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Summary record of the 2792nd meeting

Topic:
<multiple topics>

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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.

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,

Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Election of officers (*concluded*)

Mr. Rodríguez Cedeño was elected Chairperson of the Drafting Committee by acclamation.

Diplomatic protection¹ (*continued*) (A/CN.4/537, sect. B, A/CN.4/538,² A/CN.4/L.647 and Add.1)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BROWNLIE said that the Special Rapporteur's "negative proposals", namely those subjects which he proposed to set aside, raised problems of overlapping subjects, frontier zones and identification of legal boundaries that were difficult to resolve. The first subject was protection by a State or an international organization that administered a territory, concerning which the Special Rapporteur rightly recalled that the Commission had agreed in 2002 to exclude the consideration of belligerent occupation. The Special Rapporteur gave a number of examples of such protection (protectorates, mandates, trust territories) in his report (A/CN.4/538), but indicated that the practice was limited. There was thus too little evidence to warrant codification or progressive development. He agreed with Mr. Pellet that to say that there was limited practice was not a sufficient alibi for excluding a topic. As he understood it, one of the parameters for selecting a topic for future treatment in the long-term programme had always been that there should not be a total absence of practice. However, he was not sure that that should be a principle that operated constantly, and the fact that the practice was limited did not upset him. His objection to including the topic was based on pure policy reasons which militated against proposals for the exercise of diplomatic protection by an administering Power. The main reason was that there was a great variety of transitional regimes. Obviously, some of those regimes were necessary and beneficent, yet they were also often deliberately *ad hoc* and temporary in nature. They had a legal basis which was questionable or were operated in ways which were problematical. To extend diplomatic protection by analogy, so to speak, to persons living under such regimes would risk conferring a higher level of legitimacy on some of them than would be justified, not to mention the fact that it was difficult, and probably impossible, to see a community of situations out of the very varied regimes involved.

2. As to the second "negative proposal" by the Special Rapporteur, the delegation of the right of diplomatic protection and the transfer of claims, he had no particular problems and thought that the subject could be dealt with.

¹ 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.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

He did not see it necessarily as a borderland, but more as a corollary of problems that the Commission had already studied.

3. Ms. ESCARAMEIA said that she thought that too many issues had been grouped together under the heading "Protection by an administering State or international organization". The reasons for including or excluding those issues were very diverse. The distinction between "administered", "controlled" and "occupied" was not clear. One could understand that the inclusion of the right of diplomatic protection in the context of military occupation was covered by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), of 12 August 1949, and the Protocol Additional to the Geneva Conventions (Protocol II) of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II), but, on the other hand, those two instruments did not address the issue of diplomatic protection directly and the case law on the matter was extremely scarce, only two cases having been cited. In any event, for political reasons, she agreed that it would be better not to go into the question of territories under military occupation. She understood that the Special Rapporteur wanted to complete his work before the end of the current quinquennium because it would be good for the Commission's institutional image for it to have a finalized set of articles to present to the Sixth Committee. She also thought that the area in question was a very difficult one and that it would be better left to one side.

4. On administered territories, the situation was quite different. The Special Rapporteur presented the case of territories administered by a State (protectorates, mandates, trust territories) as being mostly historical situations, but there were much more recent examples. If a territory was administered by a State that granted its nationality to its inhabitants, it was difficult to say that they could not enjoy diplomatic protection. The inhabitants of Macao had had Portuguese citizenship and Portugal had considered that it had the right to accord them diplomatic protection. It had even gone so far as to take up the cause of a citizen of Macao who had been condemned to death after having been accused of transporting drugs through Singapore. Although its representations to the Government of Singapore had not amounted to diplomatic protection, the Portuguese Government had certainly had the feeling that, because the citizens of Macao were Portuguese citizens, it was incumbent upon it to protect them. The situations of administered territories were therefore not merely historical. Nevertheless, she did not think that the situation should be considered, as it was very complicated and quite varied.

