

Document:-  
**A/CN.4/SR.2520**

**Summary record of the 2520th meeting**

Topic:  
**Diplomatic protection**

Extract from the Yearbook of the International Law Commission:-  
**1998, vol. I**

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11. In conclusion, he thanked the Secretariat for having organized two meetings to commemorate the Commission's fiftieth anniversary. He hoped that the seminar to be held on 21 and 22 April 1998 would be as much of a success as the United Nations Colloquium on Progressive Development and Codification of International Law, held in New York on 28 and 29 October 1997.<sup>6</sup> That Colloquium had opened up many avenues for future reflection that should be explored by the Planning Group at the fiftieth session.

12. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the Secretary-General had not been able to open the Colloquium in New York or to meet with the Chairman of the Commission because of his very busy schedule and certainly not because of a lack of interest in international law. The Secretary-General had attended one of the Commission's meetings during its forty-ninth session<sup>7</sup> and the importance of international law had been stressed in two parts of his report on renewing the United Nations, particularly in connection with the establishment of an international criminal court, a project which had originated with the Commission. As the Secretary-General had pointed out in his letter to the Chairman of the Commission, dated 9 December 1997, the report dealt with reforms urgently required within the Secretariat to enable the Organization better to fulfil its functions. The machinery of international law, which was constantly adapting to the needs of the international community, did not, in comparison with other areas, seem to require immediate restructuring. The development of international law was a continuous dialectical process being carried out in a number of forums, including the Commission itself, which had an important role to play in any plans for future reform in that field. The diligence with which the Commission had examined its methods of work and work programme augured well for the future.

#### Election of officers

*Mr. Baena Soares was elected Chairman by acclamation.*

*Mr. Baena Soares took the Chair.*

13. The CHAIRMAN thanked the members of the Commission for the honour they had done him in electing him Chairman and said he hoped that he would prove worthy of the confidence placed in him. He would try to fulfil his functions in a spirit of openness and to continue with the innovations which had been introduced by the outgoing Chairman and that had improved the Commission's working methods and promoted an open exchange of views.

14. He suggested that the meeting should be suspended in order to give members more time for consultations on the membership of the Bureau.

<sup>6</sup> See *Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law, Making Better International Law: the International Law Commission at 50* (United Nations publication, Sales No. E/F.98.V.5).

<sup>7</sup> See *Yearbook . . . 1997*, vol. I, 2506th meeting, pp. 233-234.

*The meeting was suspended at 3.45 p.m. and resumed at 4 p.m.*

*Mr. Lukashuk was elected first Vice-Chairman by acclamation.*

*Mr. Goco was elected second Vice-Chairman by acclamation.*

*Mr. Simma was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Dugard was elected Rapporteur by acclamation.*

#### Adoption of the agenda (A/CN.4/485)

15. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/485), on the understanding that that decision in no way prejudged the order in which the various items would be considered.

16. Mr. MIKULKA pointed out that the wording of agenda item 5 corresponded to the initial wording of the topic for which he was Special Rapporteur. That wording should be replaced by the title adopted at the forty-eighth session, namely, "Nationality in relation to the succession of States".<sup>8</sup>

*The agenda, as amended, was adopted.*

#### Organization of work of the session

[Agenda item 1]

17. The CHAIRMAN suggested that, in conformity with established practice, the Enlarged Bureau should meet immediately to discuss the organization of work of the session.

*The meeting rose at 4.15 p.m.*

<sup>8</sup> See *Yearbook . . . 1996*, vol. II (Part Two), p. 76, document A/51/10, para. 88.

## 2520th MEETING

*Tuesday, 28 April 1998, at 10.05 a.m.*

*Chairman: Mr. João BAENA SOARES*

*Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-*

Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

**Diplomatic protection (A/CN.4/483, sect. E, A/CN.4/484,<sup>1</sup> A/CN.4/L.553)**

[Agenda item 6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN said that, as mentioned in paragraph 233 of the report of the Commission to the General Assembly on the work of its forty-ninth session,<sup>2</sup> the first part of the current session was to be devoted to discussion of the various reports, whereas the second part, to be held in New York, was to be used for the adoption of draft articles with commentaries and of the report of the Commission to the General Assembly on the work of its fiftieth session. Accordingly, he invited the Commission to begin its consideration of the topic of diplomatic protection and suggested that the preliminary report on the topic (A/CN.4/484) should be discussed on an issue-by-issue basis, the procedure that had been used to good effect at the previous session. Members should also consider what follow-up actions the Commission could take on the topic.

2. The Commission might wish to consider the advisability of reconvening the Working Group on diplomatic protection established at its forty-ninth session<sup>3</sup> after the general discussion, for the purpose of assisting the Special Rapporteur in focusing on the elements to be covered in his second report.

