

Document:-
A/CN.4/SR.2521

Summary record of the 2521st meeting

Topic:
Diplomatic protection

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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.4/484,¹ 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,² 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

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

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

procedures must be respected or that modernization was obligatory. Stability and change were twin concepts affecting the law in any dynamic society. According to *lex lata*, a State that brought an international claim was enforcing its own right in that the injury caused to its national had been transposed, by the legal artifice already mentioned, into an injury to the State itself.

7. Brierly explained that “such a view does not, as is sometimes suggested, introduce any fiction of law; nor does it rest . . . on anything so intangible as the ‘wounding of national honour’”.³ It was significant to note that Brierly appeared shortly afterwards to have changed his position into virtually the negation of his earlier postulate, which he described as often an entirely unreasonable interpretation to put upon the facts. That changed attitude suggested that that branch of the law might have grown up in a haphazard manner. It was time to develop the theory on the basis of custom. However, custom was limited in its operation to the States that gave birth to it or adopted it. There was no denying the fact that most of *lex lata* in that area was a legacy from the international community of yesteryear, which had been smaller than it was at the current time. Fiction or no fiction, the law in that area had worked admirably well for the majority of States. In fact, there was nothing wrong with legal fiction. He cited several articles in English-language legal dictionaries that defined the meaning of the term and recalled that legal fictions abounded in common law. For example, it was well known that judges made the law, although they said they were only declaring it. The law they made was in no way impaired because of the legal fiction.

8. Taking a different point of view, he said that historically, much of international law regarding diplomatic protection had taken shape with the spread of economic, social and political ideas from Europe and North America to other parts of the world. In developing the law towards universal application, care must be taken to avoid undue reliance on outdated materials and, conversely, there was a constant need for modernization and for taking into account the attitudes of the newer States, those of the third world. It might also be appropriate to recall that concepts did not enjoy the status of immutable and universal postulates and that they should be subjected to rigorous reappraisal in the light of later developments. The semblance of universality of the law must not be mistaken for actual universality.

9. The institution of diplomatic protection had met with resistance from certain regions such as Latin America. Two Mexican jurists, Padilla Nervo and Castañeda, had criticized the rules as having been based on unequal relations between great Powers and small States. Much had been said about whether those rules had been based on the ideas of justice and fair dealing of the European States, but there was no doubt that the great Powers sometimes stretched substantive standards and abused the diplomatic protection process, as illustrated by “gunboat” diplomacy.

10. Whatever developments had taken place with regard to diplomatic protection in the past, there was at the current time a need for rules in that regard, since all States had nationals who travelled or maintained interests in other countries. As a whole, the customary law in that area had, despite all its defects, been reasonably satisfactory, balancing the interests of both alien and host State for the good of both. The Commission, no doubt, will have to use its imagination in selecting material from historical and contemporary law and in incorporating whatever changes had taken place.

11. Mr. HERDOCIA SACASA said that, having shaken the tree of an ancient institution, the Special Rapporteur had made it drop fruit from which the Commission could benefit. He had replaced the institution of diplomatic protection in the context of the development of international law and, by the same token, had struck down ancient myths, while perhaps building new fictions. His greatest achievement was, however, to have put the individual back into the context of diplomatic protection and to have given him a new role.

12. The main point of the discussion was whether diplomatic protection was still relevant, with some people going as far as to say that it was an outmoded institution. The Commission must, rather, reaffirm that it was as valid as ever, even if the emphasis had to be shifted to the individual and a great deal of modernizing had to be done, above all in respect of the procedure for defining and distributing the results of the claim.

13. The fact of having reaffirmed that human beings had the status of subjects of international law and of having made access to certain bodies of courts possible for individuals took nothing away from diplomatic protection and did not make it any less effective. There were still some gaps, of course, in the regime of the international protection of individuals, but various institutions were working together to safeguard the general protection machinery already in place.

14. The principle of diplomatic protection was part of customary international law, not of treaty law. The same, however, was not true of human rights, which were often based on treaty law.

