

Document:-
A/CN.4/2870

Summary record of the 2870th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
2006, vol. I

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which, as diplomatic protection was a discretionary right of the State, should read: “a State ... *may* transfer that sum”. If, however, the Commission wanted to stress the need to protect the rights of the victim, then the text should read: “a State ... *shall* transfer that sum”. The Drafting Committee should be given guidance on that point.

The meeting rose at 11.15 a.m.

2870th MEETING

Thursday, 4 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Diplomatic protection (continued) (A/CN.4/560, sect. D, A/CN.4/561 and Add.1–2, A/CN.4/567, A/CN.4/575, A/CN.4/L.684 and Corr.1–2)

[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ECONOMIDES thanked the Special Rapporteur for the quality of his work, which had greatly facilitated the Commission’s task during second reading.

2. In paragraph 6 of his report, the Special Rapporteur stressed that the fate of the draft articles on diplomatic protection was closely bound up with that of the draft articles on State responsibility for internationally wrongful acts.⁴² It was true that the two subjects had special links, as the essential condition for the exercise of diplomatic protection was the commission by a State of an internationally wrongful act. However, diplomatic protection was also closely bound up with human rights—not all human rights, but those of individuals abroad who had suffered injury to themselves or to their property as the result of the unlawful act of a State. Traditionally, diplomatic protection also had fairly close ties to the settlement of disputes between States. For all those reasons, diplomatic protection was a sufficiently independent subject that had its own rules and could be addressed separately if need be. The question posed in paragraph 6 was thus important and merited in-depth consideration. In any event, he would not agree to the proposal to link the draft articles on diplomatic protection to the draft articles on State responsibility unless the Commission recommended in the strongest possible terms that the two drafts should take the form of an international treaty.

3. In draft article 1 (Definition and scope), the term “diplomatic action” was not defined, whereas elsewhere in the draft articles other expressions were used, such as “international claim” (arts. 14 and 15) or “claim of diplomatic protection” (art. 2, para. 2). Moreover, the wording of draft article 1 might give the impression that diplomatic action was regarded as a means of peaceful settlement, which was not true, because diplomatic action was always a unilateral act. The Drafting Committee should therefore review the wording of draft article 1, and of the above-mentioned term in particular. The proposal concerning a paragraph 2 that would cover consular assistance was superfluous, as there could be no confusion between diplomatic protection, which occurred at the level of the international responsibility of the State, and consular assistance, which was a daily, ongoing duty that fell under consular law, and in particular consular functions, which were defined in detail in bilateral and regional treaties and, albeit more succinctly, in the Vienna Convention on Consular Relations. That distinction should at least be made clear in the commentary.

4. Paragraph 2 proposed by the Special Rapporteur for draft article 2 (Right to exercise diplomatic protection) was a sensitive provision which it would be wiser not to include in the draft articles. It was unnecessary, because it was implicit for all States that respected the principle of good faith. If the principle was not respected, who would decide whether a request for diplomatic protection was formulated in conformity with the draft articles? No provision had been made for an appropriate mechanism that could settle such disputes. As for the proposals by Italy and by Mr. Pellet—which went much further—to make diplomatic protection obligatory, not only for the State of nationality but also for other States authorized to act in defence of the collective interest if individuals abroad were victims of grave violations of peremptory norms of general international law (*jus cogens*), they were certainly commendable and should be retained. However, in the current state of international law, no one could guarantee that such a progressive provision would not be used improperly to exert undue pressure on weak States. Thus while he was in agreement with the substance, he believed that it was premature to proceed along that path, which entailed obvious risks.

5. The rule of continuous nationality, the subject of draft article 5, was perhaps not logical in legal terms, but it was wise practically and politically. It was in fact deeply rooted in doctrine. He was not opposed to the rule being worded even more strictly to include the entire critical period from the time of the injury until the official presentation of the claim and even until the final resolution of the claim through an award or otherwise. However, should any changes of nationality occur between the date of the presentation of the claim and the date of its final resolution, provision should be made for a general exception on behalf of all persons who had involuntarily changed nationality for a reason unrelated to the claim. Such persons must not be deprived of the benefit of diplomatic protection. He agreed with Mr. Galicki that the expression “predecessor State” should be explained, preferably in the commentary. He was also in favour of retaining draft article 5, paragraph 3.

⁴² *Ibid.*, para. 76.

6. Draft articles 17 (Actions or procedures other than diplomatic protection) and 18 (Special treaty provisions) should be replaced by a general provision that might be worded: “The present draft articles are of a supplementary nature and do not apply where, and to the extent that, a *lex specialis* may, through an action or procedure other than diplomatic protection, secure redress for injury suffered as a result of an internationally wrongful act”. It was important that priority should clearly be given to *lex specialis* in all cases.

7. He fully supported the Special Rapporteur’s proposal to adopt a new draft article on the right of the injured national to compensation and said that it would be preferable to use the word “shall” rather than “should” in paragraph (2) of draft article 20, proposed in paragraph 103 of the report. In addition, States should obtain the injured person’s consent before exercising diplomatic protection.

8. Mr. MOMTAZ thanked the Special Rapporteur for analysing the work of major legal scholars, whose publications clearly constituted a source, albeit a secondary one, for the determination of the customary rule the Commission had to codify. According to the Special Rapporteur, those writings “serve to emphasize that diplomatic protection is an instrument which allows the State to become involved in the protection of the individual and that the ultimate goal of diplomatic protection is the protection of the human rights of the individual” (para. 3 of the report). That idea was defended by some of the States that had submitted observations to the Commission and had called on it to focus greater attention on the place of the individual in the formulation of draft articles on diplomatic protection; in addition to the Netherlands, which the Special Rapporteur had mentioned, those States included Italy and, to a certain extent, Austria. Recent cases before the ICJ, in particular the *LaGrand* and *Avena* cases, confirmed that diplomatic protection and human rights law were complementary.

9. Some of the provisions of the draft articles adopted on first reading in 2004⁴³ unquestionably took account of developments in international law that favoured the protection of the individual. That was true above all for draft article 7 (Multiple nationality and claim against a State of nationality), which provided for an exception to the rule prohibiting the exercise of diplomatic protection by a State against a State of nationality. That exception, which compromised the principle of the sovereign equality of States, as Morocco had pointed out, was clearly a rule of progressive development. State practice in the area was very rare, and to create the exception the Special Rapporteur had relied primarily on the case law of the Iran–United States Claims Tribunal, although it was generally agreed that the claims submitted to that body had nothing to do with diplomatic protection. In any event, draft article 7 had been well received as progressive development, a situation he welcomed, as it reflected the movement of international law towards human rights protection.

