

Document:-
A/CN.4/2845

Summary record of the 2845th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
2005, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

72. As to Mr. Koskenniemi's remarks, it was his experience that seminars held at Headquarters involving academics, United Nations officials and representatives of non-governmental organizations were an excellent way of reflecting on problems that merited the attention of the international community. Thus, he was open to Mr. Koskenniemi's proposal and was prepared to consider with him how it could be given concrete form. Resourcefulness and a search for potential partners should make it possible to find funding for those activities. He would not wish to see financial issues place undue constraints on progress in the field of international law, and he would make that issue a focal point of his future activities. If the rule of law was really a priority for the international community, then it required a corresponding financial commitment.

73. He thanked Mr. Pellet for his kind words addressed to the Secretariat. He was proud of the quality of its work. With regard to the question of reprinting old volumes, he hoped that, with the introduction of new information technologies, documents that had been out of print could be made available on websites. He shared Mr. Pellet's concern about the lateness of publications. He was trying to find a solution to the question of Internet access, although he was cautious about the outcome, since he had no personal control over the matter. He took note of the proposal for a joint seminar involving the Commission and human rights treaty monitoring bodies and was grateful for all such suggestions.

74. On the question raised by Mr. Mansfield on fragmentation, he said that was an area with which he was as yet unfamiliar. He had noted with interest that colleagues closely involved in that area had stressed the importance of the law of the sea in the context of the subject of fragmentation. In recent months, he had learned that the resources earmarked for coordination were manifestly insufficient. Every effort must be made to obtain such funding, but increased attention should also be given to coordinating the resources currently available, and not only in the area of the law of the sea. Every year, two meetings of legal experts were held, one for United Nations funds, programmes and departments and another for the various entities of the system. The Office of Legal Affairs at Headquarters must work to improve all such coordination efforts. He had no illusions at the current stage: the system was complicated and cumbersome, and the various entities had their own rules, but much could be achieved on the basis of good faith. He had been reminded of the issue of fragmentation during the presentation of a report in New York by the Chairperson of the Study Group, who had noted that institutional fragmentation had not been addressed.¹⁷ Thus, the question remained at the centre of attention. If, for understandable reasons, the Study Group could not take up the question, ways must be found of overcoming the most important obstacles in that area. While he was not very optimistic as to the short-term results, in the longer run, the problem could not be disregarded: the credibility and effectiveness of the system were at stake.

¹⁷ See *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee, 20th meeting (A/C.6./58/SR.20)*, statement of Mr. Candioti, Chairperson of the Commission, paras. 5–8.

75. The CHAIRPERSON thanked the Legal Counsel for his comments and clarifications.

Organization of work of the session (*continued*)*

[Agenda item 1]

76. Mr. MANSFIELD (Chairperson of the Drafting Committee) announced that the Drafting Committee on responsibility of international organizations would be composed of Mr. Comissário Afonso, Mr. Chee, Ms. Escarameia, Mr. Economides, Mr. Gaja (Special Rapporteur), Mr. Kolodkin, Mr. Matheson, Mr. Sreenivasa Rao, Ms. Xue, Mr. Yamada, and Mr. Niehaus (Rapporteur, *ex officio*).

The meeting rose at 1 p.m.

2845th MEETING

Friday, 27 May 2005, at 10.10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, 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. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Diplomatic protection (*continued*) (A/CN.4/549 and Add.1, sect. F and A/CN.4/546)

[Agenda item 2]

SIXTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. AL-BAHARNA commended the Special Rapporteur and recalled that his report had been submitted in response to a request from the Commission to consider the advisability of including a provision reflecting the clean hands doctrine in the draft articles. He agreed with the Special Rapporteur's findings that such an inclusion would be unwarranted and noted that the debates on that doctrine in the Sixth Committee had reached a similar conclusion. In the *LaGrand* and *Avena* cases, to which reference had been made in the report, the plaintiff States, whose nationals had been tried and sentenced in accordance with due process of law for the serious crimes they had committed under the domestic law of the respondent State, had based their claims on the wrongful conduct of the respondent State in respect of the crimes committed. In both cases the Court had refuted the arguments of the United States and rejected the applicability of the

* Resumed from the 2840th meeting.

clean hands doctrine to the claims raised by Germany and Mexico respectively.