15. He agreed that the exercise of diplomatic protection generally came within the discretionary power of the State, but it was also true that national legislators had gradually established peremptory rules of protection. It would probably be necessary to revise the comment in paragraph 48 of the preliminary report stating that even if such obligation (of protection) is referred to by some constitutional texts, it is actually much more a moral duty than a legal obligation. As, in principle, a person who had the constitutional right to protection from his State could demand it from that State.

16. In his view, the question raised in paragraph 54 (see paragraph 6 above) did not give rise to any problem for the Commission. The two rights were not contradictory, but complementary. While there was no doubt that, in practice, it was the State that had the discretionary right to exercise diplomatic protection, that protection could not be exercised where there had been no harm or no compen-

³ J. L. Brierly, “The theory of implied State complicity in international claims”, *The Basis of Obligation in International Law and Other Papers*, H. Lauterpacht and C. H. M. Waldock, eds. (Oxford, Clarendon Press, 1958), p. 158.

sation and compensation could not be effective if diplomatic protection was not exercised.

17. Mr. PAMBOU-TCHIVOUNDA said that he welcomed the courage shown by the Special Rapporteur in the drafting of his preliminary report which, in its substance, its objective and even its form, had been intended to inform the persons to whom it was addressed. If that had indeed been the Special Rapporteur's intention, he had achieved it. With that first effect digested, all that mattered at the current time was how things would evolve, especially as the task was to produce a positive evaluation of a traditional concept, that is to say, to take account of the constant dialectic between theory and practice.

18. He would limit his statement to the question of the legal nature of diplomatic protection, dealt with in chapter I of the preliminary report, and wished at the outset to mention a number of obvious facts.

19. First, the material sphere of international law depended on the structure of international society. Secondly, that structure embraced a diversity of topics which were unequal in terms of their legal characteristics: in that connection, reference might be made to the advisory opinion by ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*. Thirdly, the assignment of rights or the imposition of obligations by international law did not of themselves confer legal personality on the addressees: legal personality was not inherent in the quality of subject of law, in either domestic or international law. Fourthly, whether it was on the authority of the precedent either of the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case or of the above-mentioned advisory opinion, the conferment of specific rights on individuals or on official agents was a manifestation of the will of States or of international organizations (by treaty or by customary means), but did not constitute recognition of international legal personality. Lastly, an individual's direct access to certain international institutions for enforcing a claim fell within the framework of the application of international treaty or customary law, in the creation of which the individual would not have taken part, since he was not authorized to do so by international law, that is to say, did not possess international legal personality.

20. That said, he wished to distance himself from the notion, very widespread in a certain doctrine and stated in paragraph 32 of the preliminary report, that a certain share of legal personality was conferred on the individual. On the contrary, he perceived legal personality, either domestic or international, as a uniform whole which could not be broken up into parts. Neither did he accept the implications of such a notion, namely, that individuals would be the ones who determined the framework of the claims which they could enforce at the international level. In fact, individuals used the existing procedures within the limits of those procedures and in an attempt to satisfy very limited interests. It would be fanciful to believe that individuals had become the competitors of States or international organizations in that regard and it would be a mistake to give human rights an excessive role and influence in relation to the established institutions or mechanisms such as diplomatic protection, which was undergoing the dialectic

between stability and change, but surviving it. On the other hand, no one knew the fate which the force of the development of international law would hold for human rights, since States, on which the institution of diplomatic protection had been established, might logically prefer not to be caught up in the flux of the great advance of human rights and there was nothing to prohibit them from withdrawing from any instrument of which they were the authors. Mr. Brownlie was quite right to assert (2520th meeting), on the basis of the chronological precedence of diplomatic protection over human rights and of both judicial and arbitral precedents, that human rights had borrowed from the resources of diplomatic protection.

21. In shaping the law on the exercise of diplomatic protection, account should certainly be taken, to the advantage of that law and with a view to its modernization, of the progress which the human rights record would show. However, he could not entirely embrace the argument of Lavieć,⁴ which the Special Rapporteur endorsed in paragraph 38 of his preliminary report, that the recent means of protection also reflected the decline of diplomatic protection. To maintain the relevance of that argument would in fact be tantamount to supporting the Special Rapporteur's appeal for a rewriting of the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case to say, in the language of paragraph 53 of the report that when the State espouses its nationals' cause, it is enforcing their right to fulfilment of international obligations. Thus, in an effort to reply to the question put in paragraph 54 of the report, the Special Rapporteur was trying to correct what he described, rightly or wrongly, as a "fiction", that is to say, the State's own right in relation to international law, asserting that the State would be mandated by its nationals, whose interests it would represent at the international level.

22. First, apart from the very few and limited cases listed in paragraphs 33 to 44 of the preliminary report, the essence of diplomatic protection remained intact in its three components—it was a means of protecting rights and interests used within the framework of an international dispute between States. Therefore, as long as States existed and unless they were regarded as fictions, diplomatic protection would remain a widely used procedure, regardless of the conditions of its application. It was a right of the State, but primarily a procedural right and only incidentally a substantive right.

23. Secondly, there was a contradiction in the notion that the international law made by States conferred a certain share of legal personality on the individual, but limited the full expression of that personality in the sphere of international law. That contradiction undermined any attempt to transpose the mandate theory from domestic to international law by divesting the substitution of the State for the individual and representation of any foundation.

24. Thirdly, he proposed that the justification of the right of substitution and of the separate right of the State to enforce diplomatic protection should be inferred from the inherent nature of the relationship between the indi-

⁴ J. P. Lavieć, *Protection et promotion des investissements: Étude de droit international économique* (Paris, Presses universitaires de France, 1985), p. 5.

vidual, as an element of the population, and the State. From a legal standpoint, in fact, relations between the individual and the State were ontological, for the individual existed as an element of the population, without which there was no State, and the State existed as a creation of law. The inherent nature of the relationship between the individual and the State was established and embodied in the condition of nationality. From that standpoint, nationality was a rule of international law whose application fell within the exclusive competence of the State with respect to the modalities of its conferment and loss; since it was a rule of international law, its availability against third parties was authorized by international law. That was the meaning of the decision in the *Nottebohm* case, which had given a new lease of life, without any modification, to the customary institution of diplomatic protection. The requirement of the nationality link contained the implicit and somewhat laconic premise of the *Mavrommatis Palestine Concessions* case proclamation, which, if it was taken into account, eliminated the contrivances of the legal construction mentioned by the Special Rapporteur in paragraph 27 of his preliminary report. In that connection, the respective case law of the *Mavrommatis Palestine Concessions* and *Panevezys-Saldutiskis Railway* cases clarified each other.

25. He concluded, on the basis of the nationality of the State, that diplomatic protection was clearly a right of the State.

26. Mr. BENNOUNA (Special Rapporteur) said that, since the traditional doctrine was an established fact, the Commission must ask itself whether it would be wise to take recent developments into account, being well aware that, by so doing, it would necessarily add material to the draft articles on international responsibility. That text had in fact dealt with only two situations, one arising from unlawful acts and the other from activities which were not prohibited, both relating to State-to-State responsibility. The existence of State responsibility with regard to private persons was at the current time a fact accepted by international case law: either the individual invoked that responsibility directly by means of the procedures open to him or the State intervened to invoke the responsibility of the other State with regard to the private persons concerned.

27. It was, moreover, incompatible with the state of contemporary international law to assert that legal personality was a uniform whole. Of course, the first personality was the State and it was States that determined the share of legal personality conferred either on international organizations or on individuals, but there was no uniform model. For example, by consenting to arbitration under the auspices of ICSID, a State concluded an international agreement and bound itself to a private investor in the same way as it would bind itself to another State.

28. The strict position taken by Mr. Pambou-Tchivounda showed that the Commission was divided and that the discussion was necessary. With regard to the question put in paragraph 54 of the report, the situation was not perhaps as clear-cut as it had been in the 1920s and the solution should perhaps be sought in the area of complementarity: there probably existed a procedural right of the State in legal terms which was characterized

by diplomatic protection, but, when it took action, the State was sometimes enforcing its own right and sometimes a right of private persons.

