

Document:-
A/CN.4/SR.2523

Summary record of the 2523rd 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>)*

2523rd MEETING

Friday, 1 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES

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

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 (*concluded*)

1. Mr. MELESCANU said that, in the current debate on the preliminary report of the Special Rapporteur (A/CN.4/484), all the main theoretical questions had already been raised and, in particular, the questions of the relationship between the right of the State to exercise diplomatic protection and the rights of the individual and of the relationship between primary and secondary rules. However, from a practical standpoint, two important remarks seemed necessary. First, even though there had been few cases of diplomatic protection in the recent practice of States, the institution of diplomatic protection was nonetheless worthy of codification. Diplomatic protection constituted the national's guarantee of last resort. Furthermore, that codification must be based on the traditional conception of the institution; otherwise, States would not accept it, precisely because their practice drew only on that conception. But there had been an evolution, of which account must of course be taken. For example, it had to be considered whether a State which obtained compensation in the context of the exercise of diplomatic protection could refuse to compensate the national on whose behalf it had exercised that protection, on the grounds that the right it had exercised was its own right. In his view, the Commission must answer that question in the negative and impose an obligation on the State in that regard. In the light of that evolution, it would also not be possible to limit the exercise of diplomatic protection to patrimonial rights.

2. The second comment concerned the relationship between diplomatic protection and the exercise of the

recourse procedures currently available to individuals, particularly in the area of human rights. In his view, a clear distinction must be drawn between the exercise of diplomatic protection and the exercise of those rights of recourse by individuals, but it was also necessary to determine the relationship between those two institutions. For instance, it would have to be considered whether the State could exercise its diplomatic protection in parallel with individual recourse proceedings or only after the delivery of an unfavourable decision vis-à-vis its national. But the distinction remained quite clear-cut, for four reasons.

3. First, in the framework of the human rights protection mechanisms that gave individuals the right of petition, the action by the individual was almost always directed against the State of which he was a national. States thus had little occasion to exercise diplomatic protection in the field of human rights. Secondly, the institution of individual petition had been established specifically to replace diplomatic protection, to enable the individual to assert his rights directly: it could in no sense be seen as a development of diplomatic protection. Thirdly, there was a very clear difference between the two institutions, as diplomatic protection was part of customary law, whereas the exercise of individual petition procedures in human rights cases, always had a treaty basis. Fourthly, there were such marked differences between the international system for the protection of human rights and regional systems—particularly the most developed of the latter, namely, the European system—that it would be extremely difficult to find a common denominator that could be incorporated into the framework of diplomatic protection. Thus, diplomatic protection was a fundamental institution, which should be codified in terms of the traditional conception, while taking account of the evolution of the law.

4. Mr. SIMMA said that the difference between individual petition procedures in human rights cases and diplomatic protection was not as pronounced as it seemed to be. In some cases, an element of diplomatic protection could be an additional component in a human rights petition procedure. For instance, in the *Soering* case,² the German Government had brought a claim in the European Court of Human Rights on behalf of its national. The literature also recognized that there was at least a theoretical link between the two institutions.

5. Mr. PAMBOU-TCHIVOUNDA said he wondered whether the fact that Germany had stepped in in the *Soering* case referred to by Mr. Simma allowed the conclusion that it had effectively exercised its diplomatic protection. In his view, in order to answer that question, it would first be necessary to study the relationship between individual petitions in human rights cases and diplomatic protection.

6. Mr. BENNOUNA (Special Rapporteur) said it was clear that the exercise of diplomatic protection and of recourse procedures in human rights cases must be kept distinct and that no one had ever claimed otherwise. Diplomatic protection belonged with secondary rules, whereas human rights were primary rules. The fact remained that the law had evolved, if only as a result of

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

² European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, *Decision of 26 January 1989* and *Judgment of 7 July 1989* (Registry of the Court, Council of Europe, Strasbourg, 1989).

the adoption of the Charter of the United Nations, the Universal Declaration of Human Rights,³ the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and that the new rights thereby conferred on the individual did indeed fall within the scope of diplomatic protection.