2. Although the Special Rapporteur had concluded that it would be injudicious to include the clean hands doctrine in the draft articles, it was open to question whether there might not be cases in which it might serve to preclude the exercise of diplomatic protection. If that was so, an article to fill that gap might be required. The Special Rapporteur seemed to admit that possibility in paragraph 8 of his report, when he stated that “[i]f an alien [was] guilty of some wrongdoing in a foreign State and [was] as a consequence deprived of his liberty or property... by that State it [was] unlikely that his national State [would] intervene to protect him”. Moreover, in the third sentence of that paragraph the Special Rapporteur added, “In this sense the clean hands doctrine serves to preclude diplomatic protection”. The Commission should therefore look into the question of the inadmissibility of a plea in the light of the clean hands principle.

3. Mr. Sreenivasa RAO, echoing the words of Sir Gerald Fitzmaurice quoted in paragraph 2 of the Special Rapporteur’s report, to wit, “He who comes to equity for relief must come with clean hands”, said that, generally speaking, a person could not complain of the wrongful consequences of an act if they stemmed from another act of which the complainant was the author. The application of the principle of good faith, as Mr. Pellet had termed it, might yield different results in different situations and did not necessarily deny the complainant the right to seek a suitable remedy, even if the complainant’s own illegal conduct had elicited the wrongful response.

4. For example, a State that had engaged in a wrongful act prompting a disproportionate response might be entitled to lodge a complaint. Alternatively, a party adversely affected by wrongful conduct was entitled to complain even if it was found that the party had itself contributed to such conduct through its own negligence. In that case, due account should be taken of its share of responsibility, although the latter would not automatically constitute grounds for denying the claim itself.

5. The Special Rapporteur, with his customary thoroughness, had surveyed the most recent case law on the matter and had concluded in paragraph 6 of his report that the cases in question “make it difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations”. He had reached that conclusion principally because the ICJ had not expressly voiced any negative view of States’ claims, but had simply considered that they did not justify a denial by the Court of its jurisdiction on the basis of the clean hands doctrine, which they had invoked in one form or another.

6. While the Special Rapporteur might be right on that point, it was more important to consider whether the Commission really needed to debate the issue. He was inclined to believe that, like the Court, it did not need to pronounce on the question, since the issues at stake were not central to the topic under consideration. On the other hand, it was necessary to decide whether or not to include a provision on the clean hands doctrine in the draft articles. In the

chapter of his report on the cases of application of the clean hands doctrine to diplomatic protection, the Special Rapporteur put forward the convincing argument that, unlike cases involving direct inter-State claims, the doctrine in question had rarely been relied upon in the context of diplomatic protection. Furthermore, writers who had expressed support for the application of the doctrine in that context had done so without sufficient legal authority. The Special Rapporteur was therefore right to conclude that the insertion of such a provision was unnecessary, for it would not constitute an exercise in codification or the progressive development of law. If, as the Special Rapporteur had usefully pointed out in paragraph 16 of the report, the doctrine was applicable to claims relating to diplomatic protection, it would be more appropriate to raise it at the merits stage. However, on the questions of attenuation or exoneration of responsibility, which were also mentioned in that paragraph, Mr. Gaja had correctly observed that the admission of wrongdoing by the plaintiff State should have the appropriate consequences when determining remedies, but must not lead to exoneration.

7. Since opinions within the Commission were divided about the advisability of using the opportunity afforded by the debate on the clean hands doctrine to engage in the progressive development of the law on diplomatic protection, as advocated by Mr. Pellet, it would be helpful if the Special Rapporteur could provide some guidance in the matter.

8. Mr. BROWNLIE said that while he approved of the general conclusions reached by the Special Rapporteur, the question of the clean hands doctrine ought possibly to be analysed in a different manner. In opining that, on the whole, the clean hands doctrine was not part of either positive international law or *lex lata*, the Special Rapporteur had, perhaps, overestimated the strength of some evidence and attached too much importance to the status of that doctrine in the sources of international law, since contrary to what was stated in paragraph 6, the clean hands doctrine had not been “frequently raised” by States; it had been raised only from time to time, very briefly, as a preliminary objection and always by the same States. Curiously, the report did not mention the *Certain Phosphate Lands in Nauru* case, in which Australia had invoked that doctrine. It could not, therefore, be said that the courts had ever had to consider the clean hands doctrine very seriously, despite the impression given in paragraph 6.

9. While the importance of the clean hands doctrine being part of *lex lata* was debatable, the Special Rapporteur’s conclusion, which he endorsed, did not preclude the Commission from adopting some version of the doctrine as a form of progressive development of the law. The key question turned on the precise definition of the clean hands doctrine because in reality the same term covered several different legal positions, which did not make the task any easier. It was often hard to determine on what account States were invoking the doctrine in a particular case. In some cases, it would certainly be part of the merits, if evidence eventually supported the alleged facts. It would then be of significance to discover whether the courts had ever joined the issue of clean hands to the merits, on the grounds that it was not exclusively a preliminary objection. In other cases, the doctrine was invoked by way of

prejudice and presented as a form of international public policy. Each case therefore called for contextual analysis and careful characterization.

10. A distinction could therefore be drawn between two qualitatively different situations: first, where the alleged illegality would, in principle, form part of the merits and thus would not fall within the Commission's mandate to deal with diplomatic protection; and secondly, where it was invoked as a principle of international public policy which constituted a bar to the admissibility of a claim, in which case the admissibility in question did not fall under the rubric of diplomatic protection. It was an international public policy point that could, of course, be raised *ex parte* by a respondent State, but it was not a form of diplomatic protection.

11. Since the Special Rapporteur had concluded that the issue should not be covered in the draft articles, the Sixth Committee should be provided with an explanation of why the Commission had decided to omit the clean hands doctrine. Another possibility would be to provide for a reservation referring to general international law, simply stating that the draft articles were without prejudice to the application of general international law to questions of admissibility in other situations. Very broad wording along those lines would satisfy those who thought that the Commission's position on the clean hands doctrine was too neat and tidy.

12. Mr. YAMADA said that he accepted the Special Rapporteur's conclusion but agreed with Mr. Pellet that the logic employed in paragraph 9 was a little odd, as the penultimate sentence seemed to imply that the seriousness of the crimes committed by the nationals in question was a factor that determined whether their hands were clean or not. However, in order to ascertain whether the nationals to be protected had clean hands, it was necessary to establish the existence of a causal link between the act or omission of the national in question and the internationally wrongful act committed by the host State. For example, in the *LaGrand* case, the heinous nature of the crimes committed by the foreign nationals was irrelevant; what counted was whether they had contributed to the failure of the United States authorities to notify the German consular authorities, in other words whether they had misled the United States authorities by hiding their German nationality, or whether they had requested that the German consular authorities not be contacted and had thus been instrumental in preventing the United States authorities from complying with an international obligation.

13. He accepted that there was no evidence establishing that the clean hands principle was the cause of the inadmissibility of a claim. However, as the principle was certainly relevant to the merits of the case, the rule concerning contribution to the injury, termed "contributory negligence" or "comparative fault" in national legal systems and set forth in draft article 39 on State responsibility for internationally wrongful acts, was applicable.¹

14. Mr. KABATSI said that he fully agreed with the Special Rapporteur's conclusion that it was unnecessary

to incorporate a provision on the clean hands doctrine in the draft articles on diplomatic protection.

15. Mr. CANDIOTI endorsed the Special Rapporteur's findings and Mr. Yamada's comment about the applicability of the draft article 39 on State responsibility, especially in an overall context. On second reading, it might be possible to consider a broad provision along the lines suggested by Mr. Brownlie, such as a reference to non-specific provisions on the application of general international law, especially the law of responsibility.

The meeting rose at 10.48 a.m.

2846th MEETING

Tuesday, 31 May 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Diplomatic protection (*concluded*) (A/CN.4/549 and Add.1, sect. F and A/CN.4/546)

[Agenda item 2]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his sixth report on diplomatic protection (A/CN.4/546).
2. Mr. DUGARD (Special Rapporteur) said that the Commission's consideration of his sixth report had been a worthwhile exercise. The clean hands doctrine was an important principle of international law which should be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands. It should be distinguished from the *tu quoque* argument, which allowed a respondent State to assert that the applicant State had also violated a rule of international law, and should instead be confined to cases in which the applicant State had acted improperly in bringing a case to court.
3. He thanked Mr. Pellet for having raised the issue and for having agreed, after consideration, that the doctrine did not, at least principally, belong to the realm of diplomatic protection and therefore did not warrant inclusion in the draft articles.
4. Although no other speaker had contended or even suggested that the clean hands doctrine should be included in

¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 109–110.