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Summary record of the 2690th meeting

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nationally unless that violation was manifest and concerned a rule of its internal law of fundamental importance. The question was whether that provision should be transposed to reservations. Having found no evidence of practice one way or the other, he found it hard to take a categorical stance. However, on balance, he believed that transposition was not desirable. It would be extremely difficult—or even impossible—to establish, in accordance with article 46, that a violation was "objectively evident". There was no "normal practice" among States and international organizations. Moreover, rules on ratification were generally of a constitutional nature, accessible to other States, whereas those on procedure and competence with regard to reservations were, in most States, empirical, relating to practice rather than parliamentary acts or the constitution. If it was decided that reservations could not be subject to the same rules as imperfect ratifications, however, that should be expressly stated in the Guide, since it was not obvious on the face of it. That was the aim of guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). If a violation with regard to competence to formulate reservations had consequences at the international level, it followed that the same applied to interpretative declarations, whether conditional or not, as stated in paragraph 2 of guideline 2.4.1 bis. Perhaps, however, it was too obvious to need stating. There, too, he would welcome guidance: he recognized that, while the reasons he had given were not necessarily Cartesian, his own enthusiasm for Cartesianism was not shared by all members of the Commission.

66. He hoped that draft guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2 could be referred to the Drafting Committee, where they could be improved. During the discussion, however, he would be grateful for answers to a number of questions in particular. First, should the Commission adopt for reservations the rules in article 7 of the 1969 and 1986 Vienna Conventions on competence to express consent to be bound, or should those rules be made more flexible? Secondly, which of the two suggested versions of guideline 2.1.3 would provide a better basis for discussion in the Committee? Thirdly, if, as he would prefer, the longer version of guideline 2.1.3 was adopted, should the marginal hypothesis contained in paragraph 2 (*d*) be mentioned? Fourthly, should the Guide to Practice contain guidelines on competence at the internal level to formulate a reservation or interpretative declaration? Lastly, should there be a guideline on the international consequences—or lack thereof—of a violation of internal rules on the formulation of interpretative declarations? As far as reservations themselves were concerned, he had no doubt that their international consequences must be mentioned in the Guide.

The meeting rose at 1 p.m.

2690th MEETING

Tuesday, 17 July 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Diplomatic protection[1] (*concluded*) (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 (*concluded*)

1 The CHAIRMAN invited the members of the Commission to continue their consideration of articles 10 and 11, contained in the second report of the Special Rapporteur (A/CN.4/514).

2. Mr. MOMTAZ said that the rule that local remedies must be exhausted, set forth in article 10, was indisputably a rule of customary international law, supported by case law, legal writings and State practice and based on respect for the sovereignty and jurisdiction of the State on whose territory the wrongful act had been committed. Two important questions merited closer attention. The first concerned the meaning and scope of the definition of "local legal remedies", while the second related to the circumstances in which it was not necessary for local remedies to have been exhausted.

3. The Special Rapporteur's answer to the first question was satisfactory, although it required fuller explanation in the commentary. For instance, the Special Rapporteur excluded from the scope of the provision administrative and other remedies which were not judicial or quasi-judicial, and were of a discretionary character. He had some doubts as to the validity of such an approach, for, given that the purpose of local remedies was to provide

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[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).

satisfaction for the victim, what counted was the result, not the means whereby it was achieved. Consequently, there was no reason to exclude the means available to a country's authorities to provide relief in the exercise of its discretionary powers, particularly in view of the fact that remedies as of grace were sometimes more effective than legal remedies. On the other hand, he agreed with the Special Rapporteur that the commentary should retain the notion that the exhaustion of local remedies also included the use of legal procedural facilities which municipal law made available to litigants before courts and tribunals. He thus found paragraph 15 of the report entirely satisfactory.

4. The commentary should perhaps also mention the cases in which the States concerned, namely, the State on whose territory the wrongful act had been committed and the State whose national had been injured, had come to an agreement not to require the application of the rule that local remedies must be exhausted. That was what had happened when the United States and the Islamic Republic of Iran had undertaken to settle their disputes before a court of arbitration. The converse could arise when States agreed to offer their nationals remedies before international bodies. That question perhaps deserved a mention, even though it did not strictly concern local remedies.

5. With regard to the second question, he noted that article 10 simply stated that local remedies must be "available". However, according to paragraph 17 of the report, that meant that the remedies must be available both in theory and in practice. Moreover, in paragraph 13, the Special Rapporteur referred to the jurisprudence of the European Court of Human Rights in the *Nielsen* v. *Denmark* case, according to which the local remedy must offer "an effective and sufficient means of redress" [p. 438]. That led one to suppose that local remedies would not have to be exhausted in the absence of effective means of redress. Yet, unlike the criterion of availability, which was eminently objective, the criterion of effectiveness was highly subjective. How was the effectiveness of a local remedy to be determined? That question inevitably raised the question of fair trial, one that was somewhat controversial in international law. The administration of justice was one of the essential attributes of the sovereignty of States. States must clearly ensure that their judicial system met the required standards of independence and impartiality, but other States should not, *a priori*, make value judgements concerning the effectiveness or ineffectiveness of other States' judicial systems. In his view, the rule that local remedies must be exhausted should be disallowed only in exceptional cases, for instance, when there had been an unjustified delay in the proceedings or when the judicial apparatus of the State concerned had collapsed.

