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Summary record of the 2793rd meeting

Topic:
Diplomatic protection

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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

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).

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).

5. The vague concept of “clean hands” was not very different from the general principle of good faith in the context of relations between States, and had no autonomous consequences and little practical effect on the general rules of international responsibility. However, in the context of diplomatic protection, which involved relations between States and individuals, the concept took on new significance: it became functional, for in the absence of “clean hands” the exercise of diplomatic protection was paralysed. If a private individual who enjoyed diplomatic protection violated either the internal law of the protecting State—and it should be noted that internal law played no role at all in cases involving relations between States—or international law, then in the general context of the claim, the State called upon to exercise protection could no longer do so. A good example of such a situation was the decision rendered in 1898 in the *Ben Tillett* arbitration case. The solution applied in that case had subsequently been applied in numerous cases in which the “clean hands” doctrine effectively rendered a request for diplomatic protection inadmissible. The fact that the doctrine produced an effect only in the context of diplomatic protection was more than ample reason for the Commission to explore it further.

6. As he had reread the draft articles adopted by the Commission thus far, it had occurred to him that if the Commission went no further, it would not be adopting a set of draft articles on diplomatic protection, but rather a text on the conditions for the exercise of diplomatic protection, a much more restricted topic. At least one essential element would be missing, namely the effects or consequences of diplomatic protection, and without it the draft articles would be, as it were, lopsided.

7. It was possible that article 1, paragraph 1, which had been drafted on the basis of the *Mavrommatis* formula, could be construed to mean that the exercise of diplomatic protection called into question the international responsibility of a State that carried out an internationally wrongful act. However, basing himself on the notion that “what goes without saying is better made explicit”, he suggested that the draft articles ought to contain a second part that dealt specifically with the consequences of diplomatic protection. Such a section should begin quite simply by recalling an obvious truth, namely that in exercising diplomatic protection in respect of one of its nationals a State sought to invoke the international responsibility of another State that had injured its rights in the person of its national. Once that principle had been clearly recalled, the Commission should spell out clearly what consequences the exercise of diplomatic protection would have.

8. Without wishing to give the Commission a lesson on the rudiments of international law, he nevertheless wished to go into the matter in some detail. The proposed new section should have two chapters, one dealing with the usual legal consequences of the exercise of diplomatic protection, the other with the effects of diplomatic protection on other forms of invoking international responsibility.

9. The first chapter would address a number of issues. First, it should be noted that in exercising diplomatic protection a State was expected to exercise its own right. Yet the amount of any compensation provided in a case

involving diplomatic protection would be calculated on the basis not of the injury to the State but of the injury to the protected individual. That aspect of diplomatic protection seemed difficult to reconcile with the *Mavrommatis* formula, yet it was that very illogicality that made it necessary for the principle to be enunciated in the draft articles.

10. Secondly, when a State exercised diplomatic protection, any compensation required of the State that had committed an internationally wrongful act must be paid not to the protected individual who had been injured but to the protecting State, which in principle was free to use it in any way it saw fit, even though doing so might appear immoral.

11. One final element that might be considered among the usual legal consequences of diplomatic protection concerned the payment of compensation in cases of multiple claims. It should be made clear that such compensation could in no case exceed what was required as full reparation for the injury suffered. The Special Rapporteur had in fact touched on the subject of multiple claims in paragraph 26 of his report (A/CN.4/538), where he noted that ICJ had endorsed the principle in the *Reparation for Injuries* case. However, the only mention of the principle related to the combination of diplomatic and functional protection, while the principle of non-duplication of effects of protection was more general; moreover, it should be mentioned not in articles 5 and 7, which dealt with the conditions of the exercise of diplomatic protection, but in a separate section on consequences.

12. The second chapter of the new section should deal with the effects of the exercise of diplomatic protection on other forms of invoking a State’s international responsibility. That notion was somewhat linked to the notion underlying draft articles 23 to 26 and the alternative formulation for draft article 21 as presented in the Special Rapporteur’s report. However, he wished to address the question more systematically by considering the relationship that existed between the various ways in which a State’s international responsibility could be invoked, diplomatic protection being one such way. Such an exercise should result, not in the formulation of simple saving clauses, but in a clear and positive enunciation of the consequences of the exercise of diplomatic protection on the other forms that invoking the international responsibility of the State causing the injury could take. It was conceivable that the exercise of diplomatic protection might preclude a direct remedy or functional protection; the Special Rapporteur had in fact raised the last-mentioned issue, but he had not provided a solution to it, preferring to recommend a saving clause.

13. He found the wording of draft article 26 to be unduly cautious. States and individuals both needed to know whether the exercise of diplomatic protection in respect of a national had the effect of paralysing or neutralizing other means of invoking the international responsibility of a State. Likewise, when several States could act, in accordance with the rules set out in article 48 of the draft articles on State responsibility, it would be helpful for them to know what the effects of the exercise of dip-

lomatic protection by one of them would be on the others' right to take action.

14. He understood the Special Rapporteur's reluctance to tackle the question of the exercise of protection by or against an international organization. Yet it was clear that if the Commission chose to use simple saving clauses to address the questions of the relationship between the different forms of protection exercised by States and the remedies available to individuals, it would in fact be refusing to undertake the codification and progressive development of international law in the area of the relationship between diplomatic protection and other forms of action. The Commission must not suppose that if it dealt with the question of the active or passive responsibilities of international organizations only when considering the work done by the Special Rapporteur on that topic, it would not eventually have to revert to consideration of the very issues he was raising at present.

