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Summary record of the 2522nd meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
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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).

arrangements between States enabling individuals to have recourse to international arbitration, thereby obviating the need for diplomatic protection. The *World Investment Report* prepared by UNCTAD offered a valuable source of information in that connection.²

2. As to the preliminary report, it was essential to begin the study of the topic by establishing the basic legal hypothesis without which diplomatic protection could not arise. The necessary preconditions had been established in the passage from the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case cited in paragraph 5. The first precondition for such exercise was that a State was entitled to protect its subjects, when they were injured by acts contrary to international law committed by another State. Consequently, it was important to establish that, in order for a diplomatic claim to arise, there must first be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim was brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. But, of course, the State causing the injury had an opportunity to make reparation before the diplomatic protection procedure was initiated.

3. The second precondition for the exercise of diplomatic protection referred to in the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case was that the injured subjects must have been unable to obtain satisfaction through the ordinary channels. In other words, there must be recourse to local remedies in attempts to resolve disputes, so as to afford the State an opportunity to avoid a breach of its international obligations by making timely reparation.

4. In paragraph 11 of the preliminary report, the Special Rapporteur also rightly pointed out that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

5. It was also important to determine who had the direct and immediate legal interest and who had the attributes and the powers to bring an international claim. In his view, the State had no such direct and immediate interest. If that were the case, the rights in question would be ineluctable and could not be exercised at the State's discretion. For example, agreements on the protection of foreign investments gave persons whether natural or legal, the possibility of claiming reparation directly, thereby according them a status similar to that conferred on the United Nations in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* whereby they had international legal personality by virtue

of having the power to bring an international claim. The same was true in the case of the Calvo clause,³ whereby the alien contractually declined diplomatic protection from his State of origin. In that case too, it was clear that only the individual had a direct and immediate interest in the claim. Consequently, the debate on the legal fiction regarding the holder of those rights led nowhere, and the Commission should instead focus on the rights and legal interests that were being protected. He had already given it as his view that the State exercised vicariously a right originally conferred on the individual.

6. It was to be noted that foreign investors thus found themselves in an extremely privileged position vis-à-vis nationals, as they had recourse to three procedures—domestic remedies, diplomatic protection and international arbitration—for the protection of their rights, whereas nationals could avail themselves only of domestic remedies.

7. He also wished to comment on the disturbing question of the alleged link between diplomatic protection and human rights. In his view, the two issues were entirely distinct, and more thorough consideration of the question would reveal that diplomatic protection had traditionally concerned strictly patrimonial rights, whereas human rights concerned the very essence of personal freedom. The rights traditionally covered by diplomatic protection included most-favoured-nation treatment and performance requirements imposed upon enterprises—a far cry from traditional human rights concerns.

8. Mr. BROWNLIE drew attention to the problem of dealing with questions of direct damage to States, which, while clearly forming no part of the Commission's mandate, were nonetheless often inextricably bound up with questions of diplomatic protection in the real world. Three examples would suffice in that connection.

9. The *Rainbow Warrior* affair, involving the destruction of a Greenpeace international vessel by a French naval sabotage unit in Auckland Harbour, had led to claims on behalf of the State of New Zealand regarding violations of its sovereignty, and on behalf of the Netherlands regarding a photographer who had lost his life in the incident, who had been treated as being of Netherlands nationality for the purposes of the settlement brokered by the Secretary-General of the United Nations. The case thus represented a palimpsest of direct State interest on the part of New Zealand and the interest of another State in one of the individuals involved in the episode.

10. A second example, that of Chernobyl, had involved direct economic losses by private individuals in a number of States, as well as the potential for the States themselves to bring claims for direct damage to their airspace, had they so wished. The third example concerned the *Cosmos 954* Soviet nuclear satellite that had disintegrated over Canadian airspace in 1978, an incident that had resulted in a diplomatic settlement between Canada and the Union of Soviet Socialist Republics.⁴ The Canadian claim had related exclusively to the costs incurred by the State of

² For example, *World Investment Report 1997* (United Nations publication, Sales No. E.97.II.D.10).

³ See *Yearbook . . . 1956*, vol. II, document A/CN.4/96, pp. 206-208.

