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Summary record of the 2619th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
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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,¹⁴ 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.

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-

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

Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka.

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

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI said that the first problem with the draft articles proposed in the first report of the Special Rapporteur (A/CN.4/506 and Add.1) was their scope as set out in article 1. There were three possible approaches to the concept of diplomatic protection. The first, described by Mr. Simma (2617th meeting) as the “everyday protection” provided by diplomatic missions and consular offices, was too narrow for the Commission’s purposes. He mentioned it, however, because of the Special Rapporteur’s remarks about the constitutions of some central and eastern European countries, including Poland’s, which enunciated the right of nationals to be protected by their States while abroad. But given the lack of other internal regulations concerning possible “local remedies”, as well as existing pre-constitutional practice, he was afraid that that constitutional convention would be too narrowly interpreted, namely as relating solely to such “everyday protection”.

2. The second approach to diplomatic protection was set out in article 1, where diplomatic protection could be associated, as had been recommended by Mr. Brownlie (*ibid.*), with a wider concept of admissibility of claims. Appropriate interpretation of the word “action” would be necessary in such a case. The article might be improved by bringing the wording into line with that used in the draft on State responsibility; the phrase “internationally wrongful act ... or omission”² had already been raised in that context.

3. In article 2, the Special Rapporteur proposed a much wider and riskier definition and scope of application of the draft, including “the threat or use of force” in the meaning of “action”. In the *Mavrommatis* case, PCIJ had ruled that the right way for a State to exercise diplomatic protection was to resort “to diplomatic action or international judicial proceedings” [see p. 12]. In paragraph 55 of his report, the Special Rapporteur acknowledged that the threat or use of force in the exercise of diplomatic protection could be justified only if it could be characterized as self-defence. But as pointed out by Mr. Economides (2617th meeting), the right to self-defence and the right to use force in self-defence were formulated in the Charter of the United Nations in a very precise and narrow manner. Given the overriding importance of the principle of the prohibition of the threat or use of force in modern international law, no additional exceptions should be contemplated. The question of the threat or use of force in situations provided for

in article 2 actually fell within another complex subject, that of the right of humanitarian intervention. In that connection, he appreciated the Special Rapporteur’s attempt to move in the direction of progressive development of the law.

4. However, Mr. Tomka was right to say (*ibid.*) that the Commission should first focus on the codification of existing international law and leave matters of humanitarian intervention, together with the possibility of the use of force, outside the scope of diplomatic protection. The concept of humanitarian intervention was still questioned in doctrine and in practice, and the Special Rapporteur himself had stated in paragraph 60 of his report that the issue of whether international law recognized a forcible right of humanitarian intervention fell outside the scope of the current study.

5. As to article 3, it seemed too early to reach definitive conclusions on the scope and nature of a right of diplomatic protection. The wording in regard to State discretion in exercising diplomatic protection could be developed beyond the limits set out in article 4, where it was associated exclusively with a grave breach of *jus cogens*. That was the proper place to reflect the emerging phenomenon referred to by Mr. Pellet as “international human rightism”. As the question of diplomatic protection was closely linked to that of the nationality of natural persons, it was worth bearing in mind that the legal nature of nationality had changed significantly in recent decades, from a prerogative of the State to an inherent human right of the individual. It had been duly reflected in the draft articles on nationality of natural persons in relation to the succession of States, adopted by the Commission on second reading at its fifty-first session.³ Consequently, the question of a right of nationals of a given State to its diplomatic protection should be reconsidered with a view to possibly further limiting the discretion of States in exercising that right. Lastly, he agreed with Mr. Hafner that the title should remain as it stood.

6. Mr. ROSENSTOCK said he welcomed the Special Rapporteur’s emphasis on strengthening support for human rights and the growing importance of the individual at the international level. The Special Rapporteur recognized that, although there had been marked improvements in the field of human rights and the international standing of the individual, help was needed from the instrument of diplomatic protection. Of course, the topic also included legal persons. Moreover, and the matter might become more delicate when the Commission came to consider article 4, the State in a position to assert diplomatic protection might not be the only State in a position to take action.

7. The question whether to retain the second paragraph of article 1 and whether the word “omission” should be mentioned were matters for the Drafting Committee. He did not think that the term “action” need give rise to metaphysical concerns.

8. Two issues arose with regard to article 2. One was whether it covered material which the Commission should encompass in its work on diplomatic protection

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

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

³ *Yearbook* . . . 1999, vol. II (Part Two), p. 20, para. 47.

and the other concerned the merits of the draft as presented. On the latter point, he believed that the Special Rapporteur was correct both in law and in terms of the view that States would take if their nationals' lives were at stake. References to paradigmatic rescue missions as being covered by some notion of waiver were unconvincing. Defence of dictators who dabbled in drug-running and harassment of legally present military personnel of another country did not make a persuasive case against article 2. The question on which it might be easier to reach agreement was that the ambit of the right to use force was not a matter necessary or useful for the Commission to determine in the context of the topic under discussion. He joined those who favoured deleting article 2 as being outside the Commission's area of concern.