3. Mr. BENNOUNA (Special Rapporteur) said that, in appointing him Special Rapporteur, the Commission had recommended that he submit a preliminary report at the current session and decided that it would endeavour to complete consideration of the topic of diplomatic protection on first reading by the end of the quinquennium. The latter objective could well be rediscussed. The preliminaries were essential for the successful outcome of any human endeavour. Hence a preliminary report was a stepping stone to the in-depth consideration of the topic and the possible incorporation in a treaty or other instrument of what had emerged as established practice. From the very outset of the Working Group's consideration of the topic,<sup>4</sup> members had argued that preliminary analysis was indispensable to any comprehensive study of diplomatic protection. Mr. Lukashuk, for example, had taken the view that the Special Rapporteur would have to consider the very notion of diplomatic protection, which was increasingly geared in modern law to the rights of the individual; because a right to diplomatic protection did

exist, Mr. Lukashuk did not believe that diplomatic protection was based on jurisdiction *ratione personae* over the individual. Those views had been supported by a number of other members of the Commission.

4. Mr. Pellet had drawn attention to the complete lack of symmetry in diplomatic protection. A State whose national had been injured could exercise its diplomatic protection against the State causing the harm, but the reverse was not true: a State that had suffered harm as a result of an individual could not complain to the State of which that person was a national. Mr. Pellet had further suggested that positions of political and economic strength explained why diplomatic protection was a one-way institution. Mr. Thiam had added that multinational corporations were often more powerful than States.

5. Mr. Pellet had also said that the fact that individuals were nowadays increasingly recognized as subjects of international law was a dimension that would necessarily have to be taken into account in the Special Rapporteur's preliminary report. Taking the idea still further, Mr. Ferrari Bravo had opined that the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case had been based on what was at the current time an outdated theory under which the State had been regarded as "master" of its citizens. He himself had pointed out that major developments in recent years meant that the topic had to be viewed from a new and "fresher" angle.

6. He had thought that, in a preliminary report, he should lay out the various options available, rather than indicate his own concept of the topic. He remained entirely open-minded, but it did seem clear that the traditional view of diplomatic protection was no longer satisfactory, unless one was to cling to the iron-clad conservatism of which the Commission had sometimes been accused.

7. The traditional view could be adapted to modern-day reality in a variety of ways, and a single legal construct was not necessarily the only solution. The Commission had already wrestled with the distinction between primary and secondary rules, and the Working Group had suggested in its report that the topic be confined to secondary rules of international law, that is to say, the consequences of an internationally wrongful act (by commission or omission) which had caused an indirect injury to the State usually because of injury to its nationals.<sup>5</sup> The Working Group had likewise indicated that the topic would not address the specific content of the international legal obligation that had been violated.

8. Mr. Pambou-Tchivounda and Mr. Simma had warned, however, that the "clean hands" rule and exhaustion of local remedies would mean venturing into the field of primary rules. It might also be necessary to consider general categories of obligations; since the topic of State responsibility would require a similar effort, the work on the two topics should perhaps be coordinated.

9. In 1996, ILA had set up a Committee on Diplomatic Protection of Persons and Property that was grappling with the same questions as the Commission was about to

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> *Yearbook . . . 1997*, vol. II (Part Two), p. 71.

<sup>3</sup> *Ibid.*, p. 60, para. 169.

<sup>4</sup> For the report of the Working Group, *ibid.*, pp. 60-62, paras. 172-189.

<sup>5</sup> *Ibid.*, p. 61, para. 180.

consider. The Committee's Chairman had written to him in October 1997 to indicate that the work would focus on how the traditional principles of international law relating to diplomatic protection had changed in contemporary practice. Specifically, the Committee would look into what acts by a State constituted espousal, whether a State could exercise diplomatic protection even if its nationals had declined espousal, whether espousal deprived claimants of the right to pursue claims of their own accord and whether individual claimants should be able to opt out of group or lump sum claims. Indeed, the Committee had raised a number of questions that all came back to the basic one: what was the nature of diplomatic protection and how should it be defined?

10. It seemed inevitable that the Commission would have to come up with a response, and two approaches could be envisaged. The first, a Latin or Cartesian one, would be to work out a definition and only then determine the course of future work on the topic. The second approach, which might be called Anglo-Saxon or empirical, would be to leave the definition wide open at the outset and to develop it out of a study of actual practice with a view to codification of the topic. Both approaches had their merits and their drawbacks, but what seemed essential under any circumstances was to make a critical analysis of the traditional view of diplomatic protection in order to furnish criteria for evaluating contemporary practice. He himself thought there was a constant dialectical relationship between theory and practice and that there was nothing to prevent experts in the practice of international law from playing with theories occasionally.

11. In submitting the report of the Commission on the work of its forty-ninth session to the General Assembly, the then Chairman had emphasized the need for preliminary evaluation of the nature of diplomatic protection, including whether it was a right of an individual or might be exercised only at the discretion of a State, and had added that "the question might even be raised as to whether the legal fiction on which diplomatic protection was based was still valid at the end of the twentieth century".<sup>6</sup> He had thereby issued a challenge: to dust off and renovate the traditional conception of diplomatic protection as it had been taught in law schools for generations.