7. Mr. ECONOMIDES said that the relationship between diplomatic protection and mechanisms for individual petition was not that simple. Three cases must be distinguished. First, an individual could exercise his right of petition against the State of which he was a national; such a case had nothing to do with diplomatic protection. Secondly, an individual could exercise his right of petition against a foreign State, in which case there was a parallelism, as the State could exercise its diplomatic protection on behalf of its national. In practice, however, a Government would never do so, but would leave it to the person concerned to exercise his individual right of petition. Thirdly, a State could bring its own recourse proceedings against another State, in a human rights case in which it could also exercise its diplomatic protection. It was for the State to choose which path it wished to follow and the Commission should not concern itself with that situation. It was therefore too simple to say that it was merely a question of an opposition between primary and secondary rules. The question must be studied in greater depth.

8. Mr. KABATSI asked Mr. Simma whether, in the *Soering* case, the State had exercised its own right rather than that of the individual for whom it had substituted itself.

9. Mr. SIMMA said that three categories of State could bring a case before the European Court of Human Rights, namely, the State against which the petition had been brought, the State bringing the petition and the State of which the claimant was a national. If, as in the case referred to, it was the latter State that stepped in, it could be said that there was an element of diplomatic protection, although it was also the rights of the individuals deriving from the European Convention on Human Rights that it was seeking to protect.

10. Mr. BROWNLIE said that, although it was accepted that the system of recourse established under the European Convention on Human Rights borrowed a good deal from the world of diplomatic protection, the State that brought a claim in the court did not take over the claim of the individual concerned, but brought a claim in parallel, which accounted for the fact that the State and the individual had been separately represented before the court in the *Loizidou v. Turkey* case.

11. Mr. AL-KHASAWNEH said that the successful conclusion of work on the topic would depend to a large extent on the Commission's ability to strike a balance between realism and idealism; for the rules governing diplomatic protection had been developed at different times and with differing emphases.

12. First, there had been the traditional conception, which was bilateral, discretionary and gave the State pride of place as a subject of international law at the expense of the real injured party. Next, to limit the abuses arising from disparities between States, there had been the Calvo clause⁴ and, more recently, the attempts to reformulate that restriction in the 1970s in the context of what had come to be known as the new international economic order. But, subsequently, the curious fact had emerged that the same States that had fought against abuses of diplomatic protection in international forums had at the same time concluded investment promotion agreements giving the State of nationality the right to resort to international arbitration or even vesting that right in legal or natural persons, thereby making them subjects of international law. Cognizance must be taken of that state of affairs if the Commission's work on the topic was not to remain a purely academic exercise.

13. On the other hand, as was noted in paragraph 34 of the preliminary report, there were currently a number of large multilateral treaties in the field of human rights that had established injury to an alien as a violation of human rights. Unlike the situation with investments, however, the means of obtaining redress available to the individual had remained rudimentary, offering a striking contrast between the wide scope of human rights and the very small number of subjects in a position to exercise them. Notions of *erga omnes* obligations did not change that picture. It was also noteworthy that, in recent practice, States had tended to see claims of individuals in terms of human rights abuses rather than of diplomatic protection, at least where investments were not the point at issue. In fact, the two approaches were seen by States not as mutually exclusive, but as complementary.

14. The conclusion to be drawn was that the object of the current exercise should essentially be to codify the rules relating to diplomatic protection in the traditional sense. The major developments that had taken place in the field of human rights should not replace the traditional conception as the Commission's starting point. The exercise should also deal with the codification and progressive development of secondary rules, bearing in mind that the distinction between primary and secondary rules was not always very clear, as could be seen in the case of the "clean hands" rule. The old system of diplomatic protection had stood the test of time and was rich in precedent, but had been declining because of the establishment of more rigorous rules concerning investment disputes and developments in the field of human rights. It was precisely the tensions between those trends that made the topic an interesting one.