9. Article 3 posed no substantive problems. He was sympathetic to what the Special Rapporteur was trying to achieve in article 4, namely to pressure States to protect the rights of their nationals more energetically. But when all the qualifiers were added up, and frankly they all seemed necessary, one arrived at a rough approximation of a phrase such as "States should do this or that". Perhaps a preamble and a declaration or a treaty which moved States in the right direction without creating more difficulties and confusion would be an appropriate way of addressing the problem and responding to the admirable effort to encourage States to do more. Among the reasons for hesitation in going beyond such a modest approach were the problems of drawing up a useful definition of a gross breach of a norm of *jus cogens*. He did not object to referring article 4 to the Drafting Committee or to an informal working group, but would not insist on that being done either.

10. Mr. ADDO said the bulk of the *lex lata* in the area of law under consideration was clearly a legacy from the international community of the past, when the international community had been much smaller than today. Much of the international law regarding diplomatic protection had come into existence when European and North American economic, social and political ideas had been spreading to other parts of the world.

11. The Special Rapporteur had gone too far in articles 2 and 4. They contained provisions that did not fall within the Commission's mandate and he would not be sorry to see them deleted.

12. In his opinion there was a need for rules regarding diplomatic protection, a subject which was as relevant today as ever. The topic was closely related to that of State responsibility, and the Commission was still discussing the concept of injured State as regards State responsibility. The injured State also featured in the topic under discussion. Nationality, too, was a predominant aspect of diplomatic protection; indeed, the other name given to diplomatic protection was nationality of claims.

13. Where a wrongful act was directed against the State, the question of nationality did not arise. On the other hand, where a wrongful act was committed against a national of the injured State, the position was that the injured State had the right of "diplomatic protection" of all its nationals. Therefore, where a national of a State was subjected to mistreatment abroad contrary to international law, the

State could take up his case with the State in breach. Whether or not it did so was a matter for its discretion alone. There was no duty under international law requiring the injured State to do so. Consequently, he was opposed to article 4. On that score he also disagreed with the Special Rapporteur's views set out in paragraph 87 and with those of Orrego Vicuña cited in paragraph 90.⁴ The attempt to model article 4 on those views was unacceptable.

14. Once the State took up the case of its national, the claim became that of the injured State itself, the reason being that, although a trend was developing in international law to grant limited access to individuals, particularly in the field of international human rights, the general principle still held that individuals could not initiate and maintain an international claim.

15. The State's right of "diplomatic protection" in international law was confined to its own nationals. He was therefore rather hesitant about article 1, paragraph 2: extending diplomatic protection to non-nationals negated that basic principle. According to article 1, paragraph 2, that would take place in exceptional circumstances provided for in article 8, a provision which would generate much debate. Since article 1, paragraph 2, had been made subject to article 8, he was opposed to sending it to the Drafting Committee until article 8 was discussed. If article 8 was deleted, then article 1, paragraph 2, would have to be deleted too. Article 1, paragraph 1, however, could be referred to the Drafting Committee.

16. Since statelessness was the negation of nationality and nationality was the basis of diplomatic protection, it was not clear how the draft could accommodate a provision on stateless persons or refugees. Could any State put the diplomatic protection cloak around a stateless person or refugee in order to espouse that person's cause? Would an international tribunal grant *locus standi* to a State in such a case? Would legal residence and the effective link suffice as alternatives to the nationality requirement? As the right of diplomatic protection was limited to the State's own nationals, the question arose as to what defined nationality. That was a matter for municipal law; international law had no bearing on the question.

17. He did not agree with Mr. Pellet (2618th meeting) that nothing should be sent to the Drafting Committee or that the whole report should be revised.

18. Mr. HE said that, undeniably, diplomatic protection had often been abused and the stronger States were in a better position to exercise it. But as long as it could not be replaced by better remedies, it must be retained, because it was badly needed. In any case, its advantages outweighed its disadvantages.

19. Several points in the introduction in chapter I of the report called for further clarification. First, it had been argued that aliens, like nationals, enjoyed rights simply as human beings and not by virtue of nationality. That was true when the alien was treated as a subject with international rights. As the position of the individual in international law was open to question, the individual's remedies

⁴ See 2617th meeting, footnote 14.

were limited. On the other hand, the State being the dominant factor in international relations, the remedy it provided must be the most effective.

20. Secondly, a related question was whether the alien, enjoying certain rights under international law, could fend for himself when abroad. The answer was that, if his remedy was restricted, it was for the State of nationality to assume its right and act on his behalf.

21. Thirdly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁵ cited in paragraphs 27 and 28 were excellent illustrations of the stark fact that States did not want to extend rights to migrant workers. Regarding aliens, although they might have rights under international law as human beings, they had no effective remedies under international law. The only avenue open to them was to ask for the intervention of their State. For all those reasons, diplomatic protection remained an important tool for providing protection to nationals abroad.

22. As to article 1 and the meaning of the term “action”, it was surprising to find in paragraph 43 that “diplomatic protection” encompassed the “use of force”. In contrast, the previous Special Rapporteur had stressed in paragraph 11 of his preliminary report⁶ that States could not resort to the threat or use of force in the exercise of diplomatic protection.

23. As for article 2, he shared the view of other members that legitimizing the use of force in enforcing diplomatic protection was contrary to the basic principles of the Charter of the United Nations. The issue lay outside the Commission’s mandate for the topic. With reference to article 4, in view of the uncertainties and the dearth of State practice, it would be better not to take up the problem, which was not closely tied in with the topic under consideration.

24. He agreed that articles 1 and 3 could be referred to the Drafting Committee. The term “diplomatic protection” had long been established and so the title should not be changed. However, it seemed necessary to explain the difference between diplomatic protection and certain forms of protection of diplomatic and consular agents provided for in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, either in the introductory part or in a footnote.

25. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur’s first report was impressive in dimensions, but that one might legitimately ask whether it succeeded in marrying the conflicting criteria of quantity and quality. With regard to the structure, it was surprising to see that the report commenced with not one but two introductions. The bulk of the report was devoted to eight draft articles and extensive commentaries thereto, which purported to address the substance of the subject but often merely diluted it. Paragraph 9 (a) of the report promised an intro-

duction in which the history and scope of the topic would be examined. Yet the historical overview confined itself to the period between the two world wars. The assumption was that the subject was familiar to all—an assumption that was highly questionable in view of the difficulties some States had experienced in distinguishing between diplomatic protection and protection of diplomatic staff. It was questionable whether the report would assist the Sixth Committee by making the topic more accessible.

26. Unlike his predecessor, the current Special Rapporteur sought to provide an overview of diplomatic protection from which functional protection was excluded, as was the abundant jurisprudence concerning agents and officials of international organizations, which properly fell within the scope of diplomatic protection. Nor did that overview cast any light on the justification for dealing identically with those regimes in which the initial victim had been a natural person and those in which he or she had been a legal person.

27. A further difficulty was posed by the fact that, unlike his predecessor, and in a departure from the classical conception, the Special Rapporteur proposed a new basis for the concept, as an institution for the protection of human rights. Violation of a fundamental human right or freedom could indeed be one of the situations in which a State took up the cause of an individual, but the violation must also constitute an internationally wrongful act attributable to another State. It seemed somewhat rash to assimilate two categories, the first of which—a subject of international law—constituted a status, whereas the second—human rights—consisted of a regime or group of regimes.

28. The subject of diplomatic protection would remain inaccessible because, as he had already intimated, the historical review of the subject was confined to the inter-war period. The absence of any discussion of developments after the Second World War implied that after 1945 diplomatic protection had become a thing of the past. In fact, there was a considerable body of subsequent case law: the *Nottebohm*, *Interhandel*, *Barcelona Traction* and *ELSI* cases, to name but a few, not to mention the *Diallo* case currently pending before ICJ. Why did the report make no mention of those cases, which had contributed substantially to the consolidation of the traditional concept of diplomatic protection? Given its continuing topicality, the phenomenology of the subject should be clarified from two perspectives: first, as a system, and secondly as a regime.

29. Viewed as a system, diplomatic protection involved at least three major categories of actor: States and international organizations; individuals and economic agents; and judges and international arbitrators. The latter category highlighted the traditional role of diplomatic protection as a mechanism for the peaceful settlement of disputes between nations. Hence there was a conflict between diplomatic protection and the use of force, two mutually incompatible concepts. An instrument diametrically opposed to peace could hardly be put to the service of peace. Article 2 should thus be discarded, a point to which he would return.

⁵ Ibid., footnote 18.

⁶ Ibid., footnote 2.

30. As a scenario, diplomatic protection was also strongly influenced by the presence of economic interests, which imbued the claim with content and enabled the damages claimed by the State to be evaluated. In that respect, diplomatic protection was consubstantial with the international responsibility of States.

31. Viewed as a regime, diplomatic protection was universally acknowledged as a valuable tool functioning on the basis of rules that were already established and thus required codification, rules governing the process whereby a domestic matter was elevated to the status of an international dispute. Those rules also concerned the purpose of diplomatic protection, namely the re-establishment of the rule of law in the international legal order. Both categories of rule concerned the procedures for achieving that end. Were they only secondary, procedural rules? That raised the question of the relevance of the distinction drawn between primary and secondary rules in the draft articles proposed by the Special Rapporteur.

