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Summary record of the 2714th meeting

Topic:
Diplomatic protection

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weak. The third test, a combination of the first two, under which local remedies offered no reasonable possibility of an effective remedy, was, in his view, the one that should be preferred.

38. In support of his position, he cited circumstances in which local remedies had been held to be ineffective or futile: where the local court had no jurisdiction over the dispute, for example, in the *Panevezys-Saldutiskis Railway* case considered by PCIJ (para. 38 of the report); where the local courts were obliged to apply the domestic legislation at issue, for example, legislation to confiscate property (para. 40 of the report); where the local courts were notoriously lacking in independence (the *Robert E. Brown* claim, para. 41 of the report); where there were consistent and well-established precedents that were adverse to aliens (para. 42 of the report); and where the respondent State did not have an adequate system of judicial protection (para. 44 of the report). Those examples lent support to the third test, which required the courts to examine the circumstances of the case, including the independence of the judiciary in the respondent State, the ability of the local courts to guarantee a fair trial and whether there were precedents adverse to injured aliens. The Commission should therefore select the third test.

39. Article 14, subparagraph (e), which stated that there was no need to exhaust local remedies where the respondent State was responsible for undue delay in providing local remedies, was supported in various codification efforts, human rights instruments and judicial decisions, such as the *El Oro Mining* and *Interhandel* cases (para. 97 of the report). Nevertheless, that exception to the exhaustion of local remedies rule was a bit more difficult to apply in complicated cases, particularly those involving corporate entities. It could be subsumed under the exception set out in article 14, subparagraph (a), but it deserved to be retained as a separate provision as a way of serving notice on the respondent State that it must not unduly delay access to its courts.

40. Finally, article 14, subparagraph (f), which stated that local remedies did not need to be exhausted where the respondent State prevented the injured person from gaining access to its institutions which provided local remedies, was relevant in contemporary circumstances. It was not unusual for a respondent State to refuse an injured alien access to its courts on the grounds that safety could not be guaranteed or by not granting an entry visa. Human rights jurisprudence corroborated the proposition.

41. He looked forward with interest to hearing the comments of members of the Commission.

42. Mr. PELLET asked why article 14 was being introduced in such a piecemeal fashion and independently of article 15 (burden of proof), which was by no means unrelated to subparagraphs (a), (e) and (f) of article 14. He for one could not review those provisions without referring to article 15.

43. Mr. DUGARD (Special Rapporteur) said he thought that the approach he had chosen was the best. The matters dealt with in article 14 (a), (e) and (f) (futility, undue de-

lay and denial of access) were different from those dealt with in article 14, subparagraphs (b), (c) and (d) (waiver and estoppel, voluntary link and territorial connection). If the members of the Commission wished to await his introduction of article 15 before speaking on the topic, he would go along with that, however.

44. The CHAIR said that it might be advisable for the Special Rapporteur to go further with the presentation of his report.

45. Mr. SIMMA said that he had no problem with the fragmented approach to the presentation of the report but agreed with Mr. Pellet that the question of burden of proof was pertinent with regard to the questions of futility, undue delay and frustration of access to the courts. It would be artificial to deal separately with subparagraphs (a), (e) and (f) of article 14 only to return to them when considering article 15. All those provisions should be examined together. Subparagraphs (b), (c) and (d) of article 14 had nothing to do with the burden of proof.

46. Mr. DUGARD (Special Rapporteur) said that subparagraphs (b), (c) and (d) of article 14 could be considered separately from subparagraphs (a), (e) and (f) of the same article and that he was prepared to introduce article 15 at the next meeting.

Organization of work of the session (*continued*)

[Agenda item 2]

47. Mr. CANDIOTI (Chair of the Planning Group) announced that the Planning Group would consist of the following members: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Tomka and Mr. Kuznetsov (member *ex officio*).

The meeting rose at 12.50 p.m.

2714th MEETING

Thursday, 2 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário

Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Tribute to the memory of Paul Szasz

1. The CHAIR said it was his sad duty to announce the unfortunate news that Paul Szasz, colleague and friend of many members of the Commission, had passed away.

