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Summary record of the 2617th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
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the members did agree on—and that was the only point he considered essential and was to be found in the judgment of ICJ in the *Barcelona Traction* case—was that there was a distinction between the position, for example, of the peoples of South West Africa and those of Ethiopia and Liberia. Once the members had agreed on that, they would have gone a long way towards disentangling the problems which article 40 had entangled.

73. He welcomed those constructive contributions. He agreed with Mr. Brownlie that the Commission would have to be ready to go to the Sixth Committee with a proposal that was clear and had a sufficiently firm basis in pre-existing texts to meet with some level of acceptance. The Commission's own level of acceptance had been fairly good so far and, with the efforts of the members of the Drafting Committee, the problem could be solved. If it was not solved and if the Commission did not go back to the original article 40, there would have to be a much simpler formulation—and that would be regrettable. Just as the Commission had considered that it had to go further than article 60, paragraph 1, of the 1969 Vienna Convention in the context of multilateral treaties, so must it go further in the field of the law of responsibility in the context of multilateral obligations. On the basis of the current discussion, it could take that important step forward.

74. Mr. HAFNER, agreeing with Mr. Simma and the Special Rapporteur, asked Mr. Pellet whether two consequences should be drawn from the interpretation of the words “a State which has suffered [material or moral] injury” in his proposed article 40-1, paragraph 1: first of all, that a breach of an international obligation did in itself constitute moral injury; and secondly, that in a situation where there had been a violation of a bilateral agreement on the protection of a minority, the State which protected the minority must, even if it could not be regarded as having suffered injury, be authorized to take any measures deriving from the responsibility of the other State. In other words, the interpretation of that article depended greatly on the definition of injury.

75. Mr. Sreenivasa RAO, reserving the right to refer again to the question at a later stage, said he thought that Mr. Pellet had been trying to propose a manageable way of dealing with the very difficult concepts underlying responsibility. If reparation was not what was intended in article 40 for indirectly injured States which had no *locus standi* to raise the issue of compliance with the obligation breached, he asked what was being invented that was new and did not already exist in United Nations forums. An indirectly injured State could go only to a multilateral forum to obtain satisfaction. It could, of course, send diplomatic notes, but, if it wanted to achieve results, it had to turn to United Nations resolutions, the WTO system for the settlement of disputes and other mechanisms created for that purpose. If those mechanisms were not used, a new wheel had to be invented. Otherwise, there would be only a unilateral, highly disoriented and selective set of reactions to the defence of a community of interests. That was the fundamental difficulty and it had not been discussed.

Organization of work of the session (*continued*)*

[Agenda item 2]

76. The CHAIRMAN announced the establishment of a working group on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). The Working Group would be composed of Mr. Sreenivasa Rao (Chairman and Special Rapporteur), Mr. Baena Soares, Mr. Galicki, Mr. Hafner, Mr. Kateka, Mr. Lukashuk, Mr. Rosenstock and Mr. Rodríguez Cedeño (ex officio).

The meeting rose at 1 p.m.

* Resumed from the 2613th meeting.

2617th MEETING

Tuesday, 9 May 2000, at 10.05 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his first report on diplomatic protection (A/CN.4/506 and Add.1), containing draft articles 1 to 9, which read:

Article 1. Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;

(b) Another State exercises diplomatic protection on behalf of the injured person;

(c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Article 5

For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by *bona fide* naturalization.

Article 6

Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.

2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

Article 8

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

Article 9

1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.

3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

2. Mr. DUGARD (Special Rapporteur) said he wished to acknowledge the invaluable contribution made to the preparation of his first report by Ms. Zsuzsanna Deen-Racsmany, a research assistant funded by the Cornelis van Vollenhoven Stichting of the University of Leiden, to whom he was greatly indebted for assistance.

3. The first report contained an introduction, in chapter I, suggesting how the right of diplomatic protection might be employed as a means to advance the protection of human rights. There then followed chapter II containing the draft articles and comments thereon. The articles raised a number of controversial issues on which he required the assistance and guidance of the Commission, matters which might have been raised in an introductory report, along the lines of the preliminary report prepared by the previous Special Rapporteur, Mr. Bennouna,² with no attempt made to formulate them in draft articles. In his view, however, the formulation of a questionable rule as a draft article brought it into clearer focus, provoking debate and dissent of the kind required at the current stage of study of the topic. The report also contained an outline of further articles to be submitted in future reports.

4. The draft articles fell into two groups. Of the first group (arts. 1–4), articles 1 and 3 were largely foundational, whereas articles 2 and 4 were particularly controversial. Of the second group, articles 5 to 8 were equally controversial, but all dealt with issues relating to nationality. He thus proposed to present for the time being only the introduction and the first four draft articles for debate.

5. As to the introduction, in chapter I of the report, in embarking on his task he had been under the mistaken impression that many of the areas of diplomatic

² *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/484.

protection were already settled, as much practice and precedent existed on the topic. To his dismay, he had discovered that the subject was plagued with controversy. Before the Second World War and the advent of the human rights treaty, few procedures had been available to the individual under international law to challenge his treatment by his own State. On the other hand, if the individual's human rights had been violated abroad by a foreign State, the individual's national State might intervene to protect him. In practice it was mainly the nationals of the powerful Western States that had enjoyed that privileged position, as it was those States that most readily intervened to protect their nationals. To aggravate matters for non-Western States, diplomatic protection had been exalted to the status of an important political category by the fiction that an injury to a national constituted an injury to the State itself. Inevitably, therefore, diplomatic protection had come to be seen by developing nations, particularly in Latin America, as a discriminatory exercise of power rather than as a method of protecting the human rights of aliens.

6. He said that much had changed in recent years. Standards of justice for individuals at home and for aliens had undergone major changes. Some 150 States were now parties to the International Covenant on Civil and Political Rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribed standards of justice both for nationals and for aliens in the signatory States. In addition, someone who did business abroad now frequently had remedies available to him, either in bilateral agreements or in multilateral treaties such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States creating ICSID.