10. The same applied to draft article 8 on the exercise of diplomatic protection in respect of stateless persons

and refugees, which was also the product of progressive development and not of codification and had been quite well received by States, despite fears expressed in the Commission during its drafting.

11. That being said, he wondered whether it might not be possible to use the second reading to further strengthen that approach, which favoured the protection of human rights. It was in that context that the question arose as to whether a State that exercised diplomatic protection was asserting its own right or that of its national.

12. As currently worded, draft article 1 confined itself to the classic approach based on the case law of the PCIJ, in particular the *Mavrommatis* case, according to which a State that exercised diplomatic protection adopted in its own right the cause of one of its nationals. It would seem that the time had come to put an end to that legal fiction, which had been elaborated at a time when the ultimate goal of diplomatic protection had probably not been the protection of human rights. In specifying in draft article 1 that by exercising diplomatic protection the State sought to protect the rights of the individual injured by a violation of international law, the Commission would merely be adapting the text of the draft to current reality, which international case law had confirmed in the two above-mentioned decisions. On the other hand, if the Commission insisted on retaining the *Mavrommatis* formulation, it would have to abandon any idea of including a provision or a recommendation in the draft articles on the right of the injured national to compensation. The lack of a legal obligation for the State exercising diplomatic protection to pay the amounts received as compensation to the victims of the violation of international law might be justified to the extent that the State adopted in its own right the cause of its national. He personally favoured the inclusion in the draft articles of a provision recognizing a right to compensation for persons injured by an internationally wrongful act, because such a provision, far from being an innovation, would be in conformity with what appeared to be emerging practice.

13. It was in a similar spirit, namely strengthening protection of the human rights of the victims of internationally wrongful acts, that he wished to address the proposal by Italy on draft article 2, according to which a State would have a legal duty to exercise diplomatic protection on behalf of a national who was the victim of a breach of a peremptory norm of international law where the injured person was unable to bring a claim before an international court or tribunal or quasi-judicial authority. That proposal deserved close attention. The Special Rapporteur had already cited a number of provisions of the draft articles on State responsibility for internationally wrongful acts, notably articles 44 and 48,⁴⁴ which contained an argument that supported it. He himself wished to draw attention to draft article 54,⁴⁵ which provided that a State other than the State injured by the breach of an obligation owed to the international community, as was the case of the obligation incumbent on States to respect the norms of *jus cogens*, could take lawful measures against the State responsible to ensure

⁴³ See footnote 7 above.

⁴⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29–30.

⁴⁵ *Ibid.*, p. 30.

reparation in the interest of the injured State, and more specifically of its nationals. Under those conditions, a directly injured State that refused to exercise diplomatic protection, regardless of the reason, would find itself in an untenable situation if a State that had not been directly injured decided to avail itself of the possibility offered by draft article 54 of protecting the injured person by means other than diplomatic protection. The Italian proposal, which followed that logic, was liable to encourage the directly injured State to exercise its diplomatic protection and would prevent it from having to deal with such rather embarrassing situations. The proposal was also in keeping with the trend in international criminal law towards combating impunity for international crimes and protecting the victims of such crimes.

14. Lastly, he reiterated that if draft article 19 (Ships' crews) was retained, it should be placed after draft article 17. The possibility which current draft article 19 offered the State of nationality of the ship of claiming compensation for the benefit of its crew members, regardless of their nationality, when they had been injured by an internationally wrongful act was a type of action other than the diplomatic protection provided for in draft article 17. In other words, the possibility thus afforded to the flag State of acting on behalf of the members of its ship's crew who did not have its nationality was a typical example of the actions other than diplomatic protection covered by draft article 17.

15. Ms. ESCARAMEIA commended the Special Rapporteur for his hard work, his spirit of independence and, of course, the quality of the final product he had submitted to the Commission.

16. Addressing the "tension" that existed between human rights and the rights of the State, she said she was pleased that greater emphasis was currently being placed on human rights, which was not simply one area of law, but a pillar of both international law and modern society. The question of diplomatic protection could not be considered as though it concerned only States, because the injury that could be done to individuals or corporations was increasingly becoming an issue.

17. It was unfortunate that the Commission had not taken up a number of important questions, such as the diplomatic protection of persons living in a territory administered by an international organization, namely the United Nations. Such persons were virtually stateless, for they had no State to protect them. It was likely that such situations, which could last quite some time, would become more common in the future. Another issue was the diplomatic protection of entities other than corporations, such as non-governmental organizations, foundations or universities. Different rules should have been drawn up for such cases. She also regretted that the Commission had tended to codify old models and would have preferred that it had taken recent developments more fully into account.

18. She then turned to the draft articles themselves. With regard to draft article 1, paragraph 1, as modified by the Special Rapporteur, she approved the Italian proposal to delete the words "in its own right" for the reasons already given by other members of the Commission. She endorsed

the Special Rapporteur's proposal to add a reference in paragraph 1 to the persons mentioned in draft article 8. As for paragraph 2, she feared that the proposed wording would cause greater confusion; it would be preferable to delete it and to relegate the question of consular assistance to the commentary.

19. On draft article 2, she agreed with those who advocated making it a duty for the State to exercise diplomatic protection. The report contained a number of examples of decisions by domestic courts along those lines, and domestic jurisprudence was also a source of international law. If the proposal did not have sufficient support, the idea should at least be reflected in the commentary. Paragraph 2, which was superfluous and also gave the impression that the State must agree to pay compensation, should be deleted.

20. She supported the Special Rapporteur's proposed changes to draft article 3 (Protection by the State of nationality). With regard to draft article 4 (State of nationality of a natural person), she noted that the Special Rapporteur had been kind enough to record in the commentary the concerns which she had raised at a previous session, but said she still had some problems with the proposed revised version. For instance, a person who acquired the nationality of a State in a manner consistent with the law of that State but inconsistent with international law would not enjoy diplomatic protection. That would be the case of a woman who, in marrying, automatically lost her nationality of origin and acquired that of her husband, a situation that was certainly not consistent with international law. Another example would be that of persons residing in the territory of a State that had been illegally conquered by another State and who were forced to adopt the latter's nationality. The problem might be resolved by clarifying the wording and stating that it was not the acquisition of nationality by the person concerned that was sometimes illegal, but the situation which gave rise to that development.

21. With regard to paragraph 1 of draft article 5 (Continuous nationality), she agreed with the idea of retaining the date of the official presentation of the claim. Turning to paragraph 2, she said that the injured person might very well have acquired the nationality of the claimant State without fraudulent intent and even involuntarily, and the Commission should be more flexible as to which State could exercise diplomatic protection on his or her behalf. The same remark applied to corporations in draft article 10.

