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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IV

DIPLOMATIC PROTECTION

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DIPLOMATIC PROTECTION

A. Introduction

1. The Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development. [1] In the same year, the General Assembly by its resolution 51/160 invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments may wish to make. At its forty-ninth session, in 1997, the Commission pursuant to that General Assembly resolution, at its 2477th meeting established a Working Group on the topic. [2] The Working Group submitted a report at the same session which was endorsed by the Commission. [3] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur. [4] The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.

2. At its 2501st meeting on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

3. The General Assembly in paragraph 8 of its resolution 52/156 adopted on 15 December 1997 endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

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[1] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and addendum 1.

[2] Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), Chapter VIII.

[3] Ibid., para. 172.

[4] Ibid., paras. 189-190.

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/484).

5. The Commission considered the preliminary report of the Special Rapporteur at its 2520th to 2523rd meetings from 28 April to 1 May 1998.

1. Introduction by the Special Rapporteur of his preliminary report

6. The preliminary report raised a number of basic issues which underlie the topic and on which the Special Rapporteur sought the views of the Commission. The issues were divided into two broad categories: (a) the legal nature of diplomatic protection; and (b) the nature of the rules governing diplomatic protection.

(a) The legal nature of diplomatic protection

(i) Origin of diplomatic protection

7. The Special Rapporteur, referring to the report of the Working Group of 1997 on this topic, noted that the topic of "Diplomatic protection" involved mainly codification and that its customary origin was shaped by the dictum in the *Mavrommatis Palestine Concessions* case. [5] Referring to the historical use of the institution of diplomatic protection, the Special Rapporteur referred to certain criticisms that had been made over time of diplomatic protection. Those criticisms include the assertions that the institution of diplomatic protection was discriminatory because only powerful States were able to use it against weaker States. According to this criticism, diplomatic protection was not egalitarian, since the possibility of the individual having his or her cause internationalized depended on the State to which that individual was linked by nationality. Other criticisms included the assertion that diplomatic protection had served as a pretext for

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[5] The Permanent Court of International Justice stated that:

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

P.C.I.J., Series A, No. 2, Judgment of 30 August 1924, p. 12.

intervention in the affairs of certain countries. [6] The Special Rapporteur noted that the Calvo doctrine was formed to prevent abuse and to allow the foreign national to agree to be bound by the principle of equality with nationals who are subject to the sole jurisdiction of their courts alone.

8. The Special Rapporteur explained that at the heart of diplomatic protection there was a dispute between a host State and a foreign national whose rights have been denied and as a result who suffered injuries. If the foreign national was unable to internationalize the dispute and take it out of the sphere of local law, his or her State of nationality, at its discretion, could espouse the individual's claim by having it undergo a veritable "transformation" since only a State could invoke the responsibility of another State. He felt that this traditional view was based largely on a fiction of law because it was the damage inflicted on the foreign national which served to determine the responsibility of the host State and to assess the reparation due to the State of nationality. [7]

9. He further noted that in formulating the principle of exhaustion of local remedies in article 22 of the draft articles on State responsibility, [8] the Commission took into account the doctrinal debate as to whether the rule involved was "procedural" or "substantive". The Commission opted for the second view and consequently the responsibility of the host State would arise only after local remedies have been exhausted by individuals. In the Special Rapporteur's view it was unclear from the Commission's commentary, however, how such a right was transformed following local proceedings into a right of the State of nationality, so as to revert to the logic of diplomatic protection.

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[6] See the individual opinion of Judge Padilla Nervo in the *Barcelona Traction, Light and Power Company, Limited* case (Belgium v. Spain) Judgment of 5 February 1970, where he stated that "The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.", I.C.J. *Reports*, 1970, p. 246.

[7] See *Chorzow Factory*, P.C.I.J., Series A, No. 17, Judgment of 13 September 1928, p. 28.

[8] For article 22 and its commentary see, Yearbook ... 1997, vol. II (Part Two), pp. 30-50.

10. He also made reference to later developments where States through agreements recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to their nationals or where an individual was granted direct access to international arbitration. The Special Rapporteur believed that the above development and the fact that some legal personality was conferred on the individual, as the direct beneficiary of international law led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

(ii) Recognition of the rights of the individual at the international level

11. The Special Rapporteur referred to the emergence of a large number of multilateral treaties recognizing the right of individual human beings to protection independently from the intervention by the States and directly by the individuals themselves through access to international forums. In this context he referred to the right of petition. He further referred to recognition of basic human rights as creating obligations *erga omnes* and creating an interest on the part of all States. [9] These developments, together with the proliferation of bilateral investment promotion agreements and the creation of claims commissions [10] whereby a national of one State could present a claim against another State, created a legal framework outside the traditional area of diplomatic protection.

