

Document:-  
**A/CN.4/SR.2824**

**Summary record of the 2824th meeting**

Topic:  
**Adoption of the report**

Extract from the Yearbook of the International Law Commission:-  
**2004, vol. I**

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2006–2007, the Planning Group recommended that the Commission should take note with approval of Subprogramme 3 (Progressive development and codification of international law).

5. The documentation of the Commission had also been considered, and, in particular, the question of the need for summary records in the light of General Assembly resolution 58/250 of 23 December 2003. The Planning Group recommended that the *status quo* should be maintained in that regard.

6. Lastly, the Planning Group recommended that the fifty-seventh session of the Commission should be held from 2 May to 3 June and from 4 July to 5 August 2005, at the United Nations Office at Geneva.

7. Mr. ECONOMIDES noted that, according to the report, the Working Group on long-term programme of work had considered various topics, some of which it would continue to consider in the future, whereas it had decided that others were not suitable for codification. The Commission was surely entitled to know what the topics in question were. The report of the Planning Group should be amended accordingly.

8. The CHAIRPERSON said that it was not customary for procedural reports such as that of the Planning Group to enter into such detail. The Rapporteur would ensure that the topics in question were named in the report of the Commission.

9. Mr. MOMTAZ said that, in view of the fact that the Planning Group had recommended two new topics for inclusion in the current programme of work, the reference to “a new topic” in the title of the chapter on that matter in its report should be amended to read “two new topics”.

10. The CHAIRPERSON noted that, before taking a decision on the recommendation concerning the inclusion of two new topics in the current programme of work, the Commission should, in accordance with established practice, engage in consultations on the appointment of special rapporteurs. Once those consultations had been satisfactorily completed, it would be in a position to decide whether or not to include the two topics in the programme of work.

11. Mr. PAMBOU-TCHIVOUNDA asked for confirmation that the General Assembly was required to endorse any topic before the Commission could include it in its programme of work.

12. The CHAIRPERSON confirmed that the two topics recommended by the Planning Group for inclusion in the current programme of work had already been approved by the General Assembly<sup>1</sup> by virtue of its approval of the report of the Commission to the General Assembly on the work of its fifty-second session,<sup>2</sup> where the topics had appeared under the long-term programme of work;<sup>3</sup> and

<sup>1</sup> See General Assembly resolution 55/152 of 12 December 2000, para. 8.

<sup>2</sup> *Yearbook ... 2000*, vol. II (Part Two).

<sup>3</sup> *Ibid.*, p. 131, para. 729.

that the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”, recommended for inclusion in the long-term programme of work, remained to be approved.

13. Mr. YAMADA said that, since the two new topics had already been approved by the General Assembly, there was nothing to prevent the Commission from starting to consider them immediately. He therefore sought assurances that the Chairperson would conduct informal consultations on the appointment of special rapporteurs without delay. It was also to be hoped that the proposal regarding the new topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” would be favourably received by the Sixth Committee, so that a start could be made on that topic at the next session.

14. The CHAIRPERSON confirmed that he would undertake consultations in an expeditious manner, so that the process could be finalized as soon as possible. The Commission’s readiness to begin work on the two new topics at its next session would be duly reflected in its report on the work of its current session.

15. He took it that the Commission wished to take note of the report of the Planning Group, without prejudice to its final decision with regard to the sections concerning new topics.

*It was so decided.*

#### **Organization of work of the session (concluded)**

16. Mr. YAMADA (Special Rapporteur) announced that the final composition of the open-ended Working Group on transboundary groundwaters was: Mr. Baena Soares, Mr. Brownlie, Ms. Escameia, Mr. Fomba, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan and, *ex officio*, Mr. Comissário Afonso.

*The meeting rose at 10.30 a.m.*

## **2824th MEETING**

*Thursday, 29 July 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Yamada.

## Draft report of the Commission on the work of its fifty-sixth session

### Chapter IV. *Diplomatic protection* (A/CN.4/L.653 and Corr.1 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to consider sections A and B of chapter IV of the draft report of the Commission on diplomatic protection.

#### A. Introduction (A/CN.4/L.653)

Paragraphs 1 to 15

*Paragraphs 1 to 15 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session (A/CN.4/L.653 and Corr.1)

Paragraphs 16 and 16 bis

*Paragraphs 16 and 16 bis were adopted.*

Paragraphs 17 to 19

*Paragraphs 17 to 19 were adopted.*

2. The CHAIRPERSON invited the members to consider section C of chapter IV of the draft report of the Commission, as contained in document A/CN.4/L.653, which reproduced the text of the articles on diplomatic protection adopted on first reading, and in document A/CN.4/L.653/Add.1, which contained the text of those articles and the commentaries thereto.

3. Mr. KATEKA said that the word "Commission" was sometimes used indiscriminately to describe the International Law Commission and other Commissions, as, for example, in paragraph (3) of the commentary to article 7 in the relevant chapter of the draft report. That might create some confusion.

4. The CHAIRPERSON requested the secretariat to make the necessary changes.

#### C. Text of the draft articles on diplomatic protection adopted by the Commission on first reading (A/CN.4/L.653 and Add.1)

##### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

###### *General commentary*

Paragraphs (1) and (2)

5. Mr. GAJA proposed that, in the third sentence of paragraph (1), the words "more extensively" should be added after the words "dealt with".

6. Mr. ECONOMIDES, pointing out that a State might well provide reparation for injury by compensating the injured person directly, proposed that the words "to the State of nationality" in the seventh sentence of the same paragraph should be deleted.

7. Mr. PELLET proposed that the words "although some members considered that the scope of the topic went further and that the consequences of the exercise of diplomatic protection should have been covered by the draft articles" should be added following the word "claims" in the antepenultimate sentence of paragraph (2).

8. Mr. DUGARD (Special Rapporteur) said that he accepted Mr. Pellet's proposal, but thought that it should be placed in paragraph (1).

9. Mr. PELLET said that there was a difference between common law and Roman law as far as the concept of diplomatic protection was concerned. In common law, diplomatic protection related to the rules governing the admissibility of claims, whereas Roman law jurists regarded that question as only part of the topic. The admissibility of claims was dealt with in paragraph (2).

10. Mr. DUGARD (Special Rapporteur) said that he had no real objection to the content of Mr. Pellet's proposal and suggested that the following words should be added at the end of paragraph (1): "Some members of the Commission considered that the legal consequences of diplomatic protection should have been covered in the present draft articles and that the focus of attention should not have been directed towards the admissibility of claims".

11. Mr. PELLET said that he accepted the Special Rapporteur's proposal.

12. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission also accepted the Special Rapporteur's proposal.

*It was so decided.*

*Paragraph (1), as amended, was adopted.*

*Paragraph (2) was adopted.*

Paragraph (3)

13. Mr. PELLET said that, in the fourth sentence, the words "the independence of" should be added after the words "respect for".

14. Mr. DUGARD (Special Rapporteur) said that functional protection was designed to promote both respect for the person of agents and respect for their independence. He therefore proposed that the text should be amended accordingly.

15. Mr. KEMICHA suggested that the words "respect for the integrity and independence of its agents" should be used.

16. Mr. GAJA, expressing the view that the word "integrity" was not appropriate because it appeared to refer to corruption, proposed the words "respect for its agents and their independence".

17. Mr. PELLET said that, in fact, functional protection referred only to the independence of agents, since

the protection of their integrity was guaranteed by diplomatic protection, but he could nevertheless agree with that proposal.

18. Mr. ECONOMIDES said that the word “method” should be replaced by the word “institution” in that sentence.

19. Mr. DUGARD (Special Rapporteur) said that he agreed with the comment by Mr. Economides. He would also like the proposal by Mr. Gaja to be adopted because respect for the person was important.

20. Mr. KATEKA said that, in the fifth sentence, it would be better to delete the reference to the Sixth Committee.

21. The CHAIRPERSON said that, if he heard no objection he would take it that the Commission agreed to the proposals by Mr. Gaja, Mr. Economides and Mr. Kateka.

*It was so decided.*

22. Mr. PELLET said that paragraph (3) overlapped with paragraph (6) of the commentary to article 1.

23. The CHAIRPERSON proposed that paragraph (3) should be adopted subject to changes which might be made during the consideration of the commentary to article 1.

*Paragraph (3), as amended, was adopted on that understanding.*

24. The CHAIRPERSON invited the Commission to consider the commentary to Part One of the draft articles entitled “General provisions”.

25. Mr. PELLET said that the references to cases in the footnotes were not clear enough. For example, the date of arbitral awards should be indicated.

26. The CHAIRPERSON requested the secretariat to make the necessary changes.

*Commentary to article 1 (Definition and scope)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

27. Mr. GAJA said that the date in the footnote to that paragraph should be “1959”.

28. Mr. PELLET said that he was surprised that reference was made first to the wording used by ICJ in the *Interhandel* case because that wording came from the *Mavrommatis* case. That comment also applied to the reference to the *Panevezys-Saldutiskis Railway* case in the footnote to paragraph (5) of the commentary to the article, relating to “diplomatic action” and “judicial proceedings”. He therefore proposed that, in order to draw attention to the importance of the decision in the *Mavrommatis* case, on which all of the case law relating to diplomatic protection was based, the words “The wording was

used for the first time in the *Mavrommatis* case” or the words “See also the *Mavrommatis* case” should be added to the footnote to paragraph (3) of the commentary and the words “See also the *Mavrommatis* case and the *Nottebohm* case” should be used in the footnote to paragraph (5) of the commentary, in that order.

29. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

*It was so decided.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

30. Mr. ECONOMIDES said that the third sentence created some confusion between diplomatic action and other means for the peaceful settlement of disputes. He therefore proposed that it should be amended to read: “‘Diplomatic action’ covers all the lawful procedures which are employed by States in this regard, including protest, and which are designed to obtain compensation for injury suffered by their nationals abroad”. “Views and concerns” had nothing to do with diplomatic protection and “requests for inquiries and negotiations” were “other means of peaceful settlement” of disputes.

31. Mr. GAJA said that the amendment of that sentence did not have to be so radical. The sentence would probably be clearer if the word “State” was in the singular and if it read: “‘Diplomatic action’ covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry and negotiations aimed at the settlement of disputes”.

32. Mr. ECONOMIDES said that the sentence was intended to indicate that diplomatic action was exercised by a State against another State to try to obtain compensation for injury suffered by one of its nationals and that, if such diplomatic action failed, other means of peaceful settlement were used. The idea was quite simple and there was no reason to state it in such a complicated way. However, Mr. Gaja’s proposal was an improvement, even though it did not go far enough, particularly because it kept the words “concerns and views”, and he could support it without any problem. If the word “State” was in the singular, the word “dispute” would also have to be in the singular.

*Paragraph (5), as amended by Mr. Gaja and Mr. Economides, and the footnote, as amended by Mr. Pellet, were adopted.*

Paragraph (6)

33. Mr. PELLET said that, even by saying so, as in the first footnote to the paragraph, there was no need to repeat what was stated in paragraph (3).

34. Mr. ECONOMIDES said that he agreed with Mr. Pellet’s comment, but that, if it was decided that paragraph

(6) should be retained, the word “substantially” in the second sentence should be replaced by, for example, the word “considerably” because the difference between diplomatic protection and functional protection could not be described as “substantial”.

35. The CHAIRPERSON said that the word “substantially” could be translated by the word *substantiellement* in French.

36. Mr. GAJA said that the paragraph could be deleted, but that, if it was retained, the word “officials” in the first sentence should be replaced by the word “agents”.

37. Mr. DUGARD (Special Rapporteur) said that he agreed that paragraph (6) was repetitive, but, in his opinion, it must be stated that the draft articles dealt with diplomatic protection, not with functional protection. He therefore proposed that only the second sentence should be deleted.

38. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to retain paragraph (6), subject to the amendments proposed by the Special Rapporteur and Mr. Gaja.

*It was so decided.*

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

39. Mr. KABATSI, supported by Mr. DAOUDI, said that he regretted that paragraph (7) gave the impression that all nationals who engaged in official international business on behalf of a State were diplomatic or consular agents, because that was not actually true.

40. Mr. MOMTAZ, supported by the CHAIRPERSON, proposed that the reference to diplomats and consuls at the beginning of the second sentence should be deleted. The sentence should read: “Persons engaged in such business are protected by other rules and instruments of international law, notably the Vienna Convention...”.

41. Mr. GAJA, recalling that the *United States Diplomatic and Consular Staff in Tehran* case was often referred to as involving diplomatic protection, proposed that the first sentence should be made less categorical by adding the word “mainly” before the word “covers”.

*Paragraph (7), as amended, was adopted.*

*Commentary to article 2 (Right to exercise diplomatic protection)*

Paragraph (1)

42. Mr. GAJA said that the last footnote to the paragraph and some of the footnotes to paragraphs that followed referred to the Special Rapporteur’s first report. For the sake of the commentary’s autonomy, it would be better to include the relevant information in the footnotes instead of referring to the Special Rapporteur’s report.

43. The CHAIRPERSON said that the secretariat would make the necessary changes.

*Paragraph (1) was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

*The meeting rose at 11.40 a.m.*

## 2825th MEETING

*Friday, 30 July 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-sixth session (*continued*)

#### Chapter IV. *Diplomatic protection (continued)* (A/CN.4/L.653 and Corr.1 and Add.1)

#### C. *Text of the draft articles on diplomatic protection adopted by the Commission on first reading (continued)* (A/CN.4/L.653 and Add.1)

##### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

*Commentary to article 3 (Protection by the State of nationality)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

*Commentary to article 4 (State of nationality of a natural person)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

1. Mr. GAJA proposed that the phrase “judicial decision and treaty” should read “judicial decisions and treaties”, since the principle in question was also based on case law other than the two examples cited in the paragraph.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

2. Mr. ECONOMIDES questioned the accuracy of the last sentence. A simple reference to the Commission’s draft articles on nationality of natural persons in relation to the succession of States would suffice. Accordingly,