22. With regard to draft article 8, she agreed with Mr. Koskenniemi and Mr. Mansfield that the criterion of "lawfully and habitually resident" made the threshold too high. Refugees were in an abnormal situation and were very vulnerable, and obtaining a habitual residence in another State might take many years, during which time they had no protection. They were virtually stateless, because their State of origin would not protect them (that was why they had fled from it), and they could not enjoy the protection of the host State. She therefore supported the proposal by the Nordic countries and others to replace "lawfully and habitually resident" by "lawfully staying". The definition of refugee did not have to be the one set

out in article 1 of the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, which was too inflexible. It was sufficient that a refugee be someone whom the State recognized as such.

23. She did not really agree with the new version of draft article 9 (State of nationality of a corporation). If two or more States were entitled to exercise diplomatic protection, any one of them should be able to defend the corporation. It was not realistic to think that a corporation would become incorporated in one State, establish its registered office in another and open its headquarters in a third just to benefit from diplomatic protection from multiple States, because bilateral investment treaties usually made provision for their protection. The Commission should be more flexible on that issue.

24. It was a pity that draft article 13 (Other legal persons) had not been further developed. She endorsed the revised version of draft article 16 (Exceptions to the local remedies rule) and said she preferred subparagraph (a) as initially proposed: “The local remedies provide no reasonable possibility of effective redress”. She was in favour of the second version of draft article 17 in paragraph 87 of the report, which read “The right of States, natural persons or other entities ... [is] not affected by the present draft articles”, and she agreed with draft article 19. She also fully supported what might become draft article 20 on the question of the payment of compensation to injured persons and thought that in the proposed paragraph (2), it was preferable to use the word “shall” rather than “should” and that the State should be required to consult with the injured national. With regard to the eventual form of the draft articles, it was clear from the comments in the Sixth Committee and by States that they ought to become a convention, since most States supported that solution, which guaranteed greater predictability and certainty.

25. Mr. PELLET said that he endorsed most of the points made by Ms. Escameia, although he saw no need to elaborate a convention on diplomatic protection: the draft on State responsibility for internationally wrongful acts, for example, was in fact applied in large part by all States even though it was not a convention, and the same could hold for the draft under consideration. His view on draft article 4 was that expressed by the ICJ in its advisory opinion in the *Namibia* case, in which it had decided that one could not deprive of protection persons who had already suffered injury once by being forced to change nationality. Indeed, the problem was not that nationality had to be acquired properly but rather that when it was unlawfully imposed, the victims must not be deprived of protection; thus Ms. Escameia’s reasoning would have to be turned around almost completely.

26. Turning to protection of legal persons, he observed that article 9 (State of nationality of a corporation) was the article that raised the most issues, which were detailed quite nicely in paragraph 52 of the report; accordingly, the article must be thoroughly reviewed. First, it was necessary to know what link or links should exist between a corporation and a State for the State to be able to exercise protection on behalf of the corporation, then one had to ask whether it was likely that two or more States would want to exercise their protection on behalf of a single

corporation. Concerning the nature of the link of nationality between a corporation and a State, he welcomed the fact that some States had raised the issue of a genuine link, as he had never understood why the Commission had not taken it up. Without reintroducing the criterion of control, as Austria suggested, one might try to specify the legal criterion or criteria that the Commission could ultimately adopt as the condition or conditions for the exercise of diplomatic protection on behalf of a corporation. In that connection he was quite attracted by Italy’s proposal not to take the place of incorporation into account but rather to concentrate on where the corporation had its registered office or the seat of its management, as long as the principal place of the corporation’s activity was considered as well. In the interests of realism and clarity, then, the meaning of “registered office” should be stated in the body of the text, and it should be stipulated that if both criteria—place of incorporation and place of registered office—were maintained, they should not have to apply simultaneously. The concept of registered office was in fact ambiguous and multifaceted: it could be the statutory registered office, the actual registered office or the main centre or centres of operation. If the objective was to facilitate effective protection of the corporation, then it should be acknowledged that all of those were valid as linkage criteria. In reality, the most important criterion was the one excluded by the current wording, namely the main centre of actual operations. In contrast, the place of formation or incorporation was a totally abstract concept that facilitated incorporations of convenience; nevertheless, one could not exclude it without taking liberties with positive law. It would certainly be less useful to retain the option of taking into account a “similar connection”, a phrase which had been criticized by several Governments. If one relaxed the criteria, and especially if one introduced the criterion of main centre of activity, the concept of “similar connection” opened the door to a variety of subjective interpretations. Consequently, the term “registered office” must be construed in a broad, realistic manner, based on the corporation’s actual activities. In any event, it was essential to remove the requirement that all the criteria should apply simultaneously. The effect of that requirement was that corporations that had their registered office in a State other than the State in which they were formed were not entitled to benefit from any protection whatsoever. That resulted in the arbitrary and artificial creation of a category of “stateless” corporation, to which he did not think one could extend, by analogy, the provisions of draft article 8. If one replaced the word “and” by “or” in draft article 9, the possibilities (or dangers) of multiple protection were increased, but that was progress: the function of diplomatic protection was to enhance the effectiveness of international law, and if several States might be able to contribute to that effectiveness, so much the better.

27. He had always maintained that a corporation, like an individual, could have two or more nationalities, and he was therefore glad to see that States were more realistic than most Commission members, as they had pointed out that that phenomenon did exist in reality; he was likewise pleased that the Special Rapporteur acknowledged, in paragraph 54, that failing to take that phenomenon into account was “an error that must be rectified”. Still, he did not think one should therefore conclude that if a

corporation had dual or multiple nationality, a single State must exercise protection in respect of it, as would be the case under the new paragraph 3 proposed for draft article 9 in paragraph 55 of the report. Draft article 6 (Multiple nationality and claim against a third State), which related to natural persons, imposed no such restriction, and there was no justification for adopting a different solution for legal entities. There was no reason not to retain the principle of predominant nationality, so long as it was not used to prevent protection from coming from numerous quarters. In short, he thought that the criterion of where the corporation was formed should be removed from paragraph 2 of revised draft article 9. If that criterion was retained, however, then the word “formed” should be replaced by “incorporated” and the two criteria should be made into alternatives; in other words, the word “and” should be replaced by “or” in the French text, which did not conform to the original English. Lastly, paragraph 3 should be reworded along the lines of draft articles 6 and 7 dealing with natural persons, with the necessary changes.

