Document:-

A/CN.4/SR.2712

Summary record of the 2712th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2002, vol. I

18. Mr. GALICKI said he agreed with that proposal and pointed out that, although in paragraph 3 of General Assembly resolution 56/82 the Sixth Committee had requested the Commission to proceed with its work on the liability aspects of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, in paragraph 8 it had also requested the Commission to begin its work on the topic of the responsibility of international organizations. But the note of the group of States was a strange document: members were not required to take instructions from Governments. He thought that the provisional agenda should be adopted as it stood.

19. Ms. XUE said she endorsed Mr. Tomka's suggestion that the issue should be set aside for the moment and that informal consultations should be held to meet the concerns of all members. The concerns of Governments, which members came from, were equally important and must be taken into account.

20. Mr. CANDIOTI said that the item in question had been on the Commission's agenda for more than 20 years. For him, the question was not why it should be included, but why it should be excluded.

21. The CHAIR said that at issue was not whether to continue with the part of the topic on "liability", but whether that was how items should be included in the provisional agenda.

22. Mr. CHEE stressed that the Commission's statute made it an independent and autonomous body. The request of the group of States jeopardized that autonomy. The Commission must, however, not lose sight of the importance of the topic of liability, and he therefore supported the proposals by Mr. Pellet and Mr. Tomka.

23. The CHAIR said that the point was not whether or not the Commission should deal with the topic, but whether, under the circumstances, the topic should be on the provisional agenda. He endorsed the suggestions by Mr. Opertti Badan, Mr. Pambou-Tchivounda and Mr. Tomka that the provisional agenda should be adopted as it stood, bearing in mind that the Commission would take up the question of new agenda items, obviously including the item on international liability for injurious consequences arising out of acts not prohibited by international law and the item on the responsibility of international organizations, as a matter of priority. However, the Commission should not adopt a new method of including items in the agenda because, in the long run, that might cause problems. Clearly, the Commission would accept the General Assembly's request. The only question was whether it would depart from the way in which it had adopted the agenda for many years—in keeping with a certain process and not on the spur of the moment. If he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Opertti Badan and Mr. Tomka.

It was so decided.

The agenda was adopted.

Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/522 and Add.1)

[Agenda item 1]

24. The CHAIR said that, in accordance with article 11 of the Commission's statute, the Commission itself would fill the vacancy; the curricula vitae of the two candidates had been circulated to the members. As was customary, the election would take place in closed session.

The meeting was suspended at 5.35 p.m. and resumed at 5.45 p.m.

25. The CHAIR announced that the Commission had elected Mr. Kabatsi to fill the vacancy resulting from the death of Adegoke Ajibola Ige.

Organization of work of the session

[Agenda item 2]

26. The CHAIR drew the members' attention to the programme of work. Mr. Yamada, the Chair of the Drafting Committee, would submit the list of that body's members the next day. He asked the Chair of the Planning Group to prepare the list of that group's members.

27. Mr. YAMADA (Chair of the Drafting Committee) said that it had been the Commission's practice for the Drafting Committee to have about 14 members and that, in order to ensure optimal participation, its composition should vary depending on the topic under consideration. He requested members who wished to take part in the Committee on a particular topic to make themselves known and said that the Committee's composition should be based on the equitable representation of regions and legal systems.

The meeting rose at 5.50 p.m.

2712th MEETING

Tuesday, 30 April 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr.

Kemicha, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection[1] (A/CN.4/514,[2] A/CN.4/521, sect. C, A/CN.4/523 and Add.1,[3] A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR

1. Mr. DUGARD (Special Rapporteur), providing the Commission with an overview of the work undertaken to date, recalled that he had submitted his first report on diplomatic protection[4] at the fifty-second session, in 2000. The report had been devoted mainly to the subject of nationality of claims. After a debate and an open-ended informal consultation, the Commission had decided to refer articles 1, 3 and 5 to 8 to the Drafting Committee, together with the report of the informal consultations. The addendum had not been considered for lack of time. At the fifty-third session, the Commission had considered the addendum to the first report, which dealt with continuous nationality, as well as part of the second report (A/CN.4/514), which focused on the general principles relating to the rule on the exhaustion of local remedies. The Commission had decided to refer article 9, on continuous nationality, and articles 10 and 11, on the exhaustion of local remedies rule, to the Committee; articles 12 and 13 in that report had not been considered. So far, the Committee had not had the opportunity to take up any of those provisions; it would begin doing so that afternoon.