At the invitation of the Chair, the members observed a minute of silence.

Organization of work of the session (continued)

[Agenda item 2]

2. The CHAIR announced that the Commission had been congratulated on its work by Mr. Sergei Ordzhonikidze, Under-Secretary-General, Director-General of the United Nations Office at Geneva, and by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel. The Commission's Planning Group had made progress during its first meeting but had not finished its work, in particular with regard to choosing a new topic in addition to those of the responsibility of international organizations and international liability for injurious consequences arising out of acts not prohibited by international law. He encouraged members of the Commission who were not members of the Planning Group to consider participating in the selection of the new topic, and, to that end, to study the annex to the report of the Commission to the General Assembly on the work of its fifty-second session,¹ which contained the list of potential topics together with brief summaries of what they could contain.

Diplomatic protection² (continued) (A/CN.4/514,³ A/CN.4/521, sect. C, A/CN.4/523 and Add.1,⁴ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPporteur (continued)

3. Mr. DUGARD (Special Rapporteur), continuing with the presentation of his third report (A/CN.4/523 and Add.1), said that draft article 14, subparagraphs (a), (e) and (f), dealt with futility or ineffectiveness, in other

words, circumstances in which a State was not required to exhaust local remedies, for instance, when local remedies were obviously futile, when they offered no reasonable prospect of success or when there was no reasonable possibility of an effective remedy before the courts of the respondent State. Members of the Commission had been urged to consider those three circumstances in order to decide which best gave effect to the futility or ineffectiveness rule. His own preference was for the third test. Mr. Pellet had suggested that it would be helpful if he introduced draft article 15, dealing with burden of proof, as it went hand in hand with article 14, subparagraphs (a), (e) and (f). However, two additional aspects of article 14 had yet to be introduced: article 14, subparagraph (b), on waiver, and article 14, subparagraphs (c) and (d), on voluntary link and territorial connection. They raised very different issues, and perhaps they should be put aside for the time being.

4. Burden of proof in the context of international litigation related to what must be proved and which party must prove it. It was a difficult subject to codify, first because there were no detailed rules in international law of the kind found in most municipal law systems, and second, because circumstances varied from case to case and general rules that applied in all instances were difficult to lay down. Nevertheless, the subject was important to the exhaustion of local remedies, and some rule on it had to be included in the draft. What rules could be discerned from the present authorities on the subject?

5. A general principle that seemed to be widely accepted, and which fell into the category of principles of law accepted by civilized nations, was that the burden of proof lay on the party that made an assertion. He had incorporated it in article 15, paragraph 1. Paragraph 102 of his report cited a number of Latin maxims that provided support for that principle, although he cautioned new members that there was some disagreement in the Commission about whether it was appropriate to use Latin tags.

6. The general principle was not enough, however. The Commission must go further and seek to establish other rules. He would suggest that two additional principles were important, and he had incorporated them into article 15, paragraph 2. They related to the burden of proof in respect of the availability and effectiveness of local remedies. Previous attempts to codify the local remedies rule had studiously avoided the temptation to elaborate provisions on those subjects. Article 22 of the draft articles on State responsibility adopted by the Commission at its forty-eighth session⁵ had not dealt with the matter. Attention should be drawn to a helpful attempt to enunciate the principles by Kokott, set out in paragraph 103 of the report.⁶

7. The subject had also been considered at some length by human rights treaty-monitoring bodies, and their jurisprudence supported two propositions, namely, that the respondent State must prove that there was an available remedy that had not been exhausted by the claimant State, and that if there were available remedies, the claimant State must prove that they were ineffective or that some

¹ See *Yearbook ... 2000*, vol. II (Part Two), p. 135.

² For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

³ See *Yearbook ... 2001*, vol. II (Part One).

⁴ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁵ See 2712th meeting, footnote 7.

⁶ *Ibid.*, footnote 9.

other exception to the local remedies rule was applicable. Such jurisprudence was nonetheless guided strongly by the instruments that established the treaty-monitoring bodies, and it was questionable whether the principles expounded by those bodies were directly relevant to general principles of diplomatic protection.

8. As to judicial and arbitral decisions, in the leading cases on the exhaustion of local remedies rule, the subject had either been addressed directly by the tribunal or raised by one of the parties in the pleadings. Some support for the principles he had outlined could be found in the *Pan-vezys-Saldutiskis Railway* case, the *Finnish Ships Arbitration*, the *Ambatielos* claim, the *ELSI* case, the *Aerial Incident of 27 July 1955* case and the *Norwegian Loans* case. Although the language employed by counsel or the tribunal in those cases was not always clear, two conclusions could be drawn. First, the burden of proof was on the respondent State in that it had to show the availability of local remedies, and second, the claimant State bore the burden of proof for showing that if remedies were available, they were ineffective, or that some other exception applied, for instance, that there had been a direct injury to the claimant State.

9. Yet it was difficult to lay down general rules, since the facts of each case might necessitate some variation. That point could be illustrated by the *Norwegian Loans* case, frequently cited on the subject. France had sought to bring a claim on behalf of French nationals allegedly injured by Norway. Norway had conceded that it had to prove the existence of available local remedies but argued that it was necessary for France to prove that those remedies were ineffective, if it so claimed. France had argued that legislation made it impossible for it to bring the case before Norwegian courts and that the legislation, on the face of it, rendered recourse to local remedies futile. It was in that context that Judge Lauterpacht had laid down four principles which enjoyed considerable support in the literature: it was for the plaintiff State to prove that there were no effective remedies to which recourse could be had; no such proof was required if there was legislation which on the face of it deprived the private claimants of a remedy; in such a case, it was for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence could reasonably be assumed; and the degree of burden of proof ought not to be unduly stringent.

10. Although Lauterpacht had adduced four principles, that did not go against his own hypothesis of two, for they had been elaborated on in the unusual circumstances of the *Norwegian Loans* case. The hypothesis was supported by Jiménez de Aréchaga in one of his academic writings,⁷ cited in paragraph 115 of the report. His basic proposition therefore remained that there were essentially two rules on the availability and effectiveness of local remedies, and they were set out in article 15, paragraphs 2 (a) and 2 (b).

11. The Commission now had before it articles 12, 13 and 15 and the parts of article 14 dealing with futility, undue delay and denial of access. He again invited members

to confine their comments to those provisions, leaving aside the parts of article 14 on waiver, voluntary link and territorial connection, which he would introduce later.

12. Mr. MOMTAZ, thanking the Special Rapporteur for an excellent report received sufficiently well in advance to enable members to study it carefully, said he wished first to address the subject of the direction to be taken in future work. The Special Rapporteur had proposed to limit the scope of the topic with a view to completing the consideration of the draft articles on second reading during the current quinquennium. It was a laudable intention, one that would enhance the Commission's credibility, but it must not be pursued through shortcuts that would undermine the evolution of international law in that field. In his view, the draft articles should set out certain guidelines on functional protection by international organizations of their officials so that States could resolve any issues that such protection might raise. Was an international organization entitled to exercise functional protection simultaneously with the exercise of diplomatic protection by the State of which the official was a national? Could the State be accorded priority in that area and the international organization perhaps placed in an inferior position? Those were the questions raised by ICJ in its advisory opinion in the *Reparation for Injuries* case, questions which remained so far unanswered.

13. The evolution of international law was characterized by increasingly strong concern for respect for human rights. The right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew, although perhaps not deserving a separate article, might perhaps be mentioned in the commentary to article 8. That could also be done for the situation of individuals in a territory administered by an international organization in the aftermath of abuse or atrocities committed by certain States. Recent current events provided examples of such situations.

14. As to the "clean hands" doctrine mentioned by Mr. Candioti, on which Mr. Brownlie and Mr. Pellet had engaged in a very interesting discussion, he was inclined to subscribe to the theory advanced by Mr. Brownlie for a number of reasons. While it was true that aliens had the right of due process in their countries of residence and, in exchange, were required to abide by the law and to respect its requirements, in a number of instances the domestic legislation of the State in question might be found to contradict international law. In such a situation, obviously, the "clean hands" doctrine did not arise. The pleadings of Reuter before ICJ in the *Barcelona Traction* case also supported Mr. Brownlie's theory. Reuter had referred to the heterogeneous nature of the requirement of admissibility of international claims and had pointed out that the "clean hands" doctrine had still to be developed. One could also cite in support of Mr. Brownlie a study published in the 1960s by Salmon, a Belgian jurist, on the basis of a painstaking examination of arbitral awards and the decisions of claims commissions.⁸

⁷ E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 531.

⁸ J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225.

15. He agreed with those who thought it was not necessary to go into the matter of whether exhaustion of local remedies was procedural or substantive. As the Special Rapporteur had demonstrated in his report, the distinction had come up primarily during the codification of the law on State responsibility, specifically during the attempt to determine the moment from which an internationally wrongful act entailed the responsibility of the wrongdoing State. In other words, the question was whether the responsibility of the State came into play as soon as the internationally wrongful act was committed, independently of the exhaustion of local remedies. The answer to the question depended on whether one considered that exhaustion of local remedies was a procedural or a substantive matter. It was not, in his view, of relevance to diplomatic protection, in which the basic postulate was the existence of an internationally wrongful act. He agreed with Mr. Pellet's remarks on that point. It was simply necessary to enunciate the rule on the exhaustion of local remedies, which would apply, as the Special Rapporteur pointed out, when the injury to a foreigner was caused by a breach of domestic law. In such a case, the exhaustion of local remedies would indisputably be a question of substance and not of procedure, although there was no need to say that in the draft articles. On the other hand, when the injury arose from a breach of international law, the exhaustion of local remedies was merely a procedural matter. The exercise of diplomatic protection might even be envisaged in the event of failure to respect the exhaustion of local remedies rule, in which case recourse to the rule would obviously be futile, especially as in a number of cases the act in question might not be prohibited by domestic law.

16. Mr. PELLET said he found Mr. Momtaz's position on the "clean hands" doctrine somewhat difficult to understand. What he had said about it seemed right, but it led to the wrong conclusion. True, the theory still had to be developed in the context of diplomatic protection, but perhaps now was precisely the time to do so. The subject had long intrigued jurists, and rather than discuss the problem and turn away from it, now was the time for the Commission to resolve it. Yes, in some cases domestic legislation might contradict international law, and the question then would be whether the injured person was obliged to respect domestic law. The person would probably be considered not to have "dirty hands", but to have "clean hands", and accordingly the problem would not arise. Still, that was an exception to the "clean hands" rule, and he did not see how it could serve as an argument for not looking into the matter. He also thought that domestic law was generally presumed to be in line with international law.

17. Mr. GAJA, referring first to article 14, said he agreed with the Special Rapporteur that adding the qualifier "effective" to the remedies to be exhausted under article 10 would not make a more specific provision on effectiveness unnecessary. That was what article 14 sought to spell out in subparagraphs (a), (e) and (f). He expressed his preference for option 2 in subparagraph (a); although it could be better drafted, it conveyed the basic idea that a remedy must be exhausted only if there was a reasonable prospect of success. It would also be better to speak of "remedy" in the singular, because each available remedy must be tested for effectiveness.

18. The exception under subparagraph (e), namely undue delay, covered an aspect of effectiveness that might require special mention. In his view, the text should refer not to "delay in providing a local remedy", but to the court's delay in taking a decision with regard to a remedy which had been used. The problem was that courts took undue time to decide.

19. As for subparagraph (f), if access to a remedy was prevented, it would be concluded that there was no remedy at all. The wording of that paragraph did not correspond to what was intended. Paragraphs 100 and 101 of the third report referred to a different situation, one in which an alien was refused entry to the territory of the allegedly responsible State or where there was a risk to the alien's safety if he entered the territory. Those elements would rarely be decisive in the context of civil remedies. Normally, the claimant's physical presence in the territory of the State in which he wished to use a civil remedy was not required. The exception should be limited to cases in which presence appeared to be a condition for the success of the remedy. It might be sufficient to mention such a possibility in the commentary as part of the more general test of effectiveness as stated in subparagraph (a).

20. With reference to article 15, he was not convinced that rules of evidence as such should be included in the scope of the topic. If they were, the Commission should also consider issues relating to evidence of nationality. In any case, customary rules of evidence, if they did exist, were difficult to establish. Common law countries and civil law countries differed considerably on the most basic principles, including burden of proof. Civil law countries did not have the system of *prima facie* evidence. That had an impact in international courts and tribunals. Rules of evidence also varied greatly, depending on the type of international proceedings. There was a world of difference between proceedings in ICJ and in human rights treaty bodies. Moreover, the same treaty body might have different rules of evidence at each stage of the proceedings. For example, the European Court of Human Rights could declare that an application was inadmissible for failure to exhaust local remedies, even without notifying the respondent State. If the respondent State was notified, then its attitude towards exhaustion of local remedies became relevant, because if it did not object that there was failure to exhaust local remedies, the Court would not examine the question on its own motion. In that context, it could also be said that, if a State raised the question of failure to exhaust local remedies, it had a burden of proof which went further than what was imposed on the respondent State in other international proceedings. Whatever statement was made on the burden of proof, it was subject to the principles and rules applying to specific proceedings.

21. There was little point in stating as a general principle, as was done in article 15, paragraph 1, that the party that made an assertion must prove it. It was an ancient maxim that anyway was not accurate. What mattered was not really the allegation, but the interest which the party might have in establishing a certain fact that appeared to be relevant. Although paragraph 1 mentioned exhaustion of local remedies, a general proposition of that type was totally out of place in draft articles on diplomatic protection.

22. The “Norwegian” distinction in article 15, paragraph 2, between the availability of a remedy, which should be shown by the respondent State, and its lack of effectiveness, which should be demonstrated by the claimant State, was somewhat artificial. A remedy that offered no chance of success, i.e. was not effective, was not one which needed to be exhausted. Thus, the respondent State’s interest went further than establishing that a remedy existed. It must also show that the remedy had a reasonable chance of success. Some of the language in the *ELSI* judgment might appear to convey the idea that the respondent State merely had to demonstrate that a remedy was available. But there was little question that the remedy existed; at issue, rather, was the effectiveness of the remedy in the absence of pertinent judicial precedents at the time of the alleged injury. It was a matter of effectiveness more than of availability.

23. Examples could be found in the literature and in jurisprudence to show that the burden of proof was on the respondent State with regard to the exhaustion of local remedies and was heavier than other aspects concerning admissibility or substantive issues. But he wondered whether that was due to something specific to the exhaustion of local remedies, or whether there was a different rationale. It was very difficult for ICJ, for example, to decide whether an effective remedy existed in a State. The respondent State was in a much better position than judges or the claimant to demonstrate the existence of remedies. Similarly, the State of nationality was best able to provide evidence on the nationality of the individual. There, the burden of proof was on the claimant State. Thus, the position of the State as a claimant or respondent seemed to be less important than the availability of evidence.

24. Mr. BROWNLIE said that, from the outset, he wished to dispel any impression he might have given earlier that he was strongly critical of the Special Rapporteur’s third report, which in fact was a model of its kind.

25. He agreed on the whole with the approach in article 14, but not with the treatment of the voluntary link requirement in subparagraph (c), because it was stated that local remedies did not need to be exhausted where there was no voluntary link between the injured individual and the respondent State. The actual content of the Special Rapporteur’s commentary was fairly tentative. Paragraph 70 said that there was no clear authority either for or against the requirement of a voluntary link. That was true, but he failed to see what flowed from that fact. The Commission could engage in progressive development, and it would be a classic case of doing so against the background of a large number of existing principles. Such a course would not mean starting from scratch, for there was a considerable amount of material on local remedies. It was exactly the sort of matter on which the Commission should take a clear stand. Paragraphs 84 and 85, which seemed to suggest that the issue would not arise very often, concerned cases in which an argument could be constructed that there was a direct injury to the State in any case, and hence the domestic remedies rule would not apply. But that skirted the question of whether a voluntary link was needed. Again, paragraph 89 contained a rather tentative but essentially negative conclusion on the question whether the existence of the voluntary link

should be a condition for the application of the local remedies rule. It was disappointing that the Special Rapporteur avoided discussing policy as such. That was his own complaint about the procedure/substance point—not that it was there, but that it was the only theoretical or background question which appeared to have been discussed. The Commission should look more directly at questions of policy. He disagreed with the implication in the commentary that the question of voluntary link was an academic one. The circumstances of the *Aerial Incident of 27 July 1955* case were unfortunately not so exceptional, and there was indeed a serious question to be addressed.

26. Mr. GAJA was right to say that there was no need to deal separately with article 14, subparagraph (f). It could be made part of the discussion of the general issue of effectiveness.

27. As to article 15, like Mr. GAJA he did not consider such a provision necessary. It would be difficult to reach an agreement on its subject matter. It also seemed superfluous to have a separate article on burden of proof, which was a question that arose in any event and must be addressed in context; it was unnecessary, whenever a problem was tackled, to include a provision on the subject.

28. Mr. MOMTAZ said that he was pleased that Mr. PELLET recognized that the “clean hands” doctrine had not yet taken form. It was a matter not for the codification but for the progressive development of international law.

29. Mr. DUGARD (Special Rapporteur) said it would be best for members to refrain for the time being from commenting on article 14, subparagraph (c), which he had not yet introduced. Taking up a comment by Mr. Brownlie, he observed that, needless to say, anyone who agreed to act as Special Rapporteur would inevitably hear harsh criticism from other members. After all, that was the nature of the Commission’s debate.

30. Mr. Brownlie and Mr. GAJA had raised a question which should be dealt with in greater depth, namely, whether it was necessary to address procedural rules at all. Mr. GAJA had spoken of the conflict between common law and civil law approaches. In the current criminal law context, for example the *ad hoc* tribunals or the International Criminal Court, the attempt to find common ground was a major issue. He wondered whether the time had not come for the Commission to attempt to identify principles governing rules of evidence which applied to both civil-law and common-law jurisdictions.

31. The CHAIR expressed his gratitude to the Special Rapporteur for his inclusive approach to the subject.

32. Ms. XUE said that she was in favour of excluding from the scope of diplomatic protection the areas indicated in paragraph 16 of the third report. The core of the issue of diplomatic protection was the nationality principle, i.e. the link between a State and its nationals abroad. When a State claimed a legal interest in the exercise of diplomatic protection for an internationally wrongful act derived from an injury caused to its national, the link between the legal interest and the State should be the nationality of the

national. On the whole, that principle had been observed throughout the draft so far. If, however, the matters set out in paragraph 16 were included, even as exceptional cases, they would inevitably affect the nature of the rules on diplomatic protection, unduly extending the right of States to intervene. Given its historical application, that point was not far-fetched.

33. She understood the concern to protect officials of international organizations but questioned whether that could be characterized as diplomatic protection. If the Commission agreed to exclude protection of diplomatic and consular officials from the scope of the topic, the same logic should apply to officials of international organizations. Similarly, members of armed forces were normally protected by the State in charge of those forces, but protection as such was not regarded as diplomatic protection. She agreed with the Special Rapporteur that such functional protection, if needed, should be treated separately.

34. In the case of the crew of a ship or aircraft, the issue was not how a State should protect its nationals abroad, but rather how to avoid conflicting claims from different States. If the ship flew a flag of convenience, the State of registration would have no more interest in exercising diplomatic protection for the crew than their own national States, should the latter fail to do so. Either maritime law or air law should take care of the matter, if such protection really presented a problem in international law.

35. In practice, there were cases in which a State delegated the right to exercise diplomatic protection of its nationals or economic interests to another State where diplomatic relations had been suspended or in an emergency, but such a situation might best be characterized as anticipatory representation rather than diplomatic protection. She agreed with Mr. Mansfield that it would be hard to imagine that such delegation would culminate in judicial proceedings without the direct involvement of the delegating State.

36. The last case mentioned in paragraph 16 of the third report would appear to imply that a State or international organization which administered or controlled a territory should have the right to exercise diplomatic protection over the people of that territory while they were abroad. Nevertheless, in practice such administration or control was often established on a temporary basis until a legitimate Government could be put in place; representation of that kind, even when exercised for the protection of human rights, should not be defined as diplomatic protection.

37. Her major concern in the treatment of articles 12 and 13 was the distinction between breaches of national and international law. Article 13 should be reconsidered and, preferably, deleted, while the wording of article 12 should be strengthened, making the local remedies rule obligatory in terms of both procedure and substance, if such a line was to be drawn. In that case, it would be essential to determine which exceptions to that rule should be allowed.

38. The Special Rapporteur's commentary on article 14 was very useful, but, while there were many cases of, and academic studies concerning, procedural denial of justice, there were no generally agreed views on the topic. Furthermore, some of the clauses under the futility rule might leave too much room for subjective judgement by the claimant, and article 14, subparagraph (b), on waiver, could be further improved by a closer study of the issues of implied waiver and estoppel.

39. With regard to article 15, Mr. Gaja had rightly noted that, owing to the differences in legal systems, it was difficult to establish general rules at the level of international law.

40. Finally, she was reluctant to enter into discussion of the "clean hands" rule; as a matter of policy, claimants must be precluded from using diplomatic protection as a means of avoiding the legal liability incurred by their own unlawful acts under the domestic law to which they had willingly subjected themselves.

41. Mr. BROWNLIE said that the distinction between diplomatic and functional protection applied in certain situations, as ICJ had demonstrated in *Reparation for Injuries*. However, he was not fully convinced by Ms. Xue's use of that distinction in the context of diplomatic protection exercised on behalf of members of the armed services. Such cases represented an application of the legal interests of the State to whom the troops in question belonged; the same was true of the crews of ships or aircraft, as had been recognized in recent jurisprudence.

42. Diplomatic protection was usually classified as an issue involving the admissibility of claims. In reality, however, it was both an expression of legal interests and the instrument by which a State implemented those interests by making a diplomatic claim. When a case was brought before the ICJ or a court of arbitration, assuming that there were no problems of jurisdiction or admissibility, the instrumental aspect was covered by the operation of law, and the remaining issue was one of national interests. The principle of nationality was, of course, the major expression of legal interest in States' nationals, national corporations and agencies, but the law might recognize other bases for legal interest, such as membership in the armed forces.

43. Mr. RODRÍGUEZ CEDEÑO expressed his appreciation and respect for the Special Rapporteur's work on the complex topic of diplomatic protection. He agreed that in light of the lack of certainty on the rules governing diplomatic protection, the Commission must choose between competing rules on the basis of their fairness in contemporary international society; its work involved both the codification and the progressive development of law, bearing in mind the ongoing changes in those areas.

44. Functional protection by international organizations of their officials (para. 16 of the report) should be excluded from the draft articles because it constituted an exception to the nationality principle, which was fundamental to the issue of diplomatic protection. Such protection, which had been dealt with extensively in legal

writings and by ICJ, involved an international organization's involvement on behalf of its staff members in a claim against the territorial State, defined as the State in whose territory they had incurred the injury—a definition which should be considered for inclusion in the list of terms to be defined in the draft articles. In its advisory opinion in *Reparation for Injuries*, the Court had made it clear that the claim brought by the Organization was based not on the nationality of the victim but on his status as an agent of the Organization. Similarly, in its judgement regarding the *Jurado* case, the Administrative Tribunal of ILO had stated that the privileges and immunities of ILO officials were granted solely in the interests of the Organization.

45. Those decisions raised interesting issues regarding competing claims between States of nationality and international organizations. It must be made clear that, as the Court had noted in its advisory opinion, the possibility of competition between the State's right of diplomatic protection and the organization's right of functional protection could not result in two claims or two acts of reparation. Thus, while he agreed that the issues mentioned in paragraphs 16 and 17 of the third report did not fall within the scope of the topic under consideration, they might lead to a discussion of the need to limit claims and reparations.

46. A balance had to be found between the general principle that local remedies must be exhausted, which should be clearly stated, and the exceptions to that rule. The futility of local remedies was a complex issue because it involved a subjective judgement and because of its relationship to the burden of proof; it raised the question of whether a State of nationality could bring a claim before an international court on the sole assumption that local remedies were for various reasons futile. While the matter could not be ignored, it must be handled with great care. The Commission must not appear to establish a principle of complementary jurisdiction by granting competence to an international body in cases where local remedies were, in the claimant's view, absent or ineffective. It was important to consider the position taken by ICJ in the *Panevezys-Saldutiskis Railway* case and to prevent extreme interpretations in favour of either the claimant State or the territorial State. Thus, as the Special Rapporteur had concluded (para. 45 of the report), the third option presented under draft article 14, subparagraph (a), was preferable as a basis for drafting a suitable provision. Subparagraphs (e) and (f), raised issues which, however important, were not strictly essential to the topic under consideration.

47. Mr. OPERTTI BADAN said that he had yet to hear any substantive reasons for including or excluding the four situations mentioned in paragraph 16 of the third report. Functional protection by international organizations of their officials was normally a matter to be agreed between States and the organizations working within their territory; diplomatic protection was not the mechanism of first resort. Claims brought on behalf of the crews or passengers of ships, which could involve heavily fished areas or the activities of scientific research vessels in territorial waters, might raise issues that were difficult to resolve. A State could not delegate the right to exercise diplomatic protection unless it was unable to exercise that right. Finally, he could envision a situation in which a State of

nationality might have exercised diplomatic protection on behalf of its nationals under the administration of the United Nations Interim Administration Mission in Kosovo following the action by NATO. It would be useful for the Special Rapporteur to provide further information on those four issues so that the Commission could decide whether to exclude them from consideration. A broader but more thorough discussion was needed.

48. Ms. XUE said that, while she appreciated the clarification provided by Mr. Brownlie, the main issue was that of the connection between the claimant State and the individual. It was important to justify States' exercise of diplomatic protection. By travelling abroad, private citizens established a voluntary link that made them subject to the domestic law of the receiving State. However, diplomatic and consular officials did not establish such a link, nor did members of the armed forces or the crews of ships and aircraft. It must also be made clear that the claimant State could not intervene unless the territorial State failed to protect foreign nationals in accordance with international law. And while reparation for damages incurred by the officials of international organizations was really a matter of international law, the Commission was most concerned with the relationship between domestic and international law. It was important not to confuse functional and diplomatic protection.

49. Mr. SIMMA noted that various members had expressed doubt as to whether situations where one State exercised diplomatic protection of a national of another State as a result of the delegation of such a right (para. 16 of the report) arose in practice. He wondered whether the hypothetical case was based on a misunderstanding of article 8c of the Treaty on European Union, which stated that every citizen of a member State of the Union, while in the territory of a third country in which the member State of which he was a national was not represented, was entitled to protection by the diplomatic or consular authorities of any Member State on the same conditions as its nationals. However, such cases did not constitute diplomatic protection, but rather routine consular protection of nationals.

50. Mr. DUGARD (Special Rapporteur) agreed that the delegation of protection within the European Union did not constitute diplomatic protection; moreover, the issue was also addressed in draft article 9.

51. Mr. RODRÍGUEZ CEDEÑO pointed out that functional protection by international organizations of their officials was based on the individual's status as an agent of the organization—one consequence of which was the fact that an organization could bring a claim against a State which was not even one of its members—whereas diplomatic protection was based on a link of nationality.

The meeting rose at 11.45 a.m.