28. Concerning article 10 (Continuous nationality of a corporation), he thought, unlike Mr. Economides, that the principle of continuous nationality had no justification in either practical or intellectual terms. Nevertheless, if the principle was retained, he could go along with paragraph 1, provided that in the French version the phrase “*Un État est en droit d'exercer sa protection diplomatique seulement au bénéfice*” (“A State is entitled to exercise diplomatic protection only in respect of”) was reworded to read “*Un État n'est en droit d'exercer sa protection diplomatique qu'au bénéfice*” or “*au seul bénéfice*”. He endorsed the inclusion of paragraph 2, which again would avoid the aberration of the *Loewen* decision. Like Mr. Matheson, he was in favour of retaining paragraph 3, although he thought it should go even further by stipulating that the corporation must have ceased to exist not only legally, under the law of the State, but also in fact; if the corporation was prevented from functioning by the State, paragraph 3 would nevertheless apply.

29. With regard to the wording of subparagraph (a) of draft article 11 (Protection of shareholders) proposed in paragraph 68 of the report, the highly conservative positions taken by the Commission on the issue were a matter of concern. The prevailing considerations that had motivated the ICJ to deny Belgium any right of protection on behalf of the corporation's shareholders in the *Barcelona Traction* case were without a doubt fairly convincing. According to the decision in that case, it could legitimately be held that when individuals set up a corporation in a State other than that of which they were nationals, the shareholders accepted, in exchange for the primarily fiscal advantages that they expected of such “delocalization”, the risk created by the fact that protection of the corporation fell to a State other than their State of nationality (para. 99 of the judgment). As the Court had pointed out, it was also extremely difficult to determine who the shareholders of a corporation were (para. 87 of the judgment). The fact remained that other considerations had to be taken into account: leaving without protection the foreign shareholders of a corporation having the nationality of the State that caused the injury was unacceptable. The Commission had been aware of that, but the extraordinarily timid solution it had chosen in draft

article 11 (b) seemed to have no justification in law or in equity. Similarly, the requirement in subparagraph (a), whose applicability or lack thereof to corporations having the nationality of the host State remained uncertain, that the corporation should quite simply have ceased to exist in the State of nationality seemed untenable. There again, the Commission had confined itself to the *Barcelona Traction* judgment, which it had also interpreted in a very restrictive manner: it seemed strange that shareholders should be deprived of protection when the host State effectively froze the operations of the corporation, and that their protection should be limited to cases in which the corporation's failure was unrelated to the injury (paras. 64–68 of the judgment), when it would seem that it was precisely when the corporation, irrespective of its nationality, ceased to exist in law or in fact because of the conduct of the host State that shareholders had the greatest need for protection and should be entitled to obtain it. The Commission's position in draft article 11 was at odds with contemporary judicial practice, especially the practice of ICSID. The new wording for the article proposed in paragraph 68 of the report was undoubtedly a small step in the right direction, but the Commission could doubtless do something much better and much more useful.

30. Regarding draft article 15, if the Commission accepted the Special Rapporteur's proposal to replace the current title, “Category of claims”, with “Mixed claims” (para. 75 of the report), which was a good idea, it should take advantage of the opportunity to completely overhaul the draft article, taking into account, among other things, the comments by Italy on draft article 1. As to draft article 16 (Exhaustion of local remedies), the uncertainty that inevitably arose owing to the subjectivity of the interpreter or judge would never be dispelled no matter what wording was adopted, so either version was acceptable. Draft articles 17 and 18 seemed to say the same thing, namely that the right of States to exercise diplomatic protection in respect of their nationals who had been injured by the internationally wrongful act of another State was without prejudice to other direct remedies available to the injured individuals; accordingly, the two draft articles could not be separated. Those who advocated keeping them separate argued that draft article 17 concerned human rights remedies, whereas draft article 18 dealt with protection of investors. There was no cause to make such a distinction, however, since the legal issue involved was exactly the same. Irrespective of whether it was human rights law, investment law or another type of law that was involved, what must be indicated was that treaty provisions or special customary rules giving individuals remedies other than diplomatic protection were not being called into question by the draft articles and that, like the Convention on the settlement of investment disputes between States and nationals of other States, such special rules could even hold their own against the rules of diplomatic protection. That having been said, one might also say three more things. First, unless the treaties in question expressly provided otherwise, the two roads ran parallel—in other words, one could have the benefit of both a direct remedy and diplomatic protection; however, that was something about which he had grave doubts. Secondly, and conversely, one might think that when a direct remedy was available to an individual, the State could not exercise diplomatic protection on his

or her behalf, at least while the remedy was pending, a position that seemed to be better founded. Remedies such as those provided by the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights could be likened to domestic remedies, and such regional remedies must be exhausted before diplomatic protection could be considered. The problem of remedies at the universal level was fairly complicated, particularly in the case of the Human Rights Committee, whose decisions were not binding, and one solution might be to indicate that when such remedies were available, the State could exercise its diplomatic protection only when the direct remedies had been exhausted. Thirdly, it should also be indicated that in the event of a serious breach of an obligation arising from a peremptory rule of general international law, the injured person could enjoy the protection of States other than his or her State of nationality. Yet that was not at all what draft article 17 said, and in any case that article was not the appropriate place to say it: it would be better to deal with the matter in a special provision or in a second paragraph under draft article 2. In any event, he remained vehemently opposed to the coexistence of two separate articles, 17 and 18, either in their current wording or in the wording proposed by the Special Rapporteur in paragraphs 87 and 89 of his report.

31. Draft article 19 (Ships' crews) was laudable but not germane to the subject; while defensible from an empirical point of view, it was not defensible logically. It skewed the internal logic of the draft articles, since the remedies and procedures it contemplated were in fact associated with draft articles 17 and 18. That was why, if a vote had to be taken on the provision, he would vote against it even though he endorsed its contents. However, he suggested that the Special Rapporteur and the Chairperson of the Commission should jointly address a letter to the Secretary-General of the International Maritime Organization requesting that organization to take up the issue.

32. The future draft article 20 on the right of the injured national to receive compensation heralded the desire to include in the draft articles provisions relating not only to the conditions for the exercise of diplomatic protection but also to the consequences of its exercise. He heartily welcomed that proposal by the Special Rapporteur, which went in the right direction, even if it was neither perfect nor sufficiently far-reaching.