15. Mr. PELLET welcomed the fact that, at the very start of his preliminary report, the Special Rapporteur had raised many important questions which derived from two major problems that he would take up one by one: the historical origins of diplomatic protection, the legal fiction on which that institution was based and its relationship with human rights; and the nature—primary or secondary—of the rules to be codified by the Commission and the topic's relationship with that of State responsibility.

³ General Assembly resolution 217 A (III).

⁴ See 2522nd meeting, footnote 3.

16. The Special Rapporteur had pointed out that the institution of diplomatic protection could not be dissociated from the two age-old ideas on which modern-day international law was based: State sovereignty and international responsibility. He had therefore been right to refer in paragraph 6 of his preliminary report to Vattel,⁵ the champion of State sovereignty triumphant. The idea that international law was primarily an issue between sovereign States had been forcefully reaffirmed in the judgment in the “*Lotus*” case,⁶ which had been decided three years after the *Mavrommatis Palestine Concessions* case, in which the “traditional” theory of diplomatic protection had been stated in no uncertain terms.

17. However, the Special Rapporteur’s indignation about the institution of diplomatic protection was not entirely justified. The original purpose had been to mitigate the disadvantages and injustices to which natural and legal persons had been subjected. Hence, far from being an oppressive institution, diplomatic protection had at least partially rectified the injustices of a system that reduced the private person, both individuals and legal persons, to the rank not of a subject of international law, but of a victim of violations of that law. Nor was diplomatic protection in essence discriminatory, as stated in paragraph 8 of the report. It was discriminatory in its exercise, which was by definition almost exclusively the prerogative of the most powerful States. In that regard, Mr. Brownlie had warned that it was important not to generalize unduly: the institution was available to all States, although he would admit that some were “more equal” than others. In that sense, diplomatic protection was a component of the law of responsibility, which was, according to Jessup, the result of “dollar diplomacy”, which had taken shape mainly in the late nineteenth and early twentieth centuries in the very unequal relationship between Europe and North America, on the one hand, and Latin America—the third world of that time—on the other. Latin America had reacted against the rules imposed on it, as shown by the Calvo clause and the Drago doctrine.⁷

18. The institution of diplomatic protection was, moreover, not in itself a threat to human rights. It was, rather, a means of protecting those rights, even if that was not its primary purpose, and, when a State violated the rights of an individual, in the person of a national of another State, it enabled that State to take action in the absence of other protection mechanisms. In addition, the Special Rapporteur was perhaps wrong to adopt a human rights point of view exclusively, since it was different in conceptual and practical terms from diplomatic protection, which operated in other areas that had nothing to do with basic human rights, such as the protection of private economic interests, where it existed side by side with other mechanisms like ICSID, which gave private individuals direct access to international law.

19. The entry of private persons and, more specifically, of the individual, into the sphere of international law had very little to do with the dualism between legal systems that the Special Rapporteur had criticized. What was demonstrated by the examples he gave in the field of human rights—and he could have taken others from international economic relations—was that the individual had become a subject of international law—and he agreed with the Special Rapporteur on that point—and that that added a basic and entirely relevant component to the subject matter under discussion.

20. If the individual thus became a subject of international law, however, it could be asked whether it was appropriate to maintain the “legal fiction” which had been created in the late nineteenth and early twentieth centuries and which had been admirably expressed by PCIJ in the *Mavrommatis Palestine Concessions* case. That fiction had had no other purpose than to protect the interests of private individuals, who had admittedly not had any rights at the international level: it had been “as if” the State had been exercising its own right in taking the place of its national. It had to be decided whether that fiction served any purpose. In the first place it was difficult to see why the term itself had unleashed so many passions. Since it was well known that the law was made up of fictions or, in other words, of normative reconstructions of reality. In the case under consideration, diplomatic protection was a fiction because the factor that brought it into play, that is to say, harm to the interests of a private individual, was disguised as something else, that is the violation of a fairly elusive right of the State of ensuring that international law was respected in the person of its national. International lawyers were used to it, but the reasoning behind the system was being taken rather too far, especially since the law did not take the hypothesis to its logical conclusion: even leaving aside the Calvo clause which was of doubtful lawfulness and certainly entirely inconsistent with the basic fiction, and leaving aside the requirement of the exhaustion of local remedies by a private injured party and not by the State, there was still the eloquent example of compensation, which was assessed in terms of the damage suffered by the individual, not by the State.

