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Summary record of the 2620th meeting

Topic:
Diplomatic protection

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domestic level was not small fines. Certain rights were granted to foreigners under domestic law, and if defence of those rights could not be pursued under domestic law, that constituted denial of due process. Mr. Gaja had added to his own reasoning about not linking the exercise of diplomatic protection so totally and exclusively to State responsibility, because diplomatic protection was an instrument that States often utilized to make sure that wrongs did not occur. Generally speaking, States interacted in a number of ways at an informal level before formal claims were made. The process of diplomatic protection was thus one thing at a formal level and another at the informal level.

The meeting rose at 1.05 p.m.

2620th MEETING

Friday, 12 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. 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 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. OPERTTI BADAN said that, although the principle of diplomatic protection was well established, developing it or defining the conditions in which it could be exercised was more difficult. Nevertheless, it was important to establish rules to prevent or reduce as much as possible abuses of such machinery.

2. One particularly thorny question was that of the use of force, of which there were unfortunately too many examples in the modern-day world, aside from the cases for which Article 51 of the Charter of the United Nations provided. He did not want to reopen the discussion on the so-called "humanitarian interventions" conducted by the

United Nations or regional armed forces for the protection of human rights, but, if the Commission confined itself to the area of diplomatic protection in the strict sense, it had to acknowledge that the use of force might entail grave dangers for international relations. Instead, diplomatic protection must be placed in the context of the peaceful settlement of disputes and any possibility of the use of force must be categorically ruled out. But that did not mean that the question should not be discussed on the pretext that the prohibition of the use of force was implicit or was taken for granted: given that that aspect had been included in the initial draft, such silence might be interpreted as a lacuna on what was a very important subject.

3. Another issue which the Commission must settle was that of the scope of a convention on diplomatic protection, which must be based on the principle of the sovereign equality of States and their obligation to protect the rights and property of their nationals. The "functional protection" exercised by international organizations on behalf of their staff was a separate matter that should not be dealt with in connection with such an instrument.

4. Diplomatic protection as a means of preventing abuses against property or persons was a mechanism which must be preserved because it could not be confused with human rights protection machinery, even though the "human rights" component played an important part in that context. In human rights protection, the procedure was to the immediate benefit of the individual, whereas, in diplomatic protection, the right to take action belonged to the State of nationality and depended on that State's willingness. The idea that nationality constituted the "link of attachment" enabling that right to be exercised was perhaps somewhat obsolete. Today, what counted was place of residence. A State could feel just as bound vis-à-vis a person who had taken up residence in its territory as vis-à-vis one of its own nationals. Otherwise, it would be accused of discrimination. Unfortunately, that point had not been dealt with in the first report of the Special Rapporteur (A/CN.4/506 and Add.1).

5. In general, the Sixth Committee had supported the idea that the decision on whether or not to exercise diplomatic protection was the prerogative of each sovereign State. In his view, the State's protection obligation existed as soon as a person had a tie to that State, and not only within, but also outside, the national territory. A very clear provision along those lines should be included in the future convention. He also recognized the need to establish a conceptual balance between the principles on which the exercise of diplomatic protection and those of human rights protection were based.

6. He thought that it would be better for the draft articles not to prejudice the lawful or unlawful nature of the act attributable to a State which triggered the diplomatic protection machinery. If they did, the Commission would be moving into the realm of State responsibility and reparation or compensation, whereas the basic objective was to ensure the effective protection of persons and property. It must be clearly understood that the wording of article 1, paragraph 1, which contained a qualification of the act or omission attributable to another State, was only provisional.

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

7. In closing, he said that the subject of diplomatic protection had perhaps not been discussed thoroughly enough in the Commission for the draft articles to be sent to the Drafting Committee at the current time, even assuming that the Drafting Committee had a clear and precise mandate. That was obviously not the case and the Commission was still a long way from a consensus on those questions.

8. Mr. GOCO said that he had carefully read the Special Rapporteur's very helpful comments. They could be compared to the work of implementing agencies which issued decrees and orders spelling out the content of a particular legislative act. The comments not only interpreted the draft articles, but also stimulated discussion in the Commission.

9. Beginning with a general remark, he pointed out that the expression "diplomatic protection" was linked to the word "diplomacy". The question therefore arose whether diplomatic protection could be invoked in the absence of diplomatic relations between the States concerned. Today there were still States that had no diplomatic relations with other States.

10. Turning to the Special Rapporteur's first four draft articles, he noted that in article 1, paragraph 1, diplomatic protection was defined as action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State. However, the Special Rapporteur did not specify whether that also covered injury caused by defects or flaws in proceedings or a failure to respect the rights of the defence. In paragraph 43 of the report, the Special Rapporteur cited Dunn, according to whom the term diplomatic action "embraces generally all cases of official representation by one government on behalf of its citizens or their property interests",² which also seemed to cover sham proceedings of which the national of a State was the victim in another State. That should be made clear in the article.

11. Concerning article 2, on the use of force, it was useful to return to the case of the hostages being held in the Philippines, to which other speakers had already referred. The kidnappers were rebels and the countries of which the hostages were nationals had contacted the Philippine Government, urging it to negotiate instead of attempting a rescue operation. That approach, which constituted a form of diplomatic protection, had already had rather unpleasant consequences for the Philippine Government and everyone knew that the use of force would only worsen the situation. The use of force must thus be categorically excluded and only the beginning of article 2, until the words "diplomatic protection", should be retained.

