercise, it made recommendations regarding the adoption of new rules. If, in the context of progressive development, the Commission did not wish to formulate a rule, the alternative was for it to note that a trend was emerging and invite States to follow that trend. Such recommendations could not take the form of separate rules, but must instead be consigned to the commentary.

17. An important matter of principle that had not been sufficiently discussed was whether diplomatic protection could be afforded only with the consent of the injured party. Another question of capital significance, raised by Italy and further developed by Mr. Pellet, was whether, in certain extreme cases, diplomatic protection was a duty both of the State of nationality and of third States. The possibility, raised by the Special Rapporteur in paragraph 6 of his report, of incorporating the draft articles in a future treaty on the responsibility of States for internationally wrongful acts, required careful consideration, as, albeit logical, it might not be the wisest solution.

18. Mr. PELLET said that a distinction should be drawn between the Commission’s own work and the desired outcome of that work. He disagreed with Mr. Economides: while the Commission could not make decisions, nothing prevented it from making recommendations. For example, the draft articles on reservations to treaties were basically recommendations which the General Assembly was not asked to transform into a treaty.99

19. He was a strong supporter of soft law. Recommendations were just as much a part of law as prohibitions and obligations. A rule could be soft when it was part of a soft instrument, for example a recommendation, a non-binding resolution of an international organization, or a set of guidelines; or else it could be drafted as a soft provision in a hard instrument, so that failure to respect it did not entail responsibility, although it was expected that States would give it due attention. Proposed draft article 20, paragraph 2 would be substantive soft law if it provided that the State should transfer the sum received to the national. It was not unprecedented for a treaty to contain provisions worded in the conditional, whose implementation was not absolutely obligatory, although he personally was not in favour of such an approach.

20. Mr. Gaja had introduced an element of confusion by using the word “recommendation”. Recommendations could of course be included in a treaty, but, for his own part, he was firmly opposed to asking the General Assembly to adopt both hard and soft law in separate instruments: first, because the draft articles on diplomatic protection should be accorded the same fate as the draft articles on responsibility of States for internationally wrongful acts,40 which were currently soft law but might in the fullness of time become hard law in the form of a treaty. By making a formal differentiation between the text on diplomatic protection and that on responsibility of States, the Commission would complicate matters unnecessarily. Secondly, it was rather late in the day to start thinking about soft rules, now that the draft articles were being considered on second reading. Thirdly, there was a danger that the formal device of a recommendation would serve as a convenient place of exile to which all the more daring or radical provisions could be banished. The result would be a dry and uninteresting text, rather than one committed to progressive development.

21. Ms. ESCARAMEIA said she agreed with many of Mr. Pellet’s remarks and took strong issue with Mr. Economides’s contention that the progressive development of international law must necessarily lead to recommendations, while codification would result in hard law in the form of articles. That distinction had never been set out in any document, nor indeed should it be. Any number of conventions had developed international law. In point of fact, the Charter of the United Nations and the Commission’s own Statute described the Commission’s tasks as “the progressive development of international law and its codification”, in that order. Unfortunately, the Commission had nearly always been content to codify rules that dated back a century or more, to the detriment of its work. States themselves had urged the Commission to take a more progressive approach to the topic of diplomatic protection: some of the draft articles, such as article 8 on stateless persons and refugees and article 19 on ships’ crews, had even been acceptable to States but not to the Commission. She shared Mr. Pellet’s concern that all the more interesting provisions would be relegated to the status of recommendations, a course of action to which she was totally opposed. The Commission’s approach to the topic had been too conservative.

With regard to proposed draft article 20, the Special Rapporteur and many members actually favoured the wording “shall” rather than “should”, the latter formulation being merely a bracketed alternative. The fact that the Commission was developing international law did not mean that the product must invariably take the form of recommendations; it should also sometimes take the form of binding rules.


40 *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.
22. Mr. KEMICHÄ said that, like Mr. Pellet, he was opposed to the formulation of a separate recommendation. He favoured the approach taken in proposed draft article 20 as currently worded, and the use of the word “should”, because a provision incorporated in the body of the text would carry more weight with States than a separate recommendation. If recommendations were added to a set of 19 draft articles, the result would be a hybrid text which might be less well received.