29. Mr. ECONOMIDES said he agreed that, in addition to the State-State relationship created by diplomatic protection and international responsibility, there was also in recent law a relationship, of international law as well, between the State and the individual. When that very specific relationship of the State to the individual did not exist, there could be no other solution than the traditional concept, according to which the State enforced the right of the individual on his behalf. The creation of the possibility for the individual himself to exercise his diplomatic protection would require the drafting of a universal convention which would overturn not only the institution of diplomatic protection, but also international law as a whole.

30. Mr. BENNOUNA (Special Rapporteur) said that he had never argued that diplomatic protection should be exercised by the individual. It was always the State which exercised diplomatic protection, but, nowadays, when the State intervened, it was sometimes exercising its own right and sometimes a right which was recognized as belonging to individuals. The Commission was dealing with the topic during a phase of transition and change and it must therefore tell the General Assembly that it was going to treat diplomatic protection as part of *lex lata* and take account of those recent developments in codifying the topic, work which should constitute an adaptation and not a revolution.

31. Mr. MELESCANU said that there was really no disagreement within the Commission about the fact that the Commission should codify the institution of diplomatic protection while also taking account of recent developments. Starting from that common ground, the task would therefore be to work out precisely what those developments were and what importance should be attached to them.

32. Mr. BROWNLIE said that he doubted whether the theoretical discussions taking place were of great value if the main focus of the Commission's work was to determine how to assist individuals who had been harmed by actions of foreign States. For reasons that were both economic and political, the Chernobyl disaster had not given rise to any claims against the former Union of Soviet Socialist Republics, but, from the classical point of view, the local remedies rule would have applied and associations of foreign claimants would have appeared in Ukrainian courts. If the local remedies rule was still being applied by both developed and developing countries, then the point at issue was not a matter for theoretical or historical debate, but a matter of establishing what could be done by way of progressive development of the law to assist, not multinationals which had the necessary means, but individuals who found themselves obliged to litigate abroad.

33. Mr. DUGARD said that he was prepared to accept that the topic rested on a legal fiction whereby the claim of an individual was transformed into a claim of the State. Developments in international law, particularly in respect of human rights, and the Declaration on the Human

Rights of Individuals Who are not Nationals of the Country in which They Live⁵ tended to blur the dividing line between human rights and diplomatic protection even further. The question that arose was whether, in a particular case, the legal fiction was useful and what its consequences were. As the Special Rapporteur had explained, it was not suggested that, because the claim was that of the individual rather than that of the State, the individual should assert his own rights in international law. Such an idea could, however, follow by implication from the suggestion that the whole subject of diplomatic protection ought to be reconsidered in the light of its fictitious basis. It was important to recognize that where there was no treaty or similar mechanism that conferred on the individual the right to institute international claims, the individual had no remedy. The Commission could, by way of progressive development, recommend that such a remedy should be conferred on the individual under international law, but he doubted whether such a recommendation would have any impact on States. In most instances, the traditional rules of diplomatic protection, in which the State viewed the claim as that of the State itself and not that of the individual, would give the greatest protection to the individual.

34. The purpose of the *dictum* of ICJ on obligations *erga omnes* in the *Barcelona Traction* case had been to make it clear that, in certain cases, States could protect non-nationals in the wider interest of humanity. However, there had to be some conventional basis for allowing the State to initiate proceedings on behalf of a non-national. In any event, whatever the purport of the *dictum* of the Court, there was every reason to think that, in the majority of cases, States would not be prepared to institute international proceedings on behalf of non-nationals. Even within the European human rights system, inter-State claims on behalf of non-nationals were rare and, where they did exist, they always contained an element of a linguistic or ethnic link. The doctrine of *erga omnes* obligations in the *Barcelona Traction* case could be examined within the framework of article 40 of the draft articles on State responsibility,⁶ but not within that of diplomatic protection. The international community had changed, as also had international law, but not sufficiently to warrant a complete revision of the subject at the risk of leaving the individual worse off than before. The order of ICJ in the *case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)* showed that States were still prepared to protect their nationals and to view an injury to a national as an injury to the State.