12. The Special Rapporteur noted that, in general, domestic law of States does not provide any “right” to diplomatic protection for the nationals. Noting developments in some recent constitutions where the right to diplomatic protection appears to have been granted to nationals, he felt that such provisions in the constitutions expressed more a moral duty than a legal

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[9] See *supra* note 6, p. 32, paras. 33-34.

[10] Such as Iran-United States Claims Tribunal established by Algiers Agreement of 19 January 1981 and the United Nations Compensation Commission created by the Security Council resolution 692, of 20 May 1991.

obligation, since any decision on this matter by a State would be influenced by political considerations and the diplomatic relations between the States concerned.

(iii) The rights involved in diplomatic protection

13. The Special Rapporteur stated that it has been established that the State has a “procedural” right, which it may waive, to bring an international claim in order to protect its nationals when they have suffered injury as a result of a violation of international law. In keeping with this traditional view, a State is enforcing its own right. A more contemporary approach suggests that the State is simply an agent of its national who has a legally protected interest at the international level. Depending on whether one opted for the right of States or for the right of the national, one would be placing emphasis either on an extremely old custom, which gave sovereignty more than its due, even resorting to a fiction, or on progressive development of custom, taking account of reality by means of international recognition of human rights. The approach chosen will have practical implications for the formulations of the provisions under this topic.

(b) The question of “primary” and “secondary” rules

14. The Special Rapporteur sought the Commission's guidance as to whether the topic should be confined to secondary rules as recommended by the Working Group of 1997 or could it be more flexible since, in his view, international law could not be placed in watertight compartments of “primary” and “secondary” rules. Recalling that the recommendation by the Working Group and its approval by the Commission was due to the impasse the Commission had reached in its first attempt to codify the topic “Responsibility of States for damage to the person and property of aliens”, the Special Rapporteur suggested another approach. According to this approach, the Commission would limit itself to secondary rules, and discuss primary rules only in the context of general categories and, where necessary, with a view to appropriate codification of secondary rules. Examples included situations of nationality link of natural or legal persons or grounds for exoneration from responsibility based on the conduct of the individual claimant. Accordingly, it would not be the granting of nationality that would be considered, but its applicability to another State. Similarly, it would not be the individual's

compliance with the host countries' legislation that would be considered, but the circumstances in which the individual's conduct constituted a ground for exonerating the host State.

15. The Special Rapporteur also suggested changing the title of the topic to “Diplomatic protection of person and property” which appeared more in line with its content. The new title would also clarify the distinction between this topic and those dealing with diplomatic and consular relations.

2. Summary of the debate

(a) General comments

16. It was generally agreed that topic dealt with an issue that was complex and of great practical significance and that there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law.

17. A comment was made that much of international law regarding diplomatic protection had taken shape with the spread of economic, social and political ideas from Europe and North America to other parts of the world. In developing the law towards universal application, care must be taken to avoid undue reliance on outdated materials and, conversely, there was a constant need for modernization and for taking into account the attitudes of the newer States.

18. It was noted that the original purpose of the institution of diplomatic protection 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 individual, and specifically the private individual, 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”. It was discriminatory in its exercise because it was almost exclusively the prerogative of the most powerful States. Therefore, it was important not to generalize unduly.

19. It was noted that it might be appropriate to establish guidelines or rules - such as nationality, meritorious claim, denial of justice or violation of fundamental human rights - with a view to preventing abuses of the foreign State's discretionary power to provide diplomatic protection.

20. Other views were expressed to the effect that despite some abuse in the history of diplomatic protection, the institution of diplomatic protection has been frequently used among States of equal status and often within the same region.

(b) The customary conception of diplomatic protection

21. Some members did not agree with the suggestion that a legal interest on the part of a State in the fate of its nationals involved a legal fiction. They contended that there was nothing wrong in the notion that a State might have such an interest. Diplomatic protection was a construction in the same sense as the concepts of possession and ownership were constructions. For that reason the diplomatic protection in the context of the *Mavrommatis* construct should not be considered a fiction. Some other members were not persuaded that the analogy to a legal fiction by the Special Rapporteur was misleading. In their view, law was made up of fictions or, in other words, of normative reconstructions of reality.