2. Paragraphs 11 and 12 of the third report (A/CN.4/523 and Add.1) set out his approach. Diplomatic protection was a subject on which there was a wealth of authority in the form of codification attempts, conventions, State practice, jurisprudence and doctrine. Indeed, no other branch of international law was so rich in authority, something which did not, however, mean the authorities were clear or certain. Indeed, they were frequently inconsistent and contradictory. The Commission must choose between the competing rules. His task was to present all the authorities and options so that the Commission could make an informed choice.

3. The third report set forth article 14, which considered the circumstances in which the exhaustion of local remedies rule did not apply, and article 15, which addressed the burden of proof in the application of the rule. He had prepared an addendum, currently in translation, which dealt with the Calvo clause,[5] and he hoped to take up the topic of denial of justice, possibly in a working group later or at the next session. He was aware that the subject of denial of justice was controversial, that it was largely a primary rule and that the emphasis in the draft articles was on secondary rules, but it was impossible for the Commission to complete a study on diplomatic protection without examining the Calvo clause and denial of justice, both of which had featured prominently in the jurisprudence on the subject. The Commission must consider whether or not it wished to include a provision on denial of justice.

4. In his next report, he planned to turn to the subject of nationality of corporations, and he hoped that there would be an opportunity in a working group in the second part of the session to consider the direction that he should take on the subject. He did not wish to extend the scope of the present draft articles beyond the traditional topics falling within the subject of diplomatic protection, namely nationality of claims and the exhaustion of local remedies. If the Commission confined itself to those two topics, it would be possible to complete a set of draft articles on first and second reading by the end of the quinquennium.

5. In the course of debate in the previous quinquennium, suggestions had been made to include a number of other matters in the field of diplomatic protection, such as functional protection by international organizations of their officials. This was a very important item and should be considered by the Commission, but not necessarily in the present set of draft articles. It raised many different issues, and if the Commission included it, it would be virtually impossible to complete the draft articles by the end of the quinquennium. He suggested recommending it for a separate study. An analogy was to be found in the approach to the draft articles on State responsibility, where the Commission had left the subject of the responsibility of international organizations for a separate study.

6. Other matters that had been suggested were equally innovative and controversial and might also delay conclusion of the draft. He spoke in paragraph 16 of the third report of the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned. This was an important matter, as was the case where a State or an international organization administered or controlled a territory, and he could see the Commission examining the question of diplomatic protection of persons living in East Timor under international administration or, even more difficult, diplomatic protection of the occupants of the West Bank and Gaza. As the Special Rapporteur on that subject for the Commission on Human Rights, he was not afraid of considering that subject, but if the International Law Commission became involved in topics such as the Middle East, the debate would go well beyond the traditional field of diplomatic protection.

7. Articles 12 and 13 were taken up in paragraphs 32 to 67 of his second report. The two provisions must be

[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, p. 35, para. 1.

[2] See *Yearbook ... 2001*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 2002*, vol. II (Part One).

[4] See *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

[5] See *Yearbook ... 1956*, vol. II, document A/CN.4/96, p. 206.

read together. Both dealt with the question whether the exhaustion of the local remedies rule was one of procedure or of substance—perhaps the most controversial matter in the field of exhaustion of local remedies. He might have made it even more controversial by suggesting that the Commission should depart from the provision adopted at its twenty-ninth session[6] and confirmed at its forty-eighth session within the draft articles on State responsibility provisionally adopted by the Commission on first reading.[7] In his view, the rule was essentially one of procedure, rather than of substance, and the matter should therefore be reconsidered.

