

Document:-  
**A/CN.4/SR.2618**

**Summary record of the 2618th meeting**

Topic:  
**Diplomatic protection**

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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-ninth<sup>21</sup> and fiftieth<sup>22</sup> 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.1<sup>1</sup>)**

[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

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

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

<sup>1</sup> Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

between the original English text and the Spanish version. In article 1 and in paragraphs 41 et seq. of the report, the word “action” had been translated into Spanish by the word *medidas*, which was not appropriate and should be replaced by the word *acción*, which had, moreover, been used in Article 48 of the Charter of the United Nations to translate the word “action”. He hoped that the necessary corrections would be made.

4. In paragraph 14 of his report, the Special Rapporteur rightly referred to the great abuses to which diplomatic protection had given rise, noting that the United States military intervention on the pretext of defending United States nationals in Latin America had continued until recent times and expressly citing the interventions in Grenada in 1983<sup>2</sup> and in Panama in 1989.<sup>3</sup> Those examples supported his theory that diplomatic protection, in the sense of action taken by a State against another State to repair injury to its nationals, was still entirely topical. In order to avoid any misunderstandings, it should be pointed out that the intervention in Panama could not be justified as a case of intervention designed to defend United States nationals in that country. The fact was that, on 20 December 1989, the United States had invaded Panama with some 24,000 men and there had been many military and civilian victims of its action, which had led to the arrest of General Noriega, the de facto head of the Panamanian Government, and his transfer to the United States, where he had been tried and sentenced for illicit drug trafficking offences. It was true that the situation in Panama had changed since then and that, on 31 December 1999, the United States had transferred the Panama Canal to Panamanian sovereignty in accordance with the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal<sup>4</sup> and the Panama Canal Treaty,<sup>5</sup> known as the Torrijos-Carter treaties, and had dismantled its military bases, thus paving the way for a new era of harmonious relations with Panama and the countries of Latin America and the Caribbean.

5. In article 2, the Special Rapporteur considered the possibility of allowing the threat or use of force by a State in the case of the rescue of its nationals. It was obvious that that idea was contrary to Article 2, paragraph 4, of the Charter of the United Nations. In the case of the invasion of Panama, for example, there had been questions about the use of force. The advocates of military action had wanted to reinterpret Article 2 of the Charter, holding that the right of self-defence was a “natural” right and that it had not been uncommon for States to use force to defend not only their territory, but also their nationals and their property. Briefly describing the arguments for and against United States military action in Panama in order to add his contribution to the consideration of the topic and the formulation of the draft articles, he indicated that Sofaer, then Legal Adviser to the United States Department of State, had published an article,<sup>6</sup> in which he had maintained that

the use of armed force by the United States was lawful. However, other well-known jurists had challenged the lawfulness of that action. For example, Henkin had pointed out that Sofaer’s explanations did not justify the use of force by the United States and that the invasion of Panama had been a flagrant violation of international law.<sup>7</sup> He had refuted, point by point, all the reasons the United States had given to justify its action. His arguments led to the following conclusions.

6. With regard to protection of the life of United States citizens, there was no proof that the United States forces and the other United States nationals in Panama could not have been safely evacuated to the United States or to the Canal Zone or that the well-armed United States forces in the Canal Zone had not been able to defend themselves and their families and other United States nationals. Even if the lives of United States citizens had hypothetically been threatened, that would not have justified the invasion, since it was contrary to Article 2, paragraph 4, of the Charter of the United Nations. According to Henkin, the use of force in humanitarian intervention was recognized as an exception to the prohibition of the use of force under Article 2, paragraph 4, only by virtue of the Entebbe principle, which provided that a State could enter another country by force to the extent strictly necessary to defend and release individuals whose lives were in danger if the Government of the country in question lacked the capacity or willingness to protect them. However, Article 2, paragraph 4, of the Charter did not allow any exception authorizing an armed invasion designed to rescue persons who could have been rescued if they had been evacuated from the territory in which their lives had been in danger. There was no exception to that provision of the Charter which allowed the use of force to overthrow a regime because it had threatened lives or was responsible for the death of a large number of innocent persons.

7. The justification of the invasion in the name of endangered democracy in Panama did not hold water in international law, which had rejected the “Reagan doctrine”, which had defended the right to use force to establish democracy, just as it had earlier rejected the “Brezhnev doctrine”, which had defended the right to use force to establish socialism. As to the argument of Panama’s declaration of war, the United States would not have been justified in invading Panama even if Panama had declared war on it. The Charter of the United Nations did not authorize war, declarations of war or counter-declarations of war. It would authorize the use of force on the grounds of a declaration of war only in the case where the State which had made the declaration of war had also carried out an armed attack.

8. With regard to the argument of the defence of the Panama Canal, the use of force against Panama’s territorial integrity or political independence to guarantee the continuing operation of the Panama Canal in conditions of safety was not authorized either by the Charter of the United Nations or by the Torrijos-Carter treaties. The theory that the maintenance of the integrity of the treaties allowed a military invasion must be refuted half a century after the establishment of the United Nations and the

<sup>2</sup> See M. N. Leich, “Contemporary practice of the United States relating to international law”, *American Journal of International Law* (Washington, D.C.), vol. 78, No. 1 (January, 1984), p. 200.

<sup>3</sup> *Ibid.*, vol. 84, No. 2 (April, 1990), p. 545.

<sup>4</sup> United Nations, *Treaty Series*, vol. 1161, No. 18342.

<sup>5</sup> *Ibid.*, vol. 1280, No. 21086.