32. In general terms, articles 1 to 4 suffered from three besetting sins. First, they mixed categories. Article 1 bore a title which did not reflect its content, while articles 2 to 4 left the reader groping for his bearings amid a disorderly jumble of categories. Secondly, at the structural level, the concepts of “scope” and “definition” did not correspond. Articles 2 to 4 were based on the undefined notion of “action”, a fact which went some way towards accounting for their incompatibility with general international law and with the nature and spirit of diplomatic protection.

33. Thirdly, the draft articles suffered from a commendable but misdirected desire for innovation. The Commission was mandated to work towards the progressive development of international law. It had no mandate to work towards the excessive development of international law, which would be tantamount to a regressive step, leading the international legal order into uncharted territory. Article 2 was a perfect illustration of that danger, and for reasons already given by other members, was wholly unacceptable. As to specifics, article 1, besides confusing definition and scope, was equally hard to accept because of its treatment of injury to persons and to property from the same standpoint. In terms of mobilization of diplomatic protection, the one could come into play independently of the other, thereby stripping protection of its diplomatic nature. Articles 3 and 4 contradicted one another fundamentally, in that if diplomatic protection was a right of the State, or of the individual, it could not be a right of the international community, or be put to the service of the international community.

34. For all those reasons, he was of the view that none of the first four draft articles was ready to be referred to the Drafting Committee. It had been premature for the Special Rapporteur to present draft articles on a subject that was allegedly familiar but whose parameters had not been defined. Demarcation of the subject called for informal consultations. Only thereafter might it be appropriate to draft a preliminary report.

35. Mr. CANDIOTI said that the first report of the Special Rapporteur and the proposals for draft articles contained therein offered a stimulating basis for debate. In dealing with diplomatic protection, the Commission must have regard to certain premises already established in its

plenary discussions and working groups, namely: retaining an approach based on customary law; codifying secondary rules of international law relating to diplomatic protection, without eschewing consideration of primary rules to the extent that they were useful for the elucidation of certain aspects of the topic; considering diplomatic protection as essentially a discretionary right of the State; and, lastly, taking into account the growing recognition and protection of rights of the individual in the contemporary international legal order.

36. With regard to the introduction in chapter I of the report, he agreed with the Special Rapporteur that the fiction on which the right of the State to exercise diplomatic protection was based, whereby the injury to one of its nationals constituted an injury to the State itself, permitting it to claim on behalf of the individual, as well as the fiction formulated by PCIJ in the *Mavrommatis* case, was a useful legal recourse that did not deserve the criticisms to which it had been subjected.

37. He also agreed with the Special Rapporteur that, while contemporary international law had developed effective regional or other institutions to safeguard the rights and interests of the individual, diplomatic protection was far from obsolete. On the contrary, it continued to be a convenient general remedy available to States to safeguard the rights and interests of their nationals abroad.

38. It was essential for article 1 to begin by describing, and indeed defining, the institution of diplomatic protection, so as to distinguish it from other institutions such as protection of diplomatic staff or consular aid to nationals abroad, thereby avoiding any confusion at the outset.

39. In that purely technical sense, diplomatic protection was one of the means of making the international responsibility of States effective. Article 1 already contained a definition of the components of the subject, although the drafting might perhaps be improved. It was a procedural recourse by one State against another, whereby the claim of a natural or legal person was transformed into an international legal relationship. On the question of extension of diplomatic protection to non-nationals, Mr. Addo had made some interesting remarks which would need to be taken into account when considering article 8.

40. Agreeing with the objections raised by various members to the formulation of article 2 as proposed by the Special Rapporteur, he said that the prohibition of the threat or use of force in the exercise of diplomatic protection should be clear and categorical. The draft articles should not include any exceptions that might cast doubts on that ban. Circumstances exempting a State from responsibility for an act of force might possibly encompass imminent danger or a state of necessity, matters which should be regulated by the draft on State responsibility. Nevertheless, in the context of diplomatic protection, any rule permitting, justifying or legitimizing the use of force was dangerous and unacceptable.

41. As the Special Rapporteur had pointed out, since the formulation of the Drago doctrine⁷ in 1902 and the Porter

⁷ See 2618th meeting, footnote 12.

Convention, the prohibition of the threat or use of force had been one of the most notable aspects of the development of the right of diplomatic protection, which had certainly furthered the development of general international law. It had culminated in the rule embodied in Article 2, paragraph 4, of the Charter of the United Nations.