12. As for article 3, on the right of the State of nationality to exercise diplomatic protection, attention should be drawn to the judgment of PCIJ in the *Mavrommatis* case, which stated that "It is an elementary principle of international law that a State is entitled to protect its subjects ..." [see p. 12]. The words "is entitled" meant "to give a right". Of course, article 3 should be read in conjunction with article 4, since both articles spoke of the right and legal obligation of the State and its discretion to act.

13. Everyone remembered the case of the young woman hired as a domestic helper in another State who had been sentenced to death after having stabbed her employer who had tried to rape her. The State of which she was a national had intervened on her behalf, affording her diplomatic protection and thereby saving her from hanging. If the State of her nationality, using its discretion, had declined to exercise that right, she would certainly have found herself in a difficult situation. To be sure, she would still have had recourse before an international body, since she had been denied her human right to a fair trial. The problem had been that the State in which she had been tried had had good commercial relations with the protecting State, which it supplied with oil. Under its current wording, article 4 provided that the State of nationality was relieved of the legal duty to exercise diplomatic protection if it would "seriously endanger the overriding interests of the State and/or its people". The Special Rapporteur stressed in his comments that, according to the traditional doctrine of diplomatic protection, a State had the right to protect its nationals, but was under no obligation to do so. Accordingly, it was an imperfect right. That position had been reaffirmed by ICJ in the *Barcelona Traction* case. Moreover, the Special Rapporteur pointed out in paragraph 64 of his report that the notion that an injury to the individual was an injury to the State itself was not consistently maintained in judicial proceedings. He also stated that when States brought proceedings on behalf of their nationals they seldom claimed that they asserted their own right and often referred to the injured individual as the "claimant". Diplomatic protection nevertheless offered possibilities other than the human rights defence machinery, whose effectiveness the Special Rapporteur questioned a bit too severely in paragraph 25 of his report, and by no means had such protection been rendered obsolete by the development of human rights law. That led him to reaffirm the position that he had already taken during the consideration of the preliminary report of the previous Special Rapporteur³ on the issue of discretion given the State to exercise diplomatic protection: to prevent arbitrary acts, standards must establish the conditions under which a State could refuse to exercise the right of diplomatic protection for one of its injured nationals. He supported the interesting compromise solution recommended in the Draft Convention on the International Responsibility of States for Injuries to Aliens:⁴ both the injured individual and the State of nationality could pursue claims against the injuring State, but priority would be given to the State claim.

14. In closing, he recommended that articles 1, 3 and 4 should be referred to the Drafting Committee for reformulation. As for article 2, the first sentence should be retained up to the word "protection"; the exceptions should be deleted.

15. Mr. SIMMA said that there seemed to be two extreme views on the concept of diplomatic protection. On the one hand, neither the Special Rapporteur in his first report nor members of the Commission in their comments neatly excluded from the concept what could be

² See Dunn, *op. cit.* (2617th meeting, footnote 6), p. 18.

³ See 2617th meeting, footnote 2.

⁴ See 2619th meeting, footnote 12.

called the day-to-day protection given in other countries to a State's nationals by consular agents. It was in the context of those very activities, which were designed to assist a national in maintaining his or her rights and being unaffected by violations, that the topic of military protection came up as a natural extension or culmination of consular protection. Paragraphs 36 and 43 of the report were not free from such confusion. Article 5 of the Vienna Convention on Consular Relations had in mind a "diplomatic protection" that was not really part of the Commission's topic. He was not criticizing that interpretation, but would simply like clarification as to what the Commission would be discussing in future and what it should be prepared to discuss. At the other extreme, there was the view that diplomatic protection was not really a process at all, but just a synonym of "admissibility of claims" or "nationality of claims". That view seemed to be a little too narrow. If the concept of diplomatic protection was used in the technical sense, in the sense used by PCIJ in the *Mavrommatis* case, then it comprised issues connected with the submission of claims, and not just admissibility. He conceded, however, that the question of nationality of claims was very much at the heart of the topic.

16. The Special Rapporteur referred repeatedly to a book on human rights and diplomatic protection by Borchard⁵ that had been written in 1915 at a time when the United States Marine Corps had occupied Veracruz and between 500,000 and 1,500,000 persons had been butchered in a southern European country without any great concern on the part of other States. The question thus was whether a book written in 1915 could still be regarded as the bible. If so, then it should be called the Old Testament and the report by the Special Rapporteur should be seen as a New Testament.

17. As to whether diplomatic protection was based on a fiction or not, he shared Mr. Brownlie's view that there was a thread of common sense going through the thinking of Anglo-Saxon international lawyers, according to whom there was nothing fictitious about the concept of diplomatic protection that emerged from the *Mavrommatis* case. In that regard, he was not really sure what the Special Rapporteur had in mind in the last sentence of paragraph 21 because it was not clear whether he viewed diplomatic protection, as defined in the *Mavrommatis* case, as unable to stand up to logical scrutiny. In his own view, that was not true.