12. Some might say it was a waste of time to question the existence of diplomatic protection: the principle that any harm done to a member of a group or tribe was an attack on the tribal chieftain or head was immutable. The law was full of fictions and would make an excellent novel if redrafted as one. Like the novel, the law transformed an aspect of reality into a different element. The legal or juridical person, for example, was one of the most celebrated of legal fictions. ICJ, in its judgment in the *Barcelona Traction* case (see page 39), said that the law had recognized that the independent existence of the legal entity could not be treated as an absolute and that "lifting the corporate veil" or "disregarding the legal entity" had been found justified and equitable in certain circumstances. The Court had thus exploded the fiction sur-

rounding the concept of the corporate entity (*société anonyme*), showing that it was possible, and acceptable to get back to the underlying reality and that legal fictions did not have to be deemed immutable. They were invented to correspond to certain needs, but reality got its revenge when they were readapted to take better account of contemporary situations.

13. That was certainly true of the legal fiction of diplomatic protection. International law had progressed considerably since the mid-nineteenth century. The dualist approach to international law that had underpinned the notion of diplomatic protection was no longer in vogue. International norms were increasingly being aimed directly at individuals, and that was a positive development, as it gave individuals increasingly direct access to the courts to defend their rights at the international level. States and international as well as domestic courts were increasingly obliged to take account of the situation of individuals in elaborating or implementing rules of international law. Hence there was greater continuity between the international and domestic legal arenas, even though each retained its own specific character.

14. The reasons for inventing diplomatic protection as a legal fiction—to justify the intervention of a State on behalf of its nationals—had gradually disappeared. When the veil of legal fiction was lifted, the rights of the individual were increasingly seen to be replacing the rights of the State. The Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter referred to as the "1930 Hague Convention") had compounded the fiction of diplomatic protection by propounding the theory that the State did not bear responsibility for any individual who held dual nationality. Today, however, the fact that States were responsible at the international level for their treatment of their nationals was generally acknowledged. That was true even if an individual held dual nationality, as long as the criterion of effective nationality was met. In the decision in case A/18,<sup>7</sup> the Iran-United States Claims Tribunal had indicated that the trend towards modification of the 1930 Hague Convention rule was scarcely surprising as it was consistent with the contemporaneous development of international law to accord legal protection to individuals even against the State of which they were nationals.

15. Why accept that foreigners could claim respect for the rules of international law and obtain the protection of their own State yet deny such protection to nationals affected by the same violations of international law? ICJ had taken a first step in that direction by recognizing the possibility for all States to act on behalf of an individual whose fundamental rights had been violated (*Barcelona Traction* case). And it was at the current time acknowledged that a State could act internationally to protect certain universal rights of the individual without having to prove any link of nationality.

16. The respect for the sovereignty of the host State which had inspired the 1930 Hague Convention also jus-

<sup>6</sup> *Official Records of the General Assembly, Fifty-second Session, Sixth Committee, 22nd meeting, para. 60.*

<sup>7</sup> Iran-United States, Case No. A/18, decision of 6 April 1984, *Iran-United States Claims Tribunal Reports* (Grotius, Cambridge, U.K., 1985), vol. 5, p. 251.

tified the rule of exhaustion of local remedies. In its draft on State responsibility<sup>8</sup> the Commission had included article 22 (Exhaustion of local remedies), proceeding on the basis that the rule was a substantive and not a procedural one and that the violation of the international obligation and the State's international responsibility came into play only on completion of the available internal procedures. The Commission might also note the effects of the dualism which sought to substantiate the idea that the application of domestic law was a matter for internal procedures and that the application of international law was a matter for international ones. At the Seminar on International Law, held at Geneva on 21 and 22 April 1998, to celebrate the fiftieth anniversary of the Commission, Mr. Dominicé had drawn attention to the fact that the initial act could of itself constitute a violation of the international obligation when, in proceedings before a national court, an individual invoked international rules, asserting his own rights under international law from the outset. It was only on completion of the internal procedures that the case was taken over by the State of nationality. At that stage the question arose of whether the complainant State was acting to secure respect for a right of its own or as the representative or agent of its national when it invoked the international responsibility of the host State. That was the main question to be discussed: it was not a philosophical but a legal and practical question. There was in principle no obstacle to arguing that, in espousing the case of its national, a State was enforcing his right under the rules of international law addressed to him.

17. Taken to its extreme, the legal fiction of diplomatic protection led to the conclusion that the reparation was due to the State even if it was the damage suffered by the individual which provided the reparation measure (*Chorzów Factory* case (see page 28)). Increasing recognition was being given to the right of an individual to claim compensation from his national State before the domestic courts and of his right to contest the conditions of the distribution of the compensation if it was shared between several parties. Domestic case law tended to give precedence to the reality of the harm suffered by the individual over the fiction of the damage to the State. There was always that interaction.

18. The Commission could therefore start out from the assumption that diplomatic protection was a discretionary power of the State to bring international proceedings, not necessarily to assert its own right but to secure observance of the international rules operating in favour of its nationals, and to invoke the international responsibility of the host State. That assumption should be debated by the Commission with a view to advancing its understanding of the legal nature of diplomatic protection; in the light of that discussion he would then prepare his report on the substance of the topic for next year. The Commission might be reluctant to rid itself of the traditional concept of diplomatic protection, but it must acknowledge that that concept had been largely overtaken by recent developments in international law on the rights of the human per-

son and that it was the Special Rapporteur's duty to take due account of that point in his further work on the topic.

19. The fiction of diplomatic protection as the application of a right of the State had certainly played a positive role at a time when it had represented the only means of advancing the case of an individual in the international sphere and invoking the international responsibility of the host State in its relations with that individual. Clearly, that situation no longer applied, and rigid maintenance of the fiction might be perceived as retrograde or even reactionary in the light of all the implications of the notion of globalization.

20. In his preliminary report he had raised the question of the relationship between the topic of diplomatic protection and the topic of international responsibility, seeking clarification of the restriction of the Commission's investigations to secondary rules of international law. He had not meant that the Commission must choose between primary and secondary rules. Diplomatic protection certainly fell in the category of secondary rules but it thus prompted the question of the significance of secondary rules in relation to primary rules. When analysing the underlying law (questions of nationality and the "clean hands" rule) the Commission would necessarily come to rely on the categories of primary rules in order to draw some conclusions on the question of diplomatic protection.

21. Mr. BROWNLIE said that he wished to make it clear that he was not unfriendly to human rights concepts and institutions. His problem was that he was burdened by the experience of working for Governments and for individuals, and even tribes, seeking to use human rights principles and institutions in practice. The polarity was not between the conservative and the liberal view; the problem was simply one of how things worked.

22. The Special Rapporteur was clearly attached to the trends of thought exhibited by the Chairman of the ILA Committee on Diplomatic Protection of Persons and Property and others which sought to assimilate the institution of diplomatic protection and principles of human rights. However, assimilation was not a partnership but a one-way street, and the Commission might end up on that street if it marginalized the system of diplomatic protection.

23. The human rights system worked in a similar way to the principles of diplomatic protection: it was a condition of admissibility that the claimant should exhaust any available local remedies, and States had the discretionary power of espousing a claim on behalf of an individual or corporation. The practice of the European Commission of Human Rights was very similar: there had been important cases of principle in which an individual had decided to withdraw his claim but the European Commission had declined to treat the claim as withdrawn because there was an objective interest in maintaining the standards of the public order of Europe. The Commission should therefore be careful not to adopt false polarities between human rights and diplomatic protection. It should also be noted that, even in Europe, the protection of human rights was very patchy. There was no point in marginalizing the system of diplomatic protection when no effective substi-

<sup>8</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

tute was yet available. The practical way forward was to keep the various vehicles in play.

24. His main concern in commenting on the Special Rapporteur's views related to the working method. Theories and concepts such as the distinction between primary and secondary rules could of course be discussed, but it would not be helpful, before addressing the institutions and rules of diplomatic protection, to insist on a prior phase of theoretical debate as to whether, for example, diplomatic protection involved a legal fiction. Such points could be debated as they came up in specific contexts. The Commission was not an academy: its task was a practical one. He therefore favoured going along with the report of the Working Group on diplomatic protection at the forty-ninth session. The broad meaning of diplomatic protection was clear: the important issues were the admissibility of claims and the law relating to the prior conditions which had to be satisfied before claims were made. The claims themselves were part of the substantive law of State responsibility, treaties, unilateral acts, and so on.

25. He could agree that the Commission was dealing with secondary rules. It would certainly cause confusion if it pretended otherwise, but the distinction between primary and secondary rules should not be used as an absolute test. Classification of a rule as primary or secondary would depend on the nature of the issue on a particular occasion. Problems of classification did exist. However, the question was not of overlap but of a double function of admissibility and merit with respect, for example, to the "clean hands" rule, certain issues of nationality, and the whole area of acquiescence and delay.

26. He could not understand why a legal interest on the part of a State in the fate of its nationals involved a legal fiction. And there was nothing eccentric in the notion that a tribe might have such an interest. The Commission should avoid trying to sound too fashionable.

27. Diplomatic protection was of course a construction in the same sense as the concepts of possession, ownership and marriage were constructions. The basis for the prior exhaustion of local remedies was empirical, and it was arguable that there was an implied risk principle which meant that there was no need to exhaust local remedies in the absence of any prior voluntary connection with the jurisdiction concerned. That had been the argument advanced by Israel in its case against Bulgaria following the shooting down of an Israeli civil airliner: the individual victims did not have a duty to exhaust local remedies when no prior voluntary connection with the jurisdiction of Bulgaria existed.<sup>9</sup> It was not a legal fiction but a perfectly good piece of policy reasoning.