22. The view was also expressed that regardless of what it was called - fiction, novation, substitution - what was involved was a theoretical approach which was not relevant to the normative development of the subject. The main question, as the Special Rapporteur had rightly emphasized, was who held the right exercised by way of diplomatic protection - the State of nationality or the injured victims? Clearly, the answer, according to this view, must always be the State; and in principle its powers in that regard were discretionary. Diplomatic protection had always been a sovereign prerogative of the State as a subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War to indemnify for property that had been nationalized.

23. As to whether, in exercising diplomatic protection, a State was enforcing its own right or the right of an injured national the observation was also made that a person linked by nationality to a State was a part of its population and therefore one of the State's constituent elements. The protection of its nationals was a State's fundamental obligation, on the same plane as the preservation of its territory or the safeguarding of its sovereignty. At the same time the State was defending the specific rights and interests of the national that had been “injured” by another State. Therefore, no rigid distinction could be drawn between the rights of the State and the rights of its nationals; the two sets of rights were complementary and

could be defended in concert. It was further noted that a State had in general an interest in seeing that its nationals were fairly treated in a foreign country, but it was an exaggeration to suggest that, whenever a national was injured in a foreign State, the State of origin was also injured. In practice damages are measured in relation to the injury suffered by the individual and not by the State, as if the injury to the individual was in fact the cause of action.

24. It was also stated that it was important to determine who had the direct and immediate legal interest, the attributes and the powers to bring an international claim. According to one view, the State had no such direct and immediate interest. If that were the case, the rights in question would be ineluctable and could not be exercised at the State's discretion. For example, agreements on the protection of foreign investments gave persons, whether natural or legal, the legal capacity to bring an international claim. The same was true in the case of the Calvo clause, whereby the alien contractually declined diplomatic protection from his State of origin. In that case too, it was clear that only the individual had a direct and immediate interest in the claim. Consequently, the debate on the legal fiction regarding the holder of those rights led nowhere, and the Commission should instead focus on the rights and legal interests that were being protected.

25. According to another view, the State exercised vicariously a right originally conferred on the individual. Therefore, it would be necessary to distinguish clearly between the exercise of the right protected and the right itself. The State has a discretionary power to exercise diplomatic protection, despite the fact that the rights protected were not those of the State, but rather those of the injured individual. The Special Rapporteur also agreed that this distinction between the possession of the right and its exercise might be useful in order to reconcile the customary law in this matter and the new developments.

26. In this context a comment was made that the Commission may want to reconsider the issue of the discretionary right of the State to diplomatic protection with no right to the individual. On the other hand, the view was also expressed that in deciding whether to exercise diplomatic protection, in relation to a particular case, a State has to evaluate matters such as the overall interest of the State in the conduct of foreign policy and not simply

the interest of the individual citizen who may have been injured as the result of a wrongful act of another State. Hence the exercise of diplomatic protection should be at the discretion of the State.

27. It was noted that given the complexity of the issue, it would be inappropriate to burden the subject with theoretical concepts. For instance, the question of recognizing that the individual had the status of a subject of international law was highly contentious and should not be raised at this point. It would be better to adhere to the practice - particularly the judicial practice - whereby the individual was treated as a beneficiary of international law.

(c) The relationship between human rights and diplomatic protection

28. As regards the relationship between human rights and diplomatic protection a number of comments were made which expressed caution in assimilating the two institutions or establishing a hierarchy between them.

29. It was noted that while it was true that the law of diplomatic protection had existed long before the emergence of human rights as a term of art in international law, the two approaches existed in parallel, and their respective potentials overlapped only partially. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could now serve to buttress the diplomatic protection exercised by the State of nationality: some countries, for example, have relied wherever possible on a human rights argument in exercising diplomatic protection, as a claim based on human rights was clearly more appealing to many States than one based on an international minimum standard that had been a bone of contention throughout the nineteenth century and the first half of the twentieth century. In this context, it was noted that the traditional "*Mavrommatis* approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual's rights effective. It was noted that the human rights approach could be allowed to permeate the Commission's further debate on the topic on a case-by-case basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

30. The comment was made that the human rights system worked in a similar way to the principles of diplomatic protection: it was a condition of

admissibility that the claimant should exhaust any available local remedies, and States had the discretionary power of espousing a claim on behalf of an individual or corporation. The practice of the European Commission of Human Rights was very similar: there had been important cases of principle in which an individual had decided to withdraw his claim but the European Commission had declined to treat the claim as withdrawn because there was an objective interest in maintaining the standards of the public order of Europe. The Commission should therefore be careful not to adopt false polarities between human rights and diplomatic protection. The system of diplomatic protection should not be marginalized when no effective substitute was yet available.