<sup>6</sup> A. D. Sofaer, “The legality of the United States action in Panama”, *Columbia Journal of Transnational Law*, vol. 29, No. 2 (1991), p. 281.

<sup>7</sup> L. Henkin, “The invasion of Panama under international law: a dangerous precedent”, *ibid.*, p. 293.

promulgation of the Charter. As to the motive that General Noriega had been arrested so that he could be tried in the United States for threatening the lives of United States citizens, it could be asked whether, under international law, the United States had had the right to invade Panama in order to achieve its objectives. Perhaps the then President of the United States had made that arrest part of his general reference to the right of self-defence. In international law, however, the definition of the right of self-defence in no way included the right to invade another country to arrest an alleged drug trafficker.

9. The main argument used to justify the invasion of Panama had been to describe it as the legitimate exercise of the right of self-defence recognized by Article 51 of the Charter of the United Nations in response to acts of hostility, including one or two attacks on United States military personnel in Panama, and to a declaration of war. In invoking the right of self-defence, the United States Government had in no way referred to the basic idea underlying Article 51 of the Charter, namely, that the use of force in self-defence was authorized only as a response to an armed attack. It had apparently not been claimed that the act or acts of hostility by the Noriega regime had constituted an armed attack against the United States within the meaning of Article 51. The United States Government of that time had maintained that Article 51 allowed the use of force in the exercise of the natural right of self-defence even in cases where no armed attack had occurred. That particular point had been discussed at length, but the dominant idea which had come out of the discussion had been that the use of force in the exercise of the right of self-defence was legitimate only in response to an armed attack.

10. It should be noted that the international community had found no justification for the invasion of Panama, either as an action carried out to protect nationals abroad or on any other grounds, and that it had regarded that invasion as a flagrant violation of international law. In a resolution which it had adopted on 21 December 1989, by 20 votes to 1, with 5 abstentions, OAS had deplored the intervention in Panama and had called for the withdrawal of United States troops. On 23 December, the Security Council had had before it draft resolution S/21048 along the same lines, which had received 10 votes in favour and 4 against, with 1 abstention, but which had not been adopted because of the exercise of the right of veto.<sup>8</sup> The most striking statement had been made by the General Assembly, which, in its resolution 44/240 of 29 December 1989, had strongly deplored the intervention in Panama by the armed forces of the United States, which had constituted a flagrant violation of international law, and had demanded the immediate cessation of the intervention and the withdrawal from Panama of the armed invasion forces of the United States.

11. He reserved the right to refer at a later stage to draft articles 4 to 8 proposed by the Special Rapporteur.

12. Mr. KABATSI congratulated the Special Rapporteur on his detailed, well-structured, lucid and unambiguous report, in which he had not shied away from controversial

issues and had clearly premised the institution of diplomatic protection on the need to further the protection of human rights.

13. The question whether a State resorted to diplomatic protection to assert its own right, that of its nationals or a combination of the two was not, in his view, of particular importance. What mattered, as the Special Rapporteur had indicated in paragraph 10 of his report, was the existence of a substantial body of relevant practice and precedent. The place of diplomatic protection in customary international law was well established. A State that resorted to such protection was, in his view, exercising its own right for the benefit of the nationals it defended. The State was not simply acting as an agent, as in the rendering of consular services, for a subject without *locus standi vis-à-vis* another State or an international judicial body.

14. Diplomatic protection was thus not an obsolete facility. It was still a very useful tool, as ably argued by the Special Rapporteur in paragraph 32 of his report. The Special Rapporteur was also to be commended on the gender-sensitive language he used in paragraphs 23, 24 and 26.

15. With regard to the draft articles, he had no difficulty in accepting articles 1 and 3, which could be referred to the Drafting Committee for the usual finishing touches.

16. Article 4, as acknowledged by the Special Rapporteur in paragraphs 80 and 81 of his report, was based on scant State practice. As agreed by most members of the Commission who had addressed the matter, diplomatic protection was a sovereign prerogative of the State, exercised at its discretion. National legislation at best spelled out the objectives of State policy in terms of affording protection to a country's nationals abroad, but failed to establish binding legal provisions. Diplomatic protection was clearly not recognized as a human right and could not be enforced as such. One was left wondering what type of right under international law would be progressively developed by the Commission. Any such putative right of the individual or duty of the State could not, at any rate, be construed as a right or duty of the international community as a whole. He was therefore not convinced of its existence and felt that article 4 should be abandoned at the current stage.

17. Article 2, apart from the fact that it fell outside the scope of the topic, was a dangerous proposition. The Special Rapporteur himself was aware of the dangers involved. In paragraphs 48 and 59 of his report, he clearly demonstrated that history, both past and present, was replete with examples of cases in which the protection of nationals had served as a pretext for military intervention. Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force, the sole exception being the right to self-defence set forth in Article 51. But the right to self-defence could not include the right to military intervention on the pretext of exercising diplomatic protection. Even in putative emergency situations or in rescue operations conducted by an attacking State in another State on behalf of its nationals, it would be dangerous to give States the latitude to take unilateral decisions about the existence of an emergency or the need for a rescue operation.

<sup>8</sup> See S/PV.2902. For the final text, see *Official Records of the Security Council, Forty-fourth year, 2902nd meeting*.