23. Mr. GAJA said that he had never suggested removing some of the provisions relating to progressive development from the draft articles and placing them in a separate text. His own remarks had related to proposed draft article 20, which the Commission might decide to construe as a firm obligation. In that case, it would not be a recommendation. However, substantive soft law was not so very different from a recommendation: the Commission was not setting out a binding rule for States, but was suggesting that States should take a particular course of action. His concern was that while proposed draft article 20, paragraph 2 contained an important statement, whether couched in the form of an obligation or as a soft law recommendation, other questions too deserved consideration, which it might not be too late to include, regardless of whether binding language was used. One such question was whether the consent of the injured person was needed for diplomatic protection to be exercised. Whether such soft law indications to States should be included in the text of the draft articles themselves or in an annex was not the main issue.

24. Mr. MONTAZ said he agreed with Mr. Economides’ equation of a recommendation with the progressive development of international law, provided that the recommendation figured in the draft articles. If it was placed in the commentary, it might, at best, serve as a means of interpreting the rule contained in the provision. However, it would be unfortunate if a substantive recommendation were to be consigned to the commentary.

25. Mr. MATHESON said that one encouraging aspect of the Commission’s recent activities was that it had been able to adopt different forms of action to meet the specific requirements of each of the topics concerned. The draft articles on diplomatic protection contained traditional hard law, whereas those on international liability contained recommendations. The draft articles on reservations to treaties contained a guide to practice, and the topic of fragmentation of international law would result in an expository study. All of those products and approaches were valid. The Commission should not confine itself to one particular hard and fast approach. Instead, it should decide what made the most sense for each particular topic. He was in favour of flexibility and opposed to rigidity.

26. Mr. KOLODKIN said he was not an advocate of soft law, which was useful in interpretation, but was not law as such. To produce a separate document containing recommendations would be a perilous course of action. While he was not opposed in principle to drafting recommendations in addition to the draft articles, the Commission should not try to place elements of progressive development in a separate text. It was worth noting in passing that if the recommendations were consigned to the commentary, they would carry less weight than they would if they were included in a separate document.

27. Mr. DUGARD (Special Rapporteur) said that the issue was an important one that he would like to see resolved at the current meeting. Mr. Economides had been right to refer to paragraph 6 of the report, and to the need to decide on the form that the draft articles were to take. Personally, he was in favour of a set of draft articles which constituted an exercise in codification, with some progressive development. Whether the Commission should recommend that the draft articles take the form of a treaty and include provisions on dispute settlement was a matter that remained to be considered. As he understood it, that question was normally taken up after the draft articles had been adopted, but he saw no reason why the Commission should not give it some preliminary consideration.

28. With regard to the precedent of the draft articles on responsibility of States, members would recall that the main reason the Commission had recommended that they should not be hastily referred to an international conference for adoption as an international convention was that a number of the more radical proposals, in particular draft articles 40, 41, 48 and 54, had constituted an exercise in progressive development. The draft articles on diplomatic protection, including his proposed article 20, contained no such radical proposals. Thus, the Commission had already shown itself willing to engage innovatively in the progressive development of international law. He agreed entirely with Mr. Pellet and Ms. Escarameia that it would be most undesirable to relegate all such innovative provisions to an annex. Instead, the Commission must bear in mind that it was drafting a set of articles that would take the form of hard law and, when confronted with an innovative proposal, should consider whether to include it by way of progressive development in what was essentially an exercise in hard law. As some members had noted, many States had indicated a willingness to see the Commission adopt a more progressive approach than it had done in the past. That must be taken into account when considering the more innovative proposals. Draft articles 7 and 8, for example, had been widely accepted by States. None of the proposals made were as innovative as those that had ultimately been included in the draft articles on responsibility of States, and there was no reason why they should not be included as hard law provisions in a text on diplomatic protection.

29. The CHAIRPERSON, speaking in his capacity as a member of the Commission, welcomed the Special Rapporteur’s proposed draft article 20, paragraph 2, concerning the fate of the sum received by the State in connection with the exercise of diplomatic protection. He was opposed to formulating two separate texts merely because progressive development was involved. The question should be dealt with in the main body of the text.