8. Essentially, there were three positions: the substantive, the procedural and what he would call the mixed position. Those in favour of the substantive position, including Borchard and Ago, maintained that the internationally wrongful act of the wrongdoing State was not complete until the local remedies had been exhausted. There, the exhaustion of local remedies rule was a substantive condition on which the very existence of international responsibility depended. Those who supported the procedural position, for example Amerasinghe, argued that the exhaustion of local remedies rule was a procedural condition which must be met before an international claim could be brought. The mixed position, argued by Fawcett, drew a distinction between an injury to an alien under domestic law and an injury under international law. If the injury was caused by the violation of domestic law alone and in such a way that it did not constitute a breach of international law, for instance a violation of a concessionary contract, international responsibility arose only from the act of the respondent State constituting a denial of justice, for example, bias on the part of the judiciary when an alien attempted to enforce his rights in a domestic court. In that situation, the exhaustion of local remedies rule was clearly a substantive condition that had to be fulfilled. On the other hand, if the injury to the alien violated international law, or international law and domestic law, international responsibility occurred only at the moment of injury, and the exhaustion of local remedies rule was a procedural condition for bringing an international claim. For instance, if the respondent State was guilty of torturing an alien and there was a remedy under domestic law, an international wrong was committed when the act of torture occurred, but if there was a remedy before the domestic courts, it must be exhausted before an international claim could be brought. In that case, the exhaustion of local remedies rule was simply a procedural condition which must first be fulfilled.

9. Some had argued that the three positions were purely academic, but the question of the time at which international responsibility arose was often of considerable practical importance. First, in respect of the nationality of claims, the alien must be a national at the time of the commission of the international wrong. Hence, it was important to ascertain at what time the international wrong had been committed. Second, there might be a problem of court jurisdiction, as had happened in the *Phosphates in Morocco* case. There the question had arisen as to when international responsibility occurred for the purpose of deciding whether or not the court had jurisdiction. Third, there was the case of waiver. He would argue later that a State could waive the exhaustion of local remedies rule, but clearly it could not do so if the rule was a substantive one, as no international wrong would be committed in the absence of the exhaustion of local remedies. For that reason, the Commission must decide which of the three positions to adopt. The difficulty was that the sources were not clear. Attempts at codification seemed deliberately ambiguous. At its twenty-ninth session, in 1977, the Commission had adopted article 22 of the draft articles on State responsibility,[8] which clearly supported the substantive view. On the other hand, in 2000 Kokott had taken a purely procedural position in reporting to ILA.[9]

10. Prior to 1977, there had been a discernible trend in favour of the procedural view, an assessment that was now open to challenge, simply because the attempts at codification were so unclear and ambiguous. Judicial decisions were likewise vague and open to different interpretations that lent support for either the procedural or the substantive position. The leading case was *Phosphates in Morocco*, and it was interesting to recall that Ago, who had been counsel for Italy, had argued the substantive position. In the case, France had accepted the compulsory jurisdiction of PCIJ in 1931 in respect of any dispute arising thereafter. Italy had complained that France had violated an international obligation *vis-à-vis* Italian nationals in 1925 in Morocco, but argued that the wrong had not been complete until 1933, when the local remedies or their equivalent had finally been exhausted. Thus, in essence Italy had supported the substantive position. France, on the other hand, had contended that the rule of the exhaustion of local remedies was *no more* than a rule of procedure and that the international responsibility was already in being, but could not be enforced through the diplomatic channel or by recourse to an international tribunal or to the Court unless remedies had first been exhausted. The Court had found in favour of France and held that there had been no new factor after 1925 that had given rise to the international responsibility of that country. He had quoted the Court's dictum on the case at some length and had italicized an important statement by the Court, namely, "*This act* [i.e. the wrongful act committed in 1925] *being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States**" [p. 28]. It was interesting that that sentence had not been quoted by the Commission when it had discussed that decision. Special Rapporteur Ago, examining the *Phosphates in Morocco* case, had maintained that the Court had not ruled against the substantive position. His own interpretation of that passage, however, was that the Court had supported the French contention, which had argued the procedural position. That was also Amerasinghe's view. Thus, judicial decisions, although they might be unclear, at least contained one example in favour of the procedural position, namely the *Phosphates in Morocco* case.