7. Those developments had led many to contend that diplomatic protection was obsolete. Roughly, the argument was that the equality-of-treatment-with-nationals standard, advocated by the developing nations, and the international minimum standard of treatment of aliens, largely advocated by Western Powers, had been replaced by an international human rights standard which accorded to nationals and aliens the same standard of treatment—a standard incorporating the core provisions of the Universal Declaration of Human Rights.³ The individual was now a subject of international law with standing to enforce his or her own human rights at the international level. The right of a State to claim on behalf of its national should be restricted to cases where there was no other method of settlement agreed on by the alien and the injuring State. Only in such a case might the national State intervene, and then it did so as agent for the individual, and not in its own right. According to that argument, the right of a State to assert its own right when it acted on behalf of its national was an outdated fiction and should be discarded—except, perhaps, in cases in which the real national interest of the State was affected.

8. In his view, the argument was flawed on two grounds. First, it showed an unnecessary disdain for the use of fictions in law; and secondly, it exaggerated the current state of the international protection of human rights.

9. On the subject of fictions, in some situations the violation of an alien's human rights would engage the interests of the national State—for instance, where the violations were systematic and demonstrated a policy by the injuring State of discriminating against all nationals of the State in question. However, in the case of an isolated injury to an alien, the intervening State did in effect act as the agent of the individual in asserting his or her claim. There, the notion of injury to the State was indeed a fiction. That was borne out by a number of rules: the requirement that local remedies be exhausted, the requirement of continuous nationality, and the fact that tribunals, in assessing the quantum of damage suffered by the State, generally had regard to the damages suffered by the individual.

10. Thus, it was quite clear that diplomatic protection was premised on a fiction, one which had been a source of particular concern to the previous Special Rapporteur. He did not share his predecessor's disdain for fictions in law. Roman law had relied heavily on procedural fictions in order to achieve equity—a tradition most legal systems had inherited. The Commission should not dismiss an institution that served a valuable purpose, simply on the ground that it was premised on a fiction and could not stand up to logical scrutiny.

11. Secondly, the suggestion that developments in the field of international human rights law had rendered diplomatic protection obsolete called for closer scrutiny. The first Special Rapporteur on the topic of State responsibility, García Amador, had argued that the traditional view of diplomatic protection allowing the State to claim on behalf of its injured national belonged to an age in which the rights of the individual and the rights of the State had been inseparable. The position was now completely different and aliens, like nationals, enjoyed rights simply as human beings, not by virtue of their nationality. That meant, as García Amador had argued, that the alien had been internationally recognized as a legal person—independently of his State; he was a true subject of international rights. A necessary implication of that reasoning was that the individual, with rights and duties under international law, should, other than in exceptional cases, fend for himself when he ventured abroad.

12. He did not wish to enter into an unhelpful debate on the question of whether the individual was a "subject" or an "object" of international law. It was better to view the individual as a participant in the international legal order. As such, the individual might participate in the international legal order by exercising his or her rights under human rights treaties or bilateral agreements. At the same time, it must be recognized that while the individual might have rights under international law, his or her remedies were limited—a fact that García Amador had tended to overlook.

13. While the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) offered real remedies to millions of Europeans, it was difficult to argue that the American Convention on Human Rights: "Pact of San José, Costa Rica" or the African Charter on Human and Peoples' Rights had achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, was not protected by any regional human rights

³ General Assembly resolution 217 A (III) of 10 December 1948.

convention. To suggest, therefore, that universal or regional human rights conventions provided individuals with effective remedies for the protection of their human rights was in most cases to engage in a fantasy. The sad truth was that only a handful of individuals, in the limited number of States that accepted the right of individual petition to the monitoring bodies of those conventions, had obtained or would obtain satisfactory remedies under those conventions.

14. The position of the alien was no better. Universal and regional human rights conventions extended protection to all individuals—national and alien alike—within the territory of States parties. But no multilateral convention sought to provide the alien with remedies for the protection of his or her rights outside the field of foreign investment. Until the individual acquired comprehensive procedural rights and real remedies under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged, rather than simply dismissed as something from a bygone era.

15. International human rights law did not consist only of multilateral treaties. There was a whole body of customary international law on the subject, which included the institution of diplomatic protection. International human rights treaties were important, particularly as they extended protection to both aliens and nationals in the territory of States parties, but their remedies were weak. Diplomatic protection was available only to protect individuals against a foreign Government; on the other hand, it was a customary rule of international law that applied universally and, potentially at least, offered a more effective remedy. Most States would treat a claim of diplomatic protection from another State more seriously than a complaint about its conduct to a human rights monitoring body. That was a realistic, albeit sad, assessment of the current state of international life.

16. He would submit therefore that diplomatic protection remained an important weapon in the arsenal of human rights protection. As long as the State remained the dominant actor in international relations, the espousal of claims by States for violation of the rights of their nationals remained the most effective remedy for human rights protection. Instead of seeking to weaken that remedy by dismissing it as a fiction that had outlived its usefulness, every effort should be made to strengthen the rules that comprised the right of diplomatic protection. That was the philosophy on which his report was founded.

17. As to the draft articles, it must be said at the outset that the term “diplomatic protection” was misleading and probably inaccurate. It had much to do with the protection of nationals but little to do with diplomacy or diplomatic action. To take an obvious example, judicial proceedings brought on behalf of an injured individual represented a stage beyond diplomatic action. Governments could, therefore, hardly be blamed for assuming that the Commission was dealing, not with protection of aliens, but with protection of diplomats. In response to its request for advice on their practice in that area, the majority of Governments had simply transmitted copies of their diplomatic privileges and immunities legislation. That was under-

standable, for “diplomatic protection” was a term of art rather than an accurate reflection of the content of the subject.

18. Article 1 sought to be not a definition, but rather a description, of the topic. Nor did the article attempt to address the subject of functional protection by an international organisation—a matter briefly touched upon in the report, and one which perhaps had no place in the study, raising, as it did, so many very different issues of principle. The doctrine of diplomatic protection was clearly closely related to that of State responsibility for injury to aliens. Indeed, the Commission’s initial attempt to draft articles on State responsibility had tried to cover both the principles of State responsibility as currently formulated and also the subject of diplomatic protection. The idea that internationally wrongful acts or omissions causing injury to aliens engaged the responsibility of the State to which such acts and omissions were attributable had gained widespread acceptance in the international community by the 1920s. It had been generally accepted that, although a State was not obliged to admit aliens, once it had done so it was under an obligation towards the alien’s State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment of aliens.

19. Several attempts had been made to codify the principle and most of them had linked the topic of diplomatic protection with State responsibility. Writers on the subject had also largely defined diplomatic protection in that context. Following a time, during the period of decolonization, when the institution had been perceived by some as an instrument of Western imperialism, that argument appeared to have been discarded and there was now general acceptance that diplomatic protection was a customary rule of international law.