28. Mr. AL-KHASAWNEH said that he was not persuaded by Mr. Brownlie's point regarding legal fiction. Most of the examples cited in the preliminary report were part and parcel of legal, and indeed human, reasoning; there was nothing retrograde or eccentric about them. Nor were they confined to the nineteenth century, if he had understood correctly. As Ulpian, the Roman jurist, had stated: for the purposes of the law, certain cities and municipalities had to be treated as minors. The whole idea

of trust, and of the relationship of the king to his kingdom, was based on that analogy. Similarly, in medieval times, King Henry VIII of England had declared: *Rex in regnum sui est imperator*—a statement that had had many implications for the development of the law. Thus, it seemed to him that there was far more reality to the matter than had been suggested.

29. Mr. ECONOMIDES said it was apparent from paragraphs 33 to 44 of the preliminary report that the institution of diplomatic protection had been losing ground for some time; that was because of the impressive development of human rights, particularly in Europe. In many cases, an individual could at the current time himself defend those rights at the international level without having to seek the intervention of his own State. The codification of diplomatic protection should, however, probably have taken place in the context of State responsibility and not in an autonomous manner. No doubt the Commission would revert to the point later.

30. The Commission should not concern itself with the question of the fiction on which, according to the Special Rapporteur, the institution of diplomatic protection rested. Regardless of how it was called—fiction, novation, substitution, what was involved was a theoretical approach which was not relevant to the normative development of the subject. The main question, as the Special Rapporteur had rightly emphasized, was who held the right exercised by way of diplomatic protection—the State of nationality or the injured victims of that State? Clearly, the answer must always be the State; and in principle its powers in that regard were discretionary. Diplomatic protection had always been a sovereign prerogative of the State as a subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War to indemnify for property that had been nationalized, in particular by the former Communist States. Nowadays, of course, the individual could be a subject of international law and so could submit an international claim himself. In such cases, diplomatic protection no longer had any *raison d'être*. But when an individual could not be a subject of international law—still a frequent occurrence in contemporary practice—diplomatic protection could be very useful. Every effort should, therefore, be made not to marginalize the institution.

31. He agreed that the distinction between primary and secondary rules should be dealt with in a flexible way. The Commission should concern itself more with the substance of the matter and less with certain artificial distinctions. The rule of the exhaustion of local remedies, with its traditional exceptions, along with the other conditions for the exercise of diplomatic protection, in particular concerning the nationality of the claimant, were fundamental to diplomatic protection. He asked whether the Special Rapporteur therefore planned to deal with those questions in his second report. Undoubtedly, there was room for progressively developing and significantly modernizing the law governing diplomatic protection. Even if the law of the State was taken as the starting point, it should be possible, with a view to progressive development of the law, to enhance the place of the individual in the context of diplomatic protection, particularly where indemnification was concerned.

<sup>9</sup> *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, at pp. 531-532.

32. The title of the draft could perhaps be made more precise, but that could be done later in the light of the draft to be prepared.

33. The time had come to extend diplomatic protection to the nationals of a State who suffered damage, not while they were abroad but while they were in their own State, as a result of an internationally wrongful act caused by a foreign diplomatic mission or the officials of such a mission who enjoyed jurisdictional immunity and, consequently, could not be brought before the local courts. There was no reason why a State which protected its nationals when they were injured abroad as a result of a violation of international law in those circumstances should not do likewise if they were injured when resident on the national territory. That was a new and important point the Commission would do well to consider.

34. Mr. LUKASHUK said that the preliminary report dealt with an issue that was at once complex and of great practical significance for the protection of human rights. While he agreed that the institution of diplomatic protection would play an important role for years to come in ensuring respect for those rights, certain points in the report raised doubts in his mind.

35. Given the complexity of the issue, it would be inappropriate to burden the subject with theoretical concepts. For instance, the question of recognizing that the individual had the status of a subject of international law was highly contentious. Hence there was little point in raising it in that particular context. It would be better to adhere to the practice—particularly the judicial practice—whereby the individual was treated as a beneficiary of international law. A statement by Scelle,<sup>10</sup> to which the Special Rapporteur made reference in his preliminary report, was not altogether convincing for, as was well known, Scelle had gone against the general trend in rejecting the idea that the State could have the status of a subject of international law and in opining that only an individual could enjoy that status. He therefore agreed that there was no justification at the current time for completely rejecting the traditional points of view as reflected in the decision in the *Mavrommatis Palestine Concessions* case, much of which remained valid.

36. The Special Rapporteur was right, however, to draw attention to certain inadequacies in the traditional views, mainly that the State regarded its right to diplomatic protection as a matter of a discretionary power, the individual not having any right to diplomatic protection as such. The Commission might wish to give further consideration to that problem.

37. He was somewhat concerned about the Special Rapporteur's proposal that the individual should renounce the right to protect his own property. It was hard to imagine how such an idea could work in practice, particularly when it came to foreign investment. The tendency was, rather, to increase the safeguards for foreign investment, as attested by the creation of ICSID, which the Special Rapporteur saw as justification for considering that for-

ign investors had international legal personality. But investment disputes had long been settled by international commercial arbitration, and no one had ever suggested that an individual who submitted a dispute to such arbitration thereby acquired international legal personality.