35. The traditional rules relating to the study of the topic of diplomatic protection appeared in the report of the Commission to the General Assembly on the work of its forty-ninth session.⁷ He trusted that the Special Rapporteur would turn to those rules and would seek to amend them where necessary in the light of new developments of the kind to which he had drawn the Commission's attention. The best way to advance the interests of the individual in the modern world was by codifying the traditional rules of international law on the subject and perhaps by

recommending to States that the right to diplomatic protection should be seen as a human right and that they should consider including them in their domestic legal systems.

36. Mr. GOCO said that, in paragraph 48 of the preliminary report, the Special Rapporteur stressed the discretionary nature of the exercise of diplomatic protection by the State; on the other hand, however, he also mentioned certain factors that could make such exercise an obligation. He wondered, for example, whether, in the event of a denial of justice, arbitrary conduct on the part of the courts or some other violation of the fundamental rights of the human person, there could not be some basic rules that would make it incumbent on the State to grant diplomatic protection where it might be tempted not to do so for political reasons.

37. Mr. DUGARD said that the exercise of diplomatic protection could not be made obligatory in international law. All the Commission could do was to recommend that States should amend their domestic law.

38. Mr. BENNOUNA said he also thought that an individual could in no case oblige a State to take action against another State.

39. Mr. SIMMA said that, if the right to diplomatic protection became a human right, such a development would of necessity affect the discretionary power of the State at the international level. It would become far more difficult for a State to advance political or diplomatic arguments in favour of not making a claim.

40. Mr. HAFNER said that the more theoretical and deductive approach adopted by the Special Rapporteur and the more pragmatic or inductive approach which some members might have preferred would in any case have led to the same results, since the questions arising on the subject of diplomatic protection, one of the few classical items of State-to-State relations still left for codification, would have to be answered at some time or another.

41. Although the Commission had almost unanimously reached the conclusion that the topic related only to secondary rules; nevertheless, it had been asked whether a particular rule was a matter of primary or secondary law. The status of a rule really depended on the function it exercised in a particular situation. A norm of the law of treaties could belong to the category of secondary rules in one case and to that of primary rules in another. Continuing the debate on that point at the risk of further blurring the categorization was therefore not very useful. However, it should be clear that the Commission did not under any circumstances intend to codify the rights of the individual that had to be infringed in order to give rise to diplomatic protection. Finding a formulation that regulated the matter in a general way could, of course, become difficult in some instances, but, as the comments by States clearly showed, the Commission did not have to feel obliged to undertake a study of the substantive rules of international responsibility.

42. The only points to consider were therefore the rights of the State to exercise diplomatic protection and the conditions of such exercise. That it was a right and not a duty

⁵ General Assembly resolution 40/144, annex.

⁶ See 2520th meeting, footnote 8.

⁷ *Yearbook* . . . 1997, vol. II (Part Two), p. 62, para. 189.

could clearly be derived from actual practice. He would have great difficulty with recognizing that right to be a part of human rights for, in that case, the State would have a duty to grant diplomatic protection; yet such a duty did not exist. To cite only one example, when the Third United Nations Conference on the Law of the Sea had rejected the suggestion that States could be sued by private companies, it had been proposed that the sponsoring State of the claimant company should be obliged to appear before the Law of the Sea Tribunal and to represent the claim against the other State, a solution that would have amounted to obligatory protection. That proposal had been almost unanimously rejected for that very reason and the solution finally adopted in article 190 of the United Nations Convention on the Law of the Sea went in the opposite direction.

43. That led on to the question of the role of individuals in international relations. It was obvious that today they had more access to international institutions in order to assert their rights against States. The individual enjoyed a certain emancipation from the State of which he was a national and the significance of sovereignty was somewhat reduced as a result. That necessarily again gave rise to the question of human rights and diplomatic protection and of their mutual relevance. It should not be forgotten that there existed fundamental differences insofar as human rights were primarily directed against States, whereas diplomatic protection made use of States. Human rights were independent of nationality insofar as States were required to grant fundamental human rights to all persons under their jurisdiction. If an obligation of diplomatic protection were based on human rights, it could then be asked why it did not have to be extended to all persons under the jurisdiction of the State in question. Yet, for instance, neither article 6 of the European Convention on Human Rights nor article 1 of the Protocol thereto could be interpreted as giving rise to such an obligation. Of course, it could be conceived as a political right accorded only to nationals as citizens, but international law did not provide any indication that would justify such a rule even as *lex ferenda*. The expansion of the individual's access to international institutions thus affected diplomatic protection insofar as the latter was no longer the only means by which the individual's rights against other States could be upheld. But since such direct access existed not universally or generally, but only in few cases, individuals still needed the institution of diplomatic protection in order to enjoy a certain protection against foreign States.