5. Something that concerned her much more was the question of territories administered by international organizations. Such situations were arising more and more frequently. The reason why the right of diplomatic protection should be granted to international organizations, as Mr. Pellet had mentioned, was to meet the very real needs of people who were in distress and were very often stateless. Such had been the case, for instance, with the inhabitants of East Timor under the administration of the United Nations. Portugal had granted them its citizenship throughout the period of Indonesian occupation, but

that had been contested by several other countries and, once the United Nations administration had taken over, it had been even more difficult to say that Portugal could exercise diplomatic protection in that territory. It would therefore have been very good if its inhabitants had been able to benefit from diplomatic protection by the Organization that had actually been taking care of them and administering their territory.

6. The argument that there was not enough practice to engage in the progressive development of international law was difficult to accept because it was precisely in such situations that that was necessary. When practice was well established, all that was needed was to codify it. That was precisely the difference between progressive development and codification. The argument set out at the end of paragraph 6 of the Special Rapporteur's report that what was involved was merely a form of functional protection was surprising to say the very least. For her, diplomatic protection and functional protection were two completely different things. Functional protection related to reparation for injuries suffered by the agents of an international organization. The inhabitants of territories under United Nations administration were not agents of the United Nations. They were basically people who were just being governed by the United Nations and they were thus much more like "citizens" or "nationals" of the United Nations, but certainly not agents of that organization. Another argument invoked was that the issue could be dealt with as part of the international responsibility of international organizations. That, however, was not the point. On the contrary, it was a question of giving the international organization the right to act if some entity, a State, had injured an individual. In reality, the topic offered good grounds for progressive development. The point was to allow organizations that were administering territories to speak for the inhabitants of those territories in terms of diplomatic protection in certain circumstances.

7. On the delegation of the right of diplomatic protection and the transfer of claims, she agreed with the Special Rapporteur that it was better not to codify that very difficult area, again for policy reasons and although the example of the European Union was quite convincing. The situation was constantly changing and it would probably have to be treated in the future, but it would be best left to one side at present. The transfer of claims was also a subject that should not be dealt with specifically, but it would be good to include a draft article highlighting the need to apply the rule of continuous nationality.

8. Mr. MATHESON said that the Special Rapporteur was right in saying that every effort must be made to conclude the first reading of the draft articles on diplomatic protection during the current session so as to be able to complete work on the topic by the end of the current quinquennium. That would mean that caution should be exercised so as not to expand the scope of issues that the Commission was going to be dealing with at the current stage of its work. It should limit itself to questions that were clearly within the scope of diplomatic protection and on which there was a reasonably clear pattern of State practice upon which to draw. He agreed with the Special Rapporteur's conclusions that the Commission should not attempt in the draft articles to cover various questions,

such as protection by a State or by an international organization and delegation of the right of diplomatic protection, which were neither simple nor illuminated by any clear State practice. As Mr. Brownlie had pointed out, the Commission would then have to examine how diplomatic protection could be exercised in a whole spectrum of different circumstances. Clearly, the rights and functions of an occupying Power were different from those of an international administrative body and the rights and functions of such an administrative body would vary depending on what mandate was given in any particular case. Some of those regimes were only temporary, designed to preserve the status quo for a brief period, while others were more comprehensive and long-term in character. The Commission would need to judge how the function of diplomatic protection fit in each case: for example, whether the occupying Power or the international administration could assert protection or settle or waive claims of inhabitants of a territory without their consent. Like the Special Rapporteur, he thought that, in order to resolve those matters, it would be wiser to wait until State practice had developed further. Likewise, the "clean hands" doctrine was a broader question that went beyond the scope of diplomatic protection and should not be dealt with in the work under way.

9. Mr. PELLET said that he would like to know from Mr. Matheson and the other members why, when the Commission's task was the progressive development of international law, it should refrain from dealing with a topic just because it was difficult or because practice was scarce and uncertain.