11. State practice was of little value, because it usually took the form of arguments presented in international pro-

[6] See *Yearbook ... 1977*, vol. II (Part Two), p. 30.

[7] See *Yearbook ... 1996*, vol. II (Part Two), p. 58.

[8] See footnote 6 above.

[9] ILA, *Report of the Sixty-ninth Conference* (London, 2000), p. 606, at pp. 629 and 630.

ceedings and, inevitably, a State was bound to espouse the position that best served its own interests. In the *Phosphates in Morocco* case Italy had argued strongly in favour of the substantive approach, yet 50 years later, in the *ELSI* case, it had backed the procedural position. Hence, no clear conclusion could be drawn from arguments put forward by States, and this form of State practice was not very helpful. One example of State practice, however, that was useful had been the response of the United States Department of State to García Amador's first report on State responsibility, in which it had taken a stance in favour of the "third position".[10]

12. Academic opinion was divided on the issue. The third position, which he preferred, had received too little attention. Fawcett maintained that a distinction should be made between the cause of action and the right of action, and set out three possible legal situations in which the operation of the local remedies rule should be considered.[11] Case I was where the action complained of was a breach of international law but not of local law. In such a situation, the local remedies rule clearly did not apply, because the act was not contrary to local law, and there were no local remedies to exhaust. The example of apartheid in South Africa came to mind. Apartheid had clearly violated a rule of international law, but had been condoned and, indeed, promoted by the apartheid regime. Hence, there had been a violation of international law, but not of domestic law. Case II was where the action complained of was a breach of local law but not of international law, for example a breach of a contract between the respondent State and an alien. In such a case, the international responsibility of the delinquent State was not engaged by the action complained of; it could only arise out of a subsequent act of the State that constituted a denial of justice to the injured party when he sought a remedy for the action of which he complained. In that case, the local remedies rule acted as a substantive bar to an international claim, as no claim arose until a denial of justice could be demonstrated. Case III, which was controversial, was where the action complained of was a breach of both local and international law. In those circumstances, Fawcett argued that the exhaustion of local remedies rule operated as a procedural bar to an international claim.

13. In his opinion the third school of thought was the most satisfactory. For example, a State which tortured an alien incurred international responsibility at the moment when the act was committed, but it might also find itself in violation of its own legislation. If a domestic remedy existed, it must be exhausted before an international claim could be raised; in such a case, the local remedies rule was procedural in nature.

14. Draft articles 12 and 13 sought to give effect to that conclusion; academic opinion offered some support for such a position, but other views were also represented. Moreover, the Commission might find it difficult to depart from the position it had adopted in article 22 of the draft articles on State responsibility. However, in proposing that article, the Special Rapporteur on State responsibility had assumed that the document in its final form would distinguish between obligations of conduct and result, a distinction which had not been retained. Hence, the Commission was free to adopt the view he had proposed; whether his formulation gave full effect to that position was a matter for the Drafting Committee.

15. Mr. GAJA said that, while he might disagree with many of the Special Rapporteur's conclusions, he found them thought-provoking and believed that the final product would be a good one.

16. It was he who had proposed consideration of the issues mentioned and rejected in paragraph 16 of the third report, all of which related to situations where a State or entity other than the State of nationality had been held to be entitled to exercise diplomatic protection: functional protection by international organizations of their officials; the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers, irrespective of the nationality of the latter; the case where a State exercised diplomatic protection of a national of another State as a result of the delegation of such a right; and the case where a State or international organization administered or controlled a territory.

17. For example, in the *M/V "Saiga"(No. 2)* judgement, ITLOS had found that the ship's State of nationality was entitled to bring a claim for injury suffered by members of the crew, irrespective of their individual nationalities; thus, the State of nationality did not possess an exclusive right to exercise diplomatic protection. In that context, he had suggested that the Commission should also consider the consequences for the State of nationality of an international organization's entitlement to exercise diplomatic—not functional—protection; the question of the competing claims of the State of nationality and the United Nations with regard to personal injuries to United Nations officials had been raised by ICJ in 1949 in *Reparation for Injuries*.

18. If the Special Rapporteur and the Commission concluded that one or all of those topics did not merit specific consideration in the draft articles, they should at least be mentioned in the commentary. In any case, the Commission should be guided by contemporary practice rather than by tradition in determining the relevance of an issue.

19. Paragraph 55 of the second report referred to his own book on the exhaustion of local remedies.[12] However, owing perhaps to an inaccurate translation, the Special Rapporteur had mistakenly stated that he had argued "that the exhaustion of local remedies rule [was] a 'presupposition' for unlawfulness"; in reality, he had held that the exhaustion of local remedies was a precondition for unlawfulness, although he had indeed maintained in the book that that precondition was substantive rather than procedural in nature. His main argument had been that where local remedies were required to be, and had not been, exhausted, diplomatic protection could not be exer-

[10] Reproduced in M. M. Whiteman, *Digest of International Law*, vol. 8 (1967), p. 789.

[11] J. E. S. Fawcett, "The exhaustion of local remedies: substance or procedure?", *BYBIL, 1954*, p. 452.

[12] G. Gaja, *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967).

cised, no claim in relation to an alleged breach could be put forward and countermeasures could not be taken. One might well wonder what the practical significance was of an alleged breach which had no consequences at the international level for either the State or the individual concerned, and for which no remedy was available. He had held that, since the precondition applied to all procedures relating to such a case, it must be regarded as substantive.

20. The question of the nature of the local remedies rule raised difficult theoretical questions; it also had political implications, since the procedural theory was widely perceived as belittling the importance of a rule that many States considered fundamental. In view of those problems and the lack of consensus within the Commission, it might be unwise to endorse any of the competing views. The Special Rapporteur had rightly questioned the wisdom of article 22 of the draft articles on State responsibility, a problem that had been resolved by deleting the draft article and taking a neutral approach to the exhaustion of local remedies in article 44 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.[13] Perhaps it would be equally wise to delete articles 12 and 13 from the draft on diplomatic protection. Undeniably, some implications might follow from the adoption of one or another of the theories mentioned by the Special Rapporteur, but they were not of primary importance and did not justify inclusion of the draft articles in question.

21. He did not agree that waivers were inconsistent with the substantive nature of the local remedies rule. States could waive a precondition for admissibility with regard to either a substantive or a procedural issue. Waivers should not be treated lightly; in the *ELSI* case, a Chamber of ICJ had stated that it found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so" [para. 50]. Furthermore, he had pleaded for the Italian Government in the *ELSI* case and did not agree with the Special Rapporteur that it had been in Italy's interest to hold that the local remedies rule was procedural in nature (A/CN.4/514, para. 51); in any case, the Government had not taken that position.

22. Mr. BROWNLIE said that, while the Special Rapporteur had compiled a great deal of important material in his third report, he had been overly limited by academic studies of the issue of local remedies. The question of whether such remedies were substantive or procedural in nature was, to some extent, inescapable in special circumstances such as those of the *Phosphates in Morocco* case. However, he did not find that distinction very useful or relevant as a global approach to the problem. Generally speaking, he supported the approach taken by Fawcett, whose interest in the question of local remedies was based not on academic theory, but on practical experience.

23. It would be preferable to undertake an empirical study of the local remedies rule on the basis of three rationales: policy, practice and history. Very interesting material was to be found in State practice and especially in nineteenth-century sources. For example, if a British expatriate had built up a successful business in Ruritania and his business was destroyed by local rioters, he went to seek help from the British consulate. However, in such circumstances the British Government was very unsympathetic, because of the principle of assumption of risk on the basis of the business owner's voluntary, persistent links with Ruritania. Accordingly, he was referred to the local courts. The Government's view had been based on common sense rather than on issues of procedure or substance. In a modern example, the written pleadings of Israel in *Aerial Incident of 27 July 1955* had argued that it would be unfair to ask the Government representing the victims of an Israeli aircraft shot down by the Bulgarian defence forces to seek redress in the Bulgarian courts since neither the victims nor their families had any voluntary link to Bulgaria.

