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Summary record of the 16th meeting
Held at Headquarters, New York, on Wednesday, 20 October, at 10 a.m.

Chairperson: Ms. Picco . . . . . (Monaco)

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The meeting was called to order at 10 a.m.

Agenda item 80: Diplomatic protection (A/65/182 and Add.1)

1. **Mr. Eriksen** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Sweden and Norway), said they hoped that the articles on the topic of diplomatic protection would fairly soon be developed into a convention in order to enhance legal clarity and predictability in that important field of law. While the ties between the topics of diplomatic protection and responsibility of States for internationally wrongful acts might make it advantageous to adopt both sets of articles in the same form, the Nordic countries believed that two different approaches could be taken. They were ready to consider all options that would safeguard the core of the articles on diplomatic protection and ensure their status as a source of inspiration and guidance for States in exercising the right to diplomatic protection.

2. **Ms. Quezada** (Chile), speaking on behalf of the Rio Group, said that the articles on diplomatic protection had already been under consideration by States and their legal advisers for four years and, while many of the articles reflected State practice and corresponded to rules of customary international law, an international convention was needed to enable State practice and jurisprudence to be harmonized. Such a convention would enhance the rule of law at all levels, contribute to the peaceful settlement of disputes, improve human rights protection, including for refugees and stateless persons, and guarantee the right of sovereign States to protect their nationals in international relations. The Rio Group was ready to go to work immediately on a convention, on diplomatic protection based on the articles.

3. **Ms. Donsky** (Australia), speaking on behalf of the CANZ group of countries (Australia, Canada and New Zealand), said that, insofar as the articles on diplomatic protection reflected a large body of State practice, they were valuable to States in their present form. It was therefore inadvisable to attempt to adopt a legally binding instrument. The text was closely bound up with that on State responsibility, and, in the absence of consensus on the elaboration of a convention based on the latter, it was premature to commence negotiations on that subject for the former. The articles on diplomatic protection contained elements pertaining to the development of customary international law, and not simply to its codification. An attempt to draft a convention could open up debate on their substance, something that would undermine the important consolidating work done by the Commission.

4. **Mr. Gouider** (Libyan Arab Jamahiriya) said that in addressing the topic of diplomatic protection the International Law Commission had achieved significant results in a comparatively short time. His delegation looked forward to the negotiation of a convention in order to codify the practice, views and legislation of States on the topic. Moreover, since State practice had long required that aliens should be treated humanely, it was understood that States had a responsibility to protect their citizens from internationally wrongful acts. It was therefore incumbent on all Member States to make additional efforts in order to elaborate a convention on State responsibility; progress in that area would facilitate work on diplomatic protection, to which it was intrinsically linked.

5. **Mr. Retzlaff** (Germany) said that diplomatic protection was a right of States, not of individuals. Moreover, it was a right, not a duty. Even when a State was under a constitutional obligation to exercise diplomatic protection in favour of a national, under international law it had a large margin of discretion as to how to do so, something that was adequately reflected in article 2. Any future codification of the law of diplomatic protection should not attempt to go beyond that well-established rule.

6. If a convention was to be developed on the basis of the articles, more thought should be given to the “genuine link” between the individual and the State. In the contemporary globalized world, with more and more people living abroad for extended periods, sometimes moving back to their home countries and often moving from one country to another, the initial link with the country of nationality could be severed to such an extent that it was no longer unique or “genuine”. Accordingly, article 19 would need to be revisited: the recommendations contained therein would have to be recast as rights and obligations if the text was to be legally binding.

7. **Ms. Silkina** (Russian Federation) said that the articles on diplomatic protection were instrumental in clarifying and developing the rules of customary international law on the protection by States of natural and legal persons and of refugees and stateless persons

from wrongful acts by other States while the text was balanced and resolved a host of issues relating to diplomatic protection, certain provisions needed further work: article 15 (a), on exceptions to the local remedies rule; article 11 (a), on protection of shareholders; and article 13, on protection of legal persons other than corporations.

8. While the articles on diplomatic protection were a useful supplement to the articles on State responsibility and could serve as the basis for developing an international convention on diplomatic protection, other options should also be considered, depending on what was to be done with the latter.