6. The wording of article 11 was entirely satisfactory. However, the commentary should refer to cases where the wrongful act injured the nationals of several States. It would also be better, as suggested by the Special Rapporteur, to leave it to the commentary to deal with the question of the factors to be taken into consideration in deciding whether the claim was "direct" or "indirect". As for denial of justice, that was covered by the availability condition set forth in article 10 and there was thus no need to refer to it again. Lastly, it was appropriate and useful to maintain the distinction between primary and secondary rules.

7. In conclusion, he recommended that both draft articles should be referred to the Drafting Committee.

8. Mr. ELARABY said that respect for the sovereignty of States was the rationale for the rule that local remedies must be exhausted, a fact that was of great importance for the developing countries. Although, as several members had pointed out, the Commission would not be able to discuss the question in depth except in the light of article 14, he nevertheless wished to make three brief comments of a practical nature.

9. The first related to the nature and dimensions of the remedies available. Should the rule that local remedies must be exhausted be interpreted as extending to the highest available court of law in the land? In some countries, such as Egypt and France, there was a court of last resort, the Court of Cassation, which ruled only on points of law, never on points of fact.

10. The second question concerned the amount of compensation, which might vary from one country to another, inter alia, because of differing levels of economic development. Might it be possible for a litigant who had obtained compensation in one country to introduce a second claim in another country where the amount of potential compensation was higher? Could such a situation arise?

11. The third point related to paragraph 16 of the report, according to which, in order to satisfactorily lay the foundation for an international claim on the ground that local remedies had been exhausted, the foreign litigant must raise in the municipal proceedings all the arguments he intended to raise in international proceedings. Personally, he thought that that restriction was likely to penalize litigants. The time factor was important, as it was probable that the municipal proceedings would precede the international proceedings by several months. It was thus possible that, when local remedies had already been exhausted, new facts might emerge, on which new legal arguments could be based.

12. He considered the wording of article 11 to be satisfactory and recommended that both draft articles should be referred to the Drafting Committee.

13. Mr. GALICKI praised the logical structure on which the Special Rapporteur's proposed set of draft articles was based. The Special Rapporteur began by confirming, in article 10, the general principle that local remedies must be exhausted, including therein a concise definition of the term "local legal remedies". In article 11, he undertook the even more ambitious task of differentiating between so-called "direct" and "indirect" claims.

14. Although he accepted the general substance and structure of both articles, he wondered why article 10 referred to natural and legal persons, while no such differentiation was made in other articles. The Commission had agreed that the draft articles would endeavour to cover the protection of both natural and legal persons and that the term "national" was wide enough to cover both types of persons. Consequently, a distinction should

be drawn between those two categories of persons only when a specific article did not cover both categories.

15. In the description appearing in article 10, remedies to be exhausted were qualified by the four adjectives "all", "available", "local" and "legal". All those characteristics were equally important and none of them should be omitted. In practice, however, problems might arise with non-exhaustion of administrative and other remedies that were not judicial or quasi-judicial in character or were of a discretionary nature. In paragraph 14 of his report, the Special Rapporteur rightly pointed out that those remedies were not covered by the rule that local remedies must be exhausted. On the other hand, article 10, paragraph 2, referred to "judicial or administrative courts or authorities whether ordinary or special" before which local legal remedies were open. The concept of "available remedies" could thus be interpreted differently from country to country.

16. Although the right to exercise diplomatic protection was regarded as the prerogative of States, its practical application depended on the behaviour of individuals. Thanks to the principle of the exhaustion of local remedies, the State could not exercise diplomatic protection unless its national had previously taken legal action. But even when local remedies had been exhausted, intervention by the State was not automatic.

17. As the Special Rapporteur had pointed out in his first report (A/CN.4/506 and Add.1), diplomatic protection remained an important weapon in the arsenal of human rights protection. It was interesting to note that the principle of the exhaustion of local remedies played as important a role in the context of the human rights treaty monitoring bodies as in the field of diplomatic protection. That parallelism seemed to strengthen the links between diplomatic protection and international protection of human rights.

18. With regard to article 11, the main problem concerned the need to determine whether the claim was "direct" or "indirect", although, in practice, it was often "mixed", combining elements of injury to the State and of injury to its nationals. To facilitate that determination, the Special Rapporteur included in square brackets a list of factors to be taken into account in deciding that question. Was that list an exhaustive one? If so, the square brackets should be deleted; if not, the list should either be expanded or deleted. In any case, it would be better to avoid giving examples in a codification text and to confine them to the commentary. He therefore proposed that, instead of constructing article 11 as a rule stating that "local remedies shall be exhausted", it should set forth the exceptions to that rule, beginning with the words "local remedies shall not be exhausted". Such an approach would be in accordance with the general principle embodied in article 10. Furthermore, it seemed easier to formulate exceptions on the basis of the criterion of the real interests of States than of the highly controversial criterion of the preponderant character of the claim.