38. Further, in paragraph 50 of his preliminary report, the Special Rapporteur asked whether in taking such an approach the State was enforcing its own right or whether it was simply the agent or representative of its national who has a legally protected interest at the national level and thus a right. That posed a dilemma which should, however, be resolved not by contraposition but rather by harmonization of the rights of the State and of the individual. Needless to say, one of the main rights of States was the right to protect the rights of its citizens, but it was a right that should not be exercised in an arbitrary manner, and it should be regulated by both domestic and international law.

39. The right to diplomatic protection was enshrined in many of the new constitutions as a right of the individual. At the international level, it should be deemed to be a fundamental human right and appropriate mechanisms should be created to ensure its implementation.

40. Positing a link between diplomatic protection and international responsibility, the Special Rapporteur justified his position by saying that the Commission's first discussions on the topic of international responsibility had focused on the responsibility of States for damage to the person and property of aliens. But international responsibility was still only a subject for discussion; it was not yet an established branch of international law. Only at the turn of the century had people in France and Italy started to write about responsibility for damage caused to foreign persons and foreign property. The codification efforts of the League of Nations had considered the question in the same narrow context. The same had been true of the Commission's first efforts: only later had it decided to examine international responsibility in general.

41. He agreed entirely on the need to envisage both primary and secondary rules. On the whole the preliminary report paved the way for the successful continuation of the Special Rapporteur's work in accordance with the established timetable.

42. Mr. HAFNER said that Mr. Economides' last point was open to many interpretations. It would assist the Commission in its further work if the matter could be further clarified with reference to specific cases.

43. Mr. ECONOMIDES said that he had wished to raise the issue of victims of violations of international law which took place on the territory of their State of nationality, since diplomatic protection applied to damage suffered by nationals of a State who lived abroad. Where such violations were committed on the territory of one State by another State or its agents, which enjoyed jurisdictional immunity, the nationals of the former State had no legal redress in their own courts. That position might arise, for instance, if a diplomatic mission or its diplomatic or consular agents caused harm to a national of the host State. The State should not remain indifferent to the lawful claims of its own nationals for damage arising out of violations of international law. Rather, it should seek to

<sup>10</sup> G. Scelle, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1933-IV* (Paris, Sirey, 1934), vol. 46, at p. 661.

satisfy such claims by exercising diplomatic protection. In his view, there was a perfect symmetry between diplomatic protection in the classical sense and damage caused on the territory of the State of nationality. That point merited the Commission's consideration.

44. Mr. PAMBOU-TCHIVOUNDA said the main point, as he saw it, was to decide whether the question raised by Mr. Economides fell within the context of diplomatic protection proper or within the law of international responsibility for wrongful acts. At first sight, the former might appear to be the case but, on reflection, the question arose whether an act committed by a diplomatic agent on the territory of another State in violation of international law, but in the course of that agent's official duties, might not be attributable to the State he represented.

45. Mr. SIMMA said there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law. Theoretical debate was all well and good at the outset of consideration of a topic, but the time had come to forget the preliminaries and get down to business.

46. While the concept of "a fiction of law" was referred to only occasionally in the preliminary report, everything in the Special Rapporteur's oral presentation of the report had turned on that concept. In line with the definition of fiction to be found in the *Dictionnaire Robert*, a legal fiction would consist in positing a fact or situation that differed from legal reality. However, to judge from the Special Rapporteur's claim that that definition of fiction was precisely applicable to the *Mavrommatis* construct, it would seem that his perception of legal reality differed from that of other members of the Commission.

47. On the contrary, there was nothing artificial in seeing the home State as having a right to ensure that its nationals were treated in conformity with an international standard or with human rights. In his view, the Commission was emphatically not dealing with a fiction. In the context of diplomatic protection, to call the *Mavrommatis* construct a fiction was to depict international law in a pejorative manner, for the Special Rapporteur contrasted "a fiction" with human rights, thereby implying that the "old" law was merely fictitious, whereas the "new" human-rights-based law occupied a higher moral ground.

48. As to terminology, he was in any case not in favour of describing the two approaches as the "old" and "new" approaches. While it was true that the law of diplomatic protection had existed for decades or even centuries before the emergence of human rights as a term of art in international legal circles, the two approaches existed in parallel, and their respective potentials overlapped only partially, as Mr. Brownlie, among others, had already made clear. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could at the current time serve to buttress the diplomatic protection exercised by home States: the Federal Republic of Germany, for example, relied wherever possible on a human rights argument in exercising diplomatic protection, as a claim based on human rights was clearly more appealing to many States

than one based on an international minimum standard that had been a bone of contention throughout the nineteenth century and the first half of the twentieth century.

49. The traditional "*Mavrommatis* approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual rights approach effective. He had no objection to the human rights approach being allowed to permeate the Commission's further debate on the topic on a case-by-case basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

50. Mr. BENNOUNA (Special Rapporteur) said that as the debate progressed he was becoming increasingly convinced that, despite views expressed to the contrary, that debate was indeed necessary. He, too, would have liked to have been able to discard the concept of a fiction, which was basically a legal construction. However, in the case of diplomatic protection, the damage was suffered directly by the individual, and only indirectly by the State of which he or she was a national. It had thus been necessary to resort to a somewhat artificial construction in order to link the damage suffered by the individual with that suffered by the State. However, Mr. Brownlie and Mr. Simma were quite wrong in supposing that he used the term "fiction" in a pejorative sense. Law was an intellectual construct made up of fictions, and there was thus nothing pejorative in his use of the term. The problem was basically one of language and of differing cultural perceptions.