⁴ ILM, vol. XVIII (1979), p. 899.

Canada in cleaning up hazardous debris which had fallen on Canadian territory. However, there again, private interests might well have been damaged by the contamination. The inevitable conclusion was that it would be wrong to take the view that, because direct damage might be involved, the particular episode was therefore irrelevant for the Commission's purposes. All those examples involved actual or potential diplomatic protection in respect of private interests. The fact that they were not exclusively concerned with private interests should not place them outside the purview of the Commission's consideration.

11. Mr. BENNOUNA (Special Rapporteur) said he seemed to recollect that diplomatic protection was not applicable in cases involving space vehicles, in which the strict liability of the launching State vis-à-vis other States was invoked. As to the other cases referred to by Mr. Brownlie, it would certainly be valuable to bear in mind that the distinction between direct damage to States and damage suffered by nationals was not always clear-cut in practice.

12. He wished to thank Mr. Sepúlveda for highlighting the distinction—which as Special Rapporteur he himself had tried to bring out—between the discretionary power of the State to exercise diplomatic protection, a matter on which members of the Commission agreed, and the rights (and perhaps obligations) involved, which depended on the particular circumstances and required in-depth analysis. Thus, in the light of recent developments in fields such as patrimonial and human rights and investment, the right at issue would sometimes be the right of the individual, and the obligation of the host State would sometimes be an international obligation directly assumed vis-à-vis the individual. The Commission should highlight that distinction between the exercise of diplomatic protection—which remained a right of the State—and the rights and obligations at issue, which might be a right of the State or a right of the individual, with the possibility of some overlap between the two.

13. He was grateful for the reminder that the State did not invariably exercise its right, the proof being that that right was sometimes transmitted to the individual, who had access to international bodies. Mr. Sepúlveda had also rightly compared the protection conferred on the United Nations in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* with the right to bring a claim conferred on individual investors. In both cases that power was conferred by States.

14. Such contributions were a welcome response to his requests for guidance and helped clear the ground at the conceptual and technical levels, thereby enabling the Commission to come to grips with the substance of the problem. In his view it was premature to say that diplomatic protection was unrelated to human rights and had dealt only with patrimonial rights. It was true that in the past it had dealt mainly with questions of property, nationalization and investment, but the proceedings brought before ICJ in the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)* by a State in the wake of the recent execution of one of its nationals in the United States of America were a clear instance of a link with human rights.

15. Members had raised another problem that merited consideration: before coercion and the threat or use of force could be eliminated in the exercise of diplomatic protection, appropriate mechanisms would be required to ensure that the individual or the State could defend the individual's rights. He asked whether the range of those mechanisms should be as wide as possible, or should they comprise legal recourse alone and whether the mechanisms of diplomacy should be used in preference to claims before the courts. It had been agreed that diplomatic privileges and immunities, as defined in the Vienna Convention on Diplomatic Relations (hereinafter referred to as the "1961 Vienna Convention") and the Vienna Convention on Consular Relations (hereinafter referred to as the "1963 Vienna Convention"), would not be contemplated in the future draft articles. But diplomatic intervention and legal recourse shared many common elements, including reliance on negotiation, and he thought both approaches should be considered possible elements of diplomatic protection.

16. Mr. ECONOMIDES said Mr. Sepúlveda had been quite right to mention in the context of diplomatic protection the principle of the non-use or threat of force, a principle that had at the current time entered into the domain of *jus cogens*. Due consideration should be given to devoting an article on it in the future instrument.

17. He agreed with the Special Rapporteur's comments on diplomatic protection of property rights. True, diplomatic protection was most frequently invoked in cases where such rights were violated, but other cases could likewise call it into play. It would therefore be too restrictive to assume that diplomatic protection dealt exclusively with damage to property. He also believed that the distinction between human rights and diplomatic protection was less clear-cut than Mr. Sepúlveda had intimated; more consideration should be given to that issue.

18. As to international arbitration, mentioned by Mr. Sepúlveda, he would point out that, when a State submitted a complaint, one of two things generally happened: either the State that had committed the internationally wrongful act acknowledged its wrongdoing and there was an amicable settlement, or the State refused to admit to wrongdoing and an international dispute centring on a case of diplomatic protection ensued. Such disputes had to be settled by the procedures relevant to all international disputes, which included negotiation, arbitration and judicial settlement. In all such cases the State was exercising its diplomatic protection vis-à-vis its nationals.

