I. DIPLOMATIC PROTECTION

1. At the present session, the Commission adopted on second reading the entire set of the Draft Articles on Diplomatic Protection and the attached commentaries. Attempts had been made during the codification work and in the resulting doctrinal debate to update this classical institution to meet the evolution of contemporary international law. Indeed, this is becoming more centred on the protection of human beings as such, irrespective of their citizenship. Traditionally however, diplomatic protection is rooted in the principle that an injury to an individual is an injury to the State whose citizenship that individual enjoys. Hence, the very State exercises the option of waiving its right to diplomatic protection even in the case of violations of the individual’s human rights. On the other hand, this principle also leaves it the opportunity to accept a lower compensation than the actual injury to the individual might call for.

Throughout the article-by-article commentary, the Commission recognises the shift of primary international norms towards the protection of individuals. In the commentary to Draft Article 1, for instance, it concedes that the principle upheld by the Permanent Court of International Justice in the Mavrommatis case, whereby injury to a national is an injury to the State itself, is “a fiction and an exaggeration”. In reality, the Commission goes on, the State does not assert only its own right but also the right of the injured national. This fiction was no more than a means to an end, the end being the protection of the right of an injured national. As a consequence, Draft Article 1 has been formulated in such a way as to leave open the question whether the State is asserting its own right or that of its nationals. In the light of these developments, the Commission also highlighted in the same commentary that diplomatic protection is nowadays an important remedy for the protection of persons whose human rights have been violated abroad. In these cases, the function of diplomatic protection as a mechanism to secure reparation for the injury suffered by the individual and not by the State is even more evident.

These considerations are careful admissions by the Commission that diplomatic protection should meet the trend of contemporary international law towards the protection of human beings as such. Accordingly, both the draft articles and the attached commentary are punctuated by provisions and suggestions to adjust
diplomatic protection, as an established institution of traditional international law, to the recent developments of the international legal order.

These are however only partial concessions. On the whole, the Commission has in fact deliberately chosen to codify diplomatic protection as traditionally involving the right of a State to seek redress for the injury inflicted to its nationals (whether natural or legal persons) by peaceful means (Draft Article 1). Indeed, this decision implies two fundamental limitations to using diplomatic protection for the cause of human rights.

Firstly, the State is under no obligation to exercise diplomatic protection on behalf of a national. In other words, the State’s right to exercise diplomatic protection is of a discretionary nature. This is squarely affirmed in the commentary to Draft Articles 2 and 19. On the other hand, this assumption is in some way mitigated by the recommendations set out in Draft Article 19. As a minimum commitment, Draft Article 19(a) requires that a State, albeit not yet obliged by positive international law, should give at least consideration to intervention on behalf of a national who has suffered significant injury. Indeed, this is very likely to occur when the human rights of the injured person have been violated. In the commentary, the Commission recalls that under the Constitutions of some States the individual has a right to receive diplomatic protection for injuries suffered abroad. Moreover, a number of national court decisions indicate the obligation of the State to do something to assist its nationals, which may include the possibility of exercising diplomatic protection. Although one cannot infer from this limited practice the existence of customary rules, the recommendation contained in paragraph (a) must be seen as an exercise in progressive development.

Paragraphs (b) and (c) of the said Draft Article 19 complete the set of recommendations which would render diplomatic protection more sensitive to the interests of the injured persons. Both paragraphs are also seen as an exercise in the progressive development of international law.

Paragraph (b) provides that a State should, in the exercise of diplomatic protection, take into account the views of injured persons with regard to resorting to diplomatic protection and the reparation to be sought. Consultation with the injured person could, in fact, prove necessary to assess the damages to be claimed and to decide whether to demand satisfaction, restitution or compensation by way of reparation.

Paragraph (c) provides that States should transfer any compensation received from the responsible State to the injured nationals. On this point, the Commission speaks of an erosion of the State’s discretion with regard to the exercise of diplomatic protection. In our opinion, however, one should be a little more cautious when speaking of such an erosion. In reality, this erosion could take place only if discretionary acts by national governments in the distribution of compensation could be challenged by private beneficiaries before domestic tribunals, or before some international courts, such as the European Court of Human Rights, especially set up to examine individuals’ claims. Indeed, once the lump-sum has been finally