51. Like Mr. Brownlie and Mr. Simma, he regarded it as entirely natural that a State should ensure that its nationals were treated in conformity with international law and he wished to see that practice continue. The Commission was in agreement that the State had discretionary power at the procedural level to defend its nationals. However, matters could not be left at that. Should the Commission adopt the *Mavrommatis* conception, whereby in defending a national's rights a State was asserting its own rights; or should it adopt the approach of discretionary power, whereby in acting on behalf of one of its nationals a State could exercise one of that national's own rights? The Commission must give careful thought to that question, which was not merely a matter of theory. True, hard law did exist in that area, but the hard law had become outdated and he personally would resist any attempt by the Commission to show itself unduly conservative in that regard.

52. In conclusion, he wished to stress that, *pace* Mr. Simma, he had never sought to contrast diplomatic protection and human rights. He certainly had no wish to, as it were, saw off the branch on which he hoped to sit, by demolishing the very topic on which he had been appointed Special Rapporteur. He had simply asserted that the concept of diplomatic protection, which predated the concept of human rights, could no longer be studied without taking careful account of the evolution of human rights in recent years. It was countries undergoing a transition to democracy—including his own—that had the greatest interest in strengthening human rights, and thus

in ensuring that account was taken of individuals in action by the State.

53. Mr. FERRARI BRAVO said that the approach suggested by the Special Rapporteur was indeed an attractive one, always supposing it would prove possible to strike a balance between diplomatic protection and the exigencies of human rights. It was his impression that everything would depend on the question of legal persons—a grey area which neither the Commission nor other bodies had explored in depth, instead contenting themselves with citing the somewhat obscure *obiter dictum* of ICJ in the *Barcelona Traction* case. It was no coincidence that, at the level of the European system for protection of human rights, the rights closest to those of legal persons, namely, property rights, were dealt with not in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “European Convention on Human Rights”), but in a Protocol thereto. A new approach seemed to be gaining ground, and that would be the crucial aspect of the study to be conducted by the Special Rapporteur.

54. Mr. ROSENSTOCK said that both in his preliminary report and in his oral presentation the Special Rapporteur had seemed to suggest that there was a potential conflict between the traditional view of diplomatic protection and the human-rights-based approach, whereas subsequently he seemed to have denied that such was his view. Perhaps the Special Rapporteur should clarify his position in that regard. In his own view, there need be no incompatibility between the two approaches.

55. Mr. BENNOUNA (Special Rapporteur) said it was gratifying that doubts were beginning to creep into the debate, as doubt was the beginning of wisdom. As to Mr. Rosenstock’s question, it had not been his intention to contrast diplomatic protection and human rights. The two approaches were not mutually exclusive, and were indeed complementary. Instead, he had sought to contrast a certain traditional view of diplomatic protection with human rights. The evolution of those rights had brought about a need to review the legal nature of diplomatic protection. Under the *Mavrommatis* conception, the individual was ignored and account was taken only of the harm to the State. Such an approach was at the current time no longer tenable. Alongside the State, which had the procedural right to bring a claim, account must also be taken of the right of private individuals, who no longer “disappeared” behind the State.

56. Mr. Ferrari Bravo’s interesting comment also provided food for thought. The preliminary report could be criticized for having dealt only with individuals, and it was true to say that many more grey areas would be encountered in the case of legal persons, which some States had no interest whatever in defending, and to which the *Barcelona Traction* case law was not applicable.

57. Mr. GOCO said that the Special Rapporteur’s preliminary report dwelt on the distinction between primary and secondary rules. In his view, however, the Commission would be unable to consider secondary rules in isolation. It must also touch substantially on primary rules, as secondary rules, being procedural, were the means to enforce rights conferred. The Special Rapporteur himself

seemed to concede that the two types of rule were so closely interwoven that it might prove impractical to compartmentalize them. Personally, he thought that the topic of diplomatic protection could not be understood without direct reference to principles and rules of a substantive nature.

58. The preliminary report seemed to cast doubt on the traditional view of diplomatic protection, whereby, in resorting to diplomatic protection or international judicial proceedings on behalf of its nationals, a State was in reality asserting its own rights. Despite the new possibilities for individuals to have access to international bodies or tribunals, that surely remained the very essence of diplomatic protection. He did not give much credence to the view that in the exercise of diplomatic protection the real subject of the law, namely, the individual, was completely eliminated. Although it was the State that asserted the claim of the injured individual, the latter remained the principal actor in the judicial process. This was tantamount to the rule on subrogation wherein a party steps into the shoes of another with all the rights and claims of the latter, without denying the subrogee of his right to participate in the process. Speaking of fiction, he said he had no quarrel with that. The reason he said he thought it was so was because of the discretionary character given to the State, whether or not to give diplomatic protection. In comparison, there existed in corporate law the doctrine of “piercing the veil” of corporate fiction when the shell of the corporation, having a personality separate and distinct from its members or shareholders, is pierced in case of fraud.