9. **Mr. Sum Agong** (Malaysia) said that it would be premature to formulate an international convention on diplomatic protection in the absence of consensus on drafting a convention on State responsibility. As the Special Rapporteur on diplomatic protection had pointed out, the fate of the two texts was closely bound together. The important work done by the Commission would be undermined, particularly if a large number of States failed to ratify the convention.

10. **Mr. Minogue** (United Kingdom) said his delegation concurred with the Special Rapporteur that the fate of the articles on diplomatic protection was closely bound up with that of the articles on State responsibility. The former could be seen as giving content, in the specific context of diplomatic protection, to the admissibility requirements of article 4 of the latter. In the absence of consensus on the drafting of a convention on State responsibility, any decision to begin negotiating a convention on diplomatic protection would be premature.

11. The articles on diplomatic protection went beyond the straightforward codification of existing law, containing elements that would amount to progressive development. Non-binding article 19, on recommended practice, risked undermining the discretion of a State to decide whether or not to exercise diplomatic protection and was thus not suitable for inclusion in a treaty. A convention on diplomatic protection must not be seen as the only possible conclusion to the work on the topic. In the absence of a convention on State responsibility, the best approach would be to allow the draft articles to inform and influence State practice.

12. **Mr. Johnson** (United States of America) said his delegation endorsed the view that, insofar as the articles reflected the large body of State practice on diplomatic protection they were valuable to States in their present form, but that a few of the articles were inconsistent with well-established customary international law. As in the case of State responsibility, the negotiation of a convention on diplomatic protection might undermine the contribution already made by the articles. Therefore, it would be better to allow time for the articles to influence and help settle State practice.

13. **Mr. Serpa Soares** (Portugal) said the fact that the International Law Commission had finished its work on diplomatic protection in less than ten years proved that the topic was indeed ripe for codification. While the comments of States on the future treatment of the topic often pointed to the links with State responsibility, the timing for codification in the two areas did not need to coincide. Despite its disagreement with certain aspects of the articles on diplomatic protection pertaining to both scope and content, Portugal found the articles generally amenable to transformation into an international convention. It hoped that they and the articles on State responsibility could soon become parallel conventions, representing a major step forward in consolidating the law of international responsibility.

14. **Ms. Köhler** (Austria) said that her delegation remained unconvinced of the usefulness of formulating a convention on diplomatic protection. The relevant text had been elaborated over a relatively short period, and States needed time to reflect on the result and on the advisability of convening an ad hoc committee, a preparatory committee or a codification conference.

15. **Ms. Valenzuela Díaz** (El Salvador) said that the world had changed radically since the emergence of the concept of diplomatic protection. States were no longer the sole protagonists in international relations, in which various organizations and individuals were also now involved: hence the utility of the work on the topic. The articles relating to nationality in general and, to multiple nationality and claims against a third State in particular were especially noteworthy for addressing problems that arose in actual practice. Another important element was the recognition in article 5 of the principle of continuous nationality from the date of injury to the date of official presentation of

a claim. The inclusion of article 8, on stateless persons and refugees, was also a major step forward.

16. The articles thus surpassed traditional approaches to diplomatic protection by offering a more flexible approach to the link of nationality that was fundamental to State protection. They not only reflected the prevailing situation but also encouraged steps forward in respect of diplomatic protection, which remained an essential instrument for upholding both the rights of individuals and the interests of States. El Salvador was in favour of joint efforts by States to negotiate a convention in the field of diplomatic protection on the basis of the articles developed by the International Law Commission.

17. **Mr. Janssens de Bisthoven** (Belgium) said that, while most of the articles on diplomatic protection reflected well-established State practice, Belgium was not convinced of the utility of transforming the text into a legally binding international convention. The references made to the articles, both in jurisprudence and doctrine, attested to their usefulness in their present form. Any option that was chosen should be in line with whatever option was chosen for the articles on State responsibility.

18. **Ms. Leal Perdomo** (Bolivarian Republic of Venezuela) said that the articles reflected the Commission's analysis of the similarities and differences between diplomatic protection and consular assistance and of a number of other issues. Article 3 indicated that a State could exercise diplomatic protection in respect of a person that was not its national: in other words, in respect of stateless persons and refugees. The latter were not explicitly mentioned in article 1, however, and that omission lent undue weight to nationality as the basis for the exercise of diplomatic protection. Since article 8 referred specifically to stateless persons and refugees, the words "or a person mentioned in article 8" should be inserted in article 1, between the words "the former State" and "with a view to".

19. Article 19, which cited various forms of recommended practice in the exercise of diplomatic protection, should be regarded as neither codifying customary international law nor couched in terms that set out binding obligations: it was merely stating that such practice was desirable. A provision of that type was by no means common in instruments that aimed to codify international law, and it might restrict the natural development of the law by indicating the direction to be taken by the practice that would ultimately become custom. Citing the dictum of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case 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 right, the right to ensure, in the person of its subjects, respect for the rules of international law", she noted that in exercising that right the State was pursuing higher national interests. It was accordingly entitled to determine what use was made of any compensation obtained, which might or might not include payment to the injured person. Such was certainly the situation under the Constitution of her country. She accordingly expressed reservations about article 19, in particular paragraph (c), since the recommended practice therein was not recognized as part of customary international law.

20. **Mr. Kazemi Abadi** (Islamic Republic of Iran) said that any legal regime on diplomatic protection must observe a delicate balance between the rights of the individual and those of States. It was doubtful that the present set of articles could satisfy those concerns. They had been adopted in a much shorter period of time than other texts developed by the Commission, and that was perhaps why not all of them could be said to reflect customary international law. Article 8, on diplomatic protection of stateless persons, and article 7, on individuals with dual nationality, had been formulated on the basis of the case law of regional tribunals or of sui generis tribunals, which could hardly reflect general international law. Some areas of diplomatic protection were not covered, and some provisions, for instance article 15, paragraphs (b) and (d), were vague.

21. The fact that States had differing views about the future of the text indicated that they needed more time for further consideration of its content. More time would also provide an opportunity to assess the extent to which the articles reflected State practice. It would accordingly be premature to develop the articles into a legally binding instrument.

22. **Mr. Delgado Sánchez** (Cuba) said it was unfortunate that some States, rather than making appropriate use of diplomatic protection as a supplementary means of protecting their nationals, employed it for exerting pressure on States and

promoting the interests of transnational corporations. Moreover, a number of international tribunals emphasized some of the principles recognized in the relevant jurisprudence, including the *Barcelona Traction* case, to the detriment of others. For example, the principle that the exercise of diplomatic protection should be restricted to natural or legal persons with a genuine link to the invoking State was sometimes ignored, or else such a link was artificially established. That created uncertainty and confusion in international economic relations and merely protected the interests of transnational corporations.

23. The exercise of diplomatic protection was a sovereign right of States and of vital importance in promoting the rule of law at the international as well as the national level. Its application to stateless persons and refugees was particularly instrumental in the protection of human rights.

24. The articles were closely related to those on State responsibility, and both texts should be handled in the same way. In order to promote consensus on their future, the articles on diplomatic protection should be referred to a Sixth Committee working group which would work out the final details of an international convention on diplomatic protection.

25. **Mr. Tladi** (South Africa) said that his delegation supported the articles, which were for the most part an accurate reflection of international law. Nevertheless, it was unconvinced of the merits of article 19, on recommended practice, which could potentially be used as justification for a right of nationals to diplomatic protection.

26. Interestingly enough, paragraph (3) of the commentary to article 19 cited the case of *Kaunda and Others* v. *President of the Republic of South Africa,* in which the South Africa Constitutional Court had ruled that, while each country could decide to recognize a right to diplomatic protection, that was a matter for national systems not international law. South Africa's concern over article 19 arose not out of indifference to the plight of individuals wronged by third States, but out of its firm belief that the appropriate remedy in such a situation was through the future development of regional and universal human rights systems and the corresponding international complaints mechanisms.

27. The negotiation of a convention on the basis of the articles would help to cement their usefulness by providing States with an opportunity to retain those aspects that were consistent with State practice.

The meeting rose at 11.10 p.m.