20. The draft articles were essentially secondary rules and no attempt was made to present a provision incorporating a primary rule describing the circumstances in which the State’s responsibility was engaged for a wrongful act or omission vis-à-vis an alien. Nor was any attempt made to formulate a provision on reparation, as that was a matter to be dealt with fully in the draft on State responsibility.

21. The question whether the right of protection was one pertaining to the State or to the individual was addressed in article 3. At the current stage, suffice it to say that historically that right was vested in the State of nationality of the injured individual. The fiction that the injury was to the State of nationality dated back to the eighteenth century and Vattel,⁴ and had been endorsed by PCIJ in the *Mavrommatis* and the *Panevezys-Saldutiskis Railway* cases, and also in the *Nottebohm* case.

22. The term “action” in article 1 presented some difficulties. Most definitions of diplomatic protection failed to deal adequately with the nature of the actions open to a State exercising diplomatic protection. In the cases cited,

⁴ E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (*The Law of Nations or the Principles of Natural Law*), English translation of the edition of 1758 in *The Classics of International Law*, vol. III (Washington, D.C., Carnegie Institution of Washington, 1916).

PCIJ had appeared to distinguish between “diplomatic action” and “judicial proceedings”, a distinction repeated by ICJ in the *Nottebohm* case and by the Iran-United States Claims Tribunal in case No. A/18. In contrast, legal scholars drew no such distinction, and tended to use the term “diplomatic protection” to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retortion, severance of diplomatic relations, economic pressure and, the final resort, the use of force. It was a particularly controversial issue, in respect of which he had relied heavily on Borchard’s authoritative work on the subject,⁵ which listed all those remedies. Dunn, too, had stated⁶ that the term was used therein as a generic term covering the general subject of protection of citizens abroad, including those cases in which other than diplomatic means might be resorted to in the enforcement of obligations.

23. The question of what action might be taken by the injured State would to a large extent be covered in the articles on countermeasures in the draft on State responsibility. In the current context the vexed question of the use of force was addressed in article 2. The article raised two highly controversial questions: first, the perennially topical question whether forcible intervention to protect nationals was permitted by international law; and second, whether the matter indeed fell within the sphere of diplomatic protection. He had been reluctant to devote too much space to the matter in his comments, particularly as there was a prospect of article 2 being rejected by the Commission. Nonetheless, his report contained sufficient material for a debate on the basis of which a decision could be taken as to whether a provision of that nature should be included in the draft.

24. The use of force as the ultimate means of diplomatic protection was frequently considered part of the current topic. History was replete with examples of cases in which the pretext of protecting nationals had been used as a justification for military intervention. Following such intervention by the imperial powers in Venezuela, the Convention respecting the limitation of the employment of force for the recovery of contract debts (Porter Convention) had prohibited the use of armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. The prohibition had not been absolute and it had been acknowledged that, if the respondent State failed to submit to arbitration or to the award, States might still resort to the use of force. The question had been considered by previous special rapporteurs of the Commission, who had generally taken the view that the use of force was prohibited as a means of diplomatic protection. At the eighth session, in 1956, García Amador had produced a first report entitled “International responsibility”⁷ containing a number of “bases of discussion”, in which he had asserted that in no event should the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or any other

form of intervention in the domestic or external affairs of the respondent State.⁸ Although the records of the Commission’s discussions did not indicate any objections to those provisions, the only views expressed in favour had been short notes of approval by Krylov and Spiropoulos.⁹ In spite of that, for reasons unknown to himself the provision had been omitted from all subsequent reports.

25. In his preliminary report, the previous Special Rapporteur had declared without qualification that States might not resort to the threat or use of force in the exercise of diplomatic protection. Personally, he believed that, while the wish to prohibit the threat or use of force in those circumstances was laudable, it took little account of contemporary international law, as evidenced by interpretations of the Charter of the United Nations and State practice. The dilemma facing international lawyers was mirrored by Nguyen Quoc Dinh,¹⁰ who first stated that the use of force was prohibited in the case of diplomatic protection, and then considered that the legality of military action by States to protect their nationals was a delicate subject. Indeed it was. Nevertheless his own report had not evaded the issue of whether international law, as it stood, permitted the use of force to protect nationals and whether that matter came within the field of diplomatic protection.

26. Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force. The only exception, as far as unilateral intervention was concerned, was embodied in Article 51, on the right of self-defence. The Charter made it plain that the use of force to recover contract debts was prohibited by Article 2, paragraph 4, as was the threat of the use of force by way of a reprisal. Hence the threat or use of force in the exercise of diplomatic protection could be justified only if it could be characterized as a kind of self-defence.

27. The right of self-defence in international law had been formulated well before 1945. It was generally accepted that the wide scope of that right included both anticipatory self-defence and intervention to protect nationals. Article 51 of the Charter of the United Nations made no reference to them, but only to cases in which armed attack occurred. A considerable scholarly debate had arisen in which some authors, including Mr. Brownlie and Mr. Simma, had argued that Article 51 contained a complete, exclusive formulation of the right of self-defence, which meant that a State might intervene only in response to an armed attack. Others, such as Mr. Bowett, had held that the phrase “inherent right” in Article 51 preserved the pre-Charter customary right allowing a State to intervene to protect its nationals.

28. The decisions of international tribunals and political organs of the United Nations provided little guidance on the subject. Courts had generally avoided the topic. ICJ had skirted it when considering the United States operation to rescue nationals in the Islamic Republic of Iran. On most occasions when the issue had been raised in

⁵ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, Banks Law Publishing, 1919).

⁶ F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore, Johns Hopkins Press, 1932).

⁷ *Yearbook . . . 1956*, vol. II, p. 173, document A/CN.4/96.

⁸ *Ibid.*, p. 221, basis of discussion No. VII, para. (3).

⁹ *Ibid.*, vol. I, 371st meeting, pp. 233–235.

¹⁰ P. Daillier, Nguyen Quoc Dinh and A. Pellet, *Droit international public*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999).

the political organs of the United Nations, the veto power had prevented any unequivocal decision. It was noteworthy that Oppenheim¹¹ had asserted that there was little disposition on the part of States to deny that intervention properly restricted to the protection of nationals was justified in emergencies.