18. Mr. Pellet had said (2618th meeting) that the Special Rapporteur's approach to diplomatic protection was too human-rights oriented. He agreed that it was so oriented, but not that it was excessively or wrongly so. The members of the Commission all seemed to agree that the draft articles on diplomatic protection were supposed to fill a gap in the law of State responsibility and were to be annexed to it. The Special Rapporteur's work should therefore share the human rights spirit that had started to permeate the Commission's work on State responsibility.

19. To elaborate on a point made by Mr. Gaja (2619th meeting), he said the Commission must be aware that its task was to hammer out, put together or establish doctrine on diplomatic protection in the sense of the *Mavrommatis*

case or, in other words, to reconfirm and codify very strict requirements and limitations on the nationality of claims. The question of continuous nationality would then arise. A State was entitled to espouse a claim only for a person who had been a national at the time of the breach and had continuously remained a national up until his or her claim had been made. He did not know whether the Commission was going to endorse that principle: he simply wanted to indicate how technical the topic was. Some members of the Commission went so far as to identify the topic with the question of nationality or admissibility of claims. On the other hand, at the current session, the Commission was to recognize human rights as obligations *erga omnes* whose breach entitled every State to demand at least cessation. If Mr. Crawford's schema was followed, the State of nationality would qualify as a specially affected State to which would be attributed more rights than to all the other States in the case of a breach of an obligation *erga omnes*. What that meant was that, in the event of a breach that took the form of injury to aliens, which at the same time was also a violation of human rights, the State of nationality had two sets of rules at its disposal: a very venerable, old-fashioned and rigid set and a much more modern, streamlined, "politically correct" set involving the concept of human rights protection. When in future the Commission came back to consider the protection of human rights, it must keep in mind what it was doing thereby with the concept of diplomatic protection and see it in the light of the inflation of claims concerning human rights in customary international law. If, in future, property rights were recognized as human rights, then very little would be left for diplomatic protection because the invocation of human rights was more effective than entitlements deriving from some international minimum standard. Care should be taken not to create areas of overlap and probably of confusion between human rights and diplomatic protection, something that might weaken the right of diplomatic protection that now existed.

20. The final format of the work on diplomatic protection would probably depend on the final format of the draft articles on State responsibility. It would be hard to imagine that, if the Commission decided to couch State responsibility in a form other than a draft convention, the same would not have to be done for diplomatic protection.

21. In article 1, the term "action" had been criticized, but, in the context of the article, its meaning was clear. Diplomatic protection did not involve simply going through a checklist of whether claims were admissible. Some procedural aspects were involved, but, of course, not military aspects. He agreed with many preceding speakers that the terms "action" and "act or omission" would have to be brought into line with article 1 of the draft on State responsibility.

22. He congratulated the Special Rapporteur on having had the courage to propose draft article 2 while being perfectly aware of the controversy to which it would give rise. It could be said that it was dead on arrival and should be abandoned. Unlike Mr. Economides, who had suggested (2617th meeting) that armed force must be expressly excluded from the ambit of diplomatic protection, he thought that nothing should be said about it, simply because it was not part of the Commission's mandate.

⁵ See 2617th meeting, footnote 5.

With regard to the footnote in paragraph 52 of the report, which referred to a book of which he was a co-author,⁶ he said the book stated that there was a tendency to tolerate, for political reasons, such actions as military protection of nationals if and when they were more or less proportionate and were really the only available means. He differed with Mr. Brownlie (ibid.), however, who had referred to a waiver of illegality. He did not think that illegality was really waived in a situation where, for instance, the Security Council was paralysed by a veto and the opinions expressed in the General Assembly differed considerably. But that was not the Commission's concern at the moment.

23. With regard to article 3, the use of the words "a national unlawfully injured" could be criticized from the logical viewpoint, but, in the context, the meaning of those words was quite clear. It was a slightly inelegant expression of the principle derived from the *Mavrommatis* case which could be improved on in the Drafting Committee.

24. He was afraid that article 4 would not work and should also be abandoned. Members of the Commission had already asked to whom the duty of diplomatic protection would be owed and if it was supposed to be a human right. If it was, it would be an obligation *erga omnes* and it would spill over and create entitlements for all other States to become involved in a State's decision-making process and "help it" decide whether or not to help a national. That would lead to great confusion. It was one thing to derive from obligations *erga omnes* a sort of right to see a given provision respected, but quite another to derive from obligations *erga omnes* obligations on other States to do something. Accordingly, if diplomatic protection was not a human right, it was a constitutional right, a right based on domestic law and it was consequently not the Commission's business. Article 4, paragraph 3, made the problem even more tangible, in that it gave domestic courts jurisdiction to decide the matter. He had doubts about whether domestic courts were really qualified to adjudicate questions of *jus cogens*. Domestic litigation on the basis of article 4, paragraph 3, would inevitably lead to outrageous and exorbitant claims in which individuals would demand assistance or protection from their State of nationality and Governments would inevitably deny that a certain right invoked by an individual was really *juris cogentis*.