21. Having concluded his analysis of the legal fiction, he had to admit he was in two minds. The ideal solution would probably be to acknowledge that private persons were subjects of international law with not only the capacity, but also a real possibility, to assert their rights directly at the international level. Effective international mechanisms would have to be set up for that purpose. Some did exist in the area of human rights or the protection of investments, for example, but they were exceptions. For all other purposes, it could be considered that the age-old institution of diplomatic protection would still serve a useful purpose and that it would be better to think twice before calling it into question. The Special Rapporteur was proposing that the veil should be lifted once and for all. He himself would advise caution. The Commission would do better to distinguish clearly between the two aspects of the problem, namely, the exercise of the right protected and the right itself. It should therefore first clearly recognize that it was indisputably the State of which the injured private individual was a national that had the right to exercise diplomatic protection, on the

⁵ E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (*The Law of Nations or the Principles of Natural Law*), English translation of the edition of 1758 in *The Classics of International Law*, vol. III (Washington, D.C., Carnegie Institution of Washington, 1916).

⁶ *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*

⁷ See *Yearbook . . . 1956*, vol. II, pp. 216-217, para. 228.

understanding that, if an international mechanism was available to that individual, the problem did not arise. The Commission should then recognize that the rights protected were not those of the State, but, rather, those of the injured individual, whose identity must be more clearly defined in a future report. In any event, it must clearly recognize that the State had the discretionary right to exercise or not to exercise its protection.

22. The Special Rapporteur seemed to have such a dual approach in mind. It could be made even more explicit by indicating, first, that the fiction on which the *Mavromatis Palestine Concessions* formula was based was no longer relevant and that, when a State exercised its diplomatic protection in favour of one of its nationals, it was in fact the right of that national that the State was attempting to uphold; secondly, that, in the absence of institutions enabling protected individuals to act directly at the international level, the State had the discretionary power to exercise or not to exercise its diplomatic protection; and, thirdly, that the Commission would think *de lege ferenda* about ways of encouraging the State to exercise its protection. On that last point, however, it could do no more than to express preferences and make recommendations, since its responsibility was to codify international law and develop it progressively, not to revolutionize it. The movement to grant the individual the status of a subject of international law was well under way. The idea of raising diplomatic protection to the rank of a human right nevertheless seemed premature and, in any event, debatable, owing to the formidable technical and legal problems involved, some of which had been brought up by Mr. Hafner (2522nd meeting).

23. As to the relationship between diplomatic protection and State responsibility, the first question that arose was whether secondary rules alone should be taken into account or whether primary rules could also be considered. The distinction between the two was not always self-evident, but he was certain that there was every advantage to be gained by sticking very closely to the general approach adopted by a former Special Rapporteur, Mr. Ago, for the study of State responsibility. First of all, as the Special Rapporteur, Mr. Crawford, had pointed out in chapter II.B.1 of his first report on State responsibility (A/CN.4/490 and Add.1-7),⁸ article 1 of the draft articles on State responsibility prepared by Mr. Ago⁹ had been a stroke of genius because it had eliminated damage from the definition of international responsibility. Mr. Ago had also had that other stroke of genius of moving from so-called “primary” to “secondary” rules and of dealing not with the violations of the law themselves, but only with their consequences—that is to say, with the topic to be considered, since those very consequences constituted international responsibility: no matter what rule was violated, the consequence was always that the violator was responsible. The same approach should be adopted with regard to diplomatic protection.