18. The Entebbe operation had been hailed as a success, not only outside Uganda, but also by many Ugandans, mainly on account of the unpopularity of the then regime in Uganda and the daring nature of the operation. But it could not safely be termed lawful. It had claimed the lives of many innocent Ugandans who had had nothing to do with the hijacking or the operation to rescue the hostages. Property had been destroyed. The raid could not therefore constitute a precedent establishing a right to use force notwithstanding the prohibition contained in international law, particularly in the Charter of the United Nations. Any attempt to address the issue in the context of the progressive development of international law should be in the direction of a world order based on legality, multilateralism, the pacific settlement of disputes among and between States, and the furtherance of human rights, and not in the direction of the use of force, especially on the basis of unilateral decisions by States. If there were instances in which the use of force might be legitimate, the diplomatic protection facility was not one of them. He therefore strongly supported abandoning article 2.

19. Mr. PELLET said that, although the protection of human rights certainly constituted one of the major advances in international law in the twentieth century, it did not follow that such a relatively precise technical topic as diplomatic protection should be systematically converted into another entirely different and far wider topic, namely, the protection of nationals or, in even broader terms, ways of safeguarding human rights in the modern world. But that was the approach that the Special Rapporteur seemed to have adopted in his study.

20. Reviewing the background to the inclusion of the topic in the Commission's long-term programme of work, he said that the basic and indeed sole purpose had been to bridge a gap in the draft articles on State responsibility, as the original idea had been to deal with diplomatic protection in Part Three on the implementation of responsibility. That idea had been shelved, although, as noted by Mr. Kabatsi, diplomatic protection was a tool that States could use in implementing international responsibility. When a State had committed an internationally wrongful act entailing its international responsibility, in accordance with the provisions of articles 1 and 3 of the draft on State responsibility, it could cause damage either to a foreign State—"immediate" damage—or to a foreign national—"remote" damage. It was then, and only then, that diplomatic protection came into play. It was a long-standing institution whose main features had not been fully outlined until the late nineteenth and early twentieth centuries. As indicated by the Special Rapporteur, the European States and the United States had then been faced with a dilemma: on the one hand, they had wanted to protect their nationals, and particularly their property, in Latin America, the "third world" of the time; and, on the other hand, they had had no intention of questioning the basic assumption that international law was law between sovereign States and between them alone, as graphically illustrated by the "*Lotus*" case. There had thus been no question of recognizing that private individuals, whether natural or legal, had any measure of international legal personality. It was to resolve that dilemma that the fiction of diplomatic protection, admirably articulated by PCIJ in the *Mavrommatis* case and constantly repeated ever since, had been invented. According to that fiction, when a State espoused the cause of one of

its nationals, taking diplomatic or international legal action on his or her behalf, it was actually claiming its own right. Diplomatic protection was nothing more than that. It was not, as the Special Rapporteur thought, the actions open to a State in affording protection to its nationals and still less the actions whereby private individuals could protect their own rights. Admittedly, in cases where an individual's basic rights were violated by a breach of the rules of international law by a State other than that whose nationality he or she held, diplomatic protection could offer one means of guaranteeing respect for the rights in question. But that was not the purpose of the institution of diplomatic protection, which had incidentally existed long before the idea of the international protection of human rights had been conceived. Its purpose was not to protect human rights or even, in general terms, to protect nationals, contrary to the Special Rapporteur's argument in, for example, paragraph 54 of his report. It was a procedural means of obtaining reparation for fictional damage suffered by the State.

21. The question arose whether the fiction should be maintained. For want of anything better, it should be. On that point, he shared the views expressed by the Special Rapporteur in paragraphs 17 to 30 of his report. He subscribed to the view that, at the dawn of the twenty-first century, the individual should finally be recognized as a subject of international law, as shown, for example, by the impressive expansion of international criminal law, which made the individual a subject of *jus gentium*, and by the expansion of the international protection of human rights and even of international investments, which enabled private individuals, under certain circumstances, to bring international judicial or quasi-judicial proceedings themselves. On that point, he would go further than the Special Rapporteur had done in paragraph 24 of his report. The individual was already a subject of international law, with special characteristics that differed sharply from those of a State. Admittedly, however, the trend was not widespread enough to allow diplomatic protection to be dispensed with.

22. But if the fiction was maintained, as seemed necessary, the draft articles must, without fail, fulfil one basic condition. As indicated by the Working Group established at the fiftieth session, and reiterated by the Special Rapporteur in paragraph 4 (a) of his report, the Commission should continue to adopt an approach to diplomatic protection as conceived in customary law.<sup>9</sup> In other words, it should take as its starting point the traditional notion of diplomatic protection and keep to that notion instead of seeking, at all costs, to move international law forwards in unpredictable and unforeseen directions. Moreover, diplomatic protection, as a fundamentally conservative institution, certainly would not lend itself to such developments save through a very artificial grafting process.

23. In the light of the foregoing, he had a number of comments to make on the first four draft articles proposed by the Special Rapporteur. Article 1, paragraph 2, was, in his view, redundant because article 8, to which it referred, was self-contained and could simply be mentioned in the commentary to article 1. Article 1, paragraph 1, called for

<sup>9</sup> See 2617th meeting, footnote 22.

two comments of unequal importance. The first and less important point was that the terminology used should be brought into line with that used in the draft articles on State responsibility. In particular, as Mr. Tomka had noted (2617th meeting), it would be preferable to delete the reference to an “omission”, since the draft articles on State responsibility had established that an internationally wrongful act comprised both acts and omissions. In the French version, it would also be better to speak of *attribution* of the internationally wrongful act instead of *imputation*, in keeping with the carefully considered wording used in the draft articles on State responsibility. It was for the Drafting Committee to rule on that point if the draft article was referred to it by the Commission. Secondly, and more importantly, he certainly did not believe that diplomatic protection was an action, as Mr. Economides had clearly shown (*ibid.*). It could lead to an action, but it was not an action. It consisted simply in the endorsement of a claim by a private individual who had suffered an injury. It was not the diplomatic or judicial action itself: it was the setting in motion of such action, which was something entirely different. The word “action” was misleading and all the more regrettable since it led up to the disastrous draft article 2, which had been denounced by other members of the Commission.