44. Within that perspective, it could, of course, be asked whether an obligation to exercise diplomatic protection would not be beneficial to the individual; however, apart from the absence of any evidence to that effect, such an obligation would not seem justified in all cases, since the State had to represent the interests not only of one, but of all of its nationals and a case might easily arise where the interests of one individual ran counter to those of the nation as a whole. Furthermore, when the question had arisen in Austria in connection with a lump-sum agreement with the former Czechoslovakia, the decision reached had been that a State which did not exercise diplomatic protection could not be sued by its national on the grounds of its failure to act or of expropriation. A differ-

ent solution could be reached only if the State accepted such an obligation by its own legislation.

45. Hence it must be concluded, as was confirmed by jurisprudence, that diplomatic protection was a right of States and not of the individual. That had various consequences: first, there was indeed a certain element of fiction in that right, in the sense that something was assumed to be true although it might be untrue. The damage was caused to the individual and not to the State, but it was assumed that it had been caused to the State as if the property of the nationals or perhaps the nationals themselves had been the property of the State. In order to avoid such a conclusion, it was better to accept the existence of a certain element of fiction. But the Commission should not concern itself with those questions, as other matters had to be resolved and doctrine on that point was very divided.

46. Another conclusion was that, as long as the conditions of nationality or of exhaustion of local remedies were not fulfilled, no impairment of any right under international law had occurred and no diplomatic protection could be exercised. Only a right of the individual under national law had been violated. That could be demonstrated *a contrario* by assuming, for example, that a bilateral treaty gave the nationals of both parties the right to a certain treatment, but that that treatment was spelled out in a provision of a non-self-executing nature that had not been incorporated into internal legislation. In such a situation, the individual had not yet been granted an enforceable subjective right, as he could not invoke the provision in question before a national tribunal. If the national State requested compliance with that provision of the treaty, it did not exercise diplomatic protection but its own right to require observance of the treaty by the other State party. However, that situation must be separated from the one in which the individual could invoke a self-executing provision, but in which the exhaustion of local remedies rule could not apply because of lack of remedies or because of the well-known exceptions. It was thus necessary to determine very clearly from what moment the international law of diplomatic protection was involved. In that regard, there was no need to consider whether the individual was a subject of international law. That status was merely a consequence of the existence of certain rights and obligations and not a condition for the granting of certain rights and obligations.

47. Hence, that general rule entailed a further consequence regarding the nature of the rule of exhaustion of local remedies. It could mean only that the failure to comply with the international obligation or the responsibility of the wrongdoing State existed only if those remedies had been exhausted, subject to the various exceptions. There might be a variety of reasons for that, but it was in that sense that article 22 of the draft articles on State responsibility, must be understood. It could not be construed as only preventing an international claim. That also indicated the importance of the conception of that rule.

48. That conception also meant that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right. However, a different solution could be envisaged as far as *erga omnes* obligations with regard to individuals were concerned, as in the decision by the European Com-

mission of Human Rights referred to in the first footnote to paragraph 37 of the preliminary report.⁸ In his view, however, such cases, in which a State intended to ensure respect for human rights by bringing a claim, were not necessarily part of diplomatic protection and must be distinguished from it.