15. Turning to draft articles 23 to 25, he agreed with the Special Rapporteur that simple saving clauses were sufficient in the case of all three articles. All three dealt too closely with the responsibility of international organizations and its relationship to State responsibility, and the issues raised could be dealt with in greater detail at a later stage in the context of the work of the Special Rapporteur for the topic. He agreed with the Special Rapporteur on diplomatic protection that the exercise of functional protection by an international organization corresponded to the exercise of diplomatic protection by a State in the context of State responsibility. Nevertheless, that was no reason to exclude it from the draft articles on the responsibility of international organizations, as the Special Rapporteur for that topic had seemed to be suggesting at the previous meeting. The Commission's separation of diplomatic protection from the larger question of State responsibility had been somewhat artificial and had been dictated by practical rather than intellectual considerations. He hoped that a similar separation would not take place when the Commission took up the responsibility of international organizations: functional protection was an integral part of that responsibility, and should be dealt with under that topic as well as under the present one. He also wondered whether the three articles 23, 24 and 25 might not be combined into a single provision, along the lines of article 57 of the draft articles on State responsibility, to read: "These articles are without prejudice to any question relating to the protection of a private individual by, or in respect of, an international organization."

16. If, however, the "triple saving clause" as presented in the Special Rapporteur's report was to be retained, he would be, to say the least, somewhat opposed to the approach based on Eagleton⁸ proposed by the Special Rapporteur in respect of article 25. He failed to see why a competent international organization exercising functional protection would have priority over a State or States exercising diplomatic protection. Functional protection was based on the key assumption that an international official or agent must not rely on the protection of the State of nationality if he or she suffered an injury while in the service of the international organization. It was the

international civil servant's independence that was his or her defining feature, and that independence would be jeopardized by any intervention by the State of nationality. That reasoning had been upheld by ICJ in its advisory opinion of 1949 on the *Reparation for Injuries* case. At the same time, there was no reason for the functional protection afforded by an international organization to an international official to prevail over the broader protection afforded by the State of nationality, to which the official retained all links. Functional protection was specifically service-related, while the protection afforded by the State of nationality was both broader and discretionary.

17. Although he took issue with the minimalist approach adopted by the Special Rapporteur in his report with a view to completing work on the topic by the end of the present quinquennium, he was grateful to him for having adroitly raised a number of problematic issues which, it was to be hoped, would now be addressed.

18. The CHAIRPERSON invited members of the Commission to comment on the proposals put forward by Mr. Pellet.

19. Mr. BROWNLIE, speaking on a point of order, suggested that the list of speakers should be adhered to and that any specific comments on Mr. Pellet's statement could be made once that list was exhausted.

20. Mr. PELLET suggested that members should respond to the two separate matters he had raised in two separate debates.

21. Mr. BROWNLIE said he would prefer to deliver the statement he had prepared on the Special Rapporteur's report as a whole, rather than immediately responding to the specific points made by Mr. Pellet.

22. Mr. Sreenivasa RAO said that Mr. Pellet's contribution to the debate had been, as usual, engaging and thought-provoking. The problem, however, was that diplomatic protection had been on the Commission's agenda for quite some years, and a finished product was now required. He himself had in the past expressed surprise at the Commission's ability to expatiate on issues that were sometimes of no practical relevance or utility. The important thing now was to address the topic of diplomatic protection in a pragmatic manner, looking to the practical outcome of the work, namely the creation of a regime that would be comprehensible to and applicable by the States to which it was addressed. The Special Rapporteur was right to conclude that certain issues should not be dealt with in the draft articles.

23. Mr. ECONOMIDES said he agreed with Mr. Pellet that the "clean hands" doctrine and the consequences of the exercise of diplomatic protection deserved fuller consideration. On "clean hands", the Commission could do no more than provide some guidance by inserting a paragraph in the commentary, for it was not yet in a position to put forward a draft article. The consequences of diplomatic protection had been characterized by Mr. Pellet as a means of invoking responsibility, but there was no need to make that point, as it was implicit in the draft. On the other hand, it might be useful to indicate that reparations

⁸ See 2792nd meeting, footnote 4.

were established on the basis of the injuries suffered by the individual. The most thorny issue, however, was that reparations were paid to the State, which, according to the traditional doctrine, could do what it liked with them, including pocketing them and giving nothing to the person who had suffered the injury. He was uncertain what to do about that, short of indicating that the problem was to be resolved by internal law. To reaffirm the absolute right of States to compensation was consonant with the classical practice of diplomatic protection, but would be retrograde in today's world. In any event the two issues raised by Mr. Pellet merited consideration.

24. Mr. PELLET said he did not agree with Mr. Economides that a reference to "clean hands" should be inserted in the commentary: if anything was to be said on the subject, it should be in the draft articles themselves. He agreed, on the other hand, about the immorality of the practice whereby States kept monies intended as reparation for injuries suffered by individuals. The Commission's job, however, was to progressively develop international law; and to state—as Mr. Economides had suggested—that the practice fell within the purview of internal law might be a relatively painless way of grasping that particular nettle.

25. Mr. Sreenivasa Rao's suggestion that the Commission should race through the work on diplomatic protection was not to be taken seriously. The whole purpose of the exercise was to produce something that would be useful to States, and that could not be achieved through half-measures: a comprehensive, in-depth study of the entire topic was required. The truth of the matter was that the Commission's reputation as a centre of excellence had been somewhat tarnished of late, partly because of its readiness to sacrifice thoroughness in the interests of meeting deadlines.

26. Ms. ESCARAMEIA said that some of the important issues raised merited the creation of a working group to study them further. Such issues included the "clean hands" doctrine; diplomatic protection of individuals in non-autonomous territories; and the consequences of the exercise of diplomatic protection, specifically reparation. One or two articles could be drafted on the latter point without impeding the Commission's overall progress in its work.