25. Mr. BROWNLIE said that he was troubled by the tendency of speakers to assume that there was a close relationship between State responsibility and diplomatic protection. It was obvious that there was an operational relationship, but the overlap in substance was not very great. There were some boundary problems and it could be asked, for example, whether the "clean hands" doctrine was a question of admissibility or of responsibility. It was probably both. But by and large, the issues of whether a State was qualified to exercise diplomatic protection in different forms and of the merits of a claim were sufficiently distinct. The Commission should not go out of its way to create more problems than it already had on the agenda. He himself thought that the admissibility of claims should at least be mentioned in the report because it was

relevant, but that the two topics were not synonymous. In the scenario mentioned by Mr. Goco, unless the State of nationality of the individual on trial in the other State actually presented a claim, what was happening was precisely the operational part of diplomatic protection. The State of nationality of the individual on trial was exercising diplomatic protection in an operational sense and it was not necessarily a question of characterizing the act itself, the trial and the punishment as illegal. That might be the consequence, but the two were not to be equated. The fact remained that the issue to be considered was admissibility of claims in the world either of negotiated adversarial claims, claims subjected to arbitration or claims in ICJ and that should be recognized. Quite a lot of the material rightly invoked by the Special Rapporteur consisted of decisions of PCIJ or ICJ.

26. Mr. MOMTAZ congratulated the Special Rapporteur on his first report, which provided very useful material. As part of his general comments on the report, he said that, somewhere in the introduction, one or two paragraphs should sketch out the boundaries of the topic and clearly state what the Special Rapporteur was leaving to one side. The first issue to be excluded was that of functional protection, which was mentioned in paragraph 38 of the report. At the same time, it could be explained that, like the protection of experts and civil servants employed by international organizations, the protection and, more precisely, the immunities given to diplomats by international law were not part of the topic. It would also be useful for the Special Rapporteur to stipulate at the outset, instead of waiting until paragraph 60, that the question whether international law recognized a forcible right of humanitarian intervention fell outside the scope of the study. In his own view, the Special Rapporteur did not always draw a distinction between diplomatic protection and that sort of intervention, as could be seen in paragraph 52, in which the Special Rapporteur mentioned a practice that was more part of so-called humanitarian intervention than of diplomatic protection.

27. As to the substance of the issue, while he recognized the merit of the many quotations from doctrine and case law, he believed the Special Rapporteur should concentrate more on State practice, of which there was a great deal, as he pointed out in paragraph 10. That would certainly create a better foundation for the introduction in future articles of the procedures that States could set in motion in the exercise of diplomatic protection. That was a long-term project, but the study would undoubtedly be enriched by it.

28. Turning to article 1, he agreed with other members that the use of the word "action" was not felicitous. The Special Rapporteur himself had made it clear during his introduction that the term was likely to create difficulties. It would be better to avoid it, as it carried connotations of Chapter VII of the Charter of the United Nations and the coercive action that could be taken by the Security Council. Other solutions could be envisaged. The word "procedure" would be better than the word "action". That term was used in all the definitions of diplomatic protection given by doctrine and referred to by the Special Rapporteur in paragraph 37 of his report. Another solution would be to revert to the wording used by the Working Group on

⁶ A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin, Duncker & Humblot, 1984).

diplomatic protection at the forty-ninth session⁷ and referred to by the Special Rapporteur in paragraph 40, namely, the right to espouse the cause of a national.

29. He, too, was in favour of the deletion of article 2, for all the relevant reasons that had been given. He was also against the retention of the *chapeau* of the article. The express prohibition of the threat or use of force would only weaken rather than strengthen the principle of the prohibition of the use of force. He endorsed the views expressed by Mr. Brownlie and Mr. Pellet, who was certainly not one of the advocates of a broad interpretation of Article 2, paragraph 4, of the Charter of the United Nations. He nevertheless wondered whether it would not be useful to pay a bit more attention to article 2, subparagraph (b), and specifically, to a situation where a State was unable to provide diplomatic protection, even though it wished to do so, for example, in what was unfortunately becoming an increasingly frequent situation where the structure of a State collapsed and the State could be described as having “disintegrated”. Perhaps, at some later stage, the Special Rapporteur could provide the Commission with material for the study of that problem. It must be acknowledged that, in that type of situation, the problem of use of force arose under entirely different conditions.

30. Article 3 did not call for any particular comments, except for the reference to article 4, which brought him to the few words he wished to say about that provision. Although he was in favour of retaining article 19 of the draft articles on State responsibility⁸ and, consequently, of retaining the distinction between the concepts of crime and delict, he believed that the distinction was of no consequence in the field of diplomatic protection. He entirely agreed with the Special Rapporteur, who pointed out in a footnote to paragraph 89 of his report that article 19 of the draft articles on State responsibility made no reference to *jus cogens*, but that there was a clear correlation between norms of *jus cogens* and the examples cited. In any event, the situations in question added up to what was not an isolated, but a large-scale, violation of the rights of individuals of all categories and the citizens of one State could hardly be isolated from the nationals of the State which wished to exercise diplomatic protection. He thought that any intervention aimed at putting an end to the situations referred to in the footnote was something close to humanitarian intervention, but he did not approve of the use of force for that purpose. In any case, humanitarian intervention was not the topic under consideration. It was primarily the case where a State refused to grant a national minority the right to self-determination that gave rise to a problem and it would be difficult to imagine the exercise of diplomatic protection in such circumstances.

31. Mr. HAFNER said that the example given by Mr. Momtaz of a disintegrated State in which foreigners needed diplomatic protection, possibly through the use of force, did not come within the context of diplomatic protection, defined in article 1 proposed by the Special Rapporteur as “action taken by a State against another State”.