33. While he endorsed the thrust of the draft article, he disapproved of mingling essentially dissimilar problems and regretted the fact that the Special Rapporteur was unduly cautious, which only exacerbated the confusion. For example, paragraph 1 covered two subjects, the taking into account by the protecting State of the injury suffered by its national and possible consultation with the national, but it overlooked the main point, which was that in a case involving diplomatic protection, compensation had to be determined on the basis of the injury suffered not by the protecting State but by the injured individual. That went against the *Mavrommatis* fiction, but as the Special Rapporteur quite rightly pointed out in paragraph 95 of his report, the logic of *Mavrommatis* did not by any means always prevail; in reality, the legal regime of diplomatic

protection took exceedingly little account of it. Moreover, it was now a rule consistently applied in practice, an indisputable and perfectly unproblematic customary rule, that the amount and modality of compensation should be aligned with the injury suffered by the individual. Moreover, it was not a new rule, since in 1928 the PCIJ had decided in the *Chorzów Factory* case that the damage suffered by the individual afforded a convenient scale for the calculation of the reparation due to the State. That well-established basic principle, specific to the field of diplomatic protection, was the source of the first idea contained in draft article 20, paragraph 1, namely that the State should "have regard" to the injury. That cautious wording seemed reasonable in view of the fact that diplomatic protection was a discretionary power of the State; the State might choose not to exercise it except where a rule of *jus cogens* had been breached, and accordingly should be entitled to ask for only partial compensation—again, as long as a grave breach of an obligation arising from a peremptory rule of general international law was not involved.

34. He also could not see why the Special Rapporteur had included in draft article 20, paragraph 1, the phrase "material and moral consequences of the injury", when it seemed sufficient to say "injury". He wondered, too, why the two provisions in draft article 20 should apply only to nationals when the draft very fortuitously extended the benefits of diplomatic protection to stateless persons and refugees, and it was sometimes argued that corporations had nationality. In draft article 20, or in articles that might replace it, it would be better to use the term "protected person" instead of "national". He also wondered why the Special Rapporteur restricted the principle he enunciated in paragraph (2) to "compensation", when reparation could take three forms: satisfaction, which was hardly appropriate in the case of injury suffered by individuals, compensation and *restitutio in integrum*, an example being the restitution of an illegally confiscated sum of money.

35. While he was not in principle averse to the use of the conditional in legal texts, he thought that the indicative or the imperative was called for in paragraph (2) of the proposed draft article. He could not see why States should oppose such progressive and forward-thinking development of the law, given that both common sense and fairness justified the existence of a rule for allocating compensation or restitution among private individuals. The legal foundation of that obligation would be the unjustified enrichment of the State that held on to the recovered amounts. In his view, it was essentially a rule of customary law and consistent practice that was so clearly based on common sense that one might wonder whether it involved progressive development at all. The idea set out in the bracketed phrase in draft article 20, paragraph (2) which read "after deduction of the costs incurred in bringing the claim" should not be included in the provision, since it was derived from the principle of full reparation that was itself rooted in the decision of the PCIJ in the *Chorzów Factory* case to the effect that, in the case of internationally wrongful acts, the State responsible must wipe out all the consequences, which surely included reasonable expenditure incurred in the context of diplomatic protection.

36. In conclusion, he said that if the Commission wished to respond to the appeals made to it by the Special Rapporteur and some States to finish its draft articles on diplomatic protection, it must abandon the outdated principle, open to criticism, that had been posited at the start of the eighteenth century and set out in 1924 by the PCIJ in the *Mavrommatis* case to the effect that States acted on their own behalf, and acknowledge the truth, which was that States acted to uphold the rights of their nationals. The Commission should then consider which special rules were applicable when injury was caused to a protected person through the breach of a peremptory rule of general international law. In view of its bolder stance in the draft on State responsibility for internationally wrongful acts, it was difficult to understand the Commission's timidity in the current draft, which was a mere adjunct to the first. The Commission must also spell out more clearly what the means of exercising diplomatic protection were and must include in its draft articles rules that were as detailed as possible on the consequences of the exercise of diplomatic protection, particularly where diplomatic protection overlapped with direct remedies available to individuals, an exercise that implied a substantial redrafting of draft articles 17 and 18. Rules specifically applicable to reparation in the particular context of diplomatic protection must also be included, in keeping with what the Special Rapporteur proposed in draft article 20, but supplementing and strengthening his proposals. If all that was done, the Commission would not have laboured in vain.

37. Mr. RODRÍGUEZ CEDEÑO said that the topic of diplomatic protection was ripe for an exercise in codification and progressive development. The Special Rapporteur's endeavours in that direction had been very useful, and it was to be hoped that the Commission would adopt the final version of the draft articles and the relevant commentaries, subject to certain amendments, at the current session. While the text was not perfect, it restated and reinforced the basic secondary rules governing the exercise of diplomatic protection. The first point to note was that the issue of diplomatic protection was closely linked to that of the international responsibility of States and to human rights protection mechanisms because its underlying purpose was in fact to protect the rights of persons. In his opinion, the Commission's work should culminate in a set of draft articles from which an international instrument on the subject could subsequently be drawn up, that being the option favoured by the Commission itself and by the Sixth Committee. In that case, it would be necessary to contemplate in due course the inclusion in the draft of the technical and legal provisions generally contained in such instruments, as the Special Rapporteur had pointed out in paragraph 6 of his report.

38. Commenting on the proposed draft articles, he said he shared the opinion expressed by other members of the Commission that it was necessary to distinguish in draft article 1 between diplomatic protection and consular assistance, but that that distinction ought to be elucidated in the commentary rather than in a new paragraph 2, the solution proposed by the Special Rapporteur in paragraph 21 of his report. Consular assistance as understood in the 1963 Vienna Convention on Consular

Relations consisted in action taken on behalf of one of its nationals by the consulate of a country *vis-à-vis* the territorial authorities of the State in which it exercised its functions. In practice, the aim of that assistance was to ensure that due process was observed with respect to the person in question and that his or her rights were not violated, especially if he or she was accused of a specific offence. Diplomatic protection was action taken by a State in the event of a violation of international law after the injured person had exhausted all domestic remedies. The nationality link, except in the case of refugees and stateless persons, was a fundamental principle in the context of diplomatic protection, whereas it was not always required for consular assistance, since a State could represent the interests of other States and consequently act on behalf of persons who were not its nationals. Thus consular assistance did not have the same significance, scope or basis as diplomatic protection. That was, however, a matter that should be discussed in the commentary and not in the body of the draft articles. The definition of diplomatic protection given in draft article 1 was consistent with practice, precedent and a large part of doctrine on the subject, but it should be made more precise in order to clearly reflect the fact that diplomatic protection was exercised principally by a State in response to an injury suffered by one of its nationals as a result of an internationally wrongful act of a State. Doing so would also take account of developments in the very notion of diplomatic protection. In that connection, the Italian proposal contained in the Special Rapporteur's report and the implications of the ruling in the *Avena* case were worth considering. It was also crucial that the definition of diplomatic protection should expressly mention the persons referred to in draft article 8 (Stateless persons and refugees), which laid down an exception to the principle of the nationality link, along the lines of the Special Rapporteur's apt proposal in paragraph 21 of his report.