41 Ibid., pp. 24–25, paras. 61–67.
which, as diplomatic protection was a discretionary right of the State, should read: “a State … may transfer that sum”. If, however, the Commission wanted to stress the need to protect the rights of the victim, then the text should read: “a State … shall transfer that sum”. The Drafting Committee should be given guidance on that point.

The meeting rose at 11.15 a.m.

2870th MEETING

Thursday, 4 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escaramea, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ECONOMIDES thanked the Special Rapporteur for the quality of his work, which had greatly facilitated the Commission’s task during second reading.

2. In paragraph 6 of his report, the Special Rapporteur stressed that the fate of the draft articles on diplomatic protection was closely bound up with that of the draft articles on State responsibility for internationally wrongful acts.42 It was true that the two subjects had special links, as the essential condition for the exercise of diplomatic protection was the commission by a State of an internationally wrongful act. However, diplomatic protection was also closely bound up with human rights—not all human rights, but those of individuals abroad who had suffered injury to themselves or to their property as the result of the unlawful act of a State. Traditionally, diplomatic protection also had fairly close ties to the settlement of disputes between States. For all those reasons, diplomatic protection was a sufficiently independent subject that had its own rules and could be addressed separately if need be. The question posed in paragraph 6 was thus important and merited in-depth consideration. In any event, he would not agree to the proposal to link the draft articles on diplomatic protection to the draft articles on State responsibility unless the Commission recommended in the strongest possible terms that the two drafts should take the form of an international treaty.

3. In draft article 1 (Definition and scope), the term “diplomatic action” was not defined, whereas elsewhere in the draft articles other expressions were used, such as “international claim” (arts. 14 and 15) or “claim of diplomatic protection” (art. 2, para. 2). Moreover, the wording of draft article 1 might give the impression that diplomatic action was regarded as a means of peaceful settlement, which was not true, because diplomatic action was always a unilateral act. The Drafting Committee should therefore review the wording of draft article 1, and of the above-mentioned term in particular. The proposal concerning a paragraph 2 that would cover consular assistance was superfluous, as there could be no confusion between diplomatic protection, which occurred at the level of the international responsibility of the State, and consular assistance, which was a daily, ongoing duty that fell under consular law, and in particular consular functions, which were defined in detail in bilateral and regional treaties and, albeit more succinctly, in the Vienna Convention on Consular Relations. That distinction should at least be made clear in the commentary.

4. Paragraph 2 proposed by the Special Rapporteur for draft article 2 (Right to exercise diplomatic protection) was a sensitive provision which it would be wiser not to include in the draft articles. It was unnecessary, because it was implicit for all States that respected the principle of good faith. If the principle was not respected, who would decide whether a request for diplomatic protection was formulated in conformity with the draft articles? No provision had been made for an appropriate mechanism that could settle such disputes. As for the proposals by Italy and by Mr. Pellet—which went much further—to make diplomatic protection obligatory, not only for the State of nationality but also for other States authorized to act in defence of the collective interest if individuals abroad were victims of grave violations of peremptory norms of general international law (jus cogens), they were certainly commendable and should be retained. However, in the current state of international law, no one could guarantee that such a progressive provision would not be used improperly to exert undue pressure on weak States. Thus while he was in agreement with the substance, he believed that it was premature to proceed along that path, which entailed obvious risks.

5. The rule of continuous nationality, the subject of draft article 5, was perhaps not logical in legal terms, but it was wise practically and politically. It was in fact deeply rooted in doctrine. He was not opposed to the rule being worded even more strictly to include the entire critical period from the time of the injury until the official presentation of the claim and even until the final resolution of the claim through an award or otherwise. However, should any changes of nationality occur between the date of the presentation of the claim and the date of its final resolution, provision should be made for a general exception on behalf of all persons who had involuntarily changed nationality for a reason unrelated to the claim. Such persons must not be deprived of the benefit of diplomatic protection. He agreed with Mr. Galicki that the expression “successor State” should be explained, preferably in the commentary. He was also in favour of retaining draft article 5, paragraph 3.

42 Ibid., para. 76.