29. The right had been greatly abused in the past and still lent itself to abuse. Consequently, if article 2 was to be included, it had to be narrowly formulated. In attempting to do that in article 2, he had been influenced by the Israeli rescue operation at Entebbe Airport, Uganda, in 1976. It was debatable whether or not the territorial power had had the capacity or willingness to release the hostages. If, for the sake of argument, it was agreed that Uganda had been unable to launch a rescue, the operation had amounted to one in which no attempt had been made to destabilize the territorial State politically. He had therefore based his arguments on that precedent, rather than on many others where there was evidence that the intervening State had harboured territorial or political ambitions.

30. In his opinion, article 2 reflected State practice more accurately than an absolute prohibition on the use of force as this was difficult to reconcile with actual State practice. On the other hand, a broad right to intervene was impossible to reconcile with the protests made by the injured State and third States in the case of an intervention to protect nationals. The wisest policy would be to recognize the existence of a right of that nature, but to prescribe severe limits on its exercise.

31. In paragraph 60 of the report he pointed out that the study did not deal with humanitarian intervention. A number of authors failed to distinguish between humanitarian intervention to protect humanity at large or the nationals of any State and diplomatic protection in the form of intervention to protect solely nationals, or a preponderance of nationals, of the intervening State. He was sure that article 2 would provoke considerable debate. The options were to include article 2 or one based on the principle asserted in it or to exclude the article on the grounds either that Article 2, paragraph 4, of the Charter of the United Nations prohibited such intervention or that, while the threat or use of force might be lawful under customary international law and perhaps under the Charter, it should no longer be seen as part of the doctrine of diplomatic protection. He would find it helpful to have a decision on that subject at the outset so as to preclude the issue arising again when the subject matter had already been debated at length.

32. Article 3 was possibly less controversial. It raised the issue of whose rights were asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. The traditional view was that the injury caused to the State itself had been challenged on the grounds that it was riddled with internal inconsistencies. As he had already pointed out, the doctrine had been accepted for centuries and had been endorsed by PCIJ in the *Mavrommatis* and the *Panevezys-Saldutiskis Railway* cases. The Court had asserted 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 was in reality asserting its own right to ensure, in the person of its subject, respect for the rules of international law. That principle had been restated by ICJ in the *Nottebohm* case and affirmed by the Institute of International Law in article 3 of its resolution on "The national character of an international claim presented by a State for injury suffered by an individual" adopted at its Warsaw session, in 1965.¹²

33. A number of suggestions had been made as to the basis of that doctrine. Some writers had advanced the view that it lay in the sovereignty of the State and the State's right to self-preservation, and right to equality. Brierly had offered a satisfactory explanation, quoted in paragraph 63 of the report, namely that when a State intervened to protect its national, or when it took action as a result of an injury to that national, it was not necessarily concerned only about that particular person, but it generally had a greater interest in upholding the principles of international law.¹³ The interest of the State as a whole was therefore involved and not just that of the individual. On the other hand, it had to be acknowledged that international tribunals were not consistent in their approach. They frequently spoke of the individual as the claimant, when proceedings were brought by the State on behalf of the injured individual. The implication was that the State simply acted as the agent of the person concerned and many scholars contended that the State enforced the rights of the individual rather than its own. Again, scholars pointed to the existence of institutions such as the exhaustion of local remedies, the continuous nationality requirement and the assessment of a quantum of damages in keeping with injury suffered by the individual.

34. Developments in the human rights field were such that if an individual was able to bring proceedings before an international tribunal or monitoring body to assert his or her human rights, it was difficult to argue that the State was asserting its own right. He was therefore prepared to accept that the subject matter was a fiction. On the other hand, it was necessary to address the question of the utility, rather than the logical soundness, of the traditional view. Diplomatic protection, albeit premised on a fiction, was an accepted institution of customary international law that continued to serve as a valuable instrument for the protection of human rights. It provided a potential remedy for the protection of millions of aliens who had no access to remedies before international bodies and a more effective remedy for those who had access to the often ineffectual remedies embodied in international human rights instruments.

35. The debate on the identity of the holder of the right to diplomatic protection had important consequences with regard to scope. If the holder was the State, it might enforce its right irrespective of whether the individual

¹² Institut de droit international, *Tableau des résolutions adoptées (1957–1991)* (Paris, Pedone, 1992), p. 59.

¹³ J. L. Brierly, "The theory of implied State complicity in international claims", *The British Year Book of International Law*, 1928, vol. 9, p. 48.

¹¹ R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I, *Peace* (London, Longman, 1992), p. 440.

himself had a remedy before an international forum. If, on the other hand, the individual was the holder, it was possible to argue that the State's right was purely residual and procedural, that was to say, it was a right that might be exercised only if there was no remedy open to the individual. That approach had been suggested by Orrego Vicuña in his report to ILA,¹⁴ which had proved helpful in the compilation of the first report currently before the Commission.

36. Article 3 attempted to codify the principle of diplomatic protection in its traditional form. It recognized diplomatic protection as a right attached to the State, which the State could exercise at its discretion, subject to article 4, whenever a national was unlawfully injured by another State. The right of diplomatic intervention of the State of nationality was not limited to instances of large-scale and systematic human rights violations, nor was the State obliged to refrain from exercising that right when the individual enjoyed a remedy under human rights or foreign investment treaties. In practice, a State would undoubtedly refrain from asserting its right when the person did have an individual remedy, or it might join the individual in asserting his right under the treaty in question. In principle, according to article 3, a State was not obliged to exercise such restraint, as its own right was violated when its national was unlawfully injured.

37. Article 4 dealt with another controversial question and was a proposal *de lege ferenda* in the field of progressive development, not codification. According to the traditional doctrine, a State had an absolute right to decide whether or not to exercise diplomatic protection on behalf of its national. It was under no obligation to do so. Consequently, a national injured abroad had no right to diplomatic protection under international law, as Borchard had clearly stated. It was, however, also a position that had been reaffirmed by ICJ in the *Barcelona Traction* case. Similarly, it was a proposition supported by many authors. Yet, in the opinion of other scholars, that position was an unfortunate feature of international law and current developments in international human rights law required that a State be under some obligation to accord diplomatic protection to an injured individual. The matter had been discussed in the Sixth Committee, where most speakers had expressed the view that the State had absolute discretion whether to grant diplomatic protection. Nevertheless, other speakers had argued to the contrary.