24. In that connection, he urged the Special Rapporteur to delete all reference to the use of force. Although no subject was taboo and, unlike Mr. Tomka, he did not subscribe to the view that the Commission should systematically anticipate the wishes of the Sixth Committee, there should still be sound reasons for provoking the kind of reaction that draft article 2 could be expected to produce. And he saw no scientific reason for doing so in the case in point. On the contrary, draft article 2 was, in his view, totally irrelevant. On the one hand, it was based on the law of the Charter of the United Nations, which was outside the Commission’s remit, and not on the law of international responsibility, which formed part of its terms of reference. On the other hand, it referred to actions, with which the Commission was not concerned, and not to the endorsement of complaints, with which it was concerned. Citing an example mentioned in paragraph 59 of the report in support of his argument, without passing a value judgement on the Israeli action, he submitted that the Entebbe raid had absolutely no bearing on the issue of diplomatic protection: there had been no question of obtaining reparation for damage caused by an internationally wrongful act that had obviously not been attributable to Uganda, but rather of obtaining the release of hostages in total disregard of the territorial sovereignty of a State that had been powerless in the matter. As to the sorry case of Panama mentioned by Mr. Illueca, it had no bearing whatsoever on diplomatic protection.

25. As a final comment on article 2, he drew attention to a footnote in the report which referred to *Droit international public*<sup>10</sup> with a view to setting the record straight. As co-author, he said that page 777 dealt with “the implementation of diplomatic protection” and stated, *inter alia*, that: “Diplomatic protection cannot constitute a pretext for the use of unlawful means in international law: the use of

force is no longer justifiable on such grounds, since it is prohibited by international law”. Page 905 of the book, which had also been mentioned, initiated a lengthy discourse on armed intervention and reprisals, but made no reference whatsoever to diplomatic protection. On the contrary, it put forward a strong argument against armed reprisals and interventions. Having reviewed some past cases of armed intervention, the authors argued that, since armed force had been used, the reprisals were covered by the prohibition of the use of force set forth in Article 2, paragraph 4, of the Charter of the United Nations. As to armed interventions undertaken by States in defence of a right, the authors stated that “the ICJ judgment against the defendant in the *Corfu Channel* case is too general not to be applicable also to this case” and concluded that there might at most be some grounds for accepting the extremely reasonable and limited position of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, according to which:

if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’ and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect [see pp. 125 and 134, paras. 243 and 268, respectively].

He was thus far from convinced by draft article 2.

26. Article 3 had been overlooked by previous speakers, even though it was of very great importance. It was of far greater relevance than article 2, but he was still unable to accept it. If he had rightly understood the Special Rapporteur, the idea was to adhere closely to the traditional doctrine of diplomatic protection. Although he did not “like” that doctrine, he thought the Commission should nonetheless stick to it, but article 3 did not do so and also covered too many subjects. In his view, the crux of the matter lay in the words “on behalf of a national unlawfully injured by another State”. To begin with, it would be more appropriate to say, as Mr. Tomka had noted, “injured by the internationally wrongful act of another State”, which would have the advantage of keeping the subject matter within its proper bounds, namely, that of international responsibility. Secondly, and more importantly, precisely in terms of traditional theory, it was not the individual who was injured, but the State which suffered damage in the person of its national. That was where the traditional fiction lay; one could either accept it or wish to be rid of it, but, if one resigned oneself to keeping it, as the Special Rapporteur had done—a point on which he concurred—one could not, having let it in the front door, subsequently throw it out through the back door.

27. Contrary to what the Special Rapporteur had stated in paragraph 66 of the report, it could not be argued that the very welcome step of recognizing direct individual rights, in the context either of the protection of human rights or the protection of investments, had undermined the traditional doctrine. In legal terms, the only serious problem arising from the recognition of such rights was whether it left intact or replaced traditional diplomatic protection. He did, however, share the Special Rapporteur’s view that diplomatic protection was a discretionary

<sup>10</sup> *Ibid.*, footnote 10.

power of the State under existing positive international law—and that should perhaps be stated more explicitly—and that the question arose whether the time had come to confine the State's discretionary power within narrower bounds.

28. With regard to article 4, he would be less severe than previous speakers, since he agreed with its underlying postulates. It basically stated that, in the event of a grave breach of an obligation of crucial importance for the safeguarding of the fundamental interests of the international community as a whole, a State could not remain passive. To put it plainly, if genocide was committed somewhere or if a State systematically resorted to torture or racial discrimination as a means of governance, other States could not stand idly by. But that issue was also not one of diplomatic protection. It was a far more general issue and one with which the members of the Commission were familiar, since it related to the international crimes of States. In such circumstances, States not only had the right, but also the duty, to act although there was still no justification for the use of force. However, that did not mean that diplomatic protection should serve as the instrument for such action, first because diplomatic protection was not an action and, more importantly, because it was not the rights and interests of nationals alone that were to be endorsed, but those of the international community as a whole. The issue came not under diplomatic protection, but under the far broader topic of State responsibility—and under article 51 of the draft on State responsibility, to be precise.

29. The easy option for him would be to support the idea of referring draft articles 1 and 3 to the Drafting Committee and of consigning draft articles 2 and 4 to oblivion. However, given the fundamental questions regarding the overall approach that needed to be answered, he wondered whether it might not be better to suggest that the Special Rapporteur should review all the draft articles in the light of the Commission's discussion. That was for the Special Rapporteur to decide.