19. Mr. ROSENSTOCK said he endorsed Mr. Brownlie's comment on the complexity of certain cases involving diplomatic protection and the difficulty in drawing a clear distinction between diplomatic protection and human rights. In the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Paraguay was essentially bringing an action for violation of the 1963 Vienna Convention. The case certainly involved an obligation directly owed to the State of Paraguay, but whether it also involved human rights was a subtle and complex question to which the answer would be provided only when ICJ handed down its decision. So far as the current topic was concerned, enhanced human rights sensitivity would be to apply the stress on avoiding

statelessness as the Commission did on the topic of nationality in relation to the succession of States following the result in the *Nottebohm* case. The reasoning in the *Nottebohm* case was not wrong *grosso modo* but the result was.

20. Mr. SIMMA said that, if injury to a foreign national involved a violation of a right recognized as a human right, nothing could prevent that foreign national's State of origin from espousing his claim. The practice of the Federal Republic of Germany, for example, had stressed that approach. If injury to aliens in the form of violations of human rights were excluded from the application of diplomatic protection, no effective remedy would be available in cases where an alien did not have access to procedures before an international human rights body. If ad hoc arbitration was provided for in a contract, then the alien would have to exhaust local and probably international remedies. In most cases of violations of human rights of foreigners, however—such as unfair imprisonment or mistreatment—such international procedures were not available, and it was accordingly vital to confirm the right of the State of origin to exercise diplomatic protection.

21. Mr. SEPÚLVEDA said he agreed with Mr. Simma that diplomatic protection and human rights protection could indeed coincide in cases where human rights were violated. It would be going too far, however, to suggest that the two coincided in every case. For example, chapter Eleven of the North American Free Trade Agreement (NAFTA)⁵ indicated that no party could require that an enterprise of that party that was an investment of an investor of another party appoint to senior management positions individuals of any particular nationality. If one of the parties did make such a demand in violation of NAFTA, one could hardly say that a fundamental human right was being violated. He therefore believed that one of the first steps must be to define the nature of the right that was to be protected.

22. Mr. HERDOCIA SACASA said it was essential to draw a distinction between diplomatic protection and the protection of human rights, but there was absolutely no doubt that protection of human rights fell into the category of diplomatic protection, which must not be restricted to intervention in the event of damage to property. The American Convention on Human Rights: "Pact of San José, Costa Rica" (hereinafter referred to as the "Pact of San José") and other international instruments, for example, set out the principle that no one could be arbitrarily deprived of his property, but that principle was closely tied in with the human right of due process.

23. Mr. CANDIOTI said the preliminary report of the Special Rapporteur and his oral introduction had prompted a productive debate about the basic aspects of diplomatic protection that required elaboration as a way of laying a firm conceptual foundation for further consideration of the topic. Diplomatic protection, as the Special Rapporteur's historical analysis revealed, had at the out-

set been virtually the sole means available to States for protecting the rights and interests of their nationals abroad, but it currently existed alongside other mechanisms and institutions developed by the international community at both the regional and the international level, especially in regard to human rights. Diplomatic protection, however, was sometimes in fact the sole or the best option for dealing with a particular problem.

24. As to whether, in exercising diplomatic protection, a State was enforcing its own right or the right of an injured national—a question raised in paragraph 54 of the preliminary report—a person linked by nationality to a State was a part of its population and therefore one of the State's constituent elements. As Mr. Pambou-Tchivounda had pointed out (2521st meeting), the protection of its nationals was a State's fundamental right, on the same plane as the preservation of its territory or the safeguarding of its sovereignty. Diplomatic protection by a State of its nationals and their interests was equivalent to defence by the State of one of its constituent elements, in other words, of its own rights and juridical interests. At the same time, however, the State was defending the specific rights and interests of the national that had been "injured" by another State.