38. State practice in that field was interesting. Many States had constitutions indicating that the individual did have a right to diplomatic protection. Some constitutions, especially those of Eastern European countries, contained wording to the effect that the State had to protect the legitimate rights of its nationals abroad or that the nationals of the State should enjoy protection while residing abroad. He did not, however, know whether those rights were enforceable under the municipal law of those countries or were simply intended to ensure that a national injured abroad had the right of access to the State's consular offi-

cial. He would be grateful if colleagues from countries with constitutions containing such provisions could inform him whether there was a domestic remedy for the enforcement of that right.

39. In paragraphs 84 to 86 he described the practice of certain States which suggested that, in some circumstances, States were under a legal obligation to afford diplomatic protection to an injured individual. In paragraph 84 he referred to an interesting theory concerning the law of the United Kingdom, namely that the doctrine of administrative law relating to an individual's legitimate expectation might be extended to the field of diplomatic protection. If that were done, an injured individual might contend that, if he had complied with the conditions stated in the United Kingdom's rules relating to international claims, he had a legitimate expectation that he would be protected.

40. In paragraph 85 he drew attention to an American statute dating from 1868 under which the President was obliged to afford protection to nationals in certain circumstances. Nevertheless, in the last footnote in that paragraph, he pointed out that in *Redpath v. Kissinger*¹⁵ the Court had held that the right to diplomatic protection was not subject to judicial review. Uncertainty in that field had led to a number of cases in which individuals had asserted their right to diplomatic protection and a duty on the part of the State to provide such protection.

41. In the light of the fact that some constitutions seemed to impose a duty on States, that the Sixth Committee had signalled some support for that proposition and that there had been considerable litigation on the subject, the Commission should consider the matter and decide whether it was ripe for progressive development. It was not a question that could be dismissed out of hand, particularly as the aim was to advance the rights of the individual. As he had suggested, diplomatic protection was largely concerned with promoting the human rights of the individual.

42. It was interesting that Orrego Vicuña had offered the opinion that the discretion of a State to grant diplomatic protection was not absolute and should be subject to judicial review.¹⁶ In article 4, he sought to give effect to suggestions of that kind, by proposing that, in very limited circumstances, a State might have a duty to afford diplomatic protection to a national.

43. Paragraphs 89 to 93 of the report described the restrictions that should be imposed on that right. First, it was a right that should be limited to the violation of *jus cogens* norms. Secondly, the national State should have a wide margin of appreciation and should not be compelled to protect a national if its international interests dictated otherwise. Thirdly, a State should be relieved of that obligation if the individual had a remedy before an international tribunal. Fourthly, a State did not have that obligation if another State could protect an individual with dual or multiple nationality. Finally, he had put

¹⁴ F. Orrego Vicuña, "The changing law of nationality of claims", final report submitted to the ILA Committee on Diplomatic Protection, unpublished, 1999.

¹⁵ 415 F. Supp. 566 (W.D. Tex. 1976), *aff'd.*, 545 F.2d 167 (5th Cir. 1976).

¹⁶ See footnote 14 above.

forward the idea that a State should be under no obligation to protect a national who had no genuine or effective link with the State of nationality, that being an area where the *Nottebohm* test might apply. He was therefore bringing article 4 to the Commission's attention in the full realization that it was an exercise in progressive development. Again, the Commission should decide at an early stage whether the proposal was too radical.

44. Mr. BROWNLIE said that the first report was comprehensive and might even extend beyond the Special Rapporteur's mandate. It had been well researched and was helpful in that it set out the issues in a clear manner. With reference to the interaction between the development of new human rights norms and the old subject of diplomatic protection, he wished to pay tribute to the pioneering work done by Richard Lillich, an American international lawyer who had died recently and whose writings had often been underestimated. They had, however, been used by the Special Rapporteur.

45. He agreed with many of the Special Rapporteur's conclusions as, in substance, he had taken the view that diplomatic protection was not obsolete, but formed part of State practice. His own assumption was that not much was heard about it, because most of the time it just happened. Government action in that field was not always publicized and many incidents went unreported in published material.

46. The Special Rapporteur nevertheless seemed somewhat prone to exaggerate the elements of controversy in the topic. In paragraph 10, he indicated that diplomatic protection was one of the most controversial subjects in international law. That was not necessarily true, although some important questions were indeed involved and it was a worthwhile subject for the Commission's agenda.

47. On the actual relationship between the individual or corporation and the State, he accepted Briery's views as quoted in paragraph 63 and agreed with the Special Rapporteur that it was not helpful to describe the relationship as a fiction. In the final analysis, it could not be reduced to a single element, and even in the field of human rights, the relationship was complex—witness the procedural history of the *Loizidou* case under the European Convention on Human Rights.

48. The report, particularly in paragraphs 25 and 29, contained some lucid and realistic assessments of the topic's relation to human rights protection. In the fairly rough contemporary world, it would be irresponsible to throw away any of the protective mechanisms now available. An orchestra of instruments was needed and diplomatic protection, with all its faults and difficulties of application, remained part of that orchestra. The institution could be refurbished, but it should not be damaged. That was clearly the view of the Special Rapporteur, and he agreed with it.

49. He experienced no major structural problem with article 1. He was astounded, however, by article 2, for a number of reasons. Paragraph 43 indicated that the term "diplomatic protection" was used by legal scholars to embrace a variety of actions and "the final resort, the use of force". Paragraph 47 stated that the use of force as the ultimate means of diplomatic protection was frequently considered part of the topic of diplomatic protection.

Those were very surprising assessments of the current situation in the doctrine. He believed that the use of force was not a part of the topic and that it lay outside the Commission's mandate. Diplomatic protection was essentially concerned with the admissibility of claims, and he was surprised not to see such terms used more often in the report. Article 2 covered a form of self-help. The Commission could not possibly deal with all of the mechanisms, some of them very important in themselves, by which protection could be given to individuals who had complaints against States. Those mechanisms comprised a whole range of actions, including peace-keeping, consular activities and, for example, the steps recently taken by the Staff Association of the World Bank. In addition, the use of force to protect nationals abroad could not be considered in isolation from the whole question of the use of force and the application of the Charter of the United Nations.