59. It appeared from paragraph 18 of the preliminary report that the responsibility of the host State arose only after local remedies had been exhausted by individuals. Would that still be the case if the State of nationality had asserted the claim of the individual from the outset, following the traditional view that anyone who mistreated a citizen directly offended the State? When a State invoked diplomatic protection for its citizen and chose the means of exercising it, why was there still a need to determine on which right the State action was based (para. 13 of the preliminary report)? The ruling by PCIJ in the *Mavrommatis Palestine Concessions* case highlighted the point that the injury to a private interest became irrelevant once the State brought a case before an international tribunal on behalf of its subjects, the State then being regarded as the sole claimant.

60. As to the standard minimum treatment accorded to aliens under international law dealt with in paragraph 21 of the preliminary report, the question arose whether that should be the sole standard. Should the standard of treatment not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens? He asked whether it was not as a matter of international law that the standard of treatment should be defined in terms of equality under domestic law. To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences between the host State and the foreign State. The matter was further complicated by the emergence of human rights and the principles governing the treatment of aliens. The Special Rapporteur should explore that delicate issue in greater depth.

61. According to paragraph 40 of the preliminary report, in consenting to arbitration the parties to a dispute waived all other remedies. Did that also prevent the foreign State which was not a party to the arbitration process from asserting diplomatic protection? If the right of the individual was recognized at the international level, did that bar the State from extending diplomatic protection to him?

62. As to paragraph 24 of the preliminary report, the bases for diplomatic protection were presumably the ties of citizenship, allegiance, and so forth. Why, then, would the right of action which the State acquired subsist if there was a subsequent change in the nationality of the injured individual? It might be appropriate to establish guidelines or rules—such as nationality, meritorious claim, denial of justice or violation of fundamental human rights—with a view to preventing abuses of the foreign State's discretionary power to provide diplomatic protection.

*The meeting rose at 1.05 p.m.*

## 2521st MEETING

*Wednesday, 29 April 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

### Diplomatic protection (*continued*) (A/CN.4/483, sect. E, A/CN.4/484,<sup>1</sup> A/CN.4/L.553)

[Agenda item 6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

1. Mr. ADDO said that the questions the Special Rapporteur had raised in his preliminary report (A/CN.4/484) were legitimate and pertinent and the Commission must endeavour to find answers to them in a bid to move forward with the progressive development of international

law and its codification. If it was not to lose time debating the theoretical foundations of the law regarding diplomatic protection, it must first ascertain the *lex lata*, and proceed from there to the areas of the law that were controversial and try to see some of the lines along which needed changes in the law can best be made, with a view to achieving their universal acceptance or application.

2. Traditionally, the topic under consideration applied only to a State's treatment of aliens within its territory, not to its treatment of its own nationals. Public law specialists, such as Brierly,<sup>2</sup> and PCIJ in its milestone decision in the *Panevezys-Saldutiskis Railway* case (see page 16), had indicated that in taking up the case of one of its nationals by resorting to diplomatic action, a State was in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. That was the *lex lata*.

3. His only quarrel was with the artificiality in that way of looking at the question. Surely a State had in general an interest in seeing that its nationals were fairly treated in a foreign country, but it was a bit of an exaggeration, as Brierly had pointed out, to say that, whenever a national was injured in a foreign State, the State of origin was injured also. In practical terms, the theory was not adhered to in any consistent manner. For example, it would demand that damages should be measured in relation to the injury which had been suffered by the State and was obviously not the same as that suffered by the individual. In fact, however, the law permitted the injury to be assessed on the basis of loss to the individual, as if the injury to the individual was in fact the cause of action.

4. Aside from the artificiality of the theory, the right to diplomatic protection was not satisfactory from the procedural standpoint. The individual had no remedy of his own and the State of which he was a national might be unwilling to take up his cause for reasons which had nothing to do with its merits. Was there no way to find a solution by allowing individuals access in their own right to some form of international tribunal? The prospect of States accepting such a procedure was perhaps slim, but a discussion of the idea might be worthwhile, even if it was ultimately rejected.

5. The customary rules regarding diplomatic protection—their discretionary espousal by States, the requirement of continuing nationality, the need for a violation of rights as a basis for a valid claim and others—did not necessarily offer perfect protection for the rights and interests of aliens. Account had to be taken of the fact that diplomatic protection dealt with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronted the rights of the territorial sovereign, as ICJ had said in the *Barcelona Traction* case.

6. That brought him to the question asked by the Special Rapporteur in paragraph 54 of his preliminary report: when bringing an international claim, was the State enforcing its own right or the right of its injured national? He was not impressed with the argument that time-worn

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> J. L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963).