10. Mr. Sreenivasa RAO said that his initial reaction to the Special Rapporteur's introductory remarks was to endorse his recommendations that certain questions which were not really part of the main topic and for which States had not shown any enthusiasm should not be considered by the Commission at the current stage of its work because it might be distracted and end up with a subject that was completely different from the one currently before it. For all the reasons already given by Mr. Brownlie, Mr. Matheson and Ms. Escarameia, it would be best for the Commission to be cautious and not wander off course. In reply to Mr. Pellet, he said that, if difficult issues arose in the main area of consideration, the Commission should of course not shy away from them. However, if the Commission strayed from its main topic, that would be very time-consuming and might even require a different mandate. He therefore trusted the Special Rapporteur's instincts and, given the lack of practice in the area, he endorsed his recommendations.

11. Mr. MATHESON, replying to Mr. Pellet, said that it was not that the Commission should always avoid difficult questions or even subjects for which there might be no State practice. In the case of the topic under consideration, however, the Commission had already gone a long way and should complete it, at least with regard to the first reading of the draft articles, at the current session and not bring in peripheral subjects which might be interesting but were not essential to the topic. If there was no State practice, it might be more prudent to wait until more such practice developed. That was clearly the case with respect to States or international organizations that

might administer territories, where State practice was only beginning to develop.

12. Mr. KOSKENNIEMI, referring to the two questions which the Special Rapporteur had suggested excluding, namely protection of persons resident in an administered territory and delegation of the right of diplomatic protection, said that the fact that the problem was difficult or State practice insufficient did not mean that they should not be considered. On the first question, he agreed with Ms. Escarameia that military occupation and administration by an international organization were two completely different issues. The case of military occupation should not be dealt with in the report because it would cause difficulties which were not technical, but political, and would only prolong the debate, particularly because the question as to whether occupation was or was not legitimate could not be without consequence for the existence of the right of diplomatic protection. As far as the administration of a territory by an international organization was concerned, however, the question of the legitimacy of the situation did not arise. The problem would continue to exist and, in certain cases, the rights of individuals might be infringed.

13. With regard to the delegation of diplomatic protection, he said that the practice existed and cited the example of Finland, which had often been asked to represent countries in conflict with others. It seemed justified to take into account a practice which had given rise to little controversy and would not excessively prolong the debate. The Commission should encourage such delegation or at least acknowledge its legitimacy. If it failed to codify the topic, it would put those countries which exercised that right in a difficult position. The need for the consent of the State on whose territory such protection was exercised should also be emphasized.

14. Ms. XUE asked Mr. Koskenniemi whether the examples of the delegation of diplomatic protection which he had in mind concerning Finland really had to do with diplomatic protection as the term was used in the report or whether they simply involved cases in which, in order to protect its interests, a country was represented by another's diplomatic mission; for example, when its diplomatic relations with a third country had been severed.

15. Mr. KOSKENNIEMI said that he could not pinpoint any specific cases, but thought that some of them had involved genuine diplomatic protection.

16. Mr. Sreenivasa RAO said that the representation of the interests of a State by another in the case of the breaking off of diplomatic relations was a common practice and was quite different from the exercise of diplomatic protection, by which a State took up the claim of an individual and pursued it, if necessary by instituting a dispute settlement procedure. In that case, the practice of delegation did not exist and the question should therefore not be included in the draft.

17. Mr. MANSFIELD said that, when the Commission had first discussed the question, he had been in favour of making the delegation of the right of diplomatic protection available for the benefit of smaller States. On reflection, however, he did not know of a single case of a State

lodging a formal claim on behalf of another State under delegation. He was therefore inclined to endorse a saving clause indicating the possibility of delegating diplomatic protection, but requiring the consent of the State against which representations were made. However, that seemed to be a slightly separate question.

18. Mr. CHEE said that it was important to distinguish between diplomatic protection exercised by a State and that exercised by an organization. Historically, when international organizations had been created, they had received a mandate to administer certain territories. They currently had various functions under which diplomatic protection could be exercised, for example, as transitional authorities or as peacekeepers. In any case, it was essential not to confuse cases of military occupation of a territory and the administration of a territory by an international organization.