50. He also had problems with the apparent identification of customary law as that of 1842, not 1945 or 1999, and with the use of the sources of the law. Drawing attention to paragraph 58, he said that to take the failure of political organs to condemn an action as evidence of customary law was an unreliable proposition. If the paragraph referred to Security Council inaction, that did not mean the General Assembly had failed to pronounce itself in relation to the incident concerned or that the Non-Aligned Movement or the Commonwealth of Nations had adopted no relevant resolutions. Some State practice went against the proposition: the Entebbe raid and other incidents involving alleged protection of nationals or alleged resort to humanitarian intervention involved a sort of waiver of illegality by the international community, which was something quite different from positive approval of an action as lawful. Entebbe itself was not a reliable precedent: the debate in the Council showed that the African members had been far from satisfied. Given the circumstances, States had been slow to condemn the Israeli action, although some had done so. Many people had been killed, it must not be forgotten, including hostages and Ugandans.

51. On a preliminary basis, article 3 posed no problems. The Special Rapporteur was entirely candid in saying that article 4 was *de lege ferenda*, and the same issue arose in respect of article 7. He admired article 4 as a first attempt to deal with an extremely difficult matter, but it was paradoxical to suggest that it was supported by evidence in State practice. The constitutional provisions mentioned in paragraphs 80 and 81 provided absolutely no evidence of *opinio juris*, except in the case of Germany, where it was made perfectly clear that they were based on general international law. Compelling practice would involve examples of States making claims against other States in respect of non-nationals that were entertained by the respondents, but no examples were given. The Borchard's position cited in paragraph 75¹⁷ reflected the prevailing viewpoint in 1915, but there were not very many modern writers who thought that diplomatic protection was a duty of the State. The conclusion reached in paragraph 87 that there were "signs" in recent State practice of support for

¹⁷ Op. cit. (footnote 5 above), p. 29.

that viewpoint was an optimistic assessment of the actual materials available.

52. Mr. BAENA SOARES said the report was clear and direct and conveyed a concern for human rights he was sure all members of the Commission shared. The comments and suggestions made went in the direction of progressive development of international law and existing legal procedure was analysed with a view to moving forward and adapting it better to present circumstances.

53. The topic was controversial and difficult: its long history resonated with tragic events and acts of force that were summed up in the evocative phrase “gunboat diplomacy”. Under the pretext of protection of nationals, lamentable and totally unjustifiable acts had been committed. Legal procedure in international affairs must not be undermined because of such distorted use. The aim must rather be to serve as the impetus for the establishment of norms to improve respect for legal procedure. To that end, the Commission must give States the requisite elements to reach a decision, and draft articles with commentaries formed the most suitable means.

54. As for the introduction to the report, it was fruitless to debate the issue of whether diplomatic protection was a legal fiction or not. The important thing was to see whether it served a purpose, was useful and merited retention, or whether it should be jettisoned as a thing of the past. He thought it had its place and was not obsolete. With reference to paragraph 11, the time was long past when the protection of citizens who were not treated in accordance with the ordinary standards of civilization was the privilege of powerful States. Yet the use of force under sundry pretexts was still very much a part of international relations. He was not convinced that the end of the cold war and the globalization of information, trade and finance had yielded greater security for nationals or foreign citizens and their possessions. Similarly, the significant progress made in the protection of human rights in contemporary international law had not produced improvements effective enough to dispense with international mechanisms such as diplomatic protection.

55. The Special Rapporteur cited two important recent instruments attesting to the continued practice of diplomatic protection: the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live¹⁸ and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. Those instruments gave migrant workers and foreigners the right to have recourse to the consular or diplomatic authorities of their State of origin when their rights were impaired. One of the main drawbacks of globalization was the intensification of international movements of persons in search of better living and working conditions, with a consequent need to protect them when their rights were infringed.

56. He endorsed the Special Rapporteur’s comment in paragraph 32 that, instead of seeking to weaken that remedy by dismissing it as an obsolete fiction, every effort should be made to strengthen the rules that comprised the right of diplomatic protection. Hence the imperative need

to regulate the procedure more strictly for the purpose, first, of preventing the use of force under the pretext of protection, and secondly, of improving access by individuals to the remedy.

57. In paragraph 25, the Special Rapporteur referred to the American Convention on Human Rights: “Pact of San José, Costa Rica”, which, as implemented in the long history of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, had been highly successful in comparison with other international instruments in the field.

58. As preliminary remarks on the draft articles, he would suggest that article 2 created nearly insuperable difficulties. It was extremely dangerous to expand the prohibition of the use or threat of use of force beyond the terms of the Charter of the United Nations. He was not convinced by that very broad interpretation of the right to self-defence. He agreed, rather, with the previous Special Rapporteur, who had written in his preliminary report that a State may not resort to the threat or use of force in the exercise of diplomatic protection.

59. In conclusion, he wished to underline the fact that the consideration of the topic was an excellent opportunity to alter the view of diplomatic protection as the exclusive instrument of the strong against the weak and to ensure that it operated in a balanced manner to the benefit of the individual.

60. Mr. GAJA said that the stimulating report dealt with the most controversial issues the Commission might have to face in connection with diplomatic protection. The Special Rapporteur accorded great importance in his report to diplomatic protection as an instrument for ensuring that human rights were not infringed. It was not immediately obvious that use was made of diplomatic protection when a State raised human rights issues for the benefit of its nationals. Under international law, obligations concerning human rights were typically obligations *erga omnes*. Any State could request cessation of the breach, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. Thus, any requirement of nationality of claims appeared to be out of context when human rights were invoked. States were mainly concerned with protecting the human rights of their own nationals, however, and while the rules of general international law on human rights did not for most purposes distinguish between persons protected according to their nationality, they did tend to be more effective where aliens were concerned. He was therefore tempted to agree with the Special Rapporteur in saying that the concept of diplomatic protection extended to the protection of the human rights of one’s nationals, but diplomatic protection presented some special features that made it difficult to generalize and cover all the other aspects of diplomatic protection.

61. The first feature was that, as pointed out by ICJ in its famous dictum in the *Barcelona Traction* case, just one State, the State of nationality, could intervene in cases of diplomatic protection, but in human rights cases, any State could do so. As a consequence, the State of nationality was not in a position to waive all claims for the protection of the human rights of its own nationals. A second

¹⁸ General Assembly resolution 40/144 of 13 December 1985, annex.

feature emerged with respect to the topic of State responsibility: as far as human rights were concerned, an individual had a higher degree of protection under international law. It seemed reasonable to hold that in a case of State responsibility for infringement of human rights, the individual was entitled to choose whether to seek restitution or compensation, a conclusion that would be much more difficult with regard to other instances of diplomatic protection. For instance, could one say that, when the State of nationality concluded a lump sum agreement with the infringing State, the agreement was not lawful under international law if the company whose property had been affected wished to have restitution rather than compensation? While it might be true that the role of the individual had increased with regard to the treatment of aliens generally, the special features in the protection of human rights made it difficult to place all instances of diplomatic protection in the same category.