42. For those reasons, he was not in favour of completely deleting article 2. The notion expressed in the *chapeau* ought to be maintained somewhere in the draft, as it was a significant element in the development of customary international law on diplomatic protection. The remainder of the wording proposed by the Special Rapporteur, as from “except in the case of ...” should, however, be expunged, as the majority of the members of the Commission had indicated. It should be remembered that in article 50 (Prohibited countermeasures) of the draft articles on State responsibility, subparagraph (a) expressly forbade a State to resort by way of countermeasures to the threat or use of force as prohibited by the Charter of the United Nations. Nevertheless any attempt to delete the first part of the first sentence in article 2 as drafted by the Special Rapporteur might be misinterpreted at a time when there was a growing tendency to use force in fringe cases.

43. The characterization in article 3 of diplomatic protection as a right of a State reflected a rule of customary international law recognized by doctrine and jurisprudence, although the wording could probably be improved along the lines suggested by Mr. Hafner, Mr. Pellet (2618th meeting) and Mr. Tomka (2617th meeting).

44. On the other hand, caution was required in respect of article 4, where the Special Rapporteur had proposed that that discretionary right should become an obligation if injury resulted from a grave breach of a *jus cogens* norm. The Special Rapporteur contended that the inclusion of that obligation would be an exercise in progressive development reflecting the recent trend to recognize the right of a national to diplomatic protection. Although the concern to promote the defence and protection of human rights was noteworthy, it would seem inadvisable to establish such an obligation for States, since the concept and scope of *jus cogens* were for many people controversial and imprecise and there were few references to such an obligation in international doctrine or jurisprudence.

45. At all events, as other members had indicated, in codifying the subject the Commission should confine itself to the strictly technical concept of the institution. The ambiguity of the terms “protection” and “diplomatic” should not lead it to confuse notions and venture beyond its mandate. Article 4 should therefore be deleted.

46. Mr. GOCO, requesting clarification, asked if Mr. Candioti was proposing that the first part of article 2, i.e., without the exceptions, should be retained.

47. Mr. CANDIOTI confirmed that that was so. The principle established in the first sentence ought to be upheld. It was also embodied in article 50, subparagraph (a), of the draft on State responsibility. Hence it was important to include the principle in the draft on diplomatic protection.

48. Mr. PELLET said that the principle in question was much more general, a principle that concerned not just diplomatic protection in particular, but also countermeasures. He queried the wisdom of burdening the draft on diplomatic protection with general rules on responsibility.

49. While he largely agreed with the wording of the *chapeau* of article 2, the inclusion of such rules would mean that the Commission was entering a problematical area different to the one the Special Rapporteur seemed to have in mind. It would be tantamount to saying that it was prohibited to resort to certain methods to implement diplomatic protection; in couching the matter in negative terms it would be logical also to counterbalance such a statement by specifying permissible means for exercising diplomatic protection.

50. If Mr. Candioti’s suggestion was accepted, the draft articles might be unbalanced. Personally he was in favour of the substance of the text, but it was questionable whether it was necessary to introduce general rules on international responsibility in the draft on diplomatic protection. If that was done, it would be necessary to specify the lawful means by which diplomatic protection could be exercised, in other words by diplomatic or judicial channels or by all the means used for the settlement of disputes.

51. Mr. BROWNLIE said that, at first, he had been attracted by Mr. Candioti’s apparently logical proposal, but on further consideration he was against including the first proposition in article 2 in any form. The Commission should adopt the categorical rule that the use of force did not fall within the scope of diplomatic protection. Acceptance of Mr. Candioti’s simple proposition would still entail a whole series of confusions and difficulties and much time would be spent on vainly trying to resolve them. He therefore agreed with Mr. Pellet.

52. Furthermore, the statement that the threat or use of force was prohibited as a means of diplomatic protection was confusing because, in descriptive or operational terms, the use of force to protect nationals or pursue claims was a form of self-help and not a form of diplomatic protection at any level, either legal or factual. For that reason, even a truncated version of article 2 would create difficulties.

53. Mr. ECONOMIDES disagreed with Mr. Brownlie and Mr. Pellet with regard to Mr. Candioti’s proposal. Personally he saw no reason for confusion if the provision were clearly worded to the effect that the use of force for the purposes of diplomatic protection was completely prohibited. If no such provision existed, potentially dangerous ambiguity might exist on that point. A small minority of writers maintained that force might be permissible to rescue nationals in danger. It was time to put an end to that theory. A provision like that proposed by Mr. Candioti was indeed required in the draft. Perhaps it should be recast to make it clearer. It did not necessarily have to take the form of article 2, but could be incorporated in the preamble or placed somewhere else in the text. Moreover, the first Special Rapporteur on the topic of State responsibility, Garcia

Amador,⁸ and the previous Special Rapporteur, Mr. Bennouna, in his preliminary report,⁹ had both expressed their views to that effect. He therefore strongly supported Mr. Candioti's proposal.

54. As Mr. Pambou-Tchivounda had forcefully pointed out, the notion of diplomatic protection was inconsistent with the idea of using force. Diplomatic protection was a peaceful institution and had been created in order to avoid possible conflicts. It was therefore essential to state that fact quite plainly.

55. Mr. GALICKI said he was in a quandary over Mr. Candioti's proposal. As far as the substance was concerned, he was fully in favour of the wording. Nevertheless, given the views expressed by some members, it might be unwise to include such a categorical statement in the draft article, because it went beyond the Commission's mandate. Perhaps the precedent set in the *Mavrommatis* case could be followed by stating, when the scope and concept of diplomatic protection were defined, that the "action" referred to in article 1 meant diplomatic measures or international judicial proceedings. The Drafting Committee might consider that possibility. In order to avoid the difficulties mentioned by some members, the use of force should be excluded by specifying the acceptable means of exercising diplomatic protection.

56. Mr. LUKASHUK said that, while he understood the sentiments behind Mr. Candioti's proposal, sentiments he fully shared, he was of the opinion that the resultant legal construction would be very strange. Diplomatic protection, like any international act of a State, should comply with the rules of international law. Article 2 dealt with only one principle. Why was it not possible to say that diplomatic protection must not violate the principle of non-interference in internal affairs? That wording would take the principle in question into account. Mr. Pellet's proposal therefore seemed perfectly logical. If reference was made to unacceptable means, acceptable methods should also be enumerated. In the subsequent discussion of diplomatic protection, it might prove possible to reconsider that issue. Since views diverged on article 2, it should be completely deleted.

57. Mr. GOCO, pointing to the fact that past events had presumably been the reason for including a clause precluding the threat or use of force, said that a text dealing with diplomatic protection should indeed incorporate a clear statement of that principle.

58. Mr. DUGARD (Special Rapporteur) explained that article 2 had been inserted because of difficulties relating to the term "action" in article 1. Classical writers had considered that the term embraced all means, including the use of force, but of course Borchart's views predated the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) and the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations.

59. He was troubled by the body of opinion which argued that the right of self-defence encompassed the defence of nationals. In the debate, little attention had been paid to that school of thought which included two distinguished former members of the Commission. It would seem that the upshot of the debate was that the term "diplomatic protection" did not embrace the use of force in any circumstances and fell outside the Commission's mandate. Perhaps he should make it clear in the commentary that the term "diplomatic action" did not extend to the use of force. The Commission had spoken with some authority on the subject. The consensus view was plainly that it was impossible to regard the use of force as a form of diplomatic protection of nationals.

60. Mr. LUKASHUK said he endorsed the Special Rapporteur's very constructive proposal.

61. The CHAIRMAN said that several proposals had been made with regard to the prohibition of the threat or use of force. The first was that the very purpose of diplomatic protection was to avoid force, even if forcible means had often been employed prior to the adoption of the Charter of the United Nations. The link between diplomatic protection and State responsibility appeared to lie in the implementation of State responsibility. Diplomatic protection logically formed part of State responsibility. That being so, it had been accepted that, at least as far as countermeasures were concerned, the use of force was prohibited. Mr. Candioti's suggestion therefore seemed to be of relevance.

62. When considering a traditional institution like diplomatic protection, it had to be remembered that the hostility towards it had been caused by the abusive use of force in the past. Perhaps the solution would be to adopt the course proposed by Mr. Galicki and to make it clear that diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or property of a national who had been threatened with or had suffered injury in another State. In that way, force was excluded without recourse to the wording in the first sentence of draft article 2. Whether the use of force to protect a national formed part of self-defence was a matter that could be debated at length. A constructive solution worth considering might consist in deleting the term "action" from article 1 and instead stating that diplomatic protection meant the initiation of a procedure for the peaceful settlement of a dispute.

63. Mr. Sreenivasa RAO said that, by placing the question of diplomatic protection in the context of human rights, the Special Rapporteur had broadened the Commission's focus on the field it had to study. The Special Rapporteur had shown an awareness of past abuses. Nevertheless, his view was that, although the consolidation of human rights had gradually enhanced the protection of the individual, lacunae in that field meant that the institution of diplomatic protection had its utility and should be strengthened. It was an opinion that deserved close scrutiny. Mr. Baena Soares had been right to hold that a balanced instrument of diplomatic protection was required.

64. The topic before the Commission had been carefully considered by the Working Group established at the

⁸ See 2617th meeting, footnote 7.

⁹ *Yearbook... 1998*, vol. II (Part One), document A/CN.4/484, para. 11.

fiftieth session which had reached certain conclusions.¹⁰ Should the Special Rapporteur not pursue his study of the question within the ambit of those conclusions? Should he not confine himself to customary international law? There were many grey areas within that very traditional context that would present the Commission with many opportunities to contribute.

65. The second conclusion reached by the Working Group, namely that the Commission should deal only with secondary rules, was a very interesting proposition, which was also encountered in the topic of State responsibility. What was the secondary rule at issue when one spoke of limitations on the exercise of diplomatic protection? It was impossible to categorize those limitations as secondary rules. A strict dividing line between primary and secondary rules was not, therefore, entirely possible. Sometimes such a division merely served as an excuse for not answering difficult questions. Thorny issues had nonetheless to be addressed and there was surely room for flexibility.

66. It was unrealistic to try to complete consideration of the topic during the current quinquennium, since the issues involved needed more careful reflection by the Special Rapporteur himself and by all members of the Commission. The Sixth Committee's debates on the subject indicated that any attempt to rush through a draft on diplomatic protection would face difficulties. What was needed was not strengthening of the machinery for diplomatic protection but careful structuring of a balanced instrument.

67. Paragraph 25 of the report stated that to suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provided individuals with effective remedies for the protection of their human rights was to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The Special Rapporteur was saying that the law of human rights was still evolving, many gaps remained, and the kind of protection needed for the individual was not provided. That was a point well taken, but one that should be addressed in the field of the protection of human rights, not with the limited means of diplomatic protection, which is only an instrument to pursue established rights. As other members had said, the Commission had quite enough to do within the realm of diplomatic protection without trying to solve problems that arose in the field of human rights. Those problems were much more complicated and fundamental, and best left to forums meant to deal with them. It was quite a different matter that where due process was denied and no effective remedy provided, diplomatic protection was required.

68. Article 1 said that "diplomatic protection means action taken . . .". He would have thought that it was first and foremost a right, and indeed, article 3 designated it as such. Since the action was a consequence of the right, the right should be mentioned first, rather than the other way round. Diplomatic protection should be construed as a right, not a duty, because discretion accompanied the exercise of a right, whereas duties had to be performed and no discretion was involved.

69. It was contended that injury caused by a wrongful act at the domestic level did not give rise to international responsibility. If a dichotomy did indeed exist between national and international wrongs, then to extend diplomatic protection for injuries at the international level alone was to limit the operation of the mechanism for redressing wrongs. Was due process of law a problem of international responsibility or one of the implementation of domestic law? He was looking for some insight. The question of whether injury itself could be qualified as lawful or unlawful also had to be addressed.

70. Article 4 said that the State had a "legal duty" to exercise diplomatic protection but that that duty could be exercised only upon a request by the injured person. Therein lay a contradiction: if the State had a duty, then it had to perform it—otherwise it was committing a wrongful act. The report cited Orrego Vicuña¹¹ to indicate that a domestic remedy must be available to the individual concerned when the State of nationality did not choose to exercise diplomatic protection. But if the problem was one of State responsibility, was lack of performance also a wrongful act and, hence, an international problem? Hence the need to envisage diplomatic protection as a right to be exercised by way of discretion and infringement thereof could be the subject of an action by the individual against his or her own State in the domestic courts. To go further than that would require an examination of conditions which could trigger an international action if a State did not defend the rights of its own nationals.

71. In article 4, the "request" from the injured persons was linked exclusively to a grave breach of *jus cogens*, but that formulation radically diminished the scope of the right to diplomatic protection. It implied that a State could intervene only when *jus cogens* was involved. The intention was perhaps that, when a rule of *jus cogens* was breached, a State should intervene regardless of the circumstances, and indeed more effectively and readily than in other situations. The formulation was also required to be contrasted with the principles of State responsibility under which, if *jus cogens* was affected, not only the State of nationality, but all States, had the right and the duty to protect the individual.

72. Article 4, paragraph 3, stipulated that "States are obliged to provide in their municipal law for the enforcement" of a right of the individual. There, too, the Special Rapporteur was approaching the material from a human rights matrix, consisting of the duty of the State and the right of the individual. It should, however, be viewed from the standpoint of diplomatic protection: the right of the State, involving discretion, to protect its nationals in the event of injury.

73. The report raised so many interesting ideas that he could not touch on them all. The very mention of *jus cogens* in the context of diplomatic protection was so intriguing that it was frustrating to see only one short passage devoted to it (para. 89) and no explanation given as to what kind of rights under *jus cogens* were involved. If article 4 was to be retained, much more clarification and substantiation would be required.

¹⁰ See 2617th meeting, footnote 22.

¹¹ *Ibid.*, footnote 14.

74. Another interesting question was the extent to which the individual could pursue his own claims while exercising simultaneously the right to diplomatic protection. The precise point at which the State should exercise the right of diplomatic protection, and if it did, the extent to which the individual continued to be a player in the game, definitely needed further attention. The Draft Convention on the International Responsibility of States for Injuries to Aliens, by Harvard Law School¹² suggested that the State's claim should be given priority. Did that mean that the national's claim would no longer be addressed, or if it was, that it would no longer be the focus of resolution of claims involved? Again, the interrelationship of two claims that could run concurrently was not made clear—particularly in the case of the State that had to address and remedy such claims. Principles must be developed on those issues, which formed a legitimate part of the exercise of diplomatic protection.

75. Tempted by Mr. Candiotti's proposal concerning article 2, he nonetheless endorsed the general sentiment that it should be deleted, and thought that article 4 should likewise be removed. He was open-minded as to whether the remainder of the draft should be referred to the Drafting Committee or held in abeyance pending further work by the Special Rapporteur. He wished to thank the Special Rapporteur for providing an opportunity to ponder on a problem that was often tacitly acknowledged but never given in-depth consideration.

76. Mr. LUKASHUK said there was only one point with which he wished to take issue, in Mr. Sreenivasa Rao's comments, even though it had been expressed, not categorically, but as a question. The draft articles said that only internationally wrongful acts provided the basis for diplomatic protection, but Mr. Sreenivasa Rao suggested that breaches of national law could do so also. In his own view, unless the rules of international law were infringed, there was no basis for diplomatic protection. The alternative would be unrealistic and unacceptable: foreign Governments would be able to monitor compliance with the law in other States. For instance, a foreign Government would be able to intervene if the police in a given country imposed an unduly heavy fine.

77. Mr. Sreenivasa Rao had also inquired about the distinction between lawful and unlawful injury. Quite simply, if Mr. Sreenivasa Rao had his appendix removed, that was lawful injury, whereas if a miscreant stabbed him, that was unlawful injury.

78. Mr. HAFNER said he would try to respond to Mr. Sreenivasa Rao, even though he regarded himself as someone who asked, rather than answered, complex questions. Concerning the definition of injury, there appeared to be general agreement that article 1 must be better drafted, for the matter at hand was definitely injuries under international law, not injuries under domestic law. As to whether the breach of domestic law could entitle a State to exercise the right of diplomatic protection, he agreed with Mr. Lukashuk but thought a compromise could be reached that such a breach could entail denial of due process. If domes-

tic law was breached in respect of an alien, for example, and no redress was provided in the national courts, that should give rise to injury under international law. He was hesitant to go into the definition of injury under international law in the context of diplomatic protection, however, as it was something that could be discussed *ad infinitum*.

79. Mr. Sreenivasa Rao had said that diplomatic protection must be set out in article 1 as a right, a view he shared. Mr. Sreenivasa Rao had further indicated, however, that the element of discretion must be present. Yet if diplomatic protection was seen as a right, was not discretion an automatic consequence? There was no need to emphasize the right's discretionary character.

80. Mr. PELLET, referring to the points made by Mr. Hafner, said the general problem under diplomatic protection was not denial of due process, which was clearly an internationally wrongful act that could give rise to diplomatic protection, but exhaustion of domestic remedies, which was a broader issue than denial of due process. Diplomatic protection could be triggered even in the absence of denial of due process, and focusing on denial of justice would involve the primary rules.

81. The "discretionary" element in the right of diplomatic protection might pose some problems in the context of French law. It was different from arbitrary power. Discretion normally meant that a choice could be made among a broad range of alternatives, but the choice had to be made in accordance with the law. That was the basis for the difference between a law-abiding State and a dictatorial one. In French law, however, as a last vestige of the absolute authority vested in the monarch the State had arbitrary, not discretionary, powers in all decisions relating to the exercise of diplomatic protection. The decisions were in no way subject to judicial control, and the State was bound by no rules whatsoever. He was not proud of that fact, for it put France at the opposite end of the spectrum from the eastern European countries, where, apparently, the exercise of diplomatic protection was more or less compulsory.

82. Mr. GAJA noted that some members had adduced the need for a link between international responsibility and diplomatic protection. The link should not necessarily be understood as making the commission of a wrongful act a condition for diplomatic protection. Rather, diplomatic protection related to an internationally wrongful act and could also be used in order to prevent a wrongful act from taking place. If its nationals risked undergoing torture in a foreign country, a State had every interest in taking diplomatic action and making a claim so as to avert the torture and prevent the breach of an obligation.

83. Mr. GOCO, referring to the term "discretionary", said that PCIJ in its judgment in the *Mavrommatis* case used the word "entitled", which implied that a right was involved but that that right could be waived or a State could choose not to invoke it. In other words, the case accorded the State discretion in the exercise or non-exercise of the right to diplomatic protection.

84. Mr. Sreenivasa RAO welcomed the way Mr. Hafner had responded to the question raised by Mr. Lukashuk about injury. Certainly, what was meant by injury at the

¹² Reprinted in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", *American Journal of International Law* (Washington, D.C.), vol. 55 (July, 1961), p. 548.

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).