19. Mr. CANDIOTI said that he was in favour of excluding the two subjects from the scope of the study because, if it took them into account, the Commission would be departing from the definition of diplomatic protection provisionally adopted in article 1: "Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State".³ Diplomatic protection could not be exercised in respect of non-nationals, except in the case provided for in article 1, paragraph 2, which related to stateless persons and refugees. If that provision was to include protection by a State or an organization administering a territory, which clearly would be exercised on behalf of non-nationals, it would also need to be amended. The delegation of the right of diplomatic protection could exist, but it was different from the case of a State representing another after the breaking off of diplomatic relations. A State could delegate such a right to another, but that was a peripheral question which might be the subject of a "without prejudice" clause or a final clause. He supported the Special Rapporteur on that point.

20. Mr. KOSKENNIEMI, replying to Ms. Xue's question, said that, for financial and pragmatic reasons, the Nordic countries had the long-standing practice of combining their representations, subject to the consent of the State on whose territory such representations were exercised. Within that informal cooperation, there was no reason why a formal claim of the diplomatic protection type could not be lodged in the event of a wrongful act of a State. In accordance with the principles of diplomatic protection, however, such an arrangement was at the discretion of the State to which the right had been delegated. Such a possibility should be recognized by including a clause on the need for the consent of the State in whose territory the protection was exercised.

21. Mr. GALICKI said that he agreed with the Special Rapporteur and Mr. Candiotti. Article 1 clearly defined the bases of diplomatic protection by specifying the need for a link between the State and its national. There were exceptions, but they were confined to cases in which the powers

³ See footnote 1 above.

of the State of nationality could not be exercised on behalf of refugees or stateless persons. The delegation of diplomatic protection seemed unlikely because it required the consent of three States, namely the State of nationality of the injured person, the State representing that person and, most important, the State in which diplomatic protection was to be exercised. The latter's consent would be very difficult to obtain and, in that connection, article 8 c of the Treaty on European Union (Maastricht Treaty) was wishful thinking. It was therefore preferable not to include the delegation of diplomatic protection in the draft.

22. Mr. KABATSI said that, after listening to the various speakers, he had found himself wondering whether certain aspects of the topic that the Special Rapporteur had deemed unrelated to the study should be included. As for the situation of a military occupation, he found it acceptable to put the question to one side, although there might, in the event of a long and not particularly hostile occupation, be a case for the exercise of diplomatic protection by the occupying Power. There might also be a case for the exercise of diplomatic protection by an international organization; an organization responsible for administering a territory could perfectly well deal with any problems that might arise. He agreed with Mr. Sreenivasa Rao and Mr. Candiotti, however, that such questions were not in the mainstream of the topic.

23. Mr. ECONOMIDES said that, in his view, care should be taken not to confuse diplomatic protection, as exercised daily by embassies and consulates and as provided for by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, with the diplomatic protection regulated by customary international law, which was clearly the issue with which the Commission was concerned in the context of the study. The practice of the Scandinavian States described by Mr. Koskenniemi related to the former category. It was hard to imagine that Finland, for example, could act for a Norwegian and take his case before ICJ. The provision of the Maastricht Treaty quoted by the Special Rapporteur also related to that category of protection. It was important to avoid confusion between the two types of diplomatic protection.

24. Mr. SEPÚLVEDA said that he had two questions to put to the Special Rapporteur. The first concerned the case of persons living in a territory under military occupation, as mentioned in paragraph 5 of the report. He had in mind, for example, the detainees of Guantánamo Bay, where one occupying Power was exercising diplomatic protection on behalf of its nationals detained by another occupying Power. That being so, non-occupying Powers might also exercise diplomatic protection on behalf of their nationals. In view of its relevance, the question might well merit inclusion in the draft articles.