62. Articles 2 and 4 concerned instances in which human rights had been given a different status. He entirely agreed with Mr. Brownlie that article 2 did not belong in the draft and that the Commission should concentrate on matters that were specific to diplomatic protection. Article 4 went too far in establishing a duty to make use of diplomatic protection. He would like some clarification on one point. The Special Rapporteur suggested that there should be a duty to exert diplomatic protection in certain circumstances, but did not make it entirely clear to whom that duty was owed. It might be to the individual, but because he also referred to peremptory norms, that raised the question of whether he thought there should also be a duty to the international community as a whole.

63. Mr. ECONOMIDES, making some preliminary remarks, said the first report would enable the Commission to examine diplomatic protection in as comprehensive a manner as possible. Article 1 used the phrase "action", which raised certain problems. Diplomatic protection was a long and complex process that had a beginning and, often but not always, an end. Normally, when a State received a complaint from an individual, it examined the complaint to determine how serious it was and whether or not it was lawful. That first preparatory, investigatory stage did not constitute diplomatic protection. The embassy, the consulate, even the ministry, might be engaging in contacts, but diplomatic protection was not involved. It came into play when a Government decided to make a claim on behalf of its national to the Government that had allegedly failed to apply to that person certain rules of international law.

64. Diplomatic protection usually had two stages. The first stage was diplomatic: the State of the individual concerned negotiated with the other State to try to find a solution. If a solution was found, diplomatic protection was guaranteed and the matter was closed, failing which the State could either discontinue its initiative, which often happened, or a dispute arose between the two States. Once the dispute was settled, that was the end of the diplomatic protection procedure. Article 1 was somewhat vague on all those possibilities.

65. Article 2, subparagraph (a) was surprising, since it created insuperable difficulties and ran counter to the Charter of the United Nations, particularly the principle of the non-use of force in international relations. The sole

exception was the case of self-defence, a concept that the Charter defined very restrictively. Self-defence always presupposed an act of armed aggression and could only last until the Security Council had taken the necessary measures to maintain peace and international security. As international law regulated self-defence so closely, it was inconceivable that other exceptions, particularly ones so dangerous as those proposed by the Special Rapporteur concerning aliens, could be so quickly added to that of the principle of non-recourse to force, which from a legal standpoint was the century's most important rule of international law.

66. The Special Rapporteur's proposal was also at variance with another crucial principle of international law, that of non-intervention in the internal affairs of States. Developed in customary law, that principle was most comprehensively expressed today in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁹ which stipulated that no State or group of States had the right to intervene, directly or indirectly, for any reason whatsoever—and thus including the protection of nationals—in the internal or external affairs of any other State and that consequently, armed intervention and all other forms of interference or attempted threats against the personality of a State or against its political, economic or cultural elements were in violation of international law.

67. He would remind members in that context of the categorical condemnation by ICJ in the *Corfu Channel* case, in which the Court had found that the so-called right of intervention could only be viewed as a manifestation of a policy of force, which in the past had given rise to the worst abuses and which, regardless of the inadequacies of the international organization, had no place in international law. The Court had also condemned that so-called right in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. The Special Rapporteur's proposal was also contrary to respect for the sovereignty of States. Pursuant to the Charter of the United Nations and to customary law, States were under a strict obligation to respect the sovereignty of other States, in particular territorial sovereignty.

68. Lastly, the principles of non-use of force, non-intervention and respect for national sovereignty were so categorical and absolute that they ruled out any possibility of using force as a means of ensuring diplomatic protection. Accordingly, he agreed with Mr. Baena Soares that the examples of the previous Special Rapporteurs must be adopted, as they expressly excluded recourse to the threat or use of force in the exercise of diplomatic protection. Such a clear unambiguous provision was needed today more than ever. For those reasons, he could not endorse article 2, which constituted a dangerous regression for the law on diplomatic protection in particular and for international law in general.

69. Mr. GOCO, referring to a point raised by Mr. Baena Soares and Mr. Economides on the possibility of a

¹⁹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

restricted scope for diplomatic protection, cited a specific example. The Philippine Government had intervened on behalf of a national, a maid who had been detained in Singapore, in order to save her from the death penalty, unsuccessfully as it had turned out. The difficulty had been to find fault with the way her trial had been conducted. His point was that the State could not be accused of committing an internationally wrongful act vis-à-vis the person detained, because detention was a matter for the courts.

70. Mr. TOMKA said that the first report of the Special Rapporteur raised a number of controversial issues. He personally considered diplomatic protection to be a classic subject of international law with well-established customary rules. There had been a number of decisions by PCIJ and ICJ on diplomatic protection, and it was important to build on them. It was his impression that the Special Rapporteur was belittling the importance of such decisions. The Commission must be cautious with the proposal for progressive development. It must first try to codify the rules of customary international law and only then fill in lacunae as necessary.

71. As he understood it, diplomatic protection was related to an initial dispute between a person and a foreign State; the dispute became an inter-State matter when the State of the national allegedly injured by an internationally wrongful act espoused its national's claim and presented it as its own or on his or her behalf. Hence, it was an inter-State dispute with all the legal consequences that stemmed therefrom, one of them being that the dispute should be resolved by peaceful means and not by resorting to the use of force.

72. Although the Special Rapporteur had said that his intention had not been to provide a definition in article 1, that provision nevertheless contained one, rather than the scope of application of the articles that followed. Secondly, as already pointed out by Mr. Economides, the Special Rapporteur referred to action taken by a State without explaining what kind of action that might be, whether diplomatic or judicial proceedings. It led the Special Rapporteur to say that force might be used in the framework of diplomatic protection, a proposition he could not endorse. Again, the phrase "injury ... caused by an internationally wrongful act or omission attributable to the latter State" in article 1, paragraph 1, should be brought into line with the articles on State responsibility. As he recalled, paragraph (14) of the commentary to article 1 of the draft on State responsibility contained an explanation of why the words "wrongful act" had been used,²⁰ and not "act and omission". As the current topic was closely related to that of State responsibility, the Commission should endeavour to employ the same language.