39. Some confusion might arise if the paragraph proposed by the Special Rapporteur in paragraph 24 was added to draft article 2. It would be better to keep to the current wording of the draft article, which expressed the essential idea that a State had the discretionary right to exercise diplomatic protection on behalf of one of its nationals or on behalf of the persons covered by draft article 8.

40. Draft article 3 was acceptable as it stood. The text adopted on first reading plainly established the fundamental nature of the nationality link in paragraph 1, and referred to the exceptions for which provision was made in draft article 8. The proposal of the Netherlands therefore appeared to be unnecessary, although the Drafting Committee was at liberty to study it more closely. Moreover, it emerged from draft article 4 that the granting of nationality was governed by the rules of national law provided that they were not inconsistent with international law. That draft article was sufficiently clear to be approved in its current form. There was therefore no need to take up the amendments proposed by some Governments.

41. He was pleased that States had welcomed draft article 8, which made it possible for a State to exercise diplomatic protection in respect of stateless persons and

refugees, in other words on behalf of persons who were not its nationals but who had their habitual residence in that State. That draft article filled a substantial *lacuna* and was an exercise in the progressive development of international law that took international realities into account, although it could be argued that such cases would not be very numerous and would be inherently limited in time. While a provision of that kind was necessary, it raised two major issues regarding refugees: the first was the definition of the term “refugee” and the establishment of conditions governing the exercise of diplomatic protection in respect of a refugee. He did not entirely agree with the opinion that it would be advisable to clarify the meaning of the term “refugee” or at least raise the question. The definition in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, whose retention was recommended by some, had evolved over the years, a development that was reflected in the practice of States, including States that were parties to those instruments, especially in the regional context of Africa and the Americas, and it had acquired a much wider scope. When granting refugee status in their respective territories, then, States did not base their decisions solely on the definition contained in that treaty, but also on other international documents and texts which had subsequently become legally binding. However, the most important factor was that refugee status must be recognized by the host State in accordance with its internal procedures, in which the competent bodies and the Office of the United Nations High Commissioner for Refugees participated. The latter played a leading role in ensuring the application of and respect for the pertinent norms. That was why it was necessary to clearly establish that the person must have refugee status both at the time of the injury and on the date of the official presentation of the claim. As for the criteria for exercising diplomatic protection, the proposal of the Nordic countries was interesting: in draft article 8, they had suggested replacing the expression “is lawfully and habitually resident in that State” with the notion of “lawful stay”, since the point at issue was the legal situation of the person, namely whether he or she had been granted refugee status at a specific time by the State and was legally “staying” in its territory. The expression “lawfully and habitually resident” might have a different connotation. In some countries, the granting of refugee status was not tantamount to permitting lawful residence within the strict meaning of the term. The key criteria for determining whether a person could receive diplomatic protection were that he or she had refugee status awarded in good faith and not obtained fraudulently and that he or she resided in the country which had granted that status. Perhaps the Drafting Committee could look at the question in greater detail.

42. The current wording of draft article 14 on the exhaustion of local remedies rule was the most acceptable and should not be replaced with the wording proposed by the Special Rapporteur in paragraph 74 of his report. Draft article 16 on exceptions to the local remedies rule should also be left unchanged; the amendments suggested in paragraph 81 of the report should not be adopted.

43. Lastly, the inclusion of a provision on the right of the injured national to receive compensation or, more generally speaking, reparation was a particularly

important question related to the very notion of diplomatic protection. He agreed that such a matter should not form the subject of a separate recommendation or guideline. That provision had to be sufficiently clear and precise and must expressly stipulate that the State of nationality must pass on the compensation received to the injured person in accordance with terms and conditions which the Commission and the Drafting Committee must consider in greater depth.

44. Mr. KOLODKIN commended the Special Rapporteur for the quality of his seventh report on diplomatic protection, which contained many interesting thoughts and proposals.

45. Referring to draft article 1, he said that the proposed new paragraph 2, which drew a distinction between diplomatic protection and consular assistance, was not necessary. In fact, he was not certain that the expression “consular assistance” was more appropriate than “consular protection”. The 1963 Vienna Convention on Consular Relations and many bilateral agreements spoke at great length about “protection”. The task of consular agents was to protect the rights and interests of nationals and legal persons but also those of the State itself, within the limits permitted by international law, and he drew attention in that connection to article 5 (a) of the 1963 Convention. It was true that there was a difference between diplomatic protection and consular protection, but it was perhaps not necessary to devote a paragraph to it; a reference in the commentary should suffice.

46. He was opposed to the addition of a second paragraph to draft article 2 to meet Austria’s concern that a State should be required to accept a claim made against it. Such an obligation stemmed implicitly from the right of the other State to submit a complaint. Otherwise, every provision that established a right would also have to specify the corresponding obligation. In any case, the new paragraph 2 proposed in paragraph 24 of the report should not be retained in its current wording, especially since, as had already been pointed out, the word “accept” was not the best choice. As to draft article 3, a reversing of the two parts of the sentence in the new version of paragraph 1 proposed in paragraph 27 of the report was inappropriate because it gave the impression that the Commission was defining the State of nationality. The actual objective was to define the State that was entitled to exercise diplomatic protection, something which the old paragraph 1 did very clearly.

47. He agreed with the changes proposed by the Special Rapporteur to draft article 4. Concerning draft article 5, paragraph 1, he subscribed in principle to the ideas set out in paragraph 43 of the report. Continuous nationality should extend from the time of the injury to the date of official presentation of the claim. It would not be fair for a respondent State to be able to assert that the injured person no longer had the nationality of the claimant State on the date of settlement of claim. The same considerations were applicable to draft articles 7, 8 and 10. It was difficult to see why the Special Rapporteur had not retained draft article 5, paragraph 2 adopted on first reading.⁴⁶ That was

⁴⁶ See footnote 7 above.

a very useful provision which covered very real situations, and not just that of State succession. It should therefore be retained. The proposed new paragraph 2 was likewise welcome. Draft article 6, paragraph 2, was also useful. The Russian Federation and Israel had referred to that provision when they had exercised diplomatic protection in respect of persons with dual nationality.

48. He endorsed the recommendations regarding draft article 8 formulated in paragraph 50 of the report. The proposal by the Nordic countries to replace the words “lawful and habitual resident” by “lawfully staying” should not be adopted, because that would allow a State to exercise diplomatic protection on behalf of an injured person to whom it had no sound legal link. The words used in the current version of the paragraph were entirely consistent with the 1951 Convention relating to the Status of Refugees. As to the meaning to be given to the word “refugee”, it was for the State that was entitled to exercise diplomatic protection to define the category of persons who were “lawfully and habitually resident”, provided that the definition was not contrary to international law.

49. The Special Rapporteur’s proposal in paragraph 53 of his report to divide draft article 9 into several paragraphs was a good idea, as was the proposal to delete the reference to “similar connection”, but the Commission should be cautious about adding alternative criteria that would lead to a situation where several States would be entitled to exercise diplomatic protection. The proposed new paragraph 3 covered that particular situation, but did so by introducing the problematic notion of “closest connection”. The text should confine itself to the criterion of State of incorporation, as proposed by the United Kingdom, but he remained open to any solution that would reconcile the various viewpoints.

50. The proposed new version of paragraph 2 of draft article 10 was useful. In draft article 11, the part of the sentence in square brackets in the proposed new version of subparagraph (a) should be retained. If it was deleted, it might appear that the diplomatic protection of shareholders could also be exercised when their corporation had ceased to exist for reasons unrelated to the injury, yet draft article 10, paragraph 2, provided that diplomatic protection would be exercised by the State of nationality of the corporation that had incurred the injury and had ceased to exist as a result of that injury. Thus, if the phrase in square brackets in draft article 11 was deleted, diplomatic protection could be exercised by both the State of nationality of the shareholders and the State of nationality of the corporation. That was not a result the Commission was seeking to achieve.

51. The words “under the law of the latter State” in subparagraph (b) should not be deleted either. If a corporation was willing to be incorporated in a foreign State because such incorporation was required by the State as a precondition for doing business there even if its law contained no such provision, then the risk that the corporation would knowingly take would be much too great. It would be very difficult for the shareholders and the State exercising diplomatic protection on their behalf to prove that such a precondition had actually been set if the foreign State’s law did not contain such

a provision. Thus the words “under the law of the latter State” introduced an important detail.

52. Draft article 12 should be retained as it stood, as the Special Rapporteur rightly suggested. The proposed change to draft article 13 met Guatemala’s concern to include the principles applicable to shareholders contained in draft articles 11 and 12. The question of such inclusion would not arise if draft article 13 addressed only legal persons involved in business activities, but there were other legal persons besides commercial entities, such as universities or municipalities. Draft article 13 had been the subject of considerable controversy in the past, and the Commission had decided, as a compromise, to confine the reference to principles concerning the nationality of corporations. It would be difficult to go back on that compromise.

53. In draft article 16, it was not advisable to adopt wording that was radically different from the one adopted on first reading, which on the whole was satisfactory. In particular, he was opposed to the proposal to delete the reference in subparagraph (c) to cases in which “the circumstances of the case otherwise make the exhaustion of local remedies unreasonable” on the grounds that such a situation was already spelled out in subparagraph (a); actually, that was not so at all. He noted that in the *Avena* case, Judge Vereshchetin had stressed that in certain special circumstances, such as those of the Mexican nationals already on death row, to demand the exhaustion of local remedies could lead to an absurd result (separate opinion, p. 83, para. 12). The second part of subparagraph (c) covered that very type of special circumstances, and it should therefore be retained, if necessary in a separate subparagraph.

54. Draft article 17 was useful in its current version. In the proposed new version of draft article 18, the reference to special regimes provided for under bilateral and multilateral treaties regarding the protection of investments was particularly welcome, for it helped clarify the subject of the provision. As to draft article 19, it was preferable to retain it in the version adopted on first reading. The new wording had at least one drawback: it made the right of the State of nationality or of the flag ship the subject of regulations in the draft articles on diplomatic protection.

55. With regard to the proposed future article 20, he said that it would be inconceivable in the Russian Federation for compensation obtained as a result of diplomatic protection not to be paid to the person concerned. Recently, for example, compensation obtained from Ukraine in the case of the aircraft shot down over the Black Sea in 2001 had been distributed in full to the families of the victims. However, as State practice and legislation in that area were very varied, it would be difficult to arrive at a uniform practice. It should be possible, through recommendations, to promote the development of a practice of transfer of compensation obtained as a result of diplomatic protection to the persons concerned, but even the tenor of such recommendations was difficult to define at the current time.

56. He did not see how the fate of the draft articles on diplomatic protection was bound up with that of the draft

articles on State responsibility for internationally wrongful acts, as the Special Rapporteur argued in paragraph 6 of the report. He did not understand why the draft articles on diplomatic protection that were to a great extent the codification of customary international law could not be adopted as a treaty, without looking back to the fate of the draft articles on State responsibility.

57. Mr. MATHESON, commenting first on draft article 14, said that he agreed with the amendment of paragraph 1, which recognized that local remedies might be exhausted by an entity other than the injured party itself, as the ICJ had ruled in the *ELSI* case.

58. Turning to draft article 16 (a), he noted that with regard to the exhaustion of local remedies the Special Rapporteur evidently preferred to adopt the criterion of the absence of a “reasonable possibility of available and effective redress”. That criterion could, however, be interpreted as allowing a claimant to forego local remedies which might be perfectly adequate but unlikely to provide redress for other reasons, such as the inadequacy of the claim. That was why the United States was proposing that it was unnecessary to exhaust local remedies if they were “obviously futile” or “manifestly ineffective”, having made it clear, however, that that would not be the case where a forum was “reasonably available to provide effective redress”. That proposal had the merit of focusing on the adequacy of the local forum rather than on the likelihood of a favourable result. It was true that the phrases “obviously futile” and “manifestly ineffective” might seem to require that the ineffectiveness of the local remedy should be immediately apparent. The two alternatives in the Special Rapporteur’s report could be reconciled by stating that local remedies need not be exhausted where they did not offer a reasonably available forum to provide effective redress. That would make it possible to keep the terms preferred by the Special Rapporteur while emphasizing the adequacy of the local forum.

59. The revision of subparagraph (c) of draft article 16 was welcome. Circumstances which would make the exhaustion of local remedies “unreasonable” were already covered by subparagraph (a), and the commentary could make that clear. That solution was far better than a vague and entirely open-ended reference to “reasonability”, which could effectively negate the entire requirement to exhaust local remedies.

60. He was not opposed to replacing the phrase “special treaty provisions” in draft article 18, but he thought that the proposed reference to “special regimes provided for under bilateral and multilateral treaties regarding the protection of investments” would not cover the specific investment provisions of broader bilateral agreements such as friendship, commerce and navigation treaties. He would prefer a reference to “specific treaty provisions regarding the protection of investments”, but would leave the matter in the hands of the Drafting Committee. Although draft article 19 was unnecessary, it could be retained, preferably in its original version.