25. The second question related to the transfer of claims, which was the subject of paragraph 10 of the report. The Special Rapporteur had placed great emphasis on the importance of nationality. Indeed, in paragraph 13, it was stated that the transfer of claims was regulated by the continuous nationality rule and that there was therefore no need to consider further codification of the subject. In his view, however, the continuous nationality rule did

not provide a sound enough legal basis for the transfer of claims. Even though the Commission had decided not to include the question in the study, it should nonetheless attempt to find a justification that had a more solid legal basis than simply the concept of continuous nationality.

26. Mr. DUGARD (Special Rapporteur), replying to Mr. Sepúlveda's first question, said that the situation of the Guantánamo Bay detainees was regulated by the traditional laws of diplomatic protection. It was clear that States had the competence to exercise diplomatic protection on behalf of their nationals and that there was no need for a new provision on that subject.

27. With regard to the second question, he said that the applicable rule was indeed that of continuous nationality. In view of that, he recognized that if it had been decided to include a clause dealing with the transfer of claims, it would have been necessary to justify that inclusion by a reference to some other requirement. Since no such clause had been included, he saw no need to take the matter any further.

28. Mr. SEPÚLVEDA thanked the Special Rapporteur, but noted nonetheless that, according to paragraph 5 of the report, the right to diplomatic protection in the context of military occupation fell within the purview of international humanitarian law, yet the reply given by the Special Rapporteur had made no mention of that. It might therefore be useful to specify whether a case like that of the Guantánamo Bay detainees pertained to diplomatic protection or to international humanitarian law.

29. Mr. PELLET, referring to the Guantánamo Bay detainees, said that the fact that the United Kingdom, to take an example, was one of the occupying Powers had nothing to do with the exercise of diplomatic protection. France was also exercising diplomatic protection on behalf of its nationals held in Guantánamo Bay.

30. On the other hand, he acknowledged that he found somewhat disturbing the idea put forward by Mr. Economides that a State could transfer its right to institute a claim and that the ensuing case could thus come before ICJ. He strongly challenged the assertion that there existed several types of diplomatic protection. In his view, it would be truer to say that there were different ways of exercising it, namely, through diplomatic channels or through the courts. A State might well transfer its diplomatic functions without necessarily transferring its legal functions.

31. As for military occupation, he also strongly opposed the idea that some occupations were legitimate and others not. That idea was based on a confusion between *jus ad bellum* and *jus in bello*.

32. Since, however, the Commission had in any case decided not to include the case of persons living in occupied territories in the draft articles, the question of an occupation's legitimacy was of no importance.

33. Mr. DUGARD (Special Rapporteur), introduced draft articles 23 to 25, which appeared in paragraph 14 of the report and related to questions arising from the

relationship between protection by an international organization and diplomatic protection.

34. With regard to article 23, he said that a distinction should be drawn between the functional protection offered by international organizations to their agents and diplomatic protection as such. Although there were similarities between the two types of protection, there were also differences. Diplomatic protection was a mechanism designed to secure reparation for injury to the national of a State, premised on the principle that an injury to a national was an injury to the State itself. Functional protection, on the other hand, was a method for promoting the efficient functioning of an international organization by ensuring respect for its agents. Protection of an agent by an international organization was thus inherently different from diplomatic protection. Moreover, there were so many uncertainties relating to such protection that it was difficult to discern any clear customary rules on the subject. That was why it seemed best to exclude the subject from the current study and to make that clear in a saving clause along the lines of article 23. The Commission might wish to express an opinion as to whether functional protection belonged in the study on the responsibility of international organizations.

35. Draft article 24 related to the right of a State to exercise diplomatic protection against an international organization. That was clearly a subject related to diplomatic protection, but it seemed rather to belong to the Commission's study on the responsibility of international organizations, which would largely be concerned with issues of attribution, responsibility and reparation. He would therefore have no objection to the deletion of that provision.

36. Draft article 25, which dealt with the right of a State to exercise diplomatic protection in respect of a national who was also an agent of an international organization, clearly belonged to the current study. Basically, it aimed to preserve the right of a State to exercise diplomatic protection on its own behalf in cases where that right might conflict with the right of international organizations to exercise functional protection. ICJ had addressed the question in the *Reparation for Injuries* case, but had not provided any guidelines as to how to address the competition between functional and diplomatic protection. It had, however, stated that the important principle was that there should be no duplication of payment of damage by the defendant State.

37. Paragraph 25 of the report listed four issues that warranted consideration in that context, namely the possibility of multiple claims, the right of the United Nations to bring a claim on behalf of an agent against the agent's State of nationality, the question whether it was possible to distinguish clearly between functional and diplomatic protection and the priority of claims. The first two issues did not present a serious problem and there was no need to make special mention of them in a draft article on diplomatic protection. The third raised the question of the duties performed by the agents of an international organization which entitled them to functional protection. According to the Court, the United Nations had the right of protection where a staff member was injured while performing his official duties, but not where the injury occurred in the

course of a private activity. The question of limits to be placed on acts falling within the performance of official duties was even more controversial. In view of the uncertainties surrounding the meaning of the term "agent" and of the scope of official duties, it seemed unwise to draft a provision to the effect that functional protection might be exercised by an international organization in respect of injury to an agent incurred in the course of performing official duties.

38. With regard to the need to reconcile competing claims, some authorities, including Eagleton, considered that priority should be given to functional protection where it was in conflict with diplomatic protection.⁴ There was substance in the arguments advanced by Eagleton, but it was not quite clear whether his reasoning applied to organizations other than the United Nations. Moreover, there was no support in State practice for according such priority, which would leave the State with only a residual right. The Commission would thus need to decide, first, whether to include a provision relating to the priority of claims. If it did so, it would then need to decide whether to include a provision along the lines of draft article 25 and omit the text currently in square brackets, in which case it would be left to the parties concerned to negotiate solutions based on goodwill and common sense, or, on the other hand, to include the text in square brackets, thus indicating that the international organization had the prior right while the agent's State of nationality had only a residual right.

39. Article 26, which appeared later in the report, consisted of a general saving clause on the right of a State other than the State of nationality of an injured person to exercise diplomatic protection in respect of that person or the right of an injured person to bring a claim in his own right. That right had been recognized in article 48 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.⁵

40. Lastly, he recalled that at the previous session he had proposed a saving clause on the right of corporations to bring proceedings under bilateral and multilateral investment treaties and it had been suggested at that time that he should produce a more general clause that would also cover the case of human rights conventions. That was the reason for the alternative version of article 21 in paragraphs 41 to 43 of the report. If members preferred the new wording, the text could be forwarded to the Drafting Committee, which would consider article 21 during the current session.

41. Mr. GAJA said that, in order to analyse the four "without prejudice clauses" proposed by the Special Rapporteur, it was necessary to consider how they related to the scope of the draft articles. According to article 1, diplomatic protection consisted of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of one of its nationals in respect

⁴ See C. Eagleton, "International organization and the law of responsibility", *Recueil des cours de l'Académie de droit international de La Haye, 1950-I*, pp. 361–363.

⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26–30, para. 76.

of an injury to that national arising from an internationally wrongful act of another State. In a nutshell, diplomatic protection was action taken by one State in respect of a wrongful act allegedly committed by another State. The first two “without prejudice” provisions concerned cases in which diplomatic protection was exercised by an international organization (art. 23) or against an international organization (art. 24). Since they did not provide an exception to the scope of the draft articles as defined in article 1, they were not strictly necessary.

42. On the other hand, the relationship between the diplomatic protection exercised by a State and the diplomatic protection exercised by an international organization should not be the subject of a “without prejudice” provision as in article 25. He agreed with the Special Rapporteur that the portion of the passage in square brackets could be omitted; however, if it was deleted, the text would simply apply the general rule and could no longer be considered to be a “without prejudice clause”. Article 25 would no longer serve any purpose and would thus have to be deleted in its entirety. He preferred that solution; however, if the article was to be retained, it would have to be reworded to read along the following lines: “A State may exercise diplomatic protection of a national irrespective of any entitlement that an international organization may have to protect the same person because that person is one of its agents.”

43. While he would prefer to see article 25 deleted, if it was not, he would like the wording “without prejudice ...” to be removed and the text to state in positive terms what flowed naturally from the rest of the draft articles.

44. The “without prejudice clause” in article 26 did, however, make an important clarification. The set of draft articles as a whole and, to a large extent, current practice seemed also to cover cases in which a State of nationality brought a claim on behalf of a national because of an infringement of human rights. In any case, article 1 did not seem to exclude that possibility. However, since a State other than the State of nationality could also invoke human rights that had been infringed by another State, one had to say that diplomatic protection was not the end of the matter, since any State could invoke responsibility and, what was more, other rights besides human rights might be involved.

45. The wording of article 26 was not entirely satisfactory, for it ought to state more clearly that the fact that a State was entitled to exercise diplomatic protection did not preclude other States or individuals from bringing a claim under international law. If that was the idea that the Commission wished to convey, however, the alternative version of article 21 was not the solution because it referred to human rights treaties or possibly to some investment treaties, but did not deal with the non-exclusive nature of diplomatic protection.

46. Mr. PELLET said that he had been only partly convinced by the explanations that the Special Rapporteur had provided at the previous day’s meeting in response to his *ad hoc* statement. He had been particularly disturbed by the comment relating to diplomatic protection by an international organization or an administering State. It

was correct that, if one excluded questions relating to such situations, the problem was largely obsolete: mandates and trust territories no longer existed and neither did protectorates, at least not officially. As to cases of military occupation, he was convinced that such situations were governed by the law of armed conflict and thus had no place in the draft articles. That being said, non-self-governing territories—a euphemism for colonies—still constituted, unfortunately, a situation that was no less specific for being limited. Yet such territories, and not only Hong Kong or Macao until recently, enjoyed a different status under the Charter of the United Nations that was distinct from that of the administering State, and it was not entirely superfluous to say in such cases that the administering Power could exercise diplomatic protection in respect of nationals of those territories. Territories under the control of international organizations should not be included in that category: not, as had been said, because they constituted situations that were too diverse or too temporary or because there was insufficient practice in that area—even if Kosovo and East Timor were the only examples, they were quite enough—but because they had to do with international organizations and it was more sensible to limit the draft to States.

47. As to the Special Rapporteur’s second suggested topic to be dropped, he believed, like Mr. Gaja, Mr. Brownlie and Ms. Escameia, that that subject should be dealt with in the draft, if only in the form of a reference to the rules set out in articles 45 (c) and 46 of the Vienna Convention on Diplomatic Relations. With regard to the transfer of claims and subrogation, he did not object in principle to what the Special Rapporteur had written in paragraphs 10 to 13 of his report. It just seemed to him that all of that had to do with very specific problems that often arose in inter-State practice and for that reason the “evidence” cited by the Special Rapporteur ought to be reflected, and perhaps spelled out, in the draft. That led him to wonder about one problem in particular. The Special Rapporteur referred to the rule of continuous nationality, set out in draft article 4, which the Commission had adopted at its fifty-fourth session, in 2002.⁶ However, paragraph 2 of that article introduced an important mitigation to the principle of continuous nationality. He wondered whether the Commission might consider the possibility of incorporating that mitigation in the event that the “claim” was transferred to a new claimant. It was not at all clear that it would be necessary in all cases to insist on the continuity of claims and he did not *a priori* see any reason to do so if the change of nationality of the claim following a transfer was “unrelated to the bringing of the claim”, to use the wording of draft article 4, paragraph 2. In any event, those were important and complex issues that could not be dismissed out of hand.

48. Two other points that were particularly dear to him were the “clean hands” doctrine and the consequences of diplomatic protection. The basic idea underlying “clean hands” was that, when a subject of international law sought to invoke the international responsibility of another subject of international law even though it had itself committed a violation of the law in the same context, the situation had certain consequences. However,

⁶ See footnote 1 above.

what was important in such situations was that the consequences were quite different, depending on whether the context was one of inter-State relations—in other words, to use standard French legal terminology, in the context of an “immediate” injury—or one of diplomatic protection, which involved a “mediate” injury. In the first case, intersecting violations of the law could only be violations of international law and, if a State had violated a rule of international law in respect of another State which it deemed responsible for a violation in respect of it, it was still entitled to formulate a claim. Its own violation constituted neither grounds for inadmissibility nor a circumstance precluding wrongfulness.

Organization of work of the session (*continued*)

[Agenda item 1]

49. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of diplomatic protection would be composed of Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Ms. Escarameia, Mr. Gaja, Mr. Kabatsi, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Sepúlveda and Ms. Xue.

The meeting rose at 1 p.m.

2793rd MEETING

Wednesday, 5 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. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/537, sect. B, A/CN.4/538,² A/CN.4/L.647 and Add.1)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET said that although the Special Rapporteur had suggested that the Commission should not take up the question of the “clean hands” doctrine in the context of diplomatic protection and the question of

¹ 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.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

the consequences of diplomatic protection, he himself believed that they merited further consideration.

2. With regard to the “clean hands” doctrine, he had already noted at the previous meeting that a situation in which a State complaining of a violation of international law by another State had itself violated international law neither afforded grounds for inadmissibility nor constituted a circumstance precluding wrongfulness. In the context of inter-State relations, the fact that two States were in violation of international law did not preclude the responsibility of both States being invoked.

3. On the question of inadmissibility, he drew attention to an article published in the *Annuaire français de droit international* in 1964 by Professor Jean Salmon of the Université Libre de Bruxelles, in which the writer had meticulously demonstrated that there had never been a finding of inadmissibility in a case involving the “clean hands” doctrine.³ To the best of his knowledge, no court had ever subsequently found that that doctrine automatically rendered a claim inadmissible. Moreover, Mr. James Crawford, the Special Rapporteur on State responsibility, had explicitly stated in his second report that the “clean hands” doctrine did not constitute a circumstance precluding wrongfulness,⁴ and in 2001 the Commission had chosen not to include it in articles 20 to 25 of its draft articles on responsibility of States for internationally wrongful acts.⁵ There was at best a veiled allusion to the doctrine in the reference to the “contribution to the injury by wilful or negligent action or omission” in draft article 39.⁶ In other words, in the event of intersecting violations of international law by two States, the consequences of one State’s responsibility could be attenuated by the consequences of the other’s responsibility.

4. ICJ had also demonstrated in a number of noted cases that the violation of a rule of law by a claimant State in no way precluded invocation of the responsibility of the respondent State. A recent example was to be found in the case concerning the *Gabčíkovo-Nagymaros Project*, in which the Court had ruled, in its 1997 judgment, that “Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty” (p. 67, para. 110). Thus the fact that both parties to the 1977 Treaty concerning the construction and operation of the Gabčíkovo-Nagymaros system of locks⁷ might have violated it had absolutely no impact on the principle of Hungary’s responsibility or, *a fortiori*, on the admissibility of Slovakia’s claim.

³ J. J. A. Salmon, “Des ‘mains propres’ comme condition de recevabilité des réclamations internationales”, *Annuaire français de droit international*, vol. 10 (1964), pp. 225 *et seq.*

⁴ See *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, pp. 82–83, paras. 332–336. See also *Yearbook ... 1999*, vol. II (Part Two), p. 85, paras. 411–415.

⁵ See para. 9 of the commentary to Chapter V (Circumstances precluding wrongfulness) of the draft articles on the responsibility of a State for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 72.

⁶ See 2792nd meeting, footnote 5.

⁷ Signed in Budapest on 16 September 1977 (United Nations, *Treaty Series*, vol. 1109, No. 17134, p. 211).