32. Mr. PAMBOU-TCHIVOUNDA, recognizing that the problem raised by Mr. Momtaz was relevant, said

that he was inclined to agree with Mr. Hafner. The disintegrated State in question was not so much the State-territory or the State-population as the Government, the administration of the State. Was it at that level—the level where power was wielded and sovereignty was exercised—that the disintegration took place? If so, there was reason to ask how diplomatic protection could be exercised, since that presupposed that the Government of the claimant State, the State that espoused the cause of its national, was applying to another State. It was between two Governments that dialogue and in fact negotiation must take place because, otherwise, it was entirely appropriate to ask whether the claim was genuinely being made with a view to diplomatic protection.

33. Mr. LUKASHUK said that he regarded the question raised by Mr. Momtaz as highly important. He did not share Mr. Hafner’s view that, where there was no State, there could be no question of diplomatic protection. Who was to determine whether or not a State existed? That was a matter of subjective political judgement. The example given by Mr. Momtaz was not a fiction or a flight of fancy; it was a day-to-day reality. It was legally well founded and deserved the Commission’s attention and support.

34. Mr. MOMTAZ explained that his proposal derived directly from article 2, subparagraph (b), which referred to the case where the injuring State was unable to secure the safety of the nationals of the protecting State. It dealt not with unwillingness, but with inability.

35. Mr. KABATSI said that he understood Mr. Momtaz to be referring to the case of a State where a Government did exist, but, for exceptional reasons, was unable to secure the safety of a foreigner. If the State of nationality wished to act on behalf of its national, it had to find a way of doing so with the other State concerned.

36. Mr. MOMTAZ conceded that there could be different degrees in the disintegration of a State. In some cases, several authorities existing in the territory of a State might be seeking to take power without any of them being capable of securing the protection of the nationals of other States.

37. Mr. CANDIOTI said that the proposal made by Mr. Momtaz was very interesting. In particular, he had been struck by the general comment made at the beginning of the statement concerning the need for a clear delimitation of the topic under consideration as a means of shedding light on a number of points.

38. The CHAIRMAN, speaking as a member of the Commission, in response to the exchange of views that had taken place, said he agreed with Mr. Candiotti that everything would become clearer and the discussion would progress more smoothly once the concept of diplomatic protection had been defined for the purposes of the study. The problem raised by Mr. Momtaz could also arise from the point of view of the State of nationality; that State might well find itself unable to exercise diplomatic protection for the benefit of its nationals.

39. Commenting on the report under consideration, he congratulated the Special Rapporteur on the bold and courageous stand he had not been afraid to adopt on the question of human rights and humanitarian intervention. He

⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 61, para. 182.

⁸ See 2613th meeting, footnote 1.

personally was greatly interested in all efforts made with a view to the progressive development of international law, not only because that was one of the two main elements of the Commission's mandate—and one which could not be set aside either as a matter of principle or in the interests of a specious conservatism—but also because it could pave the way for major legal advances. What worried him, however, was that the Special Rapporteur had chosen to embark on an exercise of the progressive development of international law in the field of diplomatic protection without clearly saying that he was doing so, without indicating his sources and his reasons, and, above all, without taking care not to disturb what was reasonably believed to be one of the achievements of international law and indeed one of the pillars of the law of relations between States, namely, the prohibition of the use of force. In the first place, the use of force was governed by a rather clear-cut set of legal conditions and could not be envisaged outside the strict legal framework provided by the Charter of the United Nations. Secondly, the international protection of human rights, for its part, was governed by legal and institutional conditions and mechanisms of its own which could not be extended to diplomatic protection without distorting the very nature of the latter; defining its legal regime would then become extremely difficult, since, in such a case, a single concept would be used to refer to two completely different things. Thirdly, humanitarian intervention could not be brought into the field of diplomatic protection, even under the guise of human rights, as it was an institution invented in the nineteenth century as a means of developing power policies at a time when the prohibition of the use of force had not yet been proclaimed as one of the principles of international law.

40. In his view, the Special Rapporteur should have begun by asking two simple questions. The first related to the definition of diplomatic protection. As could be seen from paragraphs 10 to 21 of the report, the point had certainly not escaped the Special Rapporteur, but he had not provided a full answer, although it was essential to do so not only by analysing the institution on the basis of the entire body of international case law, but also by distinguishing, either in the introduction or in the ensuing sections, between the concept of diplomatic protection and similar or related concepts such as the protection of diplomatic and consular staff or of officials of international organizations. The second question should have been whether diplomatic protection could today be used for ends other than those it served in traditional international law. The answers to those two questions would certainly have helped to delimit the topic by making it possible to conclude that diplomatic protection was not connected either with the protection of human rights or, still less, with humanitarian intervention. The concept of diplomatic protection had to be understood strictly within the meaning it had in traditional international law; custom in that area was sufficiently well established, the practice of States relatively well known and case law sufficiently abundant to provide precise rules whose codification would not be controversial.

