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Summary record of the 2688th meeting

Topic:

Diplomatic protection

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

2688th MEETING

Thursday, 12 July 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda.

Diplomatic protection[1] (*continued*) (A/CN.4/506 and Add.1,[2] A/CN.4/513, sect. B, A/CN.4/514[3])

[Agenda item 3]

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to outline how he would like to deal with article 9 proposed in chapter III of his first report (A/CN.4/506 and Add.1).

2. Mr. DUGARD (Special Rapporteur) said that, following a suggestion made by Mr. Economides (2687th meeting), he had indicated that he would be drawing up a new draft article that he would submit to the Commission. He would be making a proposal in writing to the Drafting Committee, which would be meeting at the next session. He felt that the debate in the Commission on the draft article had been exhaustive and that no point would be served in taking it up again. At the current time, he simply wanted article 9 to be sent back to the Committee after an informal discussion had been held in the Commission to enable him to explain his views on the matter.

3. The CHAIRMAN said that he did not see any reason why informal consultations open to all members of the Commission should not be held on the draft article during the following week. Meanwhile, if there were no objections, he would take it that the Commission wished to refer article 9 to the Drafting Committee.

It was so agreed.

4. Mr. DUGARD (Special Rapporteur), introducing articles 10 and 11 proposed in his second report on diplomatic protection (A/CN.4/514), said that the exhaustion of local remedies was clearly accepted as a rule of customary international law and had been reaffirmed as such on a number of occasions by ICJ, particularly in the *Interhandel* and *ELSI* cases. It was generally accepted that the State in which an alien suffered an injury must be given the opportunity to remedy that injury before the case was brought before an international court. That rule was founded on respect for the sovereignty of the host State and for its own judicial organs. Members of the Commission would recall that, originally, an article on the rule of the exhaustion of local remedies had been included in the draft articles on State responsibility adopted on first reading (art. 22).[4] The Commission had, however, decided not to retain it in the draft articles on State responsibility in order for it to be dealt with in the framework of the draft articles on diplomatic protection. In his comments on article 22 in his second report,[5] the Special Rapporteur on State responsibility had expressed strong criticism of article 22 originally proposed by Special Rapporteur Ago in his sixth report.[6] As he pointed out in his own proposals, he too considered that it was difficult to accept the earlier provision.

5. Article 10 was essentially of an introductory nature and was intended to create a setting in which to accommodate the other articles on the exhaustion of local remedies. Paragraph 1 clearly stated that there was a generally accepted rule of the exhaustion of local remedies and that it applied to natural as well as to legal persons. It did not, however, apply to diplomats or to State enterprises engaged in *acta jure imperii* because an injury to them was a direct injury to the State, to which the exhaustion of local remedies rule was inapplicable.

6. Article 10 and the other draft articles formulated thus far fell into the category of secondary rules. However, in paragraphs 7 to 10 of his second report, he had shown that it might not be possible to maintain a distinction between secondary and primary rules throughout the draft articles. That distinction, which was justified for State responsibility, did not have the same object in terms of diplomatic protection and, more specifically, in terms of the exhaustion of local remedies rule. The reason was that the concept of denial of justice took pride of place in most attempts to codify the rule. At a later stage, probably during the next quinquennium, he would ask the Commission for guidance as to whether he should include a provision on denial of justice in his draft or not. At the current stage, he simply wanted the Commission to know that he considered it very difficult to accept a distinction between primary and secondary rules for the purposes of the exhaustion of local remedies, especially since there was no clear-cut distinction between the two types of rules. There was therefore nothing to prevent the Commission from considering certain primary rules in

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

[2] See *Yearbook . . . 2000*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[4] See 2665th meeting, footnote 5.

[5] *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4.

[6] *Yearbook . . . 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3, at p. 43, para. 113.

the context of the exhaustion of local remedies, particularly with regard to denial of justice. At the fifty-second session, Mr. Sepúlveda had argued forcefully in favour of preparing a study of denial of justice.[7] Like most members of the Commission, he himself felt that it was a primary rule that should not be considered. After giving it some thought, he had reached the conclusion that the Commission should reconsider the matter—not during the current session, but perhaps at a later stage.