19. Nevertheless, he considered that the texts of the two draft articles should be referred to the Drafting Committee, together with the comments on them made in the course of the debate.

20. Mr. ROSENSTOCK said that he endorsed the general approach adopted by the Special Rapporteur and recommended the two draft articles for referral to the Drafting Committee. The Committee would, however, need to have some idea of the form that articles 13 and 14 would take, in order to have an overview of the issue.

21. In reply to the member of the Commission who had expressed doubts as to the subjective criterion of the effectiveness of the remedies, he said that, while those doubts were understandable, some guidance should be given to the institutions that would be called upon to pronounce on the question.

22. Mr. TOMKA said that the method adopted by the Special Rapporteur was unusual. Normally, special rapporteurs began by considering the principles drawn from jurisprudence and doctrine before proposing a draft article. The reverse approach adopted by the Special Rapporteur was not always easy to follow and he wondered about its *raison d'être*.

23. As for article 10, he shared the Special Rapporteur's view that the exhaustion of local remedies rule applied not only to legal remedies, but also to all remedies provided for by the local legal system, including those that were open to administrative authorities.

24. The Special Rapporteur should not have to deal with the question of denial of justice. In fact, if the method the Commission had adopted on State responsibility was correct, the distinction between primary and secondary rules should also apply in the case of diplomatic protection.

25. Without being opposed to article 11, he considered that, in the light of the definition of diplomatic protection that had been adopted, it was not indispensable. In fact, when diplomatic protection was exercised, the rule embodied in article 11 had no *raison d'être*. It would then be sufficient to distinguish between cases where injury was directly caused to the State and those where the State endorsed the claim of a national who had not obtained reparation.

26. Mr. PELLET, referring to Mr. Tomka's question about method, said that the Special Rapporteur was following the guidelines the Commission had given at its forty-sixth session, i.e. that the draft article should be stated first and then the commentary should be written on it.[4] He himself had had difficulty following that method in his own reports, since he was not as disciplined as Mr. Dugard. In terms of substance, he had the same problem as Mr. Tomka in the sense that it was sometimes not clear why the Special Rapporteur was proposing a particular provision, but he did not think that he could be reproached for his method.

27. Mr. AL-BAHARNA said that the Special Rapporteur set out clearly in paragraph 6 of his report the persons required to exhaust local remedies.

28. However, article 10 did not seem to reflect the distinction established by the Special Rapporteur between legal persons which engaged in *acta jure gestionis*, for which the exhaustion of local remedies rule applied, and

[4] See *Yearbook . . . 1994*, vol. II (Part Two), para. 399.

those which engaged in *acta jure imperii*, which were not subject to the rule because injury to them was considered to be a direct injury to the State. He did agree with the Special Rapporteur that too strict a distinction should not be made between primary and secondary rules in the context of diplomatic protection.

29. The Special Rapporteur rightly recalled that, in the *Nielsen* v. *Denmark* case, the European Commission of Human Rights had stated that the exhaustion of local remedies rule required "that recourse should be had to all legal remedies available under the local law" [p. 440]. Likewise, in the *Ambatielos Claim,* the arbitral tribunal had declared that it was the whole system of legal protection, as provided by municipal law, which must have been put to the test. It was clear from article 10 that what was involved were remedies that were open before ordinary and special courts as well as administrative courts. If judicial and administrative courts could provide a legal or judicial remedy satisfactory to the injured alien, it might seem questionable that the same could be true of special or extraordinary courts. Moreover, the term "authorities" was ambiguous and misleading in that it referred to the political organs of the State and to officials of those organs. The authorities to which the Special Rapporteur was referring in the last footnote to paragraph 14 of his report clearly confirmed that administrative or other remedies which were not judicial or quasi-judicial in character and were of a discretionary character therefore fell outside the application of the local remedies rule.

30. Furthermore, like the Special Rapporteur, he considered that it was not necessary for the principles contained in the cases referred to in paragraphs 14 to 17 of the report to be reflected in the draft article, given that, in practical terms, the expression "all available local legal remedies" covered recourse to all available local remedies, whether procedural or otherwise.

31. Article 11 distinguished between direct and indirect injury to the State. The Special Rapporteur confirmed that the exhaustion of local remedies rule did not apply where the claimant State was directly injured by the wrongful act of another State. It was true that in practice it was difficult to decide whether the claim was "direct" or "indirect" where it was mixed, in the sense that the injury was caused both to the State and to its nationals. In that respect, the draft article introduced the criterion of "preponderance", which was to be found in both the *Interhandel* and the *ELSI* cases. Accordingly, as stated in paragraph 21 of the report, in the case of a "mixed" claim, it was incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element was preponderant. Article 11 thus stated that the local remedies rule applied where the international claim was brought preponderantly on the basis of an injury to a national, but it did not reflect fully the principles provided in the international cases and claims cited in the report.