41. Turning to the consideration of draft articles 1 to 4, he noted that article 1 was concerned with the definition of diplomatic protection rather than with its scope, as stated in the title. Paragraph 1, and particularly the word "action", gave rise to legal problems of a fundamental

nature. Diplomatic protection was a right; it was the right of a State to set in motion against another State procedures for the peaceful settlement of disputes with a view to protecting the rights or property of one of its nationals in the event of injury suffered by that national in the host State. The origin of the injury did not necessarily have to be an internationally wrongful act. For example, it was possible to imagine the case of a person whose property in a foreign State had been confiscated and who had exhausted all available domestic remedies without success. There had been no denial of justice, but the law had been manifestly misapplied, either because of judicial corruption or because of pressures or instructions emanating from the State in question. Should or should not diplomatic protection be exercised in such a case? Had there been a violation of international law—an internationally wrongful act? Those questions deserved, at the least, to be asked. It was precisely in such a case that diplomatic protection could be exercised because an injury had been caused to the rights or property of an individual in a foreign State; the case law of PCIJ and ICJ contained many examples in that regard. Yet another question that arose and that would have to be answered in the commentary was whether diplomatic protection could be transformed into a procedure aimed at providing a fourth level of jurisdiction in countries which had only three such levels and where the country's supreme court had handed down a ruling that was injurious to the interests of a foreign national. Diplomatic protection would then become a mechanism for instituting proceedings for a review of the judicial review.

42. Another question that called for an answer was whether diplomatic protection should be viewed solely as a contentious procedure. Like other members of the Commission, he was inclined to think that it could be exercised through diplomatic negotiations without necessarily resorting to litigation. Article 1, paragraph 2, could be retained subject to the contents of article 8 to which it referred and which would, at first glance, seem to give rise to a great number of problems.

43. He endorsed all the comments already made on article 2 and believed that it should simply be deleted, especially in view of the suggestion that the idea of the peaceful settlement of disputes should be introduced in article 1. In that way, the problem could be resolved without having to refer to the use of force or the prohibition of the use of force.

44. Turning to the debate on the discretionary or compulsory exercise of diplomatic protection that had arisen in connection with article 3, he thought it both logical and normal to support the view that diplomatic protection should be exercised in a discretionary manner. That view not only complied with well-established jurisprudence in positive law, but also corresponded, from both the legal and practical points of view, to the original fiction whereby the State substituted itself for its national in setting the procedure in motion. In legal terms, that fiction made diplomatic protection a right of the State and it was then the right of the State that was concerned. In that sense, diplomatic protection became a subjective right and not an obligation. Once the State had substituted itself for its national, it was no longer the national but the State that was protected by international law or the international court; and it was the State that exercised that

subjective right. Moreover, to consider diplomatic protection to be an obligation would be tantamount to creating a right to diplomatic protection, which would then become an inherent right of the human individual, thus placing the matter outside the framework of the topic. Furthermore, in practical terms, the exercise of diplomatic protection in its classical and traditional meaning implied a financial cost for the State even if the outcome of the proceedings was favourable and reparation was granted. At the outset, the State had to bear the costs of the proceedings. But it was possible that the State did not have the means to do so and that, all things considered, it decided not to institute proceedings for that very reason. No one could have the right to oblige it to take action. The State's view of whether embarking on the procedure would or would not be timely had also to be taken into account. It would therefore seem that the idea of the discretionary exercise of diplomatic protection should be maintained, subject to the reasons for that choice being explained and the concept of "discretionary exercise" spelled out in the commentary.

45. Lastly, referring to article 4, which gave rise to many difficulties already mentioned by other members of the Commission, he said that he, too, was in favour of its deletion.

46. Mr. HAFNER said that he wondered whether the Special Rapporteur should not also deal in his future work with the question of the possible legal effects of the exercise of diplomatic protection on the recognition of a State or a Government.

47. Mr. PELLET, referring to two important points raised by the Chairman, said that, in the first place, it seemed perfectly obvious to him that the normal course of exercising diplomatic protection was through negotiations, all other procedures, including court action, in particular, being somewhat exceptional. Secondly, with regard to the question whether diplomatic protection could be exercised in the case of injury suffered as a result of a lawful act, he thought that the point was well taken, but the example quoted was not relevant because it related to wrongful acts. The problem was undoubtedly a complex one and deserved to be raised, not only in relation to the topic of State responsibility, but also in relation to that of international liability for injurious consequences arising out of acts not prohibited by international law.

48. Mr. PAMBOU-TCHIVOUNDA, also referring to the two points in the statement by the Chairman mentioned by Mr. Pellet, said he agreed that action before a court or a tribunal was somewhat exceptional as a means of exercising diplomatic protection. Moreover, the practice as described by Mr. Economides (2619th meeting) showed that politics and diplomacy were the real means of exercising diplomatic protection. Diplomacy was, by definition, the method *par excellence* of establishing relations between States and diplomatic protection had much to gain by placing itself within the scheme of friendly relations and, in that way, obviating the need for court action, which was often costly and complex. Secondly, with regard to the question of the exercise of diplomatic protection within the framework of lawful conduct, he entirely agreed with the view of Mr. Operti Badan that initiating the process of diplomatic protection did not prejudice the wrongfulness or otherwise of the act giving rise to such action.

49. Lastly, referring to the question by the Chairman as to whether diplomatic protection should not be regarded, as it were, as an additional level of jurisdiction, he thought the point important and essential on both theoretical and practical grounds. At the theoretical level, it referred back to the question whether there was a border between the domestic and international legal systems and, if so, to the question of the means of crossing that border. At the practical level, to bring a claim before an international judge or arbitrator was to put on trial the operation of the domestic legal system of the State in question; it had to be ascertained whether all domestic remedies had been exhausted, whether justice had been properly administered, etc. That, however, meant shifting from the sphere of justice to that of private law.