49. Mr. Economides' idea of examining whether the exhaustion of local remedies rule was applicable in the case of a violation by a foreign State of the rights of individuals in the territory of their national State called for several comments. In certain cases, that rule did not work, as Mr. Brownlie had pointed out (2520th meeting)⁹ when referring to the *Aerial Incident of 27 July 1955*,⁹ when there was no link with the relevant jurisdiction. That would be particularly true, for example, in the case of someone owning land near a border, the use of which land was impaired as a consequence of transboundary damage caused by the neighbouring State as in the *Trail Smelter* case. In such a situation, it would certainly be unfair to require the exhaustion of local remedies within the neighbouring State and diplomatic protection could be granted even without resort to those remedies. A different situation was the one in which a diplomat did not honour his obligations vis-à-vis citizens of the receiving State, for example, by not paying his debts. In such a situation, the duty under article 6 of the European Convention on Human Rights came into conflict with diplomatic immunity. Irrespective of that, it could be asked whether the private person who had suffered damage would have to exhaust local remedies in the sending State, since that was theoretically possible. Nevertheless, he could imagine that that requirement was not regarded as a condition for the exercise of diplomatic protection. That solution could also be derived from the general conception developed in connection with the case of the *Aerial Incident of 27 July 1955*. The question remained whether in such a situation one of the traditional conditions for the exercise of diplomatic protection was in fact met, namely, that an internationally recognized standard had not been observed. For diplomatic protection was an instrument to be used against a foreign State, but, if a diplomat did not honour his debts, the responsibility of the sending State was not involved since no act was imputable to it. It would certainly be difficult to establish the existence of any direct involvement of the sending State which could give rise to a claim by the private individual. If, on the other hand, the act was directly imputable to the State, it was largely an act *jure gestionis* where the State did not enjoy immunity and for which it could thus be sued before the domestic courts.

50. Lastly, reference must also be made to one question which Zemanek posed in his general course, namely, whether the resort to an international body to protect human rights must be considered a "local remedy".¹⁰ The

⁸ Council of Europe, Decision of the Commission as to the admissibility of application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy (11 January 1961), *Yearbook of the European Convention on Human Rights*, 1961, vol. 4 (The Hague, Martinus Nijhoff, 1962), pp. 116-183, at p. 140.

⁹ See 2520th meeting, footnote 9.

¹⁰ K. Zemanek, "The legal foundations of the international system", *Collected Courses of the Hague Academy of International Law, 1997* (The Hague, Martinus Nijhoff, 1998), vol. 266, pp. 9-336, at p. 266.

simple textual interpretation did not enable one to answer in the affirmative, but the Commission must certainly deal with such questions.

51. There was still a long way to go and many questions as important as those addressed in the report would arise in the future and have to be discussed. One could for example envisage quite a substantive discussion on the question whether diplomatic protection could be exercised for non-nationals, particularly in view of the fact that, as was shown in the context of human rights, the link of nationality became less important, with the link of residence benefiting accordingly.

52. Hence, despite the understandable wish to reach a concrete solution from a general and abstract position, the Commission must spare no effort to reach a stage as soon as possible at which it could frame concrete rules, in order to assure States that its work was properly targeted. The work done in the Working Group on diplomatic protection¹¹ had already enabled States to gain a clear picture, one that they seemed to have appreciated, of the structure of the Commission's work. It should thus continue its work in accordance with that structure, taking into account the discussion generated by the report it had before it.

53. Mr. LUKASHUK, referring to the remarks by Mr. Brownlie, said that transboundary damage should not initially be considered in the study on diplomatic protection. It belonged to a different sphere and it would be better for the Commission to confine itself to the case in which damage had been caused in the jurisdiction of the foreign State. Moreover, it seemed certain that the existence of a right of the individual to diplomatic protection was bound to be more and more widely recognized, as was the responsibility of the State in that regard.

54. Mr. HAFNER said that he could accept the exclusion of transboundary damage from the scope of the subject, although it could in fact give rise to the exercise of diplomatic protection; in that case, however, the fact that it had been excluded must be clearly spelled out.

55. Mr. ROSENSTOCK said he agreed with Mr. Dugard and Mr. Hafner that the topic under consideration was eminently suitable for codification, although that did not mean there was no room for progressive development: the fact that the topic was not a new one had no bearing on that consideration.

56. In his preliminary report, the Special Rapporteur had provided a thumbnail sketch of the history of the institution of diplomatic protection and some editorial comment thereon and he recognized the utility of such an approach. As for the editorial comments, suffice it to say that silence should not be taken for assent. Reviving bilateral or North-South issues did not seem a profitable undertaking.

57. Nor was it useful to launch a debate as to whether diplomatic protection was a legal fiction. In the same spirit, he would refrain from explaining why he found paragraph 47 of the preliminary report surprising, redundant and potentially disturbing, for theoretical debates

¹¹ See 2520th meeting, footnote 4.

were unhelpful. Moreover, whether intentionally or otherwise, the Special Rapporteur seemed to oppose “traditional” approaches to progressive ones and the traditional view of diplomatic protection to one which recognized, applauded, fostered and enhanced the role of human rights. Such a dichotomy did not reflect the true state of affairs and, like Mr. Dugard and Mr. Brownlie, he thought that it served no useful purpose, and was contrary to the interests of individuals, to marginalize diplomatic protection. It was indeed for the State to exercise that protection, but the rights of the individual were not threatened in consequence. The remarks by Mr. Herdocia Sacasa and Mr. Addo had been particularly relevant in that regard.

58. Nor did it seem essential to resolve the other theoretical issues that might arise, before tackling aspects of the exhaustion of local remedies. As long ago as 1834, the then Secretary of State of the United States of America, Mr. McLane, speaking of the exhaustion of local remedies, had declared that

it would be an unreasonable and oppressive burden upon the intercourse between nations that they should be compelled to investigate every personal offence committed by the citizens of the one against those of the other.¹²

Approximately a century and a half later, Mr. Brownlie, a British scholar, practitioner and member of the Commission, not known as a conservative, had described the rule on exhaustion of local remedies as “justified by practical and political considerations and not by any logical necessity deriving from international law as a whole”.¹³

59. The decision taken the previous year by the Working Group, which had been approved by the Commission, accepted by the Special Rapporteur and supported by Governments in their comments, namely that the work must concentrate on secondary rules, had been the right one. He had heard nothing that caused him to think it should be reconsidered, much less modified. The results of the Commission’s straying from secondary rules in its study of State responsibility were not encouraging. That being said, it would be useful to set up a consultative group to work with the Special Rapporteur, as recommended in the report of the Planning Group at the forty-eighth session.¹⁴

60. Mr. BENNOUNA (Special Rapporteur) said it was not his intention to question the conclusions the Working Group had reached at the previous session. The fact remained that the Working Group had left some questions pending and it was precisely in order to study those questions in greater depth that the preliminary report had been drafted.

61. Mr. ROSENSTOCK said he was pleased that the debate on questions settled at the previous session was not to be reopened and read out a paragraph in which it was stated that “the topic will be limited to codification of secondary rules”.¹⁵

62. Mr. BENNOUNA (Special Rapporteur) said he had meant that it was important to bear in mind the relative nature of the distinction between secondary and primary rules, and the fact that there was no watertight division between the two categories.

63. Mr. ROSENSTOCK agreed that there was indeed no watertight division; nor, however, was there any doubt with regard to the decision that had been taken, the reasons that had inspired it or what it implied.

The meeting rose at 1.05 p.m.

2522nd MEETING

Thursday, 30 April 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Ben-nouna, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

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

[Agenda item 6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SEPÚLVEDA said that the preliminary report of the Special Rapporteur on diplomatic protection (A/CN.4/484), albeit of a preliminary nature, provided valuable material for debate, as did the bibliography and list of cases relating to diplomatic protection distributed by the Secretariat. It could be seen from the latter document, however, that since 1981 only nine cases relating to diplomatic protection had been resolved, five of them at domestic level and four by international courts; and that only half a dozen books on the topic, together with a rather larger number of articles in specialized journals, had been published since 1980. An effective tool was thus needed to gather information on State practice in the field of diplomatic protection, and on related topics such as

¹² Moore, *Digest* (1906), vol. VI, p. 658.

¹³ I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), p. 496.

¹⁴ *Yearbook . . . 1996*, vol. II (Part Two), pp. 84-85 and p. 91, document A/51/10, paras. 148 (g) and 191-195, respectively.

¹⁵ *Yearbook . . . 1997*, vol. II (Part Two), p. 61, para. 181.

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).