25. As Mr. Herdocia Sacasa had pointed out, no rigid distinction could be drawn between the rights of the State and the rights of its nationals; the two sets of rights were complementary and could be defended in concert. Hence there was no need, at the current stage of development of international law, when individual rights were broadly acknowledged, to describe the machinery for diplomatic protection as a fiction or any other artificial construct that might have been appropriate in other historical contexts.

26. He agreed with other speakers about the need to bring the institution of diplomatic protection up to date in view of the latest developments in the international protection of human rights. Interesting proposals had been made on innovations as a contribution to progressive development of the law, something that merited further analysis. But it was important to remember that diplomatic protection was just one part of the vast field of international responsibility. As a means of giving effect to State responsibility, it created a relationship between two States: the "protector" State and the State against which action was being taken, which was viewed as responsible for an internationally wrongful act that had caused injury to a national of the "protector" State. The contemporary emphasis on protection of human rights—an emphasis of which he wholly approved—should not obscure the fact that the State-to-State relationship was an essential element in determining the nature of diplomatic protection.

27. Respect for the independence and for the other rights, including the jurisdictional powers, of the State against which diplomatic protection was being exercised, and in particular, observance of the principle of exhaustion of local remedies, were essential to the regulation of diplomatic protection. Mr. Sepúlveda's comments were particularly pertinent in that connection.

28. In the matter of primary and secondary rules, a consensus had emerged in favour of leaving aside the primary rules which set out the material content of the obligations

⁵ *The NAFTA*, vol. I. North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (Washington, D.C., U.S. Government Printing Office, 1993).

of States in the treatment of foreigners and foreign investments and of concentrating on secondary rules that defined the basis, terms, modalities and consequences of diplomatic protection, although some primary rules of a general nature could be taken into account. In that regard he endorsed the Special Rapporteur's proposals in paragraphs 59 to 62 and 64 of the preliminary report. As had been pointed out in the debate, the study of diplomatic protection must include study of the means for exercising it. Certainly, the threat or use of force was to be excluded: the traditional machinery for peaceful settlement of disputes, particularly negotiation but also mediation, good offices and arbitration, were much more appropriate and productive. The question of countermeasures in the context of diplomatic protection should also be given due consideration.

29. In his opinion, the debate had clarified the starting point for future work and it provided sufficient material to formulate conclusions on which later efforts could build.

30. Mr. BENNOUNA (Special Rapporteur) recalled that, in the Commission's work on State responsibility, it had been agreed that the use of countermeasures must not entail any violation of human rights. Established international practice confirmed that position. The threat or use of force was likewise deemed to be unacceptable in the exercise of diplomatic protection. He nonetheless thought it should be made clear that peremptory norms—*jus cogens*—had to be respected in the exercise of diplomatic protection.

31. Members of the Commission had stated that diplomatic protection entailed protection of one of the constituent elements of the State: the population. That was true, in keeping with the principle of the State's jurisdiction by virtue of a link with persons, not with territory. Thanks to the progress made in the field of human rights, however, the interpretation of the State's jurisdiction *ratione personae* was much more restrictive today, and fortunately, States no longer had the right to do whatever they wished with their population.

32. Mr. HAFNER said that in any attempt to compare human rights protection with diplomatic protection, specific aspects of both must be distinguished. For example, the content of human rights must not be confused with the means of enforcement of human rights. If that distinction was kept clear, the following questions could be answered. Was diplomatic protection a human right? No. Could a human rights violation give rise to diplomatic protection? Yes. Under the *erga omnes* effect of human rights, any State could bring a complaint against another State, but a clear distinction must be made as to whether such a complaint was made as a consequence of diplomatic protection or of a particular right to raise a complaint under a given regime, in which case the complaint clearly did not fall within the ambit of diplomatic protection. He saw no need to invoke peremptory norms or general rules of international law in connection with diplomatic protection, for it went without saying that they did apply.

33. Mr. Sepúlveda's citation of chapter Eleven of NAFTA raised a very interesting point. If a State brought a claim in connection with non-compliance with a non-

self-executing norm which was not implemented by the necessary domestic law, the question arose as to whether such a claim involved diplomatic protection or not, and he would argue that it did not: the State was making a claim in its own right. The same could be said of the *case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, in which Paraguay was clearly bringing a claim in its own right, not in the exercise of diplomatic protection.