50. Mr. BROWNLIE said that the issue raised by the Chairman concerning the exercise of diplomatic protection in the case of activities by a State that were not unlawful was not particularly relevant. On the other hand, the principle of diplomatic protection was often applied, in his view, in cases of threatened injury to a State, for example, when a bill had been drafted and was about to be submitted to a parliament and particular measures that were likely to cause injury to a State under international law were going to be adopted. The example of the treatment of diplomatic missions could be cited in addition to the examples relating to the expropriation or confiscation of the property of foreigners. Article 1, in its current form, referred only to the injuries actually caused to the personal property of a national, but not to cases of threatened injury.

51. Mr. LUKASHUK, referring to the question of principle raised by Mr. Sreenivasa Rao (*ibid.*) and taken up by other members, said that he would like to know whether diplomatic protection could be exercised only once an internationally wrongful act had been committed or, in other words, whether a breach of national law by a State was enough to trigger it. Most experts did believe that it was sufficient under traditional international law, but, even then, according to the rule on the exhaustion of domestic remedies, that had to involve some level of inter-State responsibilities defined by international rules.

52. The current situation was different; the breach of a national law was not sufficient grounds for exercising diplomatic protection. A State had to have breached one or more international rules governing the rights of aliens and it had to be liable for those breaches for diplomatic protection to be justified. Mr. Gaja had asked (*ibid.*) what should be done if a foreign national was the victim of torture or degrading treatment. He believed that an answer to that question was provided by the rule on the exhaustion of domestic remedies. In fact, if it was known beforehand that the rights of foreign nationals were not really guaranteed through domestic remedies, diplomatic protection could be resorted to directly. For example, if the passengers on an Italian ship were taken hostage and tortured or subjected to degrading treatment, what kind of action would Mr. Gaja propose to his Government?

53. The Commission should also consider the case where a State was for some reason unable to provide diplomatic protection to its citizens, as in that of Sierra Leone at the current time. Which State could provide such protection to the nationals of Sierra Leone?

54. Mr. GOCO said that he had taken note of the Chairman's comments on diplomatic protection as the exercise of a discretionary power of the State. He agreed that, in practical terms, when a right existed, a State could exercise it or not. What worried him was that, when referring to a State, what was meant was the Government or, in other words, the persons in charge, but those persons could change policy in certain circumstances. What was then involved was an act of Government that was beyond the control of the courts. He was concerned about the concept of discretionary power, as it might cause an injury to a national of a State. For example, in the case of an individual who had been declared *persona non grata* while in another State and against whom an internationally wrongful act had been committed, diplomatic protection should clearly be exercised. However, the State concerned might not wish to exercise it, for one reason or another. In other words, he feared that discretionary power might give rise to abuses.

55. Going back to the example given by Mr. Brownlie, he recalled a bill submitted to the United States Congress which had provided for sanctions against foreign companies established in the United States and dealing with countries such as Cuba. The bill constituted a threatened injury for a country like Canada which had trading relationships not only with the United States, but also with Cuba and other countries. He understood that discretionary power should be taken into account, but in order to avoid abuses, rules were needed to safeguard the exercise of the right of diplomatic protection.

56. Mr. OPERTTI BADAN noted that, according to article 1, paragraph 2, "In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national." Those exceptional circumstances were indeed provided for in article 8. Moreover, article 5 defined the State of nationality as "the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization". In that context, he asked the Commission to consider the question of habitual residence, a concept that was the basis for the link between a person and a State. It was a concept that had evolved greatly in recent years, especially within the framework of the protection of persons and their families. In his next report, the Special Rapporteur could study the possibility of extending diplomatic protection to persons who had their habitual residence in a given State.

57. Mr. ECONOMIDES said that he agreed with the Chairman that diplomatic protection was always an exclusively peaceful operation or process. That idea should be brought out clearly in the Commission's work; it should perhaps be included in a provision stating explicitly that diplomatic protection was incompatible with the use of force.

58. Actual practice provided an answer to the question whether diplomatic protection could be exercised in relation to an act that was wrongful not only under international law, but also under domestic law. Wrongfulness at the domestic level was in the first place a question to be settled by the domestic courts; if the domestic wrongfulness subsisted after domestic remedies had been exhausted, domestic and international wrongfulness would coincide in most cases in the form of either a denial of justice or a material breach of a rule of law. If doubts

continued to exist, a dispute settlement procedure would settle the question whether a breach of domestic law or of international law was to be decided. In any event, diplomatic protection applied only in the event of a breach of international law.

59. Mr. GAJA, replying to the question put to him by Mr. Lukashuk, took as another example the case of a bill concerning the expulsion of aliens on a discriminatory basis. If that was considered a wrongful act, the State of nationality of the aliens affected could make representations to the State concerned even before they had been expelled. The State of nationality could not say that the wrongful act had already been committed, since the bill might not be adopted or, even if it was adopted, expulsion might not take place. Nevertheless, the State was entitled to ensure that international law was observed in respect of its nationals. In the two examples given, torture and expulsion, there were no remedies to be exhausted. If there were, that raised the difficult question of the nature of the rule of exhaustion of domestic remedies, but it was not the time to consider that question. Turning back to the kind of situation mentioned by Mr. Lukashuk, he said that the State could use peaceful methods in its attempts to settle the dispute.