73. He was against including article 2 because it was not related to the subject of diplomatic protection. The actions referred to by the Special Rapporteur might be justified or excused on the basis of other principles of international law, such as necessity, but like humanitarian intervention, those were controversial issues.

74. As he experienced difficulties with article 4, he did not consider it appropriate to make a reference to it in article 3, the wording of which should make it clear that a national was injured by the internationally wrongful act of another State. The Special Rapporteur had said that article 4 was intended as a matter of progressive development and, when he had sought to explain under which circumstances a State had a legal duty to exercise diplomatic protection, one of the questions that arose was to whom the duty was owed: to other States that, it was hoped, would become party to the instrument currently being elaborated, or to a national? He asked whether the Commission was drafting a human rights instrument providing for obligations of States in respect of their nationals, and in some cases even non-nationals, or rules for inter-State relations. Furthermore, those duties were to be tied in with the issue of *jus cogens*, although the nature of the rules of *jus cogens* continued to be controversial. That too would create further difficulties when the draft article was submitted to the Sixth Committee. The Special Rapporteur proposed that that obligation should be enforceable before a competent domestic court or other independent national authorities (para. 3), but it was difficult to see how a court would decide as far as the exception under paragraph 2 (a) was concerned. Would it find that there was an overriding interest in the State not providing diplomatic protection in a case of grave breach of *jus cogens*? There was considerable disagreement about that approach.

75. Some States viewed the issue of diplomatic protection as an *acte de gouvernement*, and the Special Rapporteur had referred to French practice. A number of representatives in the Sixth Committee, which the Special Rapporteur had enumerated in a footnote to paragraph 78 of the report, had argued that diplomatic protection was at the discretion of States; if the Commission submitted article 4 as currently drafted, States might well reject it.

76. He said that articles 1 and 3 could be referred to the Drafting Committee. Article 4 was not ready for such a course and article 2 should be deleted.

77. Mr. Sreenivasa RAO said it had emerged in the course of the discussion that diplomatic protection was directly linked not to the denial of due process of law, but to an internationally wrongful act attributable to a State, something which led directly to the topic of State responsibility. There was a problem of nuance, and Mr. Goco had raised the issue. If the matter was addressed solely as one of State responsibility—as one of the consequences of demanding satisfaction and certain kinds of cessation—then the whole body of the law on diplomatic protection sometimes seemed irrelevant. He asked whether that was really the approach the Commission wished to adopt, or whether it was the best approach at the current time, given State practice.

78. Mr. TOMKA said that the Commission's approach should be based on established practice, namely the condition for diplomatic protection was that the international obligation of a State as far as treatment of foreign nationals was concerned had been breached and the foreign national had exhausted local remedies. The national's State might then take up the case and present the claim as the claim of the State, transforming the dispute from

²⁰ *Yearbook* . . . 1973, vol. II, p. 176, document A/9010/Rev.1.

one between a foreign national and a State to one between two States.

79. Mr. GOCO said he wondered whether that question should really be linked to the internationally wrongful act. Retaining the words “in respect of an injury to the person or property of a national caused” in article 1 brought in the whole issue of State responsibility.

80. Mr. SIMMA said that, in his view, the Special Rapporteur had correctly based his report on the outcome of discussions in the Working Groups at the forty-ninth²¹ and fiftieth²² sessions, namely that the Commission was to work on the subject of diplomatic protection within its classical meaning: the action of a State from the moment one of its nationals was treated in a way that led to an internationally wrongful act, i.e. a violation of international law, and that the Commission would not include in the topic what some people loosely referred to as diplomatic protection and signified consular and diplomatic assistance on a day-to-day basis. The problem which that created was deciding what to do with exhaustion of local remedies, an issue on which the Commission was beating around the bush but on which it would need to take a decision at some stage. Exhaustion of local remedies might come either at the stage preceding the Special Rapporteur’s topic, i.e. something to be regarded in accordance with the substantive theory of the subject as a pre-condition of an internationally wrongful act, and it would not be of any concern to the Special Rapporteur or, on the other hand, if the Commission chose to regard exhaustion of local remedies as a procedural matter which would have to be built into the process of submitting a claim, the Special Rapporteur would not get around to tackle his topic.

81. Mr. HAFNER said that, according to Mr. Simma, diplomatic protection came into play if an internationally wrongful act was committed. The problem was that the exercise of the right to diplomatic protection led only to a determination as to whether there had been an internationally wrongful act. The question therefore arose as to whether diplomatic protection already came into play when an internationally wrongful act had merely been alleged.

82. Mr. SIMMA said that diplomatic protection would of course come into play when a State took the legal view that one of its nationals had been injured in violation of international law. The other State might disagree and argue that the national must first exhaust local remedies. But that was a factual question which did not invalidate the legal point he had just made.

83. Mr. DUGARD (Special Rapporteur) said that the Commission was currently approaching the difficulty inherent in the separation of primary and secondary rules. Mr. Goco had to some extent suggested that it might be helpful for a provision to be included on the denial of justice. But as he saw that as a primary rule, he had carefully steered away from it. Mr. Simma had drawn attention to the difficulties in respect of the

exhaustion of local remedies. He was seeking to confine himself to secondary rules.

The meeting rose at 1 p.m.

2618th MEETING

Wednesday, 10 May 2000, at 10 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (continued) **(A/CN.4/506 Add.1¹)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN extended a warm welcome to Mr. Momtaz, a newly elected member of the Commission who was now taking up his functions, and invited the Commission to continue its consideration of draft articles 1 to 4 contained in the first report on diplomatic protection (A/CN.4/506 and Add.1).

2. Mr. MOMTAZ thanked the Commission for the confidence it had shown in him by electing him as a member and assured it of his full cooperation.

3. Mr. ILLUECA said that the first report of the Special Rapporteur was a masterpiece of political, diplomatic and legal balance. The Special Rapporteur rightly pointed out that, although there was much practice and precedent on diplomatic protection, it remained one of the most controversial subjects in international law. The right to diplomatic protection was a means of promoting the protection of human rights on the basis of the values of the modern-day legal system. Before going on to consider the substance of the report, he drew attention to a discrepancy

²¹ *Yearbook . . . 1997*, vol. II (Part Two), p. 62, para. 189.

²² *Yearbook . . . 1998*, vol. II (Part Two), p. 49, para. 108.

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).