30. Mr. IDRIS commended the Special Rapporteur on the high quality of his in-depth report. He had shown flexibility in admitting that some parts of his report should be trimmed. The Commission should therefore consider only the relevant aspects of the report and leave aside what it considered to be superfluous.

31. The diplomatic protection regime was well established both in theory and in the practice of States and had enabled those nationals of a State whose rights had been violated by another State to obtain reparation. That starting point was very well reflected in the report. Despite the adoption of international human rights instruments, including at the regional level, international law on the subject was not as well developed as it should be. If only for that reason, diplomatic protection was a useful mechanism, acting as a safeguard against the infringement of the rights of aliens, who would not be able to obtain any reparation without the intervention of the State of which they were nationals. As pointed out by the Special Rapporteur, instead of seeking to weaken diplomatic protection, the Commission should make every effort to strengthen it. The question whether diplomatic protection was a fiction was not very important. The Commission should, rather, focus on making the diplomatic protection regime more useful in

practice, in order to protect the rights of the nationals of a State who lived in another State. With that in mind, the Commission should therefore give priority to the codification of the rules of customary law rather than the progressive development of new rules.

32. While he agreed with the principles embodied in article 1, he thought the article should deal only with secondary rules and leave aside primary rules, which could be considered within the much broader framework of State responsibility. With regard to the question of the threat or use of force, as referred to in article 2, he shared the view of many other members of the Commission that it was not relevant in the context of diplomatic protection and might lead to confusion with the regime of counter-measures provided for in the framework of State responsibility. Moreover, many States would find the idea unacceptable, since diplomatic protection could be used as a pretext for violating the territorial integrity of another State. The principles relating to the use of force were clearly defined in the Charter of the United Nations, which provided for the use of force solely in cases of self-defence. That question should therefore be excluded from the scope of article 2.

33. With regard to article 3 on the holder of the right to diplomatic protection, he asked whether, if the holder was the State, the latter could intervene at any time, before all domestic remedies had been exhausted. If, on the other hand, that right belonged to the alien concerned, could the State exercise it only once its national had exhausted all local domestic remedies? The Special Rapporteur had pointed out that, in its traditional form, the right of diplomatic protection was attached to the State, but that was a very controversial issue and the Commission should explore it further.

34. Article 4 was equally controversial. The question to whom the legal duty to exercise diplomatic protection was owed had been raised; was it to other States parties or to the person who had been injured? Noting that there was a general view in the Commission that individuals were also subjects of international law, he invited the Special Rapporteur to study that question further.

35. Lastly, he said that the current title of the report was confusing. It gave the impression that it actually dealt with the protection of diplomats. In order to avoid any misunderstanding, it should be reviewed.

36. Mr. PELLET, referring to Mr. Idris' last comment, said that anything could of course be called by any name at all. However, words did have a meaning and institutions did have a name. While it was unfortunate that diplomats did not know their international law, their ignorance was not a reason for the Commission to rename an institution that dated back to Vattel. The title "Diplomatic protection" should therefore be retained.

37. Mr. KATEKA said that, in his view, Mr. Idris' comment was justified. Only the day before, the Special Rapporteur had pointed out that Governments themselves, in their replies, confused diplomatic protection with the privileges and immunities of diplomats. It would therefore be desirable for the Special Rapporteur to amend the title of his report or else to clarify its meaning in the general comments.

38. Mr. SIMMA said he took the view that the problem was one of information and education. If diplomats and other users of international law such as legal advisers did not properly understand the meaning of diplomatic protection, the Commission should make an effort to explain it to them clearly.

39. Mr. ECONOMIDES said that he agreed with Mr. Pellet. There was no need to change the title, but it could be improved by adding a few words to clarify the concept.

40. Mr. BAENA SOARES said that he also agreed with Mr. Pellet. It was not the title that had been chosen that was wrong, but the interpretations of it.

41. Mr. BROWNLIE said that he too agreed with Mr. Pellet. However, in order to avoid complicating matters, the concept of “diplomatic protection” could be clarified in the introduction to the report.

42. Mr. LUKASHUK said that the Commission should not spend too long on the question; he too was opposed to changing the title, as diplomatic protection was too deeply rooted in international law.

43. Mr. HE said that it would be useful to distinguish, from the start, between diplomatic protection and the protection provided for in the Vienna Convention on Diplomatic Relations.

44. Mr. OPERTTI BADAN suggested that “diplomatic protection of persons and property” might be a more accurate title, but, in any case, the question should not be considered until the end of the debate.

45. Mr. CANDIOTI said that there was no justification for changing the title and that it would be more appropriate to give a clear and precise definition of it in article 1.

46. Mr. DUGARD (Special Rapporteur) said, by way of information, that Borchard’s work, the bible on the subject, was entitled *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*.<sup>11</sup>

47. Mr. ADDO said that the term “nationality of claims” was frequently used in works on international law as a synonym of diplomatic protection. It could therefore be included in brackets after the title or else the commentary could explain that it could also be used.

48. The CHAIRMAN said he took it that the current title of the topic under review, “Diplomatic protection”, could be retained even though its meaning might need to be defined in the introduction or the commentary. With regard to sending the draft articles to the Drafting Committee, it would be better if the Commission took a decision on that matter at the end of the debate.

49. Mr. LUKASHUK congratulated the Special Rapporteur on his report, which was a serious study of one of the most complex problems of international law. The Special Rapporteur had been right to start from the principle that special attention should be paid to customary law or, to be more precise, positive law. There had been significant developments in the area of diplomatic protection, linked

to those in international human rights law. It was difficult to disagree with the idea that allowing claims by States concerning violations of the rights of their citizens was one of the most effective means of providing legal protection against human rights violations. That idea was at the very core of diplomatic protection.

50. He noted with satisfaction that the Special Rapporteur had consulted Russian sources, which was a rather infrequent occurrence in the work of the Commission. He also welcomed the Special Rapporteur’s stated intention to complete the first reading during the current quinquennium.

51. Although the Special Rapporteur spoke a good deal about legal fictions, his report was absolutely realistic. However, not everyone agreed with the attention he paid to the fiction of the dichotomy between the rights of the State and those of the individual. Many members, including Mr. Idris, Mr. Kabatsi and Mr. Pellet, had already dealt with it. The State had not only a right, but also an obligation to defend the rights of its citizens. That was one of its principal functions: a State that was unable to defend its nationals was of no use to them. In international law, that principle found its concrete expression in the institution of diplomatic protection. To violate the rights of the citizen was to violate the rights of the State. Article 1, paragraph 1, dealt with the injury caused by a State to nationals of another State as a result of an internationally wrongful act; the internationally wrongful act entailed the responsibility of the State. While the report cited a large number of examples in support of that idea, the Special Rapporteur thought that, in some cases, the State still acted as the representative of the individual and not in order to defend and protect its own rights. It did not seem necessary constantly to underline the discretionary nature of the State’s power. It was enough to say that that power was attached to the State and it was the State that exercised it.

52. The Special Rapporteur rightly drew attention to the tendency in domestic law to consider the granting of diplomatic protection as an obligation of the State. Generally speaking, the development of both internal law and international law led to the recognition of the individual’s right to diplomatic protection. The Russian Federation was one of the States whose internal law included provisions of that sort. The principle whereby the State had an obligation to defend its citizens abroad was written into the Constitution (art. 61) and given effect in a number of legislative texts, such as the Decree on the Ministry for Foreign Affairs and the Decree on Embassies of the Russian Federation, in which the protection of Russian nationals abroad figured prominently.

53. Article 1 rightly stipulated that diplomatic protection could be extended only in cases where an internationally wrongful act had been committed, not in the case of an infringement of internal law. The term “unlawfully” in the English version of article 3 should therefore be amended accordingly.

54. As the discussions had shown, article 2 was the most controversial. It deserved special attention as it dealt with the use of force. He agreed in principle with the statement that the threat or use of force in the exercise of diplomatic

<sup>11</sup> Ibid., footnote 5.

protection could be justified only in cases of self-defence. In support of that view, the Special Rapporteur had drawn on traditional customary law in his interpretation of Article 51 of the Charter of the United Nations. His own interpretation of Article 51 was somewhat different from that of the Special Rapporteur. That article dealt with the case in which “an armed attack occurs against a Member of the United Nations”, in other words, an armed attack against a State. The concept of the State encompassed not only that of territory, but also that of population.

55. He agreed with the Special Rapporteur that it was vital to reflect the practice of States and that a total ban on the use of force would be ignored. If a television channel in France or some other democratic State were to broadcast pictures of acts of cruelty committed against French people abroad and the French Government did not take the necessary steps at once, that Government’s stay in office might well be short. One only had to think of the episode in which a United States television station had shown United States peacekeepers being dragged through the streets of Mogadishu. A few days later, the United States Government had announced the withdrawal of its troops from Somalia. That was why he saw it as the task of the Commission, not to close its eyes to reality, but to adopt practical provisions. It should restrict the possibility of abuse of the right in question by legitimizing it only in extreme cases. Mr. Illueca, Mr. Kabatsi and other members had presented persuasive arguments along those lines. If the case of self-defence was accepted, it would seem necessary to include a reference to Article 51 of the Charter of the United Nations in article 2 and, to be more precise, to indicate that the Security Council should be informed without delay about the measures taken by Member States in the exercise of the right of self-defence. Moreover, the article could be entitled “Cases of self-defence”.

56. Article 4 was the least successful of all the draft articles proposed. The Special Rapporteur stated that the State had a legal obligation to exercise diplomatic protection when there was a grave breach of *jus cogens* norms. It might be asked whether there were grounds for establishing such an obligation in international law. If such an obligation existed, it was more an obligation under internal law. The statement at the end of paragraph 80 of the report that certain States consider diplomatic protection for their nationals abroad to be desirable seemed strange because it was impossible to imagine which States might not consider the protection of their nationals desirable. The Special Rapporteur’s conclusion that the State had not only the right, but also the legal obligation to protect its citizens abroad was quite right and in conformity with the main objective of contemporary international law, which was to strengthen the rights of the individual and not those of sovereign States. However, in advocating that the State should be allowed a broad margin of discretion in fulfilling that obligation, the Special Rapporteur greatly reduced its scope. Lastly, according to article 4, paragraph 3, “States are obliged to provide in their municipal law for the enforcement of this right”. It was not clear to what the word “right” referred, since that article dealt only with obligations. In general, there was good reason to think that article 4, which seemed to raise many more questions than it gave answers, should be dropped. The other draft articles should, however, be sent to the Drafting Committee.

57. Mr. RODRÍGUEZ CEDEÑO congratulated the Special Rapporteur on the high quality of his work. As diplomatic protection was an important issue, the aim of the work should be to draft conclusions that would be reflected in the draft articles. Although it was too early to take a decision on the final form that the latter would take, it could nevertheless be stated that they would have to be realistic if they were to be accepted. It was therefore necessary to move forward carefully, since, although the codification of international law was an acceptable process, the same could still not be said of its progressive development. One could not force international law to develop in unexpected, or even sometimes uncertain, directions.