24. In that connection, the terms in which paragraphs 60 to 64 of the preliminary report were drafted were rather disturbing. The Special Rapporteur referred to the deci-

sion of the Iran-United States Claims Tribunal in case A/18,¹⁰ which seemed absolutely indefensible in modern-day law. The “Ago approach” was all the more essential in that nearly all of the doctrine in Romance languages made the topic of diplomatic protection an extension of that of responsibility. He himself believed that it should be an integral part thereof and should have formed part of part three of the draft articles on State responsibility.¹¹ Diplomatic protection was, after all, one of the ways of implementing that responsibility. It was indeed the only way where there was no agreement enabling a private individual to exercise his rights directly at the international level when harm resulted from an internationally wrongful act, which, it must be recalled, always gave rise to the responsibility of the author State.

25. In conclusion, he explained how he saw the interrelationship between diplomatic protection and State responsibility. First of all, they were linked in terms of reasoning: the State was responsible for any violation of international law which it had committed or had been attributed to it, as stated in part one of the draft articles on State responsibility. If that first condition was met, a number of consequences arose (part two of the draft), the main one being the obligation to provide compensation. Compensation gave rise to no problem if the internationally wrongful act committed by the State had caused damage to another State (leaving aside the hypothesis of international crime), in which case the issue remained at the inter-State level, but it did give rise to a problem when the injured party was not another State, but a private individual, who, with rare exceptions, did not have the capacity to act at the international level. It was precisely at that level that diplomatic protection came into play and thus proved to be an extension, a consequence and a component of the law of State responsibility. Accordingly, it would be wise not to reject the two strokes of genius that characterized the draft on State responsibility prepared by the former Special Rapporteur, Mr. Ago, as some of the wording at the end of the report under consideration seemed to be suggesting.

26. Mr. HAFNER said that two delicate points would have to be cleared up in the discussion that ensued. First, if, following the conclusion between two States of a treaty providing for the obligation of a State A to adopt legislation concerning the nationals of a State B, State A failed to comply with that obligation, would a claim by State B be part of the exercise of diplomatic protection or of a right of the State itself? In the latter case, the treaty would have conferred no immediately applicable right on the individuals concerned, since diplomatic protection could be exercised only if one of the rights granted to them under the domestic legislation of State A had been violated. Secondly, that issue would have consequences for the question whether the assessment of compensation came under the law of responsibility, or under diplomatic protection. In his view, the context of responsibility would govern the situation described above, although account should be taken of the link between the two.

⁸ See footnote 1 above.

⁹ *Yearbook* . . . 1973, vol. II, p. 173, document A/9010/Rev.1, para. 58.

¹⁰ See 2520th meeting, footnote 7.

¹¹ *Ibid.*, footnote 8.

27. Mr. PELLET, referring to the first point, said that the analysis based on the case law of PCIJ, which had ruled that a treaty dealing with the treatment of aliens would confer rights only on the contracting States, was no longer correct in the modern age. In the relations between States, each State party to the agreement was entitled to have the other contracting State fulfil the provisions of the agreement, but, in the relations between State A and the nationals of State B, the treaty, addressing the treatment of aliens, vested them with rights justifying the exercise of diplomatic protection in the absence of an appropriate international mechanism. On the second point, it was true that diplomatic protection was a means of applying the rules on State responsibility in cases of mediate injury and that it established a link between the internationally wrongful act and its consequences, that is to say, first, the obligation to make reparation. The calculation of the compensation itself offered a striking illustration of the fiction on which the institution rested, since the compensation due to the State in respect of the rights which it supposedly possessed was made on the basis of the injury suffered by its nationals.

28. Mr. ECONOMIDES said that diplomatic protection could still be used by powerful States in the modern age, but that they managed to settle issues by diplomatic means without having to bring them before international bodies, to which, in contrast, small States had recourse; the two famous cases, *Mavrommatis Palestine Concessions* and *Ambatielos*,¹² had been brought by Greece as plaintiff. Too much importance was accorded to the notion of fiction. Diplomatic protection had actually come into being following the conclusion of the first agreements on permanent-resident status conferring rights on individuals in writing. In the event of a violation of those rights, the individual, as a subject of international law, had no other recourse than to make representations to the courts of the host State, but the sending State, which had been directly injured by the violation of the treaty, had taken the view that, having suffered injury, it had an interest in taking action. It was only very much later that the theoretical construct of the fiction had appeared.