61. He approved of the Special Rapporteur’s proposal to add an article on the right of injured nationals to receive

compensation. States must be encouraged to treat their nationals fairly when those States received compensation as a result of diplomatic protection. However, it was unfortunate that that issue had been addressed at such a late stage. If innovations were introduced during second reading, the Commission was more likely to make errors or produce results that States would not accept.

62. Those concerns were particularly important in that they touched on an area that fell within the realm of State policy and practice and the State’s treatment of its nationals, and because the intention was to guide or regulate the conduct of Governments. Any pronouncement on that subject should at least be based on a thorough study of State practice with regard to claims negotiation and administration.

63. With respect to the substance of the proposals, it was quite true that in the normal course of events a State should have regard to the consequences suffered by its injured national and, where feasible, consult that person before quantifying a claim. However, it must be borne in mind that in some circumstances a Government could not always do that if, for example, it had to process a large number of claims, such as the hundreds of thousands of claims brought against Iraq in the wake of the first Gulf War. If paragraph (1) of the text proposed by the Special Rapporteur was retained, it ought to contain a recommendation to States rather than impose an obligation on them.

64. Even more caution was required with respect to paragraph (2). It was not at all unusual for States to withhold a portion of the amounts received from a foreign Government. The United States, for example, regularly deducted a fixed percentage of amounts recovered from foreign Governments in order to pay for action to defend the interests of its nationals. Otherwise, the United States Government would have to subsidize the considerable effort required to present complex claims on behalf of multinational corporations that had ample resources to deal with such contingencies, or to face the prospect of prolonged disputes with those corporations over the amount to be deducted. Other Governments would undoubtedly face the same dilemma if such deductions were prohibited or limited to the actual costs incurred. Furthermore, if a Government used part of the amounts recovered for other legitimate public purposes, such as the maintenance of its foreign policy operations which formed the necessary basis for the protection of its nationals, that could not be deemed illegal or improper. States did have a right to require their nationals to contribute to such legitimate purposes. Thus the most that could be asked of States was that they should make a fair and reasonable payment to a claimant when they received compensation in fulfilment of a claim.

65. For those reasons, he was of the opinion that the Commission should defer any pronouncements on those points until a thorough survey of State practice could be carried out and States had given their views. If the Commission nonetheless decided to address that question at the current stage, it should be careful not to announce any new obligations or make categorical recommendations. The best solution would be to discuss the matter in the commentary.

66. Other suggestions that had been made could impose even more serious restrictions on the ability of States to deal with their nationals' claims, such as requiring the consent of claimants for the exercise of diplomatic protection, or for the form and amount of redress. States must retain control over their claims negotiations with other countries, for those negotiations were often a key element in resolving dangerous crises. In that context, a State might be led to lodge a claim against the will of its national, or to fix a form and an amount of recovery that did not satisfy its national. For example, one element of the 1981 Algiers Declaration,⁴⁷ which had resolved a potentially dangerous situation in relations between Iran and the United States, had been the compulsory resolution of claims from nationals of both countries by means of a bilateral arbitration process; subsequently a large number of claims had been settled by the two sides through bilateral negotiation. The Supreme Court had dismissed one corporation's suit challenging the right of the United States Government to settle its case in that manner against its will. If the United States Government had been unable to agree to a compulsory settlement of its nationals' claims, the Accords might well have collapsed, with potentially serious consequences.

67. In short, States must retain the right to exercise diplomatic protection and settle such claims even when the claimant objected. Any other rule could seriously impair the ability of Governments to resolve foreign policy crises.

The meeting rose at 1.05 p.m.

2871st MEETING

Friday, 5 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Diplomatic protection (continued) (A/CN.4/560, sect. D, A/CN.4/561 and Add.1-2, A/CN.4/567, A/CN.4/575, A/CN.4/L.684 and Corr.1-2)

[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. KATEKA, after commending the Special Rapporteur's willingness to accommodate the views of Member States and of the Commission, said he

⁴⁷ See *Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States*, ILM, vol. 20, No. 1 (January 1981), p. 223.

endorsed the Special Rapporteur's belief that European citizenship was applicable to consular assistance and not to diplomatic protection. He was of the view, however, that the Special Rapporteur had overemphasized the importance of article I-10, paragraph 2 (c) of the Treaty establishing a Constitution for Europe, which surely related to diplomatic representation under the 1961 Vienna Convention on Diplomatic Relations and to consular assistance under the 1963 Vienna Convention on Consular Relations rather than to diplomatic protection.

2. He had some difficulty with the revised proposal for draft article 1, contained in paragraph 21 of the report. The addition of the phrase "or a person referred to in article 8" created problems on which he would elaborate when commenting on draft articles 3 and 8. Paragraph 2 of the revised draft article was unnecessary: it did not detail exhaustively enough what was not covered by diplomatic protection.

3. With regard to draft article 2, he did not share Italy's view that a State had a legal duty to exercise diplomatic protection, which, as the Commission had correctly stated, was a discretionary right. Thus, he did not see the desirability of adding a second paragraph to the draft article, declaring that a State was under an obligation to accept a claim of diplomatic protection. In his view, if a claimant State fulfilled the requirements for the exercise of diplomatic protection, the respondent State was obliged to comply. Paragraph 2 could, however, find a place in the commentary.

4. In connection with the reservations that he had previously expressed concerning the need for draft article 3, paragraph 2, on the exercise of diplomatic protection in respect of a non-national, he would take the opportunity to express his views concerning draft article 8 on stateless persons and refugees. During the first reading, he had expressed misgivings regarding the draft article.⁴⁸ In theory, it was right for the Commission and some States to express solidarity with refugees by seeking to protect their human rights; and for countries of the North, which did not suffer from the phenomenon of refugees to the same extent as those of the South, the progressive development contained in draft article 8 was ideal. In practice, however, the provision would have the tendency to make permanent what was supposed to be a situation of limited duration. Some countries already played host to refugees in the hundreds of thousands—a heavy burden in an environment where burdens were rarely shared by the international community.

5. In that regard, he agreed with Austria's comment that an open definition of the term "refugee", as suggested in the commentary to draft article 8, should be avoided: the definition contained in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol was sufficient. The 1969 OAU Convention governing the specific aspects of refugee problems in Africa had adopted the definition contained in the Convention relating to the Status of Refugees, but had gone further by saying that the term "refugee" also applied to "every person who, owing to external aggression, occupation, foreign domination or

⁴⁸ See footnote 7 above.