34. Mr. PAMBOU-TCHIVOUNDA, responding to a point made by the Special Rapporteur, said that it was not merely peremptory norms but international law as a whole which constituted a limitation on the use of diplomatic protection. Once diplomatic protection was accepted as an institution of international law and its use was accepted as a discretionary power of the State, the State had a primary obligation to exercise that power in accordance with international law as a whole.

35. Mr. ECONOMIDES said Mr. Candioti's point that diplomatic protection always existed in parallel with other possibilities available to individuals posed the difficult question of the relationship between diplomatic protection and all other available local or international remedies. Everyone agreed that domestic law took precedence in all cases and that diplomatic protection was something exceptional, since it implied intervention by a State as a kind of last resort. But it was not clear whether all international remedies took precedence or only those which led to a binding settlement. His opinion was that all international remedies did take precedence over diplomatic protection and that a State could intervene only if the settlement that such remedies produced was not respected.

36. Mr. Hafner was right to say that, in principle the Commission did not have to deal with general questions of international law. But there was the problem that diplomatic protection was a relationship which could create a dispute or an atmosphere of conflict between States. Accordingly, it would be wise to make express reference to the peremptory norms of international law, in particular the principle of the non-use of force, and also to the principle that countermeasures were not applicable in the sphere of human rights.

37. Lastly, on a technical point, it should be remembered that a State's population consisted not only of nationals but also of foreigners and stateless persons, who did not enjoy diplomatic protection.

38. Mr. MIKULKA said that he was largely in agreement with the content of the Special Rapporteur's preliminary report. However, if the comment just made by the Special Rapporteur on peremptory norms was interpreted *a contrario*, the Commission might find itself conducting a debate similar to the one on countermeasures. Countermeasures gave a State the right to disregard certain rules of international law but not the peremptory norms. Diplomatic protection, however, should be exercised purely and simply in conformity with all the rules of international law, not only those of *jus cogens*.

39. The question raised by Mr. Economides as to whether international remedies preceded diplomatic protection needed further study. It was not clear whether a

State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State had the right to exercise diplomatic protection in an attempt to overturn a decision against the individual by the international body concerned.

40. He shared the Special Rapporteur's doubts as to whether a rigid distinction should be maintained between primary and secondary rules. The Special Rapporteur's position prompted the question whether the Commission should not consider, under the current topic, some other issues not falling within the category of secondary rules—the question of nationality for example.

41. Mr. GOCO, responding to a point raised by Mr. Hafner, said that the question was whether a State's right existed independently of the injury suffered by the individual and of any legal action he might take. Paragraph 51 of the preliminary report said it was conceivable that the State could not bring an international claim against the will of the national concerned. There was also the Calvo doctrine, concerning an individual's contractual refusal of diplomatic protection from his State of origin. Could a State invoke diplomatic protection in such circumstances and proceed, on the basis of a treaty for example, against the expressed will of the injured individual? If it could, then the individual would become merely a procedural aspect of the case. That seemed to be the real issue the Commission had to settle.

42. Mr. SEPÚLVEDA said that the *North American Dredging Company* case dealt with by the United States-Mexican General Claims Commission was relevant to Mr. Goco's point about the Calvo clause. In its contract with the Mexican Government the company had agreed not to have recourse to the diplomatic protection of the United States. The Claims Commission had decided that the contract was valid and that therefore the claim brought by the United States Government was not admissible.⁶ The case was often cited as a reaffirmation of the Calvo clause.

43. Mr. SIMMA said that he had always understood the *North American Dredging Company* case as upholding the principle that a natural or legal person could not renounce a right which was not his or its own.

44. Mr. SEPÚLVEDA said that the point was that the United States-Mexican General Claims Commission had rejected the claim brought by the United States Government on the ground that the contract was valid.

45. Mr. BENNOUNA (Special Rapporteur) said that Mr. Simma was wrong on the specific point at issue. The *North American Dredging Company* case was indeed cited in the literature as a validation of the Calvo doctrine, but things were not as simple as that. There was also a specific Western doctrine, as Mr. Simma had pointed out, that an individual could not renounce a right which was not his own. But the case law did not follow that line. The debate which he as Special Rapporteur had brought to the Commission was not an artificial one and it must remain

open. He intended to propose that, although there was no problem as to the exercise of the discretionary power of the State, the Commission must look more closely at the rights and obligations involved. The purpose of his preliminary report was in fact to delve into the nuances of the traditional doctrine.

46. Mr. KABATSI said the Special Rapporteur's position was that, in the light of the development of individual rights at the international level, the Commission should reconsider the traditional law as expressed in the *Mavrommatis Palestine Concessions* case. The Special Rapporteur was not happy with the "fiction" of the interest of the State, as opposed to the interest of the individual, in connection with the espousal of claims. He argued correctly that if it was currently true that in human rights cases an individual could use remedies other than diplomatic protection the Commission should abandon the strict "fiction" that the State was espousing its own right and not the right of the individual. The Special Rapporteur was seeking the Commission's guidance on that matter.

47. He also sought guidance as to whether the Commission should reconsider the Working Group's proposal made at the forty-ninth session to limit the topic to the codification of secondary rules.⁷ The Special Rapporteur's position was that, whenever appropriate, the Commission should also discuss primary rules with a view to appropriate codification of the secondary rules. The Special Rapporteur did accept in paragraph 5 of his preliminary report that the topic was ripe for codification, that is to say, he accepted the Working Group's position and the fact that the customary origin of the principle in the *Mavrommatis Palestine Concessions* case was well established in international law. Even when he described it as a legal fiction, the Special Rapporteur was not really calling into question the right of the State to protect its nationals when local remedies had failed to do so. The debate in the Commission had provided the guidance sought by the Special Rapporteur: the concepts of the interest of the State and the interest of the individual should for the moment remain separate, even though they were complementary. In most cases the exercise of diplomatic protection involved the enforcement of human rights and there were, moreover, still cases in which a remedy was not directly available to the individual.

48. At the current stage, the Commission need not worry about the avenues available for enforcement of claims by individuals through the human rights treaty mechanism. It needed to follow the Working Group's outline and answer the various questions raised under the four chapter headings. Most of the details of the issues were stated in the report of the Commission on the work of its forty-ninth session.⁸ The Commission's task was to clarify those issues.

49. He was inclined to agree with the Special Rapporteur that the codification exercise should be limited to secondary rules but that, whenever necessary, primary rules could also be considered in passing.

⁶ *Opinions of Commissioners under the Convention concluded 8 September 1923 between the United States and Mexico—4 February 1926 to 23 July 1927* (Washington, D.C., U.S. Government Printing Office, 1927), pp. 31-32.

⁷ *Yearbook . . . 1997*, vol. II (Part Two), p. 61, paras. 180-181.

⁸ *Ibid.*, p. 62, para. 189.

50. Mr. KUSUMA-ATMADJA said that, so far as the position of individuals was concerned, the question was whether a State could exercise its right to protect its nationals even if the national concerned had indicated that he did not wish to rely on that right. It was an important issue as the situation would, of course, differ depending on whether private persons or legal persons were involved. He too therefore considered that the matter should be treated with the utmost caution.

51. Mr. GOCO said he would like to know whether, in the event of an alleged violation of the fundamental human rights, the State of the victim could, in the exercise of its discretionary power, refuse to accord diplomatic protection.

52. Mr. KABATSI said that, if the individual did not have access to the various remedies through the mechanisms provided by treaty, the State could exercise its diplomatic protection, and in his view, even if a fundamental human right had been violated, that remained the position. The State might, however, wish, for a variety of reasons, to decline to take up the matter.

53. Mr. HE said that diplomatic protection, which had had an unfortunate history, could be regarded as an extension of colonial power or as an institution imposed by powerful States on weaker ones. It still caused great concern to small and developing countries. The time had therefore come to re-evaluate the principles on which it was based.

54. The judgment of PCIJ in the *Mavrommatis Palestine Concessions* case had proclaimed it to be an elementary principle of international law that a State was entitled to protect its subjects when they were injured by acts contrary to international law committed by another State and for which those subjects had been unable to obtain satisfaction through the ordinary channels. It was worth noting that, in some countries, both natural and legal persons might well suffer an injury under internal law which could amount to a violation of the principles of international law. That occurred because of the different stages of development, different legal systems and different degrees to which the principles of international law had been incorporated into internal law. For instance, acts such as nationalization and requisition, which were lawful under internal law, might well be contrary to international law, while acts such as rebellion and armed action, which were contrary to internal law, might not necessarily be contrary to international law.