60. Mr. ADDO said he agreed with Mr. Pellet that the normal way to exercise diplomatic protection was through negotiation. On its own, however, that was not enough; judicial proceedings also played a part. That was in fact the conclusion to be drawn from the judgment of PCIJ in the *Mavrommatis* case. The starting point was thus indeed negotiation, but, when that produced no results, judicial proceedings had to be taken before ICJ in the form, for example of arbitration or international litigation.

61. With regard to the case of Sierra Leone, he pointed out that, within the limits prescribed by international law, a State could exercise diplomatic protection to the extent it deemed fit, as it was its own right it was asserting. The State was the sole judge of whether or not to grant its diplomatic protection and to what extent it should do so. Therefore, although the Government of Sierra Leone was currently not able to exercise diplomatic protection, that did not mean that it would not be able to do so in future.

62. Mr. TOMKA said that the discussions had shown that there was a danger of confusing concepts which, despite some similarities, were legally different. Taking a customary law approach, which should be the basis of the Commission's work, the precondition for the exercise of diplomatic protection was the claim that international law had been breached. For that reason, the situation relating to a bill or to the preventive measures taken by a State did not come within the scope of diplomatic protection. In those cases, a State could draw the attention of another State to the need to respect its obligations, but it could not invoke its responsibility in an international court, as there had been no breach. A dispute might arise between those two States over the interpretation of an international convention, but that had nothing to do with diplomatic protection. The situation was also different in cases of damage caused to a foreign national by an activity that was not unlawful; what would be the grounds for the dispute between the national and a State? The national could not claim that international law or domestic law had been

breached. The State of nationality could, of course, exert pressure on his behalf, but it was not a question of diplomatic protection. The latter applied when there had been a breach of international law relating to the treatment of aliens or to human rights and when the injured national had been unable to obtain reparation after exhausting domestic remedies. In that case, the State of nationality could take up the case at the international level. It was necessary to distinguish clearly between those different situations in order to avoid any risk of confusion.

63. Mr. Sreenivasa RAO congratulated the Special Rapporteur on the quality of his work. However, in his next report, he should concentrate his attention on the conditions under which diplomatic protection was exercised: it was necessary to know when such protection was legitimate or illegitimate, in what conditions it was legitimate and at what point it touched on the area of State responsibility. The current confusion was the result of his failure to provide precise guidelines. The definition of diplomatic protection given in article 1 also gave rise to a problem, as it was linked only to State responsibility. In his future reports, the Special Rapporteur should therefore provide guidelines for the Commission in those areas.

64. Mr. SIMMA said that it was necessary to go even further. Before asking the Special Rapporteur to come up with clear replies to the questions raised about the limitations on or the conditions for the exercise of diplomatic protection, it had to be indicated clearly what was meant by diplomatic protection. He noted that there was no consensus on that point.

65. Mr. CANDIOTI said it was true that the Commission did not have a clear idea of what the legal concept it was trying to codify actually was. The first thing to do was therefore to agree on a strict definition of diplomatic protection under international law; the Commission should not include in diplomatic protection other kinds of diplomatic actions that were unrelated to it.

66. Moreover, as Mr. Hafner had said, it was essential to understand the effects of diplomatic protection. As he believed that that question could be studied in a working group before written rules were drafted, he supported Mr. Pellet's proposal that such a working group should be set up. Diplomatic protection was well defined in a number of judgements, including the judgment of PCIJ in the *Mavrommatis* case, but, if unrelated concepts were added to them, there was a risk of opening a Pandora's box, by mixing up fundamentally different concepts. That was why it was important to set up the working group to help the Special Rapporteur define the scope of diplomatic protection.

67. Mr. OPERTTI BADAN said that he supported that proposal and suggested that the working group should be set up the following week.

68. Mr. DUGARD (Special Rapporteur) said that he would like not only to reply to Mr. Operti Badan's suggestion, but also to sum up the comments made on articles 1 to 4 at the soonest possible date.

The meeting rose at 1.10 p.m.

2621st MEETING

Tuesday, 16 May 2000 at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (continued)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN, extending a warm welcome to Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, invited the Commission to continue its consideration of the third report by the Special Rapporteur (A/CN.4/507 and Add.1-4), and specifically, of article 40 bis.

2. Mr. GAJA said that he wished to respond to Mr. Pellet's proposal (2616th meeting) that issues currently dealt with in article 40 bis should be addressed in Part Two bis, on the implementation of State responsibility. Paragraph 118 of the report showed that the Special Rapporteur was inclined to share that view. He endorsed the idea of couching the provisions in Part Two in terms of obligations of the wrongdoing State, but thought that those obligations had to be owed to someone: either one or more States or another subject of international law. Hence the need in chapter I of Part Two for a provision such as the current article 40 bis, a text which, irrespective of its heading, attempted to identify the categories of subjects to which obligations arising from a wrongful act were owed. On the other hand, there was no need to characterize the legal position of the *omnes* with regard to obligations stemming from the commission of a breach of an obligation *erga omnes* in terms of rights, legal interests or in any other way.

* Resumed from the 2616th meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).