58. Diplomatic protection was linked to two important issues, namely, human rights and State responsibility. As far as human rights were concerned, diplomatic protection was a mechanism (not an “action” or a “measure”, as stated in the report) aimed at protecting the rights of a national of a State in the territory of another State in cases where those rights might be violated. It could not be said that all the rights that might be violated were human rights, although in fact many of them were, as in cases of the denial of justice, the unlawful deprivation of liberty, the lack of a normal judicial procedure or, indeed, the violation of the rights of migrant workers or discrimination against foreigners.

59. Moreover, the mechanisms of diplomatic protection and those relating to the protection of human rights, while complementary, were different. Human rights instruments had been developing continuously since 1945. There were both universal and regional mechanisms, such as the Inter-American Commission on Human Rights and the American Convention on Human Rights : “Pact of San José, Costa Rica”. Those regional mechanisms usually worked quite well. However, the rules on diplomatic protection should not be reduced to the question of human rights, as that would limit their scope. Diplomatic protection should be treated as a separate subject. Nevertheless, as Mr. Economides had pointed out, it was a subject that was very closely connected to the international responsibility of States.

60. That connection was partly reflected in article 1. In that respect, the Special Rapporteur should further develop the idea he had put forward (2617th meeting), namely, that a State acted when it believed that another State had committed an internationally wrongful act against one of its nationals or else it exercised that right to declare that such an act had been committed by the territorial State. That was an issue. He did not personally think, despite the doctrine, that a State could unilaterally declare that another State had breached a rule of international law. Article 1 referred to the “injury to the person or property of a national [of a State] caused by an internationally wrongful act or omission attributable to [another] State”. That wording suggested that the State of which the injured person was a national considered that the territorial State had committed a wrongful act, and that, in his opinion, prejudged the nature of the act committed. Furthermore, it was perhaps unnecessary to separate an internationally wrongful act from an internationally wrongful omission. Under the title “Scope”, article 1 referred to the basic elements of the definition of diplomatic protection, which was in fact a mechanism rather

than an action. In that connection, it should be pointed out that the inclusion of the word *toute* in the French version—for which there was no equivalent in the original English text—before the word *action* had the effect of unduly extending the scope, and that did not seem to be the purpose of the original English text.

61. With regard to article 2, he shared the misgivings expressed by previous speakers, as he did not believe that the question of the use of force had a place in draft articles on diplomatic protection. The only exception to the general prohibition on the use of force provided for by the Charter of the United Nations was in the case of self-defence (Art. 51). If it created further exceptions, the Commission might well seriously jeopardize rather than promote the development of international law by turning diplomatic protection into a right of intervention.

62. He noted in passing that the Special Rapporteur had deliberately chosen not to deal with the “functional protection” that could be exercised by an international organization on behalf of its officials. Although that question could be left aside for the moment, it would have to be tackled sooner or later, at least in the commentary. Besides, it was related to the question of “humanitarian intervention”, mentioned in paragraphs 55 et seq. of the report. In his view, the term “humanitarian intervention”—to which, in any case, he preferred the term “humanitarian action”—could be used only to describe the action taken by the international community or, rather, by the relevant international agencies, through the mechanisms provided for that purpose, in order to protect persons or populations in danger.

63. Article 3, which provided that the State of nationality had the right to exercise diplomatic protection on behalf of a national injured by another State, set forth a generally accepted principle and appeared to pose no problem.

64. Under article 4, paragraph 1, the “right” to exercise diplomatic protection, provided for in article 3, would become a “legal obligation” if there was a grave breach of a *jus cogens* norm, except in the cases listed in paragraph 2. On that point, he agreed completely with the arguments advanced by the Special Rapporteur in paragraphs 88 to 93 of his report. It seemed to him only natural that a State should have the duty to protect its own nationals abroad when their most basic rights were gravely breached.

65. Those were, basically, his preliminary comments on the draft articles under consideration.

66. Mr. KATEKA said that the report submitted by the Special Rapporteur had at least one great merit: it provided food for thought on a controversial issue, the complexity of which sprang partly from its links with the issues of State responsibility and human rights. To get a measure of that complexity, one only needed to look at the list in paragraph 43 of the report. He hoped that the Commission’s work would help to clarify those questions for the international community. Whatever abuses might arise as a result of diplomatic protection, its advantages clearly outweighed its disadvantages and that principle had not been invalidated by the development of human rights law, especially since, as the Special Rapporteur had quite rightly emphasized, there were no international instruments to

protect the rights of individuals abroad, except in relation to investments. It was also possible that States took diplomatic protection more seriously than complaints by private individuals to human rights bodies.

67. Turning to the draft articles themselves, he said that he approved in general of the contents of article 1, although he thought that paragraph 2 placed too much emphasis on the protection of non-nationals. In his opinion, that was not an issue to be raised in the first article, but one that should be dealt with at a later stage. On the other hand, he tended to agree with Mr. Rodríguez Cedeño about “functional protection”: if that issue was not raised in article 1, where the scope of the subject was defined, it would be difficult to come back to it later on.