32. Moreover, the Special Rapporteur emphasized that article 11 reflected the idea that, if local remedies were required to be exhausted, the dominant factor in the initiation of the claim should be injury to the national. However, the draft article should reflect clearly the case law principles regarding the direct and indirect factors related to the initiation of the international claim formulated on behalf of the injured national and should indicate the cases in which the preponderance criterion was applicable.

33. Other factors, such as the subject of the dispute, the nature of the claim and the nature of the remedy sought should also be considered in the assessment of whether the claim was predominantly weighted in favour of a direct or of an indirect claim. Those principal factors should be presented in the body of the article and not in the commentary in order to make the draft article more comprehensive and to ensure that it better reflected case law principles. Contrary to what was proposed in paragraph 31 of the report, there was a case for removing the square brackets in the draft article, since the factors in question were not merely examples to be relegated to the commentary, but elements of the rule of which due account should be taken.

34. Mr. LUKASHUK, said he thought that Mr. Al-Baharna was dividing the State in two, with courts, on the one hand, acting within the framework of the law and the administration, on the other, acting outside the law because it did not respect legal rules. However, the law was as compulsory for the administration as for judicial bodies. In many cases, moreover, administrative remedies offered much more effective protection and it would not be wise to exclude them.

35. Mr. AL-BAHARNA said that, in order to clear up any misunderstanding, he had no objection to legal remedies also comprising remedies before administrative bodies. He had particularly emphasized the reference made in article 10 to ordinary and special courts because he considered that it was not justified in the sense that there could be doubts as to the application of judicial or quasi-judicial remedy procedures.

36. Mr. HAFNER, referring to the institution of ombudsman or mediator which existed in certain countries and was even provided for in many constitutions, asked Mr. Al-Baharna whether the exhaustion of local remedies rule applied also to a mediator. In other words, must the ombudsman have been seized before diplomatic protection came into play?

37. Mr. AL-BAHARNA said that he was not trying to call into question recourse to administrative bodies; he was simply wondering about the relevance of a reference to special courts.

38. Mr. GOCO said that each State had its own rules regarding the application of remedies. Thus, under the administrative law applicable in his own country, an entity which invested in the country and expressed reservations concerning or objections to a directive that had been adopted, for example, by the Minister of Commerce, could initiate an administrative remedy. The question was whether such an action enabled the legal remedies proper to the system to be exhausted, since that would avoid subsequently bringing the matter before a court. In fact, when the executive had already taken a decision, addressing the courts could turn out to be ineffective. In the

Interhandel case, it had been stated that it was the entire system of local legal protection which should be put to the test, but that was often very difficult.

39. Mr. LUKASHUK said that Mr. Al-Baharna had likened special or extraordinary courts to courts of special jurisdiction, whereas in fact they were simply special bodies which considered certain types of disputes. In the Russian Federation, for example, it was special courts that handled economic or commercial disputes, but they were certainly not courts of special jurisdiction.

40. Mr. DUGARD (Special Rapporteur) said that the question raised by Mr. Hafner was an interesting one. He did not know of any cases in which local remedies had not been exhausted because the injured foreigner had not brought the matter before an ombudsman. Maybe Mr. Hafner knew of some. In any event, the institution of ombudsmen post-dated most of the cases relating to diplomatic protection.

41. Mr. HAFNER said that the question of the ombudsman had come to mind during the debate on what was meant by "administrative bodies"; he had not said that the exhaustion of local remedies rule should apply to the ombudsman. In fact, to his knowledge, an ombudsman was not competent to have a decision which had caused an injury annulled or amended; he could make recommendations, but he could not require an authority to take a particular decision. The fact of addressing an ombudsman could therefore not, in his opinion, be regarded as a local remedy. However, he would like to know the Special Rapporteur's view on the matter, which was more political than legal.

42. The CHAIRMAN, speaking as a member of the Commission, pointed out that, in certain courts, the ombudsman did have the power to amend the decision of an administrative body. In Uganda, the ombudsman's jurisdiction was similar to that of an appellate court.

43. Mr. HERDOCIA SACASA said that the principal element with regard to local remedies was their effectiveness. As indicated in paragraph 13 of the report, in the *Nielsen* v. *Denmark* case, "the crucial point [was] not the ordinary or extraordinary character of a legal remedy, but whether it [gave] the possibility of an effective and sufficient means of redress" (p. 438). As Mr. Momtaz had said, it would be useful to include that element in the draft article itself.

44. Mr. GOCO said that there were many ways of satisfying the rule on the exhaustion of local remedies, and the Office of the Ombudsman was one of them. At the same time, however, a special civil action for *certiorari* could be brought before the Supreme Court if an injured party considered that the ombudsman had committed abuse of discretion or exceeded his jurisdiction.

45. The CHAIRMAN announced that the Commission had completed its discussion of articles 10 and 11. He invited the Special Rapporteur to sum up the discussion.

46. Mr. DUGARD (Special Rapporteur) thanked Mr. Pellet for having rescued him by replying to Mr. Tomka's difficult question and confirming that he had followed the practice of the Commission. Articles 10 and 11 did not seem to have presented great difficulties for the members of the Commission, contrary to what had been the case with article 9.

47. In his introductory statement, he had raised the question whether, in addressing the exhaustion of local remedies rule, he should strictly observe the distinction between primary and secondary rules. He had asked the question because the term "denial of justice" cropped up frequently enough in attempts to codify the rule to make him suggest that an article on the subject might be included in the draft. The Latin American members of the Commission, particularly Mr. Sepúlveda, had on many occasions supported that proposition. It was quite clear, however, that the majority of the Commission remained opposed and he would take that into account in his future work. He suspected that the concept of denial of justice would require at least some consideration in the commentaries.

48. Regarding article 10, paragraph 1, there had been some reservations about the phrase "bring an international claim", but the term "international claim" was used frequently in codification attempts relating to the exhaustion of local remedies. That was a matter that could be considered in the Drafting Committee. A number of members had rightly criticized the inclusion of the words "natural or legal person". He intended to incorporate in the draft one or more provisions dealing with legal persons, but he agreed that no distinction should be drawn between natural and legal persons except where one wished to make that distinction and that those words should be deleted. It had been pointed out, moreover, that the reference to article 15 was erroneous and should be replaced by a reference to article 14, the text of which was contained in paragraph 67 of the report. Other articles dealing with the issues raised in paragraph 67 might have to be included.

49. There had been strong support for the inclusion of the word "effective" in the phrase "all available local remedies". His intention had been to deal fully with the rule on effectiveness of remedies in a separate article. Mr. Momtaz had opposed the inclusion of the word "effective" on the grounds that it introduced a subjective element, whereas available remedies could be determined by objective means. There was a considerable amount of State practice, however, which supported the view that the remedies should be both available and effective. Mr. Elaraby had drawn attention to the fact that, in many countries, the highest court had jurisdiction only over legal questions and that, in such cases, an appeal on a question of fact was not available. It might be said that, in such circumstances, the availability test was sufficient. There were instances, however, in which one had to consider the effectiveness of the local remedy in the context of the judicial system of the respondent State, and that meant questioning standards of justice in that State. Cases in which it had to be determined whether there was an effective remedy by looking at the judicial system of the respondent State were few and far between.

50. In paragraph 2, he had attempted to describe rather than to define local remedies, in order to express as general a principle as possible. He had carefully avoided using the term "quasi-judicial" because it had different meanings in different jurisdictions and would raise more difficulties than it would resolve. That, too, was something that the Drafting Committee could consider. The discussion on the question whether the injured individual must approach an ombudsman had emphasized the difficulties involved. As Mr. Hafner had rightly pointed out, in some countries, the ombudsman could make suggestions only on how a case was to be decided, whereas, in others, he had greater powers. To use the dictum quoted in paragraph 13 of the report (see para. 43 above), the crucial point was not the ordinary or extraordinary character of the legal remedy, but whether it gave the possibility of an effective and sufficient means of redress. In other words, one had to look at the facts of the particular case, and that meant that a provision seeking to cover all possibilities had to be drafted. There had been some criticism of the principle expounded in paragraph 16 that the foreign litigant must raise in the municipal proceedings all the arguments that he intended to raise in international proceedings. It had rightly been pointed out that the provision failed to take account of the differences frequently encountered between procedures in municipal law and in international law. The principle was difficult to apply in practice and it was for that reason that he had not attempted to include it in the draft article itself. Mr. Elaraby and Mr. Kabatsi had raised the question of compensation at the national level, asking whether an individual who had failed to comply with all the national procedures could attempt to gain a hearing at the international level. In his view, that was a procedural question and it did not relate to substantive issues such as compensation. Clearly, if the individual was dissatisfied with the quantum of compensation awarded at the municipal level, he could bring it up at the international level. As to whether the individual could seek a remedy at the international level without having exhausted local remedies, he said it was a difficult principle to incorporate in a draft article and should therefore be covered in the commentary.

51. One or two members had felt that one could do without article 11. Others had been in favour of merging articles 10 and 11. Mr. Galicki had made a helpful suggestion as to how that might be done. Most members, however, had been in favour of retaining article 11. Mr. Gaja had suggested that only one of the two criteria proposed, the preponderance test, should be employed, but the general feeling had been that both had to be retained. Most members were opposed to including the factors in square brackets in the draft article. Some had been in favour of retaining them, providing it was made clear that they were part of the rule and not simply examples. The terms "direct" or "indirect" were not used in article 11, although they were employed fairly frequently in the commentary, as had been pointed out by Mr. Economides and Mr. Pellet, who had thought it might be wiser to use the terms "mediate" and "immediate". That was something that might also be considered by the Drafting Committee.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 10 and 11 to the Drafting Committee.

It was so agreed.

Reservations to treaties[5] (*continued*) (A/CN.4/508 and Add.1–4,[6] A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,[7] A/CN.4/L.603 and Corr.1 and 2)

[Agenda item 5]

Fifth and sixth reports of the Special Rapporteur (*continued*)

53. Mr. PELLET (Special Rapporteur), introducing the second set of draft guidelines proposed in his sixth report (A/CN.4/518 and Add.1–3), said that they consisted of guidelines 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries) and 2.1.8 (Effective date of communications relating to reservations), dealing with procedures for the communication and publicity of reservations, and 2.4.2 (Formulation of conditional interpretative declarations), paragraph 3, and 2.4.9 (Communication of conditional interpretative declarations), paragraph 2, relating to interpretative declarations.

54. Those six guidelines were based on the same concern, namely, to ensure that reservations were known to the partners of the State or international organization that formulated them so that they could respond in good time. The same was true of interpretative declarations when they called for a reaction or, in other words, when they were conditional interpretative declarations. In accordance with the methods he had used from the start and which the Commission clearly seemed to have endorsed, he had taken the relevant provisions of the 1969 and 1986 Vienna Conventions as a starting point, although they left some grey areas that the guidelines tried to remove. He was thinking in particular of the major relevant provision of the Conventions, article 23, paragraph 1, which stated that a reservation must be communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. The situation was the same for both States and for international organizations. The contracting States, as indicated in article 2, paragraph 1 (*f*), of the 1969 Vienna Convention, were those that had consented to be bound by the treaty, whether or not the treaty had entered into force. Identifying which States were entitled to become parties might be extremely difficult in certain circumstances, however. As indicated in paragraphs 101 to 109 of the report, the Commission had hesitated for a long time before incorporating the concept of the State entitled to become a party to the treaty in the provision that was to become article 23, paragraph 1, of the 1969 Vienna Convention. The con-

[5] For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

[6] See footnote 2 above.

[7] See footnote 3 above.

cept did not give rise to any particular difficulties when the treaty in question defined the States that were entitled to become parties to it in a clear and restrictive way. That was not always the case by any means, however, and the practice of the Secretary-General showed that there was some confusion in that regard. Curiously enough, no special difficulties were reported in the replies by depositary States to the questionnaire on reservations, although they might be expected to encounter some, especially when they had to communicate the text of reservations to States that they did not recognize or, even worse, to entities that they did not recognize as States. He had wondered whether an effort should be made to define a State entitled to become a party, but had decided against it, since the question of which State or international organization was entitled to become a party to a treaty did not relate to the law of reservations. It arose quite frequently in the law of treaties in general. His position on that point was not categorical, however, and, as indicated in the footnote to paragraph 112 of the report, he would be very grateful if members of the Commission could give him their views on the subject.

55. He had used article 23, paragraph 1, of the 1986 Vienna Convention in drafting paragraph 1 of guideline 2.1.5. His only addition—an important one—was that the communication must be in writing. It was indeed important for States that might have to react to a reservation to be able to do so with full knowledge of the facts, and that meant that the exact text of the reservation must be communicated to them. In addition, that was, if not indispensable, at least very useful in determining the precise date on which the communication was deemed to have been made. It was with that in mind that he had drafted paragraph 2 of guideline 2.1.6, which provided that "Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile]". He admitted to having no strong views on that point, which was also one on which he would find the opinion of the members of the Commission useful. With or without facsimile, the requirement of written confirmation, which was, moreover, in conformity with practice, seemed always to come into play for the same reasons, namely, that States and other interested parties must be able to react with full knowledge of the facts.

56. Article 23, paragraph 1, of the 1986 Vienna Convention did not contain anything specifically about reservations to the constituent instruments of international organizations. Guideline 2.1.5 must, however, be supplemented in that regard. Article 20, paragraph 3, of the Convention implicitly required that the organization in question should have had knowledge of the reservation and hence that it should have been communicated to it, even though article 23 did not say as much. That was the practice, after all, and it was sometimes problematic, as demonstrated by the famous reservation by India of 1959[8] to the constituent instrument of the Intergovernmental Maritime Consultative Organization (IMCO), which had subsequently become the International Maritime Organization (IMO). In that case, however, the difficulties had arisen from the substance of the reservation, not from the communication of the reservation in and of itself. As could be seen from paragraph 121 of the report, such communication was a consistent practice and he proposed that it should be referred to in paragraph 2 of guideline 2.1.5. Some clarification was necessary because of what some saw as the recent watering down of the concept of international organization. He had got the idea for the clarification from a passage in the lengthy arguments by the Secretary-General in the case of the Indian reservation.[9] The Secretary-General had stated at that time that he invariably referred reservations, and accordingly communicated the texts of the proposed reservations, to the body involved when they related not only to the constituent instruments of international organizations per se, but also to conventions that created "deliberative organs", an expression that very probably referred to the General Agreement on Tariffs and Trade (GATT). A fair number of treaties adopted since the 1960s had set up institutions whose status as international organizations had been challenged, including the treaty monitoring bodies in the fields of disarmament, arms control and environmental protection and the International Criminal Court. In his view, those were indeed international organizations, but, since their characterization as such was sometimes disputed, he proposed to reproduce the phrase used by the Secretary-General in paragraph 2 of guideline 2.1.5, by adding a reference to a convention that created a deliberative organ after the reference to the constituent instrument of an international organization. That was nevertheless a delicate issue on which the views of the members of the Commission would be welcome.

57. As indicated in paragraphs 124 and 126 to 128 of the report, he had wondered whether further clarification would be advisable in guideline 2.1.5. For example, was it necessary to stipulate that the reservation had to be expressly communicated to the heads of secretariat of international organizations? Must it be communicated to any preparatory committees which might exist before the entry into force of the constituent instrument? Must it be communicated to not only the organization, but also to the organization's member States, when it related to a constituent instrument? In his opinion, that last question should be answered affirmatively, if only as a matter of good policy because, in international organizations, it was always the organs composed of member States that would decide whether a reservation was admissible and so they should preferably know about it as early as possible. That was what was implied by the word "also" in paragraph 2 of guideline 2.1.5. On the other hand, there should be no requirement to communicate a reservation exclusively or expressly to heads of secretariat. That was probably what would happen in practice, but it might not always be the case because of the actual structure of the organization concerned. At any rate, that was of little importance, so long as the text of the reservation reached the organization. Similarly, it seemed unwise to mention preparatory committees expressly; first, it was a moot point whether they always had the capacity to decide whether a reservation was admissible and, secondly, if they did, a reference to "deliberative organs" might suffice. If the Drafting Committee decided not to mention deliberative

[8] See A/4235, annex I.

[9] *Ibid.*, para. 21.

organs, however, the question would have to be reconsidered. Could the rules on reservations contained in guideline 2.1.5 be transposed to interpretative declarations? The answer seemed to be "no" as far as simple interpretative declarations were concerned because they did not involve any formalities and it would be absurd to require that they should be communicated in writing when they did not have to be formulated in writing. In that field, as in many others, however, the regime for conditional interpretative declarations should be modelled on that of reservations. That was the purpose of paragraph 3 of guideline 2.4.2, which transposed *mutatis mutandis* the rules of guideline 2.1.5 to declarations. That was, nevertheless, a provisional arrangement because the Commission would have to decide whether those guidelines on conditional interpretative declarations were needed, but it should not adopt a final position on that point until it had studied and compared the effects of reservations and the effects of conditional interpretative declarations. If the Commission found that conditional interpretative declarations operated in the same way as reservations, it could then delete the draft guidelines relating to them, but it should be careful about doing so until it was certain that they had the same effects.

58. The other draft guidelines related to much more secondary problems, but might help simplify the life of States and international organizations, whether they were the authors of reservations or interpretative declarations, other parties or the depositaries themselves, whose role was dealt with in guidelines 2.1.6 and 2.1.7. As indicated in paragraphs 135 to 138 of the report, the Commission and the special rapporteurs on the law of treaties had, at one time, thought about devoting a special provision to the depositary's role in respect of reservations. They had finally decided not to do so, having rightly considered that that role was the same for all communications relating to treaties. At its eighteenth session, the Commission had therefore decided to include all the rules on notifications, communications and the role of the depositary in what had become articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the 1986 Vienna Convention.[10] He drew attention to a mistake in paragraph 138 of the report, which should read: "article 78" instead of "article 79". There was thus no doubt that communications relating to reservations were covered by those general provisions, but the Guide to Practice would be incomplete if those provisions were not reproduced in it after they had been adapted to communications relating specifically to reservations. That was the purpose of guideline 2.1.6, paragraph 1 of which reproduced the wording of article 79, subparagraph (*a*), of the 1986 Vienna Convention, as adapted to reservations. For the purpose of that adaptation, it had seemed wise to use the terminology relating to reservations in respect of the recipients of those communications rather than the slightly different wording used in the part relating to depositaries. On that technical point, he drew the members' attention to paragraphs 139 to 141 of his report. Furthermore, the *chapeau* of paragraph 1 of the guideline provided for cases in which the contracting States and organizations had expressly or implicitly agreed on other modalities, just as had been done in the *chapeau* of article 78, paragraph 1, of the 1986 Vienna Convention.

[10] *Yearbook . . . 1966*, vol. II, pp. 173 *et seq*., document A/6309/Rev.1, Part II.

59. When there was a depositary—and there generally was one for multilateral treaties—it should be encouraged to act as speedily as possible. That was the aim of the words "as soon as possible" in guideline 2.1.6, since it was difficult to set a precise deadline, if only because, in practice, deadlines varied from one depositary international organization to another. In fact, the situation seemed to be satisfactory, since, according to the replies of depositary international organizations, communications relating to reservations were made within a period that might be as short as 24 hours, but was never longer than three months. Paragraph 2 of guideline 2.1.6 referred to the form of those communications. For the sake of clarity, he proposed that the important rule contained in article 79, subparagraph (*b*), of the 1986 Vienna Convention should be reproduced in a separate guideline, which was, for the time being, numbered 2.1.8. It was obviously important to know when those communications took effect, since that date determined the time period during which recipient States could properly formulate objections to reservations in accordance with the provisions of article 20 of the 1969 and 1986 Vienna Conventions.

60. Like article 77, paragraph 1, of the 1969 Vienna Convention and article 78 of the 1986 Vienna Convention guideline 2.1.6 related to the purely mechanical role of the depositary. If there were no differences of opinion between the reserving State, the recipients of reservations and the depositary, there was no problem, but there could be differences of opinion between the reserving State or international organization and the depositary, for example, with regard to the admissibility of the reservation or the recipients of a communication might consider that the depositary had overstepped its role. In such circumstances and particularly in the first case, two attitudes were possible. The depositary could act as a sort of guardian of the integrity of the treaty and some old, well-known episodes vouched for the fact that, in the past, that had been the natural tendency of some depositaries. After the advisory opinion of ICJ on *Reservations to the Convention on Genocide* and the reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (see para. 56 above), however, the General Assembly of the United Nations had substantially restricted the freedom of action of the Secretary-General in his role as depositary and it was those restrictive rules contained in its resolutions 598 (VI) of 12 January 1952 and 1452 B (XIV) of 7 December 1959 which had been used as a model by the drafters of the 1969 Vienna Convention, article 77, paragraph 2, of which, as reproduced in article 78, paragraph 2, of the 1986 Vienna Convention, permitted the Secretary-General to do no more than bring such questions to the attention of signatory or contracting States and organizations and, where appropriate, of the competent organ of the international organization concerned. That was the "letter-box" principle, it being understood that the "postman" could for all that ring the bell to alert States and international organizations to what was, in his opinion, a problem. He could, however, not adopt a stance, even provisionally. There would be no point in going into detail on the advantages and disadvantages of that system, for it was consistent with positive

law and embodied in the 1969 and 1986 Vienna Conventions, from which the Commission did not *a priori* wish to depart. Hence there was no alternative but to reproduce those rules and that was what guideline 2.1.7 did.

61. He had forgotten to transpose those rules to conditional interpretative declarations and it would be legitimate to instruct the Draft Committee to rectify that omission and to add a third paragraph to guideline 2.4.9, which would indicate that the provisions of guidelines 2.1.6, 2.1.7 and 2.1.8 also applied to conditional interpretative declarations. The Commission would decide at a later stage whether that provision should be retained.

62. He requested the members of the Commission to give him their opinion on six particular questions which were, of course, in no way exhaustive. First, would it be wise to specify in the Guide to Practice itself what was meant by "State or international organization entitled to become a party to the treaty"? Secondly, even if it was not of fundamental significance, could a communication relating to reservations or conditional interpretative declarations be validly confirmed or made by facsimile, as provided for in square brackets in guideline 2.1.6? Thirdly and more importantly, should reference be made to treaties creating "a deliberative organ that has the capacity to accept a reservation" (guideline 2.1.5, para. 2), in addition to the reference to the constituent instruments of international organizations? Fourthly, should the communication by the depositary of a reservation to the constituent instrument of an international organization exempt the depositary from communicating the text of the reservation to the member States or States entitled to become parties to that constituent instrument? Fifthly, was it necessary to mention in guideline 2.1.5 not only international organizations and, possibly, deliberative organs, but also the preparatory committees which were often set up pending the entry into force of a constituent instrument? Could the members of the Commission agree that the Drafting Committee should provide, at least temporarily, as he very much hoped, that the rules relating to reservations contained in guidelines 2.1.6, 2.1.7 and 2.1.8 should be transposed to conditional interpretative declarations.

63. Lastly, he drew attention to the fact that he wrote his reports exclusively in French and therefore did not understand why, since the previous session, they had been marked "Original: English/French". According to the secretariat, the reason was that the reports contained quotations in English. Yet the four preceding reports on the subject had also done so and they had been marked "Original: French". Furthermore, quotations might sometimes be in Spanish or Italian. A point of fundamental importance was that it was scientifically essential to cite legal theory and judicial decisions in the original language. Quotations in English were always accompanied by a translation into French which he himself had prepared with the assistance of the secretariat. For all those reasons, he very much hoped that there would be a return to previous practice so that the impression would not be given that he wrote his reports in English or, worse still, that he had passages of his report written in that language. If that were not done, he would be forced not to include any quotations in English and would therefore be unable to cite English-speaking legal writers.

64. Mr. KATEKA, supported by Mr. HAFNER, said he was surprised that, in the English version of the report, quotations which were originally in English were accompanied by a French translation and asked what the purpose of that practice was.

65. Mr. MIKULKA (Secretary of the Commission) said that a technical error had been made by the secretariat. Replying to Mr. Pellet, he explained that, if a document submitted in one language contained even one sentence in another language, the existing rules governing the editing of documents required that, when the secretariat published the document, it had to give both as the original languages.

66. Mr. LUKASHUK said that, if Mr. Pellet's view point were accepted, some quotations would have to be published in Arabic, Chinese or Russian, which were official languages and that was likely to give rise to problems.

67. Mr. ILLUECA said that he fully agreed with Mr. Pellet's opinion. For the sake of the scientific rigour of the work of the Commission, it was essential for quotations to be given in their original language. It was also very helpful for academics, jurists and Governments that relied on Commission documents to have the original quotations.

68. Mr. ROSENSTOCK said that silence about the distinction the Special Rapporteur wished to draw between conditional interpretative declarations and other declarations did not mean consent. The fact that the issue had not been raised for the time being should certainly not be interpreted as approval of that idea.

The meeting rose at 1.10 p.m.

2691st MEETING

Wednesday, 18 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, 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. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.