55. There was thus both a confrontation and a link between internal and international law and it was important to adapt the former to the principles of the latter. The Special Rapporteur noted in his preliminary report that the institution of diplomatic protection had evolved over time and on account of two factors in particular: the development of the rights of individuals, on the one hand, and of the rights of legal persons as foreign investors, on the other. The trend towards recognition of the rights of the individual, towards allowing individuals to have increasing access to international bodies and to be parties to proceedings before international courts, and also towards allowing foreign legal persons to have direct

access to ICSID, would have a significant impact on the traditional role of diplomatic protection.

56. He could not, however, agree that that role was outdated, given the need to have recourse to diplomatic protection to protect a national of a State injured by acts of another State that were contrary to international law. Nonetheless, in view of the developments he had mentioned, the changing framework of diplomatic protection would enable States to bring claims on behalf of injured nationals. Furthermore, the increasingly complex structure of legal persons as exemplified in the *Barcelona Traction* case—when a company could have one nationality and its shareholders several other nationalities—would make it even more difficult for the State of the nationality of the legal person to take action. The problem was whether the State whose nationality the company possessed had any real interest in bringing the case before an international court.

57. In view of all those factors, the traditional theory, framework and role of diplomatic protection should be re-evaluated.

58. Although the Working Group had decided that the topic should be confined to secondary rules, to focus exclusively on those rules would only make the work more difficult inasmuch as the Commission would have to study the conditions under which diplomatic protection had been exercised. Such conditions would include the “clean hands” rule—a borderline case, as already pointed out, between primary and secondary rules—and also exhaustion of local remedies. Both of them were complicated issues where the possibility of entering into the field of primary rules could not be ruled out.

59. Mr. BROWNLIE said it was to some extent true that the institution of diplomatic protection had had an unfortunate history and had been and still could be abused. But there was an obvious distinction between the essence of something and its abuse. A motor car, for instance, could be used to take people to hospital but also to assist in an armed robbery, yet it had not been abolished on that account. It was not true that diplomatic protection was used only by strong States against the weak. It was frequently used between States of equal status, often within the same region. When certain Jews in Tsarist Russia who had acquired United States nationality were being persecuted, United States protests had been directed at the Russian Government of the time;⁹ in the 1960s, China had directed protests both to Indonesia¹⁰ and to Mongolia¹¹ regarding the treatment of its nationals resident on their territories; and, again, in the late nineteenth and early twentieth centuries, there had been protests by China over the United States failure to protect Chinese residents in the United States against riots¹² and also by Italy in regard to injury to Italian nationals in riots in New Orleans.¹³ It was important not to generalize unduly.

⁹ Moore, *Digest* (1906), vol. II, pp. 8 et seq.

¹⁰ “Chronique”, RGDIP, vol. 70 (1966), pp. 1013 et seq.

¹¹ *Ibid.*, vol. 71 (1967), pp. 1067-1068.

¹² Moore, *Digest* (1906), vol. VI, pp. 820 et seq.

¹³ *Ibid.*, pp. 837 et seq.

Mr. GALICKI said that, in view of the preliminary report and the discussion in the Commission, the establishment of a working group on diplomatic protection would be beneficial for further development of the item.

61. It was no easy matter to answer the question posed in paragraph 54 of the preliminary report, namely, When bringing an international claim, is the State enforcing its own right or the right of its injured national? According to the traditional approach, the right to exercise diplomatic protection was a discretionary right of the State of nationality. On that basis, the position of an injured individual was very weak and completely dependent on the will of the State of his nationality. However, as rightly stated in paragraph 52, the attribution of rights to individuals by means of treaties may go so far as to allow individuals direct access to international machinery and courts to guarantee observance of such rights. In that connection, the examples cited in chapter I.B of the report seemed to suggest that, in the particular case of the inherent rights of individuals as currently covered by the developing international law of human rights, it might be possible to replace States by individuals or at least to allow individuals to act in parallel with States in those areas hitherto confined to the diplomatic protection exercised exclusively by States.

62. It should not be forgotten that the very concept of nationality—the basis for the exercise of diplomatic protection—had undergone significant changes. No longer could nationality be defined—as it had been in article 1, subparagraph (a), of the Draft Convention on Nationality prepared by the Harvard Law School¹⁴—as “the status of a natural person who is attached to a State by the tie of allegiance”. As the phenomenon of the subjectivization of individuals had developed, the “legal bond” of nationality had become less a “tie of allegiance” and more a matter of the reciprocal rights and duties between the individual and the State. The existence of those rights and duties as an element of nationality had been stressed by ICJ in the *Nottebohm* case. Furthermore, the right to nationality was recognized in an ever-increasing number of international treaties as one of the human rights to be enjoyed by all individuals.

63. While the concept of nationality as a “tie of allegiance” between the State and the individual matched the traditional approach to diplomatic protection, the concept of the right to nationality as a human right paved the way for certain further considerations concerning diplomatic protection as an institution closely connected to nationality. Some very interesting changes were already taking place in the attitude of States to the question of the protection they afforded their nationals. Certain new constitutions, the Polish Constitution¹⁵ among them, provided that a national abroad was entitled to protection from his Government. He fully agreed, therefore, that there was clear evidence that some States, at least, were in favour of treating the right to diplomatic protection as a human right which could be claimed by individuals and did not lie exclusively within the discretion of States.

64. The right to State protection set forth in the Polish Constitution was contained in chapter II, that dealt with human and civil rights and it was guaranteed by judicial remedies. It might therefore be possible to recognize that, at any rate in constitutional practice, there might be a newly emerging human right to diplomatic protection.

65. In summary, first, the subjectivization of individuals, which had a strong impact on the traditional concept of diplomatic protection, should be considered in the Commission’s work on the elaboration of appropriate principles. Even if there was no general agreement on the question of individuals as subjects of international law, individuals were gradually acquiring an increasing number of subjective rights under international law. Secondly, the relationship between the new international law of human rights and the traditional rules on diplomatic protection should be analysed in depth. Thirdly, the question of a human right to diplomatic protection must be considered with a view to that right being exercised by the State of nationality. Lastly, in the light of the growing possibilities for individuals to have direct access to international bodies and courts, careful consideration must be given to the parallel exercise by States and/or individuals of the rights traditionally covered by diplomatic protection.

66. Mr. BENNOUNA (Special Rapporteur) said he agreed that an appraisal of the various internal laws and constitutional principles on diplomatic protection would be useful and he trusted that the Secretariat would assist in the matter.

67. He would be interested to see the relevant provisions of the Polish Constitution under which, according to Mr. Galicki, diplomatic protection would be elevated into a human right. Also, Mr. He had spoken of the need to determine to what extent diplomatic protection was governed by internal law and to what extent it fell within international law. There might well be a problem under internal law in the case of a remedy exercised by the individual vis-à-vis his State when it had not protected him. At the international level, on the other hand, the right to act or not to act remained at the discretion of the State: but discretionary did not mean arbitrary. Established rights to diplomatic protection might exist under internal law but, in his view, there were no such rights at the international level. At all events, international law had not yet reached that stage. For that reason, an evaluation of the various national laws would be of great interest. It had been suggested that States might be approached for their assistance in the matter but the problem was that, in general, States failed to reply. He would prefer it, therefore, if the Secretariat could make the necessary inquiry.

68. Mr. GOCO said it was clear that discretion could not be equated with arbitrariness. A State was naturally protective of its interests but, in the case of diplomatic protection, there were no hard and fast rules. At the same time, the role of the international media must not be overlooked, in view of the image that might be painted of a foreign State which withheld diplomatic protection from a suffering victim—though, presumably, a foreign State that did exercise its discretion not to grant diplomatic protection would have weighed up all the implications.

¹⁴ *Research in International Law, I. Nationality* (Cambridge, Mass., Harvard Law School, 1929), p. 13.

¹⁵ Poland, Constitution adopted on 2 April 1997, chapter II, art. 36.