68. Article 2 was the one that had aroused the most criticism. As the Special Rapporteur recalled in paragraph 48 of the report, the cases in which the protection of nationals had been used as a pretext to justify the excessive use of force were, unfortunately, only too numerous. The most shocking example was undoubtedly that involving the measures taken in 1902 by Germany, Great Britain and Italy against Venezuela, which had not paid contractual debts owed to nationals of those countries.<sup>12</sup> It was true that the Special Rapporteur had tried to limit the scope of the article by stipulating that force could be used only to rescue nationals who were “exposed to immediate danger”. However, as everyone knew, the use of force was prohibited by the Charter of the United Nations except in the case of self-defence, as provided for in Article 51, and it would be dangerous for the Commission to “legalize” it in any way at all for the purposes of diplomatic protection. On the whole, it would be better to delete that article, which had no place in such a draft.

69. With regard to article 3, he too was of the view that the right to exercise diplomatic protection should be left to the discretion of States. That article therefore seemed acceptable to him.

70. He had more reservations about article 4: it was quite normal that, when there was a grave breach of *jus cogens* norms, the right addressed in article 3 should become a duty and it should at least be explained in the commentary what was understood, in paragraph 2 (a), by endangering “the overriding interests of the ... people”.

71. In conclusion, he believed that only draft articles 1 and 3, which had been found generally acceptable, should be referred to the Drafting Committee and that it would be better to drop articles 2 and 4, which had no place in the draft.

72. Mr. HAFNER said there was no point in once again going into the theory of diplomatic protection, which had already been discussed at length when the preliminary report of the previous Special Rapporteur had been submitted at the fiftieth session.<sup>13</sup> He would therefore focus only on the report under consideration, in which the current Special Rapporteur fortunately took an approach that was both more pragmatic and more empirical than that of

<sup>12</sup> See *Yearbook . . . 1956*, vol. II, pp. 216–217, para. 228.

<sup>13</sup> See 2617th meeting, footnote 2.

his predecessor and which was based on a whole range of documents and factual information.

73. The basic idea expressed in article 1 was very clear: a State had the right to present a claim to another State for a wrongful act committed by the latter, even if it was not the State itself, but its national who had suffered the injury caused by that wrongful act. Obviously, that concept was based on the presumption that the State was an entity, a whole, that also encompassed its nationals. The link to State responsibility was quite clear, which meant that some terminology could be borrowed or, at least, that the terminology used in the two areas should be harmonized, as had been pointed out by Mr. Pellet and Mr. Tomka.

74. With regard to article 1, or rather the comments thereon by the Special Rapporteur, he wondered whether there was not some contradiction between paragraph 36 of the report, which referred to the protection of the interests of nationals provided for in article 5 of the Vienna Convention on Consular Relations, and paragraph 43, which cited Dunn's definition,<sup>14</sup> according to which Governments should only be able to take action on behalf of their nationals which was based on an assertion of an international obligation and which fell within the category of protection in the technical sense of the term. Dunn's definition was clearly narrower than that of the Convention and clarification on that point would be welcome.

75. As had been emphasized by several other speakers, article 2 gave rise to a number of major problems that the Commission could not evade indefinitely. The Special Rapporteur had very commendably tackled them head on. Nevertheless, it was inconceivable that States should be given a legal basis, within the framework of diplomatic protection, that would allow them to use force other than for self-defence, as provided for in Article 51 of the Charter of the United Nations. The notion of self-defence could not be stretched to cover also the protection of the nationals of a State in a foreign country. Everyone was aware of the deplorable situation of the hostages currently being held in the Philippines, but could one reasonably hope to improve the situation by giving the States of which they were nationals the right to intervene by force to obtain their release? That would be tantamount to authorizing the State of nationality to act against the wishes of the territorial State, at the risk of provoking a conflict between States with an escalation of violence. He could not therefore subscribe to the opinion expressed at the end of paragraph 59 of the report, according to which from a policy perspective it was wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which would permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse. Furthermore, he doubted whether such activities came within the meaning of acts of diplomatic protection, at least as those were defined by Dunn. In summary, he shared the opinion of previous speakers and former Special Rapporteurs that diplomatic protection should in no case imply the threat or use of force. Article 2 therefore had no place in the draft.

76. With regard to article 3, he would like the meaning of the term "unlawfully injured" in the original English text (the adverb "unlawfully" not being translated in the French text) to be made explicit, even though, according to the commentary, it apparently referred to an injury caused by an act that was unlawful under international law. It was perhaps not appropriate to keep the second sentence, which explained that the right to exercise diplomatic protection was of a discretionary nature, since some might argue that such a wording precluded States from enacting internal legislation that made that right obligatory in certain cases. In fact, it was rather the State to which a claim was addressed that was under the obligation to accept, through diplomatic protection, the presentation of a claim by another State for injury suffered by the latter's nationals. There was no need to dwell on the link between the State of nationality and its nationals; what was important was to specify under what conditions the requesting State could invoke diplomatic protection.

77. He had doubts about the usefulness of article 4. As had been stressed by previous speakers, a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved. Mr. Tomka had already asked what was understood by *jus cogens* in that context, but he would like to know exactly what was meant by the words "is able to bring" at the beginning of paragraph 1. Did they concern a legal or a factual possibility? And, if the violations committed were really grave, could diplomatic protection not be exercised even if it was possible to resort to a court or to the relevant international tribunal? Of course, that might have implications for the question of the exhaustion of domestic remedies, but, when the violations were serious, the important thing was obviously to be able to react quickly. Apart from that aspect, which would deserve further study, article 4 did not seem to offer much of interest.

78. He, too, agreed with the previous speakers who had recommended that only draft articles 1 and 3 should be referred to the Drafting Committee.

*The meeting rose at 1 p.m.*

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## 2619th MEETING

*Thursday, 11 May 2000, at 10 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. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-

<sup>14</sup> See Dunn, *op. cit.* (2617th meeting, footnote 6), pp. 18–20.