31. A comment was also made that human rights and diplomatic protection were entirely distinct, and more thorough consideration of the question would reveal that diplomatic protection had traditionally concerned strictly patrimonial rights, whereas human rights concerned the very essence of personal freedom. The rights traditionally covered by diplomatic protection included most-favoured-nation treatment and performance requirements imposed upon enterprises - which were not the core concern of traditional human rights. This view was not shared by other members of the Commission. It was noted that while, in practice, diplomatic protection was most frequently invoked in cases where patrimonial rights were violated, other rights could likewise call it into play. It would therefore be too restrictive to assume that diplomatic protection dealt exclusively with damage to property.

32. The view was also expressed that it would be possible to strike a balance between diplomatic protection and the exigencies of human rights. This issue was particularly relevant in the context of the question of legal persons - a grey area which neither the Commission nor other bodies had explored in depth - but had instead contented themselves with citing the somewhat obscure *obiter dictum* of the International Court of Justice in the *Barcelona Traction* case. It was further noted that it was no coincidence, that at the level of the European system for protection of human rights, the rights closest to those of legal persons, namely, property rights, were dealt with not in the European Convention on Human Rights, but in a separate protocol thereto. Therefore, a new approach seemed to be gaining ground, and that would be the crucial aspect of the study to be conducted by the Special Rapporteur. In this context, it was, however, noted that the American

Convention on Human Rights set out the principle that no one could be arbitrarily deprived of his property, but that principle was closely tied in with the human rights of due process.

33. The comment was made 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, [11] 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.

34. It was observed that if injury to a foreign national involved a violation of a right recognized as a human right, nothing could prevent that foreign national's State of origin from espousing his or her claim. The practice in some countries had stressed that approach. If injury to aliens in the form of violations of human rights were excluded from the application of diplomatic protection, no effective remedy would be available in cases when an alien did not have access to procedures before an international human rights body. In most cases of violations of human rights of foreigners, however - such as unfair imprisonment or mistreatment - international procedures were not available, and it was accordingly vital to confirm the right of the State of origin to exercise diplomatic protection.

35. In analysing the relationship between human rights and diplomatic protection, attention was drawn to a situation of violation of human rights under a given regime where espousing the claim by the State under that regime did not fall within the ambit of diplomatic protection.

36. The Special Rapporteur stressed that he had never sought to contrast diplomatic protection and human rights. He had simply asserted that the concept of diplomatic protection, which predated the concept of human rights, could no longer be studied without taking careful account of the evolution of human rights in recent years. It was countries undergoing a transition to democracy that had the greatest interest in strengthening human rights, and thus in ensuring that account was taken of individuals in action by the State.

(d) Preconditions for the exercise of diplomatic protection

[11] ECHR, *Soering* case, decision of 26 January 1989, Series A, No. 161.

37. It was stated that the necessary preconditions for diplomatic protection had been established in the *Mavrommatis* judgement. The first precondition was that there must be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim was brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. The second precondition for the exercise of diplomatic protection was that the injured subjects must have been unable to obtain satisfaction through domestic remedies which afforded the State an opportunity to avoid a breach of its international obligations by making timely reparation.

38. It was noted that the basis for the prior exhaustion of local remedies was empirical, and it was arguable that there was an implied risk principle which meant that there was no need to exhaust local remedies in the absence of any prior voluntary connection with the jurisdiction concerned. [12] A view was also expressed that the requirement of the exhaustion of local remedies entailed a further consequence that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right. It was further noted that the Commission would have to address the question as to whether the resort to an international body to

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[12]See for example in the *Case Concerning the Aerial Incident of July 27th 1955* (Israel v. Bulgaria) Preliminary Objections where in response to a preliminary objection by Bulgaria that the domestic jurisdiction of Bulgaria was not exhausted, Israel argued that there were a number of important limitations to the application of the exhaustion of local remedies rule:

> "[I]t is essential [...] that a link should exist between the injured individual and the State whose actions are impugned. ... [T]he rule is only applied when the alien, the injured individual, has created, or is deemed to have created, a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned. ... The victims [in this case] had no voluntary, conscious and deliberate connection with Bulgaria. To the contrary, such connection as they did have, if such it can be called, was involuntary, unknown and completely unpremeditated."

See ibid., I.C.J. *Pleadings,* 1959, pp. 533-534. The Court found that it was without jurisdiction on another ground and did not rule on other issues raised as preliminary objections including the exhaustion of local remedies requirement.

protect human rights must be considered a “local remedy”, even though a simple textual interpretation could not answer the question in the affirmative.