29. Mr. ELARABY, drawing attention to the abuses by the big Powers which had marked the history of diplomatic protection, said that, whatever the result of its work, the Commission would have to try to fill a number of gaps in order to deny powerful States the possibility of taking action against weaker States. It would also have to give attention to the unequal development of human rights rules, in time and from country to country, so as not to create a need for increased intervention.

30. Mr. BENNOUNA (Special Rapporteur) said that the history of the institution had indeed been marked by instances of abuse, but the purpose of diplomatic protection could not itself be criticized. He had in fact referred to human rights in order to show that, in parallel with the question of investments, the individual was increasingly the addressee of certain rules of international law. However, the study of diplomatic protection was not designed to provide a definition of the rights in question.

31. Mr. Sreenivasa RAO said by way of a preliminary comment that the Commission should take account of the historical evolution of the institution of diplomatic protection and try to move away from the fiction by according the individual as direct a role as possible in the relationship in question, for States could essentially take action within the framework of State responsibility, subject to the conditions and parameters proper to that sphere. The consideration of the historical evolution prompted him, moreover, to wonder whether the Commission could limit itself to the study of the secondary rules of diplomatic protection. He looked forward to fresh guidance from the Special Rapporteur on that point. With regard to the nationality link, he would like the Special Rapporteur to explain the meaning of the last sentence of paragraph 60 of the preliminary report, at least as far as the English version was concerned.

32. Mr. ROSENSTOCK said that he shared Mr. Pellet's doubts about paragraphs 60 to 64 of the preliminary report. The notion of diplomatic protection must be understood as the formulation of its claims by a State, for the gradual emergence of new instruments and mechanisms had not fundamentally changed the nature of diplomatic protection. The study of the topic from a contemporary perspective might, for example, prompt a rereading of the *Nottebohm* case, with more importance attached to human rights and the need to prevent statelessness, and might possibly lead to the production of different criteria. It would not, however, be a good idea for the members of the Commission to reopen the debate on notoriously controversial points, which were, moreover, merely subsidiary in relation to the question of diplomatic protection in the strict sense. That had indeed been the meaning of the Commission's decision at its forty-ninth session to limit the topic to the codification of secondary rules.

33. Mr. BENNOUNA (Special Rapporteur) said that he disagreed with Mr. Rosenstock and that it would be very useful, at the first session devoted to consideration of the topic of diplomatic protection with a view to its codification, to review the history of diplomatic protection, including any abuses to which its exercise had given rise, as well as the limits of the topic. There was no need to shrink either from a theoretical debate or from the doctrinal opposition expressed during the preliminary discussion, for such a debate would remove the obstacle of substantive opposition which lay in wait.

34. Summing up the discussion of the topic, he said that most of the speakers had acknowledged that the institution of diplomatic protection had developed at a given period in history and that the juridical construct on which it was based had taken account of the facts of international law as they had existed before the adoption of the Charter of the United Nations. The distortions and abuses to which the institution had been subjected reflected the profoundly unequal nature of international relations at that time and, in particular, the absence of such counterweights to the sovereignty of States as the rights of peoples and the rights of individuals.

35. All the speakers had stressed the importance of diplomatic protection and its continued validity as a means of protecting the victims of denials of justice in various

¹² *Merits, Judgment, I.C.J. Reports 1953*, p. 10.

national legal systems; hence the need to strengthen its role in guaranteeing the rights of individuals. From that standpoint, diplomatic protection and the machinery for the protection of human rights acted as complements to each other in the promotion of the pre-eminence of law in the treatment of individuals. At the current time, diplomatic protection was undergoing modernization in the light of the development of international law since the adoption of the Charter of the United Nations. The task was therefore both to codify a topic which was ripe for codification and to relocate it in the contemporary historical context.