27. Concerning the consequences in international law of diplomatic protection, she was not convinced by Mr. Pellet's argument that articles 23 to 25 should be merged into one article. Although article 23 was merely a reminder that the exercise of diplomatic protection was without prejudice to functional protection, there was no harm in retaining it, not only because it recognized a particular issue dealt with in the *Reparation for Injuries* case but also because it clarified certain situations. It could be dealt with in the future under a separate topic, although not under that of responsibility of international organizations, since what was at issue was not a responsibility but a right.

28. The matter covered in article 24, the exercise by a State of diplomatic protection against an international organization, would be better dealt with under the topic of responsibility of international organizations, but there

was no harm in retaining the article in the present draft as a reminder. Article 25, on conflict between the State and an international organization, was useful. The bracketed words should not be retained, however, because they indicated that the exercise of functional protection by an international organization took precedence over the exercise by a State of diplomatic protection. That was not always the case: it was sometimes difficult to know in what capacity the individual had suffered the injury, or to be sure that the international organization had relinquished the right to exercise functional protection and that the State could step in. She could not accept the analogy with multiple nationalities.

29. In summary, therefore, articles 23 to 25 should be retained: they were more than "without prejudice" clauses and served as reminders of issues that needed to be addressed under other topics.

30. Article 26 should be retained, but redrafted as suggested by Mr. Gaja at the previous meeting. Protection under human rights treaties needed to be mentioned. Human rights law was not *lex specialis* vis-à-vis diplomatic protection and the reverse was also true. A clear statement should be made to the effect that "diplomatic protection does not preclude other mechanisms of protection of rights of individuals".

31. She did not support the alternative formulation for article 21, since bilateral investment treaties and human rights treaties were separate issues that should be dealt with separately.

32. Mr. ECONOMIDES said that he agreed with the Special Rapporteur and several previous speakers that the question of diplomatic protection by a State or international organization that administered a territory, *de jure* or *de facto*, in accordance with international law should not be covered in the draft. It was of very limited practical import and should be dealt with on the basis of a special agreement between the administering State or international organization and the administered State or territory or, in the absence of such an agreement, on the basis of customary international law, which in any event would apply to all matters not specifically addressed in the draft articles. The commentary should make it clear that the unlawful acquisition of a territory did not open the door for an aggressor to exercise diplomatic protection.

33. He agreed with the Special Rapporteur's views about the delegation of the right of diplomatic protection. Article 8 c of the Treaty on European Union (Maastricht Treaty) had nothing to do with diplomatic protection as it was understood in the draft articles. The Treaty did not mean that a State espoused an international claim by one of its nationals against another State, but rather that an embassy or consulate provided its nationals with normal, routine diplomatic or consular assistance in foreign countries with which it had diplomatic and consular relations. Diplomatic protection within the meaning of the draft articles entailed the settlement of an international dispute between States, whereas normal diplomatic or consular assistance entailed the exercise of a number of diplomatic and consular functions on behalf of nationals in foreign countries. He referred in particular to article 3 of the

Vienna Convention on Diplomatic Relations and to article 5 of the Vienna Convention on Consular Relations. He personally considered that the right to exercise diplomatic protection as defined in article 1 of the draft was a sovereign right *par excellence*, one that could not be delegated to another State.

34. On the transfer of claims, he could accept as a new rule and as part of the progressive development of international law the thesis that succession of a claim to a foreign national on death was not an obstacle to the exercise of diplomatic protection if all other conditions obtained. Such a rule, which would introduce an exception to the principle of continuity of nationality, was equitable and would be well received.

35. Turning to the relationship between diplomatic protection and protection by an international organization, he agreed that the so-called “functional” protection exercised by an international organization should be considered under the topic of responsibility of international organizations or even as a separate topic, but not in the context of the topic of diplomatic protection exercised by States. There were significant differences between the two institutions on many points. The inclusion in the draft of a simple saving clause like that in article 23 was useful in order not to encroach upon or prejudice the content of the functional protection exercised by international organizations. On the other hand, he had doubts about the relevance of article 24, as it dealt with a matter that was beyond the scope of the draft articles, which related exclusively to the diplomatic protection exercised by States. Similarly, he was unhappy with article 25 because it went too far and because if the text in brackets was included it could raise more problems than it solved, whereas without that text it merely stated the obvious.

36. On article 26 and the alternative version for article 21, he remained convinced that instead of adopting “without prejudice” clauses it was necessary to go further and give special international procedures priority over diplomatic protection. In law, what was specific took precedence over what was general, just as a later act prevailed over an earlier one. Diplomatic protection was an ancient, unwieldy and often political institution, often exercised by States as a last resort and systematically avoided by small States, especially when they were confronted with stronger States. That institution must now give way to special international procedures that pursued the same goals as diplomatic protection, namely procedures for protection of human rights and of investments and other similar procedures instituted by international treaties different in character from the customary institution of diplomatic protection. Article 26 should accordingly read: “These articles shall not apply when the State of nationality or another State acting on behalf of an individual or an individual acting alone brings international proceedings against another State with the same purpose as diplomatic protection in order to obtain compensation for damage caused by an internationally wrongful act.” Provision could be made for diplomatic protection to come into play in the event of the failure of a special international procedure, for example when a State refused to pay the compensation awarded.

37. Mr. BROWNLIE said he greatly appreciated the report, and also the important and creative *tour d’horizon* given by Mr. Pellet, who had raised problems about which the Commission should be thinking. However, careful thought had to be given to whether the Commission should now make important programmatic decisions that would have major implications for the Special Rapporteur. The topic of diplomatic protection must be completed, and the issues raised by Mr. Pellet were important enough to warrant becoming part of a separate project. That was the sort of issue that should be discussed by the Planning Group.

38. He did not accept Mr. Pellet’s definition of the purpose of diplomatic protection. State responsibility was complementary to but different from diplomatic protection; their functions were related but different. Diplomatic protection was about identifying and protecting, as a legal matter, the interests of States. Indeed, the Special Rapporteur might be asked to do an in-depth study of the problem of priority of claims. He was thinking not of claims by different institutions—States as opposed to international organizations—but rather of more ordinary situations. In the *Lockerbie* cases, for instance, the priority of claims as between the United States and the United Kingdom must obviously have posed a problem, which had been resolved in a practical manner.

39. Another possibility for further efforts relating to diplomatic protection would be the definition of State interests. Recent events had revealed the problem of whether a State held the right to a name and a flag and whether outside authorities could oblige it to change them. Diplomatic protection was also closely related to admissibility of claims, a subject which was rarely brought up in the discussion and which depended on the definition of State interests.

40. Reverting to his earlier remarks on delegation of the right of diplomatic protection and the transfer of claims, he said that he had some sympathy with the statement just made by Mr. Economides. For a State to ask another State to act on its behalf in diplomatic protection was probably a simple case of international agency, which was not the same as transfer of the right to exercise diplomatic protection. He did not think the Special Rapporteur should be asked to reconsider that issue, although he was inclined to support Mr. Koskenniemi’s suggestion that there might be some kind of saving clause to tell the reader that the exercise of diplomatic protection on behalf of other States was a possible eventuality.

41. He had no particular problem with article 26, which, though it merely stated the obvious, had an expository role. However, he was uneasy about articles 23, 24 and 25, and suspected that the first and last, at any rate, should be dispensed with. The Special Rapporteur sometimes had a tendency to labour in his neighbour’s vineyard, and the content of those provisions did not, in his view, fall under diplomatic protection. There might possibly be room, however, for a more general, single proviso of the type suggested by Mr. Pellet.

42. He would turn with some reluctance to the “clean hands” doctrine, which, in his view, was a non-subject. Mr. Pellet had referred to an arbitration case from 1898.

There was little or no evidence of the existence of a doctrine in general international law called the “clean hands” doctrine, and even if there were, he agreed with the Special Rapporteur that it had nothing to do with the exercise of diplomatic protection. Quite often in international litigation, as in the *Barcelona Traction* case, the *Certain Phosphate Lands in Nauru* case or the *Oil Platforms* case, as well as in the jurisdiction phase of the recent NATO cases (*Legality of Use of Force* cases), “clean hands” had been cited as a matter of admissibility or propriety. That was a major source of confusion, because, given the way in which cases were fought, admissibility often involved elements of prejudice. ICJ had shown no tendency to adopt or encourage references to the “clean hands” doctrine. Mr. Pellet had referred to a number of perfectly respectable principles of treaty law, and elements analogous to the “clean hands” doctrine were indeed present in the law. The principle of “good faith” was related, but it was not the same thing: it had considerable authority behind it, whereas the “clean hands” doctrine did not. It would make life unnecessarily difficult for the Special Rapporteur if the Commission asked him to study the non-subject of “clean hands”.

43. Mr. PELLET said that he continued to disagree with the assertion that the “clean hands” doctrine did not apply to diplomatic protection. None of the cases cited by Mr. Brownlie involved such protection. Mr. Brownlie was right that ICJ had not been receptive to references to the “clean hands” doctrine; but that related only to cases between States. He agreed with Mr. Brownlie that in proceedings between States the doctrine was inapplicable. However, where a case involved an individual and a State via diplomatic protection, the doctrine was relevant.

44. Mr. MOMTAZ said that he wished to begin by reverting to the question as to whether the draft articles should cover the protection of the inhabitants of a territory under enemy occupation. In his view, it was important to distinguish between, on the one hand, the inhabitants of a territory under enemy occupation who had the nationality of the State whose territory had been occupied following an armed conflict and, on the other, those who were nationals of non-belligerent States. That distinction was based on article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12 1949, pursuant to which persons in the first category were protected. He agreed with the Special Rapporteur that such protection was not a question of diplomatic protection, but fell within the purview of international humanitarian law (paragraph 5 of the report). On the other hand, he was puzzled by the Special Rapporteur’s reference to the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II). There, the notion of occupied territory was out of place: territories occupied by belligerents during a domestic armed conflict were not considered by international humanitarian law to be occupied territories.

45. As to the second category, although a belligerent State was under an obligation to respect foreigners residing in territories which it controlled or occupied, such persons did not fall within the purview of international humanitarian law and did not enjoy protection under

article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. Nothing prevented a State from exercising diplomatic protection on behalf of its nationals. The question was whether such protection should be exercised *vis-à-vis* the State occupying the territory or the State whose territory had been occupied. Of course, there was no point in exercising diplomatic protection *vis-à-vis* the State whose territory had been occupied, because it would have no practical consequences. He noted that article 4 of the Convention tended to blur the distinction between the occupied and the occupying State with regard to the protection of foreigners resident in that territory; that was a sensitive issue, and could have important legal and political consequences.

46. Turning to the next part of the report, on delegation of the right of diplomatic protection and the transfer of claims, he agreed with the Special Rapporteur that a belligerent State could not hand over to a neutral State the protection of its nationals in an enemy State without the latter’s consent (paragraph 8 of the report). In such cases, it was more appropriate to speak of a Protecting Power, which was the term used in the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

47. He had doubts about the Special Rapporteur’s assertion that “the transfer of claims is regulated by the continuous nationality rule” (paragraph 13 of the report). That rule should be applied with care, especially when State succession took place following violence. In such cases, of which there had been several in recent years, nationality was often imposed upon, and sometimes denied to, an individual by the new State authorities, whereas in some instances, the individual preferred to give up his nationality of origin for religious or ethnic reasons. The International Tribunal for the Former Yugoslavia had addressed those painful questions and ruled in favour of abandoning the requirement of a nationality link for certain categories of victims. On the other hand, he shared the Special Rapporteur’s view on the functional protection of its agents by an international organization and supported the line of reasoning in paragraph 18 of the report. However, the Special Rapporteur’s arguments concerned only universal international organizations. In the case of regional organizations, especially the smallest among them, it was common practice for member States to appoint and pay their agents. In such a situation, functional protection could not and should not be exercised.

48. Lastly, with regard to the “clean hands” doctrine, he drew attention to a recent ruling of the European Court of Human Rights that appeared to contradict Mr. Pellet’s assertion, namely the decision of 23 January 2002 on the *Slivenko* case, cited by Flauss who, in a study on diplomatic protection and human rights, spoke of banishing “clean hands” from international cases involving the protection of human rights, that doctrine being highly controversial in relations between States and individuals.⁹

⁹ J.-F. Flauss, “Protection diplomatique et protection internationale

49. Mr. MATHESON said that, although the issues raised by Mr. Pellet were interesting, the Commission could not simply ask a working group to come up with some quick drafting on the subject; the Special Rapporteur would have to be instructed to do a study of law and policy and propose options. He was opposed to such an approach, which would substantially delay the Commission's work.

50. On the saving clauses in articles 23 to 25, he said that those provisions were unnecessary and should be omitted. It was sufficiently clear that the articles on diplomatic protection did not prejudice matters which they did not cover, a point which could be elaborated upon in the commentary. However, if the Commission decided that it would be useful to include saving clauses on those points, he had no quarrel with the substance of the proposed articles, except for the bracketed words in article 25, which strongly suggested that the right of an international organization to exercise functional protection on behalf of its agents took priority over the right of the State of that person's nationality to exercise diplomatic protection and that a State could exercise diplomatic protection only if the organization was unable or unwilling to exercise functional protection. If the bracketed language were included, article 25 would not be a benign saving clause, but one which would make an important and erroneous substantive assertion about the scope of both diplomatic and functional protection. It had already been pointed out that the bracketed formulation was not consistent with the opinion of ICJ in the *Reparation for Injuries* case, in which, as the report noted (para. 23), the Court had found that, in such a situation, "there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim" (p. 185). Rather, the Court suggested that such cases could be easily resolved by goodwill or common sense or, if desired, by formal agreement. Nor, as the report further indicated, was there any support in the practice of the United Nations or any other international organization for giving such priority to the organization. Clearly, international organizations had a proper interest in the protection of their agents, and it might be that in many cases the State of nationality should defer to the organization as a matter of common sense and good policy. However, that would not always be the case, and it was easy to imagine circumstances in which the State in question would be better able to protect its nationals than would the organization, or in which both the State and the organization might usefully offer protection. That was particularly important in that the article was not limited to the United Nations, because there were many international organizations whose ability to offer protection was relatively weak. For all those reasons, he was opposed to including the bracketed language.

51. Although the two additional saving clauses in the form of a new article 26 and the alternative formulation for article 21 were not strictly necessary, he could understand the desire to make clear that the articles on diplomatic protection did not prejudice other rights and remedies of States or individuals, particularly those under

bilateral investment treaties and human rights treaties. There was probably no need for two separate provisions on that point; perhaps the Drafting Committee could be asked to come up with a single formulation that included the substance of both.

52. Mr. COMISSÁRIO AFONSO, referring to the question of protection by an administering State or international organization, said that he agreed with the Special Rapporteur that there was not enough evidence or sufficient practice to warrant codification or progressive development. The cases of protectorates, mandates or trust territories, besides the element of legitimacy referred to by Mr. Brownlie, also lacked another fundamental prerequisite, namely statehood. While it was important to address the question of diplomatic protection correctly, the Commission should not regard such protection as a panacea applicable to all situations.

53. On the delegation of the right of diplomatic protection, he agreed with Mr. Economides that article 8 c of the Treaty on European Union (Maastricht Treaty) did not encompass the concept of diplomatic protection as defined in the draft articles. Article 8 c was a case of normal fulfilment of diplomatic functions as set out in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, pursuant to which diplomatic and consular missions were duty-bound to defend and protect their nationals "within the limits permitted by international law" (article 3, paragraph 1 (b), of the Vienna Convention on Diplomatic Relations and article 5 (a) of the Vienna Convention on Consular Relations). However, diplomatic protection was a completely different concept. Three elements helped distinguish between diplomatic protection and the protection extended by diplomatic and consular missions to their nationals.

54. Firstly, the notion of injury arising from an internationally wrongful act did not arise in the context of the functions of diplomatic and consular missions. Ambassadors or consuls could assist their nationals irrespective of whether or not they had broken any of the laws of the host country. Secondly, diplomatic protection did not depend on the consent of other States. Thirdly, the State exercising diplomatic protection adopted in its own right the cause of its national; that was not a function of diplomatic and consular missions. Under diplomatic protection, once a State took up the case, it became the sole claimant, as seen in the *Mavrommatis* case.

55. He also agreed with the Special Rapporteur with regard to the transfer of claims. He endorsed the fundamental thrust of draft articles 23, 24, 25 and 26, but wondered what their purpose was. Was the Special Rapporteur trying to distinguish between diplomatic protection and functional protection by an international organization? If so, he personally felt that article 23 should be included under the topic of responsibility of international organizations. Article 24 should simply enshrine the right of a State to exercise diplomatic protection against an international organization. The same could apply to article 25. He supported article 26, which should probably be considered to be an exception and could therefore be incorporated in article 7.

56. Mr. KOLODKIN, referring to the delegation of the right of diplomatic protection, said that diplomatic protection in the broad sense, namely as exercised within the framework of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, differed from the subject of the draft articles, which was diplomatic protection *stricto sensu*. The practice of delegating diplomatic protection in the broad sense existed in the Russian Federation; for example, a provision to that effect (art. 15) included in the Treaty on the establishment of a Union State between the Russian Federation and Belarus clearly concerned diplomatic protection in the broad sense.¹⁰ He suggested elaborating on the right of diplomatic protection in the commentary.

57. He agreed with the Special Rapporteur that the topics raised in his introduction should not be included in the draft articles and that the Commission must conclude its study of the subject within the remaining three years of the current quinquennium (paragraph 3 of the report). The message from the Sixth Committee was clear; the Commission should focus on completing the draft articles on first reading, rather than dwelling on complex questions.

58. He had reservations about the need to retain draft articles 23 to 26, and especially articles 23 and 24. Article 23 dealt with functional protection. As indicated in paragraph 18 of the report, however, protection of an agent by an international organization was different from diplomatic protection. It was therefore clear, even in the absence of article 23, that the provisions on diplomatic protection contained in the draft articles were without prejudice to the right of functional protection and it was unnecessary to spell the provision out. The same applied to article 24. The draft articles related to the diplomatic protection of a person injured by another State. By definition, therefore, they could not prejudice the right to diplomatic protection from an international organization.

59. The retention of the first part of draft article 25, on the other hand, was desirable, although not essential. The text in square brackets, which assigned priority to the international organization in the exercise of protection, was largely based on the arguments by Eagleton, quoted in paragraph 34 of the report, which he found unconvincing. He greatly preferred the logic of ICJ, which, in the *Reparation for Injuries* case, had not given preference to functional over diplomatic protection. The retention of the first part of draft article 25, together with the commentary, would be a useful confirmation of the proposition that an international organization did not have a priority right of protection.

60. Draft article 26—at least, in its current form—did not seem necessary. The right of a State other than the State of nationality to exercise diplomatic protection as the result of an internationally wrongful act had nothing to do with diplomatic protection, which was based on the principle of reciprocity. It was clear, even without the draft article, that provisions on diplomatic protection were without prejudice to such rights, which related to *erga omnes* obligations in the field of human rights. The

analogy with article 33 of the articles on responsibility of States for internationally wrongful acts that had been adopted by the Commission at its fifty-third session, in which the question of which entities apart from Governments had rights relating to responsibility, was hardly appropriate. Chapter I of Part Two of the draft articles on State responsibility, indeed, referred only to States. It had therefore been logical to include in it a “without prejudice” clause concerning the rights of other persons or entities. As it stood, the provision had no place in the draft articles on diplomatic protection.

61. The alternative formulation for draft article 21 confirmed that the discussion on the draft article from the previous session had been of some use. He remained doubtful, however, as to whether the article should relate to natural as well as to legal persons. One conclusion that could be drawn from the alternative formulation was that the articles on diplomatic protection were without prejudice to the right to invoke procedures under the human rights treaties. The important factor, to his mind, was, on the contrary, that the right to invoke procedures under such treaties was without prejudice to the right to diplomatic protection.

62. Ms. XUE said that the fifth report on diplomatic protection, which dealt with issues that did not fall within the traditional domain of the topic, was commendable, since it would help clarify the nature and scope of the draft articles. The report raised five major issues.

63. With regard to protection by an administering State or international organization, she agreed with the Special Rapporteur that such protection should not be covered under the draft articles, for several reasons. Firstly, the international legal order had changed and the examples given in the report related to obsolete institutions such as protectorates, mandates and trusteeship. At the previous meeting, Ms. Escarameia had referred to the case of Macao. Whatever the facts of the specific cases, it was clear that, although Macao and Hong Kong had not been placed under the Trusteeship Council as former colonies, they had undoubtedly been vestiges of a colonial past. The definition of an administered territory could, as pointed out at the previous meeting, be quite broad in the context of modern international relations. While the prevailing view in the Commission had clearly been that military occupations should be excluded, there had been some sympathy for the inclusion of a territory administered by an international organization. She could not concur, not only because that situation was politically sensitive or difficult to codify—there being little evidence of State practice—but also because it was contrary to the law. Although historically rooted in foreign intervention, the right to exercise diplomatic protection was currently regarded rather as the inherent sovereign right of a State, whereas an administering Power, which was transitional in nature, could exercise only such rights and perform only such duties over the territory concerned as were conferred or imposed on it, respectively. No general rules on diplomatic protection should be developed so as to give an administering Power quasi-sovereign status. Moreover, what little evidence there was of general State practice in that regard did not indicate that the administered territory was not entitled to protection by the occupying

¹⁰ Signed at Moscow on 8 December 1999 (United Nations, *Treaty Series*, vol. 2121, No. 36929, p. 13).

Power. On the contrary, the latter was obliged, under the terms of its mandate, to provide such protection. Indeed, if all types of international claim for remedy or diplomatic and consular representation were characterized as diplomatic protection, the case of an administered territory could also become more complicated. In essence, the right to exercise diplomatic protection was intended to meet both national and individual interests. A transitional Power should not be recognized as having such a right under the general rules of international law on diplomatic protection.

64. The traditional concept of diplomatic protection had some similarities with protection by diplomatic and consular missions, but the two concepts were nonetheless inherently different. In the latter case, where diplomatic relations were broken off or had never existed, or where financial constraints prevented the establishment of a mission, it was understandable that a State should request a neutral or friendly State to look after its interests and nationals in the receiving State. Such delegation, though generally technical and limited, still needed the agreement of the three parties concerned, as provided by the Vienna Convention on Diplomatic Relations. It did not include the right to exercise diplomatic protection, and the Convention should not be so interpreted.

65. In the case of diplomatic protection, on the other hand, the claimant State was not constrained by such factors. It was worth considering why a State should want to delegate such a right to another State. One reason might be to place the claimant State in a stronger negotiating position. The Commission should therefore tread warily. Although there might be no hard rules prohibiting such delegation in international law, the fact that States consistently stressed the nationality link between the claimant and the injured individual and the principle of continuous nationality could well be interpreted to mean that such a right should be exercised by the State of nationality only and not by others.

66. In paragraph 8 of the report, article 8 c of the Treaty on European Union (Maastricht Treaty) was cited as an example of the right of diplomatic protection being delegated by one State to another. A careful reading of the article, however, showed that the protection referred to was different from diplomatic protection: it referred only to the protection rendered by diplomatic missions under the terms of the Vienna Convention on Diplomatic Relations. Although such delegation in the case of the European Union was no different from the normal diplomatic practice, it nonetheless needed to be arranged among the member States and negotiated with third States. The European Union was undergoing a process of integration and some competences were being gradually transferred from member States to the Union. However, at the present juncture it was difficult to imagine that diplomatic protection could be exercised regardless of the nationality of the individual concerned. She therefore agreed with the Special Rapporteur that the delegation of the right of diplomatic protection was not a topic ripe for codification.

67. With regard to articles 23 to 26, she said that draft article 23 confirmed, firstly, that an international organization

was entitled to exercise protection of its agent injured by a State in breach of its international obligation, and, secondly, that diplomatic protection was different from functional protection. The draft article did not, however, shed much light on what constituted functional protection, or on the nature of the relations between functional and diplomatic protection. As stated in paragraph 17, there were many unanswered questions relating to functional protection, questions which should be clarified before it could be decided whether such protection formed a separate legal regime or was just an exception to the rule of diplomatic protection. The number of imponderables—the definition of “agent”, the scope of functions, the characterization of the performance of official duties and the types of international organization to be covered—was so great that the topic of responsibility of international organizations might not answer all the questions raised.

68. It was hard to comment on draft article 24, since situations could vary from case to case and from organization to organization. Two kinds of situation could be implied: where the injured national was not related to the international organization, or where such national was its agent. It was not clear whether the draft article applied to the first situation, the second, or both. The former case might seem suitable for diplomatic protection, but special treaties—conferring privileges or immunities on the organization and its agents—often governed such matters, so that diplomatic protection seldom came into play.

69. In situations where no treaty existed, there were other policy considerations that might help explain the status of the law. Firstly, when an international organization was alleged to have caused injury to its agent in breach of its international obligations, the matter was very likely to concern the organization’s internal affairs. The essential question was therefore whether the organization had provided for any meaningful and effective mechanism for the settlement of disputes, whereby member States could ensure that their nationals working for the organization were fairly treated and their rights respected. Such an approach enabled all agents, whether or not their State of nationality was willing or able to exercise diplomatic protection, to receive equal protection under the organization’s legal procedure. Moreover, although a State had the right to make representations on behalf of its nationals, the formal exercise of diplomatic protection against an organization such as the United Nations would be in the nature of a political rather than a legal act. Rules governing the international responsibility of international organizations might therefore be appropriate.

70. Draft article 25 was in line with draft article 1: a State was entitled to exercise diplomatic protection, regardless of the injured national’s profession. In practice, however, everything depended on the specific situation. If the square brackets were retained, priority was given to the organization’s right to exercise protection and the functional relationship of the individual with the organization was regarded as preponderant, as in the case of dual nationality. She was not convinced by that argument. In practice, such priority was a matter of convenience or an obligation on the organization. If the text currently within square brackets were deleted, however, the matter of competing claims would be left to the two parties to work

out between themselves. As before, much depended on the circumstances of each case. Moreover, if injury was caused to people of different nationalities and the organization concerned did not exercise functional protection, the question arose as to whether several States should be allowed to exercise diplomatic protection. It was doubtful to what extent functional protection was related to diplomatic protection and she was not convinced that the articles should be included in the draft.

71. Draft article 26 was potentially very controversial. Firstly, it might be a serious departure from the basic principles of diplomatic protection, as it could imply that under certain circumstances protection equivalent to diplomatic protection could be exercised by a State other than the State of nationality. Secondly, it contained the questionable implication that a State could exercise other forms of protection in parallel to diplomatic protection. More importantly, the articles on State responsibility cited could not claim to be *lex lata*, although they might be *de lege ferenda*. Some of the content of the draft articles remained controversial among States, particularly the question of whether a State other than the injured State was entitled to claim on behalf of the injured State or the international community. Draft article 26 was thus a substantial departure from generally accepted State practice and States' common understanding of the law on diplomatic protection. She would prefer to see it deleted.

72. The alternative formulation for article 21 was an improvement, but still tried to cover every situation relating to the protection of foreign investment, whereas priority should be given to bilateral treaties, to which States attached the greatest importance. She therefore suggested a further amendment, with the addition of the words: "In case of disputes relating to foreign investment, bilateral treaties on foreign investment should be given priority."

73. Mr. Sreenivasa RAO said that at the previous meeting he had supported the Special Rapporteur's submission that the issues of protection by an administering State or international organization, the delegation of the right of diplomatic protection and the transfer of claims need not be brought under the scope of the draft articles. Their exclusion—as further debate had amply brought out—was desirable for both policy and practical reasons.

74. With regard to draft article 23, he concurred with the Special Rapporteur's recommendation that the question of functional protection extended by international organizations to agents for the acts that they performed in the course of their duties should be excluded from the present topic. That did not, however, necessarily mean that the issue should be deemed to fall within the scope of the topic of responsibility of international organizations. More reflection was needed and he was confident that the Special Rapporteur for the latter topic would give the matter further thought, since that topic dealt with the legal consequences of the wrongful conduct of international organizations, whereas functional protection was essentially an entitlement and a duty of a different nature.

75. Draft article 24 raised a different problem. On the face of it, a case for diplomatic protection could arise

where the national of a State was wronged by an international organization but was not an agent of that organization. In such a case, the normal rules of diplomatic protection might apply, *mutatis mutandis*, taking into account the special character of the international organization and the relationship of the wrongful conduct to the particular nature of its mandate. The question should, however, be discussed in connection with the responsibility of international organizations. In cases where the national of a State was the victim of wrongful conduct by the international organization of which he or she was an agent, several possibilities arose: the agent might have the right of recourse to the administrative panel or staff grievances panel of the organization concerned; or the State might exercise contractual rights, where the agent was employed by or loaned to the international organization as part of a contractual arrangement. He had in mind particularly the situation of several peacekeeping forces placed at the disposal of international organizations under contractual arrangements. He was therefore not convinced that any modification of the rules on dual nationality would be at all relevant to the draft article. He agreed with the Special Rapporteur's observations in paragraph 20 of the report and concurred that there appeared to be no good reason to have a saving clause of the kind suggested in draft article 24. The draft article could therefore be deleted.

76. Draft article 25 and the Special Rapporteur's observations thereon brought out some interesting points. The first concerned the reconciliation of conflict between the possible competing claims of an international organization to extend functional protection to its agent and the right of diplomatic protection that a State was entitled to extend to the same agent in his or her capacity as its national. The nature of the injury in such a case was crucial in resolving the conflict. The difficulties of determining the real limits of the agent's official functions were material, but could be resolved only on a case-by-case basis, given the context and the circumstances. No *a priori* guidelines could usefully be attempted on a hypothetical basis, although a presumption in favour of the right of protection by the international organization could, perhaps, be envisaged, for the excellent reasons proposed by Eagleton and outlined in paragraph 34 of the report. He had some difficulty in accepting the suggestion that a State might, with respect to its national, be given the right of extending its diplomatic protection in respect of wrongful conduct that he or she suffered as an agent of an international organization, if the organization concerned declined to extend its protection. Such a right did not operate simultaneously at two levels, at least in the case of the United Nations, in view of Articles 100 and 103 of the Charter of the United Nations. In any case, unlike diplomatic protection, functional protection exercised by an international organization was deemed to be an obligation of that organization rather than a right exercisable at its discretion. If retained, therefore, article 25 could be drafted to emphasize the duty of an international organization to extend functional protection in respect of wrongs suffered by its agents, except where the nature of the injury was clearly unrelated to or did not in any way affect the functions of the person concerned as an agent of the organization. He did not, however, hold strong views on the desirability or otherwise of retaining the draft article.

77. As for draft article 26, he had no objection to the saving clause envisaged, or to a general saving clause, but any such clause should be carefully drafted so as to preserve the right of a State other than the State of nationality to invoke under international law the responsibility of the State in respect of a wrongful act.

78. Lastly, in relation to the assertion by Mr. Momtaz that, in cases where a Government paid the salary of an official of an international organization, the question of functional protection did not apply, he said that the question was not that simple. The position of an official ultimately depended on the agreement between the host State and the international organization. Most such agreements extended functional protection to their officials.

79. Mr. MOMTAZ said the crucial point was that an official was sometimes not only paid but also appointed by a member State. The question was whether the basis for functional protection was the immunity granted to the agent or his or her independence. In the *Reparation for Injuries* advisory opinion of 1949, ICJ had put forward an extremely broad definition of the word “agent”. More thought should be given to the issue.

The meeting rose at 1 p.m.

2794th MEETING

Thursday, 6 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. 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. RODRÍGUEZ CEDEÑO, focusing his comments on article 26, said that it was very important to stress once again that a clear-cut distinction should be made between the various interpretations of the word “protection”, with their legal implications and different applicable regimes.

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).

Those forms of protection had in common that they were exercised on behalf of the individual, but the applicable legal regimes and available remedies differed.

2. Diplomatic protection, as understood by the Commission, was basically the exercise of the right of the State of nationality of a company or its shareholders to lodge a complaint, in certain circumstances, on their behalf for an internationally wrongful act by another State, as clearly defined in article 1, which had been adopted. The legal regime applicable to the protection of human rights was much broader because it encompassed various regimes for the protection of persons who were in the territory of a State or who moved within that territory or to another State, either because of a situation of violence or for other reasons. Human rights norms also differed in that they were imprescriptible and could constitute peremptory norms of international law whose violation could give rise to action by the international community as a whole. Consequently, the legal interest was different. Under diplomatic protection, the exercise of protection was limited to the State of nationality of the injured person, although a State other than the State of nationality could also exercise protection in certain circumstances, whereas in the case of human rights protection the legal interest was much more far-reaching. Diplomatic protection and the protection of individuals in a human rights context also differed from protection in the context of diplomatic and consular law, which was also governed by specific rules, as several members of the Commission had pointed out in their comments.

3. The saving clause in article 26 was too broad and might give a State other than the State of nationality of the injured person the possibility of exercising diplomatic protection in a way that was relevant to the Commission. The Special Rapporteur cited several important examples with which he tried to demonstrate that a State could also protect its nationals under a number of international human rights instruments. In those instruments, however, the question of the State’s acceptance of the claim, which characterized the exercise of diplomatic protection, did not arise. A State party to those instruments acted within the framework of the functioning of the monitoring bodies. Thus, under article 41 of the International Covenant on Civil and Political Rights and article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a State which believed that another State was not giving effect to the provisions of an instrument could bring the matter to the attention of a monitoring body in accordance with the rules of procedure generally provided for in those texts. Such actions were part of treaty relations between the States parties to a treaty. Article 26 merely referred, without further detail, to an internationally wrongful act; that could open up other possibilities which might well be incompatible with the diplomatic protection mechanism being discussed by the Commission.

4. He was not certain that it was necessary to include a saving clause along those lines, but he would have no objection if most of the members deemed it appropriate. The two systems of protection did not have to be linked, although they could supplement one another to some extent and even coincide, also to some extent, when their