7. In article 10, paragraph 2, he was attempting to define local remedies and to determine which remedies must be exhausted. It was quite clear that all legal remedies must be exhausted before a claim was brought at the international level. There were difficulties, however, in defining the expression "legal remedies". Clearly, that concept included all judicial remedies and administrative remedies when they were available as of right, but not administrative remedies which were discretionary or available as a matter of grace. The ruling in the famous *Ambatielos* case raised difficulties in that respect. In that case, the claimant had failed to call a crucial witness in proceedings before the courts in the United Kingdom and, for that reason, had been unable to prove his case. In finding that the alien concerned had not exhausted all the available local remedies, the tribunal had held that it was incumbent on him to exhaust procedural facilities that might be available to him in the municipal courts. It was not clear exactly what was meant and it was very difficult to draw a principle from that decision. It was, however, a clear warning that a claimant who failed to present his case properly at the municipal level, whether as a result of poor preparation or of poor legal advice, could not expect to have the matter reopened at the international level. Another principle that seemed to be generally accepted was that the alien must raise before the domestic courts all the arguments that he intended to raise at the international level. That rule had not been included in article 10, paragraph 2, but had been dealt with in the commentary, where it belonged. Paragraph 2 made it clear that the remedies must be available both in theory and in practice. Whether they were available was a matter of fact that must be decided, however, in each particular case.

8. Article 11 dealt with the distinction between direct and indirect claims for the purpose of the rule on the exhaustion of local remedies. Basically, the problem was whether that rule applied when the injury was done to both the national of a State and to the State itself. It was necessary to include a rule on that subject in the draft in order to indicate quite clearly which cases fell within its scope. That suggestion had in fact been made by the Special Rapporteur on State responsibility in his second report. The basic principle was that the rule on the exhaustion of local remedies applied only when there had been an injury to a national of a State, in other words, when the State was injured through its own national, i.e. indirectly. The rule did not apply when there had been a direct injury to the State itself. The difficulty was that, in many cases, there would be elements of both direct and indirect injury. A number of cases which illustrated that point were cited in paragraph 19 of his report.

9. The question that arose in cases of that kind was how to decide whether the rule on the exhaustion of local remedies applied or not and how the distinction was to be drawn between direct and indirect injury. Article 11 suggested two criteria which were different sides of the same coin: the preponderance criterion and the sine qua non or "but for" criterion. It should be asked whether the injury was preponderantly to the national of the claimant State, in which case it was indirect and the rule on the exhaustion of local remedies applied. One could also apply a sine qua non test and ask whether the claim would have been brought if the national of the claimant State had not been injured. Other criteria had been suggested, such as that of the subject of the dispute: if the individual injured was an ordinary citizen, the injury must be considered to be indirect and, if the individual injured was a diplomat or consul, it must be considered to be a direct injury. According to the criterion of the nature of the claim, it must be determined whether the claim was public or private. Using the criterion of the nature of the remedy sought, if the State would content itself with a mere declaratory order, without compensation for injury to an individual, that might indicate that the injury was direct and not indirect. The difficulty was that, in many instances, a State would seek not only a declaratory order, but also compensation for injury to the individual, and the court had to decide which was the preponderant factor. It was important in such cases to guard against the possibility that a State might seek a declaratory order in its favour and then regard the matter as being *res judicata,* in order simply to avoid the application of the exhaustion of local remedies rule. That was why article 11 made it clear that a request for a declaratory judgement did not exempt the State from compliance with the exhaustion of local remedies rule. In his view, the subject of the dispute, the nature of the claim and the nature of the remedy were factors that should be considered in deciding whether the claim was preponderantly direct or preponderantly indirect. They were not separate factors which deserved mention in the draft article and he had referred to them in square brackets because he did not feel strongly about the matter. In any event, they would have to be dealt with in the commentary.

10. Mr. LUKASHUK said that, in article 10, the Special Rapporteur had successfully formulated a provision that gave precise expression to the general principle that local remedies must be exhausted. The provision was adequately supported by the commentary. The distinction drawn between primary and secondary rules, however, which had played a significant role in the codification of the law of State responsibility, was by no means justified in all cases. Indeed, the Special Rapporteur had correctly emphasized that the exhaustion of local remedies was well established in customary international law. Article 10 was also correct in including in the concept of local remedies those that were available not only before the courts, but also before administrative authorities. That position was generally accepted in both practice and doctrine. It was, however, regrettable that the Special Rapporteur was too restrictive in his commentary in paragraph 14 of his report, when he stated that administrative or other remedies that were not judicial or quasi-judicial in character were not covered by the local remedies rule. It was well known that many legal systems had an admin-

[7] See *Yearbook . . . 2000*, vol. I, 2626th meeting.

istrative hierarchy which acted to provide reparation in certain areas. Such administrative remedies fully qualified for the category of local remedies. There was thus a contradiction between article 10 and the commentary by the Special Rapporteur, even though the Special Rapporteur himself recognized that, according to doctrine, local remedies included administrative remedies.

11. The sentence in paragraph 6 of the report concerning diplomats or State enterprises engaged in *acta jure imperii* was unclear. The Special Rapporteur gave no explanation in his commentary, although that was a provision of vital importance. The footnote referring the reader to paragraph 27 made the matter no clearer. It was regrettable that the Special Rapporteur had not drawn sufficiently on the practice of the European Court of Human Rights, which, more than any other court, had had to attend to the problem of the exhaustion of local remedies. The words "international claim" in article 10, paragraph 1, were also incomprehensible. No explanation was provided on their meaning by the Special Rapporteur in his commentary, despite their defining importance for the draft articles as a whole. In his view, however, the draft article could be referred to the Drafting Committee.

12. Article 11, on the other hand, unfortunately raised serious difficulties. The problematic concept of "international claim" reappeared, but with the addition of "legal proceedings". It made no sense. Diplomatic protection did not always take the form of legal proceedings. The example showed yet again how important it was to define from the outset what was meant by means and methods of diplomatic protection.

13. The argument that a claim should not have been brought but for the injury to a national was highly questionable. If there was no injury, the problem of responsibility or diplomatic protection simply did not arise. The criterion was therefore unacceptable. In a case where, by its actions, State A violated the rights of a national of State B, held by that national under a trade agreement between the two States, the violation of the agreement automatically engaged the responsibility of the author of the violation. The fact that the violation concerned human rights in no way limited the responsibility. Therefore, contrary to the thrust of article 11, the injured State was entitled to require the immediate cessation of the violation of the agreement. The generally accepted rule of previous exhaustion of local remedies could not possibly apply in such a case. The injured State was entitled to require the cessation of the violation of the agreement concurrently with its injured national's entitlement to seek local remedies. The State of the injured national could not be involved in the details of the claim. It could not stand in for its national in the settling of the legal disagreement. In his view, that was the significance of the position taken by ICJ in the *Interhandel* case, on which the Special Rapporteur based his argument, but without interpreting it correctly. Indeed, the Special Rapporteur recognized the logic of the situation when he stated in paragraph 29 of the report that a State could seek a declaratory judgement on the interpretation of a treaty relating to the treatment of nationals without exhausting local remedies provided it did not couple that request with a claim for compensation or restitution on behalf of its national. That was an extremely precise and clear expression of the situation, which should serve as the basis for the draft article. It was regrettable that the Special Rapporteur was, as he had stated in his introductory comments, not in favour of following that course. It would be helpful if the Special Rapporteur could recast the draft article.

14. Mr. GAJA said that the structure of article 10 was not entirely satisfactory. It should have started with a precise definition of the exhaustion of local remedies rule, followed by more detailed provisions concerning specific aspects of the rule, together with any exceptions. The definition developed by the Institute of International Law[8] and repeated in article 45 (Admissibility of claims) of the draft articles on the responsibility of States for internationally wrongful acts brought together the existence of local remedies and their effectiveness. The wording of article 10, with its requirement for the exhaustion of "all available local legal remedies", was not only too broad, but it did not specify that such remedies must be effective.

15. Moreover, despite a somewhat clumsy wording, article 22 of the draft articles on State responsibility adopted on first reading, on the exhaustion of local remedies rule, had contained an interesting element not present in article 10, namely, the *raison d'être* of local remedies. In certain cases, local remedies existed to prevent an injury, but, in many others, only to provide reparation. The latter kind of remedy was the more common, although, when it existed, the first was considerably more important, in that prevention was preferable to reparation.

16. Paragraph 16 of the report referred to the *Finnish Ships Arbitration* and the *Ambatielos Claim*, which suggested that the allegations of fact by the claimant State should be considered as well founded. Otherwise, there would be no scope for reparation. In the former case, the arbitrator had stated that every relevant contention, whether well founded or not, brought forward by the claimant Government in an international procedure must have been investigated and adjudicated upon by the highest competent municipal courts. The provision thus did not concern only the exhaustion of local remedies; the approach adopted by the arbitral tribunal in that case was equally relevant in determining whether there were available remedies. That should be clearly indicated, either in the body of the article or, at least, in the commentary.

17. With regard to article 11, he generally agreed with the Special Rapporteur's approach, which seemed to reflect prevailing practice. However, the proposal to use two tests to decide whether a claim was "direct" or "indirect" and thus whether or not it was subject to diplomatic protection was not entirely convincing. As currently

[8] Draft on "International responsibility of States for injuries on their territory to the person or property of foreigners" (*Yearbook . . . 1956*, vol. II, p. 227, document A/CN.4/96, annex 8).

worded, article 11 seemed to provide for the cumulative application of such tests. He was particularly concerned about the Special Rapporteur's implication that consideration should first be given to whether the claim was brought preponderantly on the basis of an injury to a national and whether the legal proceedings in question would not have been brought but for the injury to the national. The second test, with its *sine qua non* condition, was in his view extremely subjective and difficult to apply. There could be speculation on the reasons why Switzerland and the United States had, respectively, brought claims in the *Interhandel* case and the *ELSI* case. In the former case, there was some support for a subjective test, as the Special Rapporteur noted in paragraph 26 of the report. However, in both cases, the determining factor for ICJ—and a factor that should be expressed in the draft article—had been to determine whether one and the same dispute was involved and whether it related to an injury to a national. If that was so, any attempt by the claimant State to split the claim and request declaratory relief for a direct injury, in order to bypass the exhaustion of local remedies rule, was bound to fail.

18. Mr. HE said that the exhaustion of local remedies was a well-established rule of customary international law affirmed by bilateral and multilateral treaties, State practice, the decisions of national and international courts, various attempts at codification and the writings of jurists. Like the Special Rapporteur, he thought it preferable to deal with the subject in several articles, rather than in just one.

19. As far as article 10 was concerned, the addition of the phrase "exhausted all available local legal remedies" made the text clearer, the key word being the adjective "legal". Legal remedies obviously included judicial remedies and remedies before administrative bodies, but not extralegal remedies, such as grace, or those whose purpose was to obtain a favour and not to vindicate a right. As the Special Rapporteur had pointed out at the end of paragraph 14 of his report, administrative or other remedies which were not judicial or quasi-judicial therefore fell outside the application of the local remedies rule. That comment was important, but the exact meaning of the term "quasi-judicial" required clarification.

20. Article 11 applied only to cases where the claimant State had been "indirectly" injured in the person of one of its nationals, not to cases where it had been "directly" injured by the wrongful act of another State. In order to determine whether injury was direct or indirect, account should be taken of various factors, such as the remedy claimed, the nature of the claim and the subject of the dispute, which were enumerated in square brackets at the end of article 11. In his opinion, those factors should be listed in the commentary rather than in the body of the article.

21. In practice, it was difficult to decide whether a claim was "direct" or "indirect" when the case was "mixed" or, in other words, when injury was caused both to the State and to a national of that State. In the event of a "mixed" claim, it would be for the tribunal to decide which element was preponderant. If the claim was mainly indirect, local remedies must be exhausted. The "but for" test was closely related to the preponderance test and article 11 retained both as decisive factors for the application of the principle of the exhaustion of local remedies.

22. Articles 10 and 11 were both concerned with the application of that principle considered from two different angles. He proposed that they should be merged into one single article comprising two paragraphs; the first would deal with the exhaustion of all local legal remedies and the second, dealing with the claim, should be based preponderantly on the injury to the national.

23. Mr. SEPÚLVEDA said that the principle of exhausting local remedies formed part of customary international law, as was borne out by a large number of decisions of national and international courts, bilateral and multilateral treaties, State practice and the writings of jurists. It was based on some undisputed arguments, including that put forward by ICJ in the *Interhandel* case that the State where the injury had occurred must have an opportunity to redress it within the framework of its own domestic system. It was only when justice had been denied that diplomatic protection came into play or a claim could be submitted to an international court.

24. He agreed with the Special Rapporteur that no excessively rigid criteria should be applied when classifying rules as primary or secondary. Roberto Ago, who had referred to both categories of rules in the context of State responsibility, had drawn up a fairly wide-ranging provision on the exhaustion of local remedies, without, however, trying to define those rules. Since it was difficult to distinguish between the two categories of rules, it was preferable to ask whether such a differentiation was helpful in all cases. He thought that, if maintaining that distinction led to the deletion of the article on the exhaustion of local remedies, the treatment of the topic would suffer, because it would not be understood why a fundamental aspect of diplomatic protection had been excluded. Furthermore, such an exclusion might lead to that of other essential aspects, such as the concept of denial of justice, which was closely related to the rule of the exhaustion of local remedies. Both elements together constituted the bedrock of the study of diplomatic protection.

25. Lastly, he drew attention to two major errors in the Spanish version of the second report. First, in paragraph 67, in the text of draft article 14, the words *Es necesario agotar* should be replaced by the words *No es necesario agotar*, in line with the original English version. At the beginning of article 10, paragraph 1, the word *acción* should be replaced by the word *reclamación*.

The meeting rose at 11.10 a.m.