36. At the current time, in fact, some rights were accorded directly to the individual at the international level. The individual possessed those rights from the outset and retained them intact, but they could be defended by his State of nationality by means of the institution of diplomatic protection. It thus emerged from the discussion that it must be accepted that, in accordance with the traditional case law and doctrine, the State of nationality had a discretionary power by virtue of the nationality link, but that, in view of those new rights of the individual, a State was not automatically and in all scenarios asserting its own right when exercising diplomatic protection. It had thus been proposed that the question put in paragraph 54 of the preliminary report should be answered by drawing a distinction between, on the one hand, the right either of the individual as the direct addressee of certain rules of international law or of the State and, on the other hand, the exercise of that right, which in all scenarios was a matter for the discretionary power of the State of nationality. A kind of right of the individual to enjoy the protection of his State of nationality was indeed beginning to emerge in some national constitutions, but that obligation did not yet exist in international law. With the help of the Secretariat, the Commission would seek to ask States to inform it about the status of their legislation on the topic.

37. An individual also had the possibility of recourse to international bodies, including courts of arbitration, and the State could always espouse his cause and enforce his rights through the procedures available to it vis-à-vis the host country. In future, he would try to clarify the relationship between those two different means of recourse. It had been pointed out in that connection that the boundaries between some of the legal categories used to delimit the topic at the Commission's forty-ninth session were neither watertight nor rigid, especially with respect to the distinctions between direct and indirect injury and between primary and secondary rules. In the case of that second distinction and to reply to the question put in paragraph 65 of the preliminary report, the main tendency in the Commission was to accept that the frame of reference, for the purposes of the topic, consisted of secondary rules, but that, in its consideration of the topic, the Commission should bear in mind the inevitable clashes with primary rules, which must be taken into account when answering questions about, for example, the rights in question, the nationality or the nationals concerned, the "clean hands" rule, and so forth. It was clear from the discussion that wisdom did not consist of reproducing the past, but of reading the past with an eye to the present.

38. He wished to make it clear that his comments about the Commission's secretariat should not be interpreted as

criticism, but, on the contrary, as an appeal to the Secretary-General to boost the resources of the Codification Division to enable it to cope with the very heavy workload which it had to bear, in respect of the Commission in particular.

39. Mr. PELLET said that the terms "direct injury" and "indirect injury" were dangerous in the context of State responsibility and that it was more a question, in the topic under consideration, of the distinction between mediate and immediate injury. Furthermore, while a right to diplomatic protection certainly did not exist in international law, it might nevertheless be asked whether, in the event of a serious violation of the rights of the human person, a State which did not exercise its diplomatic protection would not for all that be violating a rule of general international law.

40. Mr. MELESCANU said that the notion of denial of justice used by the Special Rapporteur must be understood in the general sense of the term. While some national constitutions did contain an obligation to provide diplomatic protection, it was very doubtful whether that constituted an obligation in international law; hence the need for a careful redrafting of the questionnaire on the topic which was to be sent to States.

41. Mr. KUSUMA-ATMADJA said that he was generally in agreement with the Special Rapporteur's conclusions, provided that the points raised by other speakers, in particular Mr. Pellet, were incorporated in them. He would also welcome clarification of the notions of legal construct or fiction and of the distinction between "individual" and "person". He cited three cases in which Indonesia had accorded its diplomatic protection to its nationals over the past year and said that soft law could in some cases prove more effective.

42. Mr. BENNOUNA (Special Rapporteur), referring to the Commission's further work on the topic, said that the conclusions he had offered were the ones he had personally drawn from the discussion. The Commission must at the current time, perhaps during the drafting of its report to the General Assembly, produce some preliminary conclusions of its own, provide guidance for the Sixth Committee's debates on a number of points and prepare the questionnaire to be sent to Member States.

43. The CHAIRMAN pointed out that the Commission must comply with the programme of work it had submitted to the General Assembly.

The meeting rose at 1.15 p.m.

2524th MEETING

Tuesday, 5 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES