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**Summary record of the 2791st meeting**

Topic:  
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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-SIXTH SESSION

*Held at Geneva from 3 May to 4 June 2004*

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### 2791st MEETING

*Monday, 3 May 2004, at 3.10 p.m.*

*Outgoing Chairperson:* Mr. Enrique CANDIOTI

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

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#### Opening of the session

1. The OUTGOING CHAIRPERSON declared open the fifty-sixth session of the International Law Commission and extended a warm welcome to all members.

2. The Sixth Committee of the General Assembly considered from 27 to 31 October and 3, 4 and 6 November 2003 the Commission's report on the work of its fifty-fifth session.<sup>1</sup> A topical summary of the discussion had been prepared by the Secretariat and was contained in document A/CN.4/537. Delegations had expressed interest in enhancing the dialogue between the Committee and the Commission and had decided that the first week in which the Commission's report was discussed would henceforth be known as "International Law Week".<sup>2</sup> During that week, Member States' legal advisers would be invited to participate in high-level discussions on issues of international law. Delegations had intimated that they would welcome the presence of more members of the Commission in New York to participate informally in the discussions. He and Mr. Gaja, representing the Commission, had been able to respond to questions from the floor

on specific topics. The proceedings had taken place in a very positive atmosphere.

3. On 25 March 2004, in response to an invitation by the President of the International Tribunal for the Law of the Sea, he had visited the Tribunal's seat, in Hamburg. He had outlined the topics currently on the Commission's agenda and had heard comments and questions from the judges, who had shown great interest in the Commission's work and had expressed the wish for closer contacts and exchanges of information between the Tribunal and the Commission. The Commission might consider including the Tribunal in the list of institutions with which it maintained such relations.

4. At its 2221st meeting, on 7 June 1991, the Commission had adopted draft articles on jurisdictional immunities of States and their property,<sup>3</sup> a topic that had figured on the Commission's original provisional list of 14 topics for codification drawn up in 1949<sup>4</sup> and that had subsequently been inscribed on the Commission's work programme in 1978.<sup>5</sup>

5. On 5 March 2004, the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property had adopted its report,<sup>6</sup> containing a draft Convention on the subject which was expected to be adopted during the fifty-ninth session of the General Assembly. The success of the Committee's endeavours had been largely due to the hard work of its Chairperson, Mr. Gerhard Hafner, a former member of the Commission, and of Mr. Yamada, both of whom had engaged in years of consultations involving the testing of possible drafting alternatives and compromises. On behalf of the Commission, he expressed gratitude to both for their perseverance. The adoption of the draft Convention would represent an important acknowledgment of the contribution made by the Commission in presenting the draft articles on which it was based, and also

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<sup>1</sup> *Yearbook ... 2003*, vol. II (Part Two).

<sup>2</sup> General Assembly resolution 58/77 of 9 December 2003, para. 11.

<sup>3</sup> For the text of the articles and commentaries thereto adopted by the Commission, see *Yearbook ... 1991*, vol. II (Part Two), chap. II, p. 13, para. 28.

<sup>4</sup> Documents of the first session, report to the General Assembly, *Yearbook ... 1949*, p. 281, para. 16.

<sup>5</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 153, para. 188.

<sup>6</sup> A/59/22.

of the subsequent work of the 1999 Working Group of the Commission<sup>7</sup> chaired by Mr. Hafner.

### Election of officers

6. Mr. GALICKI, speaking on behalf of what continued to be referred to as the group of Eastern European countries, although a number of those countries had acceded to the European Union two days previously, nominated Mr. Melescanu for the position of Chairperson of the Commission.

*Mr. Melescanu was elected Chairperson by acclamation.*

*Mr. Melescanu took the Chair.*

7. The CHAIRPERSON thanked the members of the Commission for the confidence they had placed in him, not only in electing him to chair its meetings in 2004 but also in having re-elected him as one of its members in 2003. He undertook to make every effort to ensure that the Commission's work yielded good results.

8. He suggested that the meeting should be suspended in order to give members more time for consultations concerning the membership of the Bureau.

*The meeting was suspended at 3.20 p.m. and resumed at 3.35 p.m.*

*Ms. Xue was elected first Vice-Chairperson by acclamation.*

*Mr. Economides was elected second Vice-Chairperson by acclamation.*

*Mr. Comissário Afonso was elected Rapporteur by acclamation.*

9. The CHAIRPERSON suggested that the election of a Chairperson of the Drafting Committee should be postponed as that position was to be filled from among the members from the group of Latin American countries, two of whom had not yet arrived in Geneva.

*It was so decided.*

### Adoption of the agenda (A/CN.4/536)

10. The CHAIRPERSON invited the Commission to adopt the provisional agenda.

*The agenda was adopted.*

### Organization of work of the session

[Agenda item 1]

11. The CHAIRPERSON drew attention to the proposed programme of work for the first two weeks of the Commission's session. If he heard no objection, he would

<sup>7</sup> For the report of the Working Group, see *Yearbook ... 1999*, vol. II (Part Two), annex, pp. 149–173.

take it that the Commission decided to adopt the proposed programme.

*It was so decided.*

12. The CHAIRPERSON invited members to join the Drafting Committee and the Planning Group. Since the Drafting Committee would be taking up the topic of diplomatic protection the following day, consultations should be held with a view to forming its membership as soon as possible.

### Diplomatic protection<sup>8</sup> (A/CN.4/537, sect. B, A/CN.4/538,<sup>9</sup> A/CN.4/L.647 and Add.1)

[Agenda item 3]

#### FIFTH REPORT OF THE SPECIAL RAPPORTEUR

13. Mr. DUGARD (Special Rapporteur), introducing his fifth report on diplomatic protection (A/CN.4/538), said he would focus on issues he believed should not be included in the draft articles, although he was open to persuasion if he had misjudged the situation. At the next meeting he would turn to the issue of diplomatic protection by an international organization, and specifically the relationship between diplomatic protection and functional protection arising out of the decision of ICJ in the *Reparation for Injuries* case. Lastly, he would introduce the topic of diplomatic protection of ships' crews.

14. In his four previous reports on diplomatic protection,<sup>10</sup> he had covered the three issues generally considered to fall within the ambit of diplomatic protection, namely, diplomatic protection of natural persons and corporations and the exhaustion of local remedies. In late 2003, the Sixth Committee had been asked whether there were any other matters that should be included, such as diplomatic protection of ships' crews or issues arising from the *Reparation for Injuries* case. There had been little support for the inclusion of those topics, although the Czech Republic had suggested the inclusion of a provision on the subject of the delegation of the right of diplomatic protection<sup>11</sup> and Portugal had proposed dealing with the protection of persons in a territory controlled or occupied by another State or administered by an international organization.<sup>12</sup> Essentially, the Sixth Committee considered that it was incumbent upon the Commission to conclude its examination of the topic of diplomatic protection as soon as possible and to make every effort to complete the second reading of the draft articles on that topic within

<sup>8</sup> For the text of articles 1 to 10 of the draft articles on diplomatic protection provisionally adopted by the Commission at its fifty-fourth and fifty-fifth sessions, see *Yearbook ... 2003*, vol. II (Part Two), pp. 34–35, para. 152.

<sup>9</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

<sup>10</sup> First report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, p. 205; second report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514, p. 97; third report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1, p. 49; fourth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/530 and Add.1, p. 3.

<sup>11</sup> See *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/58/SR.17), and corrigendum, para. 48.

<sup>12</sup> *Ibid.*, 18th meeting (A/C.6/58/SR.18), and corrigendum, para. 3.

the present quinquennium. He believed that that was both possible and desirable, but it meant that the Commission must complete the drafting work on the articles and conclude their consideration on first reading during the current session.

15. Nonetheless, at the beginning of his fifth report, he addressed the two issues that did not in his view merit inclusion in the draft articles, namely, protection by an administering State or international organization, and delegation of the right of diplomatic protection and the transfer of claims. The Commission had carefully considered the first issue in 2002, but there had been no support for the inclusion of such a right in the context of military occupation, since it fell within the purview of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), of August 12 1949, and of international humanitarian law. Although some members had favoured dealing with protection by an international organization of persons living in a territory which it administered or controlled, most had taken the view that the topic could best be addressed in the context of responsibility of international organizations. While some precedents existed regarding the diplomatic protection of persons resident in a territory under the protection of a State which did not exercise sovereignty over the territory, and of persons resident in a territory administered by an international organization, such practice was limited and there was, in his view, too little evidence of a general practice to warrant codification or progressive development in either area.

16. Delegation of the right of diplomatic protection could arise in a variety of situations, for example, following the outbreak of hostilities. The best known example of such a delegation was article 8 c of the Treaty on European Union (Maastricht Treaty), cited in paragraph 8 of the report, which had prompted the Czech Republic to suggest the inclusion of a provision on the subject.<sup>13</sup> It was not clear whether that article contemplated diplomatic protection as the term was understood in the draft articles, or only consular action. The fact that there were no general rules, and that State practice on the subject was limited, confirmed that it was not a topic ripe for codification.

17. With regard to the transfer of a claim to diplomatic protection, to a large extent that was covered by the principle of continuous nationality. If there had been a break in the continuity of nationality, diplomatic protection could not be exercised. It would be unwise to embark upon the codification of the principle that a diplomatic claim could be transferred on death, assignment or subrogation, because that was already dealt with by the continuous nationality rule. There were exceptional cases, but they were so exceptional and depended so much on the circumstances that it would not be a good idea to attempt to codify any principle other than that of continuous nationality. He therefore recommended not including any articles on the subject.

18. In summary, he did not think that the topics he had raised, interesting as they were, should be included in the draft articles on diplomatic protection.

19. Mr. PELLET said that there was simply no reason for the Commission to rush through its consideration of the topic of diplomatic protection. If the Commission needed to continue working on the topic beyond the current quinquennium, then it should do so.

20. Referring more specifically to the Special Rapporteur's proposals, he agreed that some matters, such as denial of justice, should not be considered under the topic of diplomatic protection. He also agreed that protection by international organizations probably belonged under the topic of responsibility of international organizations. However, if the Commission were to follow that line of reasoning, then it could equally well be claimed that diplomatic protection as conceived by the Special Rapporteur belonged under the topic on State responsibility. He did not object to saying that it fell under the topic of responsibility of international organizations, but it had never been specified that the diplomatic protection at issue was diplomatic protection by States. That would have to be specified somewhere, or else the Special Rapporteur would have to deal with everything not covered under the topic of responsibility of international organizations. The subject must be treated by one or the other Special Rapporteur; unless it could be addressed as a separate, third topic, although that was probably unnecessary.

21. With regard to the protection of persons in a territory controlled, occupied or administered by another State or administered by an international organization, the Commission should not reject the subject just because it was complicated or because practice was limited and unclear. On the contrary, that was all the more reason to take it up, for such persons were in particular need of protection. Furthermore, the Commission was responsible not only for codifying but also for progressively developing international law.

22. Similarly, he was not sure that the Commission should evade the question of delegation of the right of diplomatic protection. The Special Rapporteur argued in paragraph 8 of his report that practice was unclear. That was all the more reason to try to shed light on a matter which would take on increasing importance in the future, and to elucidate article 46 of the Vienna Convention on Diplomatic Relations, which, as it currently stood, was a somewhat esoteric provision. It would be interesting to see how diplomatic protection and the law of diplomatic relations were connected. The fact that practice was limited did not mean that the Commission should not address the question.

23. It was not sufficient to say that "as the transfer of claims is regulated by the continuous nationality rule, there is no need to consider further codification of this subject" (paragraph 13 of the report). Firstly, if that was the case, it should be clearly specified. Secondly, the Special Rapporteur had himself acknowledged that there were exceptions and that the matter was not that simple. He personally was convinced that States would not be opposed to the Commission's giving greater consideration to the question.

24. He was surprised that the Special Rapporteur had made so little mention of the "clean hands" doctrine. In

<sup>13</sup> See footnote 11 above.

his view, if that doctrine had any separate existence or real consequences at procedural level, it could only be in connection with diplomatic protection; in that connection he drew attention to the pleadings in the *Oil Platforms* case, during which the issue had been discussed at great length. He did not think that a question that the Commission had discussed in depth should be abandoned so lightly. The “clean hands” doctrine was a specific legal institution inseparable from the question of diplomatic protection, and was only of relevance if the protected individual’s hands were “not clean”.

25. With regard to the legal consequences of diplomatic protection, on which he was aware that his view did not enjoy much support in the Commission, he continued to believe that once the conditions for the exercise of diplomatic protection were met, diplomatic protection had consequences, and that those consequences had limits. He did not see why the Special Rapporteur chose to disregard the problem.

26. He reserved the right to take the floor the following day on the “clean hands” doctrine and the legal consequences of diplomatic protection if the Special Rapporteur did not address them at greater length.

27. Mr. GAJA said he did not have strong views on whether the topics touched upon by the Special Rapporteur should be dealt with in a particular provision, but had felt it was important for the Commission to discuss them. The problems raised were of considerable importance and could not be ignored, even though practice was limited. He was thinking in particular of diplomatic protection of people in territories under United Nations administration or under foreign occupation. Many recent events suggested that the topic was of practical relevance, though he realized that it would be difficult to agree on a solution because of its political implications.

28. With regard to the delegation of the right of diplomatic protection from one State to another, he wished to draw attention to a mistake in the Special Rapporteur’s report: the provision cited in paragraph 8 of the report was, as correctly stated in the footnote, located in article 20 of the consolidated version of the Treaty establishing the European Community, not in the Treaty on European Union (Maastricht Treaty). It had been introduced by the Maastricht Treaty, but as a provision of the Treaty establishing the European Community.

29. The Special Rapporteur argued that consent for the delegation of diplomatic protection was needed and that the matter thus did not have to be dealt with. Personally, he had always emphasized the need for consent, and believed that the Commission should explicitly state that consent was required. The provision might specify that one State could not delegate the right to exercise diplomatic protection without the consent of the State against which diplomatic protection was to be exercised. Such a provision would be useful in view of the way in which article 20 of consolidated version of the Treaty Establishing the European Community was worded.

30. On the question of delimiting the topic of diplomatic protection and his own topic, he was still hesitant

on a number of points and was not yet prepared to make specific proposals; the Commission should not yet take a definite stance on the question.

31. Mr. DUGARD (Special Rapporteur), replying to a comment by Mr. Pellet on the diplomatic protection of persons resident in the territory under the protection of a State that did not exercise sovereignty over that territory, pointed out that authority was largely derived from the law relating to protectorates, mandates and trust territories; that practice was not clear. But the other difficulty was that, happily, those institutions were no longer in existence, and he was thus not certain that it was desirable to embark upon their codification. As to the Maastricht Treaty, he saw the value of Mr. Gaja’s proposal to specify that a State could not delegate a right without the consent of the other State; however, the question arose as to whether the Commission should go out of its way to specify that it was not dealing with certain matters.

32. He agreed with Mr. Pellet on the importance of the “clean hands” doctrine, but was not sure that it concerned diplomatic protection only or even primarily. It had not arisen in connection with diplomatic protection in the *Oil Platforms* case or in the more recent *Arrest Warrant* case. It was the type of topic which might well be considered separately, and should not be included under diplomatic protection, because it extended well beyond it.

33. Mr. Pellet had expressed surprise that he had not elaborated on the limits of the consequences of diplomatic protection; if Mr. Pellet could develop his thoughts on that point, it would help him in preparing a reply in time for the next meeting.

34. Mr. PELLET said he would return to the question at the next meeting. He pointed out that in both the *Oil Platforms* case and the *Arrest Warrant* case, the only area in which the “clean hands” doctrine had concrete consequences was that of diplomatic protection. Yet the Special Rapporteur ignored such consequences.

35. Mr. BROWNLIE said he was probably not the only member of the Commission who had never been convinced that the “clean hands” doctrine was a part of general international law. He reserved the right to speak further on the matter at the next meeting.

*The meeting rose at 5.10 p.m.*

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## 2792nd MEETING

*Tuesday, 4 May 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Mathe-son, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda,