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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS FIFTY-SIXTH SESSION**

**Rapporteur: Mr. Pedro COMISSÁRIO AFONSO**

**CHAPTER IV**

**DIPLOMATIC PROTECTION**

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## 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.<sup>1</sup> In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, 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 might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.<sup>2</sup> The Working Group submitted a report at the same session which was endorsed by the Commission.<sup>3</sup> 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.<sup>4</sup>

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 endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

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<sup>1</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, para. 249 and annex II, addendum 1.

<sup>2</sup> *Ibid.*, *Fifty-second Session, Supplement No. 10 (A/52/10)*, chap. VIII.

<sup>3</sup> *Ibid.*, para. 171.

<sup>4</sup> *Ibid.*, paras. 189-190.

4. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.<sup>5</sup> At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.<sup>6</sup>

5. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic,<sup>7</sup> after Mr. Bennouna was elected a judge to the International Criminal Tribunal for the Former Yugoslavia.

6. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.<sup>8</sup> The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

7. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)). Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the next session. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

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<sup>5</sup> A/CN.4/484.

<sup>6</sup> The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10)*, para. 108.

<sup>7</sup> *Ibid.*, *Fifty-fourth Session, Supplement No. 10 (A/54/10)*, para. 19.

<sup>8</sup> The report of the informal consultations is contained in *ibid.*, *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 495.

8. At its 2688th meeting, the Commission established an open-ended Informal Consultation on article 9, chaired by the Special Rapporteur.

9. At its fifty-fourth session, in 2002, the Commission had before it the remainder of the second report of the Special Rapporteur (A/CN.4/514 and Corr.1 and 2 (Spanish only)), concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1), covering draft articles 14 to 16. The Commission decided to refer draft article 14, paragraphs (a), (b), (d) (to be considered in connection with paragraph (a)), and (e) to the Drafting Committee at its 2719th meeting, held on 14 May 2002. It further decided, at its 2729th meeting, held on 4 June 2002, to refer draft article 14, paragraph (c) to the Drafting Committee to be considered in connection with paragraph (a).

10. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8], at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and 6 at its 2732nd meeting. At its 2745th and 2746th meetings, held on 12 and 13 August 2002, the Commission adopted the commentaries to the aforementioned draft articles.

11. At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

12. At its fifty-fifth session, in 2003, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/530 and Corr.1 (Spanish only) and Add.1). The Commission considered the first part of the report, concerning draft articles 17 to 20, at its 2757th to 2762nd, 2764th and 2768th meetings, held from 14 May to 23 May, 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, held on 15, 16 and 18 July 2003.

13. At its 2762nd meeting, held on 23 May 2003, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, on article 17, paragraph 2.<sup>9</sup>

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<sup>9</sup> See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 90-92.

The Commission considered the report of the Working Group at its 2764th meeting, held on 28 May 2003. 14. The Commission decided, at its 2764th meeting, to refer to the Drafting Committee article 17, as proposed by the Working Group,<sup>10</sup> and articles 18, 19 and 20. It subsequently further decided, at its 2777th meeting, to refer articles 21 and 22 to the Drafting Committee.

15. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting, held on 5 June 2003. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.

### **B. Consideration of the topic at the present session**

16. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/538). The Commission considered the report at its 2791st to 2796th meetings, held from 3 to 11 May 2004.

17. At its 2794th meeting, held on 6 May 2004, the Commission decided to refer draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur, to the Drafting Committee. The Commission further decided, at its 2796th meeting, held on 11 May 2004, that the Drafting Committee consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection.

18. The Commission considered the report of the Drafting Committee at its 2806th meeting, held on 28 May 2004, and adopted on first reading a set of 19 draft articles on diplomatic protection (see section C below).

19. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

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<sup>10</sup> Ibid., para. 92.

**C. Text of the draft articles on diplomatic protection  
adopted by the Commission on first reading**

**1. Text of the draft articles**

**Part One**

**General Provisions**

**Article 1**

**Definition and scope**

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

**Article 2**

**Right to exercise diplomatic protection**

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

**Part Two**

**Nationality**

**Chapter I**

**General Principles**

**Article 3**

**Protection by the State of nationality**

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

## **Chapter II**

### **Natural Persons**

#### **Article 4**

##### **State of nationality of a natural person**

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

#### **Article 5**

##### **Continuous nationality**

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.
2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.
3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

#### **Article 6**

##### **Multiple nationality and claim against a third State**

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

### **Article 7**

#### **Multiple nationality and claim against a State of nationality**

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

### **Article 8**

#### **Stateless persons and refugees**

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

## **Chapter III**

### **Legal Persons**

#### **Article 9**

#### **State of nationality of a corporation**

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

## **Article 10**

### **Continuous nationality of a corporation**

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.
2. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

## **Article 11**

### **Protection of shareholders**

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

- (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
- (b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.

## **Article 12**

### **Direct injury to shareholders**

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

## **Article 13**

### **Other legal persons**

The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

## **Part Three**

### **Local Remedies**

## **Article 14**

### **Exhaustion of local remedies**

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 16, exhausted all local remedies.
2. “Local remedies” means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

## **Article 15**

### **Category of claims**

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

## **Article 16**

### **Exceptions to the local remedies rule**

Local remedies do not need to be exhausted where:

- (a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

#### **Part Four**

#### **Miscellaneous Provisions**

#### **Article 17**

#### **Actions or procedures other than diplomatic protection**

The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

#### **Article 18**

#### **Special treaty provisions**

The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

#### **Article 19**

#### **Ships' crews**

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

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