39. In the context of local remedies, the question arose as to whether the minimum standard of treatment accorded to aliens under international law should be the sole standard. Should the standard of treatment not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens? To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences which might exist between the host State and the foreign State.

40. A comment was made that foreign investors were in a privileged position vis-à-vis nationals, as they had recourse to three procedures - domestic remedies, diplomatic protection and international arbitration - for the protection of their rights, whereas nationals could avail themselves only of domestic remedies.

41. It was further noted that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

42. Questions were raised as to whether a State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State only had the right to exercise diplomatic protection after all other domestic modes of dispute settlement were exhausted.

(e) <u>The question of “primary” and “secondary” rules</u>

43. It was observed that theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. These points could be debated as they came up in specific contexts. It was felt that the broad meaning of diplomatic protection was clear: the important issues were

the admissibility of claims and the law relating to the prior conditions which had to be satisfied before claims were made. The 1997 report of the Working Group on Diplomatic Protection should be followed in this respect.

44. Comments were made that although the Commission was dealing with secondary rules and it would cause confusion if it pretended otherwise, the distinction between primary and secondary rules should not be used as an absolute test. Classification of a rule as primary or secondary would depend on the nature of the issue on a particular occasion. However, the question was not of overlap but of a double function of admissibility and merit with respect, for example, to the “clean hands” rule, certain issues of nationality, and the whole area of acquiescence and delay. Therefore, the Commission would be unable to consider, in the context of this topic, secondary rules in isolation. It must also touch on primary rules, as secondary rules, being procedural, were the means used to enforce rights conferred.

45. As regards which law governed diplomatic protection, it was generally agreed that it was international law. In this context, it was noted that some Governments in their constitutions committed themselves to their nationals to exercise diplomatic protection. The view was also expressed that such national laws did not affect the discretionary right of the State to exercise diplomatic protection.

46. It was also observed that there was room for progressively developing and significantly modernizing the law governing diplomatic protection. Even if the law of the State was taken as the starting point, it should be possible, with a view to progressive development of the law, to enhance the place of the individual in the context of diplomatic protection, particularly where indemnification was concerned.

47. The comment was made that the study of diplomatic protection must include study of the means for exercising it. The traditional machinery for peaceful settlement of disputes, particularly negotiation but also mediation, good offices and arbitration, should be considered as well as the question of countermeasures in the context of diplomatic protection.

48. As regards the title of the topic, a comment was made that it could perhaps be made more precise, but that could be done later in the light of the draft to be prepared.

(f) The relationship between the topics of “Diplomatic protection” and “State responsibility”

49. It was observed that it was important to remember that diplomatic protection was just one part of the vast field of international responsibility. As a means of giving effect to State responsibility, it created a relationship between two States: the “protector” State and the State against which action was being taken, which was viewed as responsible for an internationally wrongful act that had caused injury to a national of the “protector” State. The contemporary emphasis on protection of human rights - even though correct - should not obscure the fact that the State-to-State relationship was an essential element in determining the nature of diplomatic protection. In this context, it was also observed that the topics of diplomatic protection and State responsibility 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. When the obligation to compensation was owed to a private individual, who, with rare exceptions, did not have the capacity to act at the international level, diplomatic protection came into play and thus proved to be an extension, a consequence and a component of the law of State responsibility.

50. Attention was also drawn to the problem of dealing with questions of direct damage to States, which, while clearly forming no part of the Commission's mandate, were nonetheless often inextricably bound up with questions of diplomatic protection in practice. Sometimes a particular case could represent both a direct and indirect State interest. An example of such a case was the *Rainbow Warrior* incident where New Zealand brought a claim regarding violations of its sovereignty, and on behalf of the Netherlands regarding a photographer who had lost his life in the incident, who had been treated as being of Netherlands nationality for the purposes of the settlement. Also the Chernobyl incident had involved direct economic losses by private individuals in a number of States, as well as the potential for the States themselves to bring claims for direct damage to their airspace, had they so wished. These examples involved actual or potential diplomatic

protection in respect of private interests. The fact that they were not exclusively concerned with private interests should not place them outside the purview of the Commission's consideration.

(g) Scope of the topic

51. A comment was made that consideration should be given to extending diplomatic protection to the nationals of a State who suffered damage, not while they were abroad but while they were in their own State, as a result of an internationally wrongful act caused by a foreign diplomatic mission or the officials of such a mission who enjoyed jurisdictional immunity and, consequently, could not be brought before the local courts. There was no reason why a State which protected its nationals when they were injured abroad as a result of a violation of international law in those circumstances should not do likewise if they were injured when resident on the national territory.