24. In any event, even if a case was subsequently dealt with through the diplomatic channel, it was useful to have the facts established rapidly in the local courts. Moreover, Governments had taken the view that it was not appropriate for small claims to be addressed initially through the diplomatic channel, an approach which might affect diplomatic relations between States. For all those reasons, the Commission should give greater consideration to the policy basis of local remedies. From a practical point of view, local remedies would acquire greater importance if the Commission took the view that disputes should be settled at the domestic level whenever possible, and a voluntary link rule would place various restrictions on the operation of the local remedies rule. For that reason, it was unfortunate that the voluntary link question, which was just one aspect of the policy issue, had been raised only in article 14. The reader of the draft articles in sequence would gain the impression that the local remedies rule applied in all cases. If the Commission wished to pursue the question of a voluntary link rule, that decision would affect draft article 10 and all subsequent articles. It would therefore be premature to refer that portion of the document to the Drafting Committee; the current emphasis on the distinction between procedure and substance must be heavily qualified.

25. Mr. SIMMA said that, while he supported Mr. Brownlie's remarks concerning the importance of voluntary links to a State, the Special Rapporteur had made it clear that the distinction between substance and procedure was of practical relevance to the topic under consideration, as was demonstrated in the *Phosphates in Morocco* case. Furthermore, he tended to agree with Mr. Gaja that a State which waived the local remedies precondition should be considered to have agreed to a lower threshold for the commission of an internationally wrongful act; some rules were not peremptory in nature but were open to agreement between States.

26. Mr. BROWNLIE said that the *Phosphates in Morocco* case was one specific example; the *Aerial Incident of 27 July 1955* case and his Ruritania example, on the other hand, illustrated the importance of the absence or presence of a voluntary link between the victim and the

[13] *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, chap. IV, para. 76.

State. He agreed that the distinction between procedure and substance was inescapable, and did not contend that it was non-applicable, but he objected to the use of that distinction as a comprehensive framework for the issue as a whole. It was not a suitable general vehicle for approaching the subject.

27. Mr. PELLET said that, while he would do his best to comply with the Special Rapporteur's wishes with regard to the scope of the present debate, he would be unable to refrain entirely from touching on article 14. Paragraphs 1 to 12 of the third report called for no particular comment, but he was disturbed by certain peremptory assertions in paragraphs 13 to 17. First, with regard to denial of justice, following lengthy debate and despite some dissenting opinions, the Commission had concluded that that question should not be dealt with specifically in the draft articles. He was thus somewhat surprised at the Special Rapporteur's announcement of his intention to return to it. If the start of each new quinquennium was used as a pretext for reverting to positions adopted by the Commission in previous years, no topic would ever be brought to a successful conclusion. The Special Rapporteur should resist the temptation to take on the role of Odysseus's wife.

28. On the matter of substance, he reiterated his opposition, not necessarily to the substance of the Special Rapporteur's positions—which in any case, true to his chosen role of Penelope, the Special Rapporteur did not really explain, instead merely promising to do so—but rather to his line of approach. That opposition was not rooted in the fact that, in tackling the question of denial of justice as such, the Commission would be dealing with primary rules: after all, the distinction was neither evident nor written in stone, and nothing in any case prohibited the Commission from dealing with primary rules. Rather, he was opposed to it dealing with the question itself, because denial of justice was merely one of the manifestations of the more general rule whereby local remedies must be regarded as exhausted if they had failed or were doomed to failure. In that regard, it seemed to him from his perusal of the section of the third report dealing with article 14 that the articles could be drafted in such a way as to cover denial of justice without any need to make specific reference to it. For that reason, he was firmly convinced that it would be better not to discuss article 14 in the Drafting Committee without having first seen what the Special Rapporteur was proposing with regard to denial of justice—for the possibility of merging article 14 with a draft article on denial of justice must remain an open question. Furthermore, to deal with denial of justice would involve the Commission in entirely unnecessary incursions into the realm of States' internal law.

29. However, he had no problem with the idea of studying the Calvo clause in the context of the draft articles—although the question of its validity in international law was another matter. It could be argued, on the basis of international law alone, that the issue was a separate one, albeit closely linked to the question of who was the holder of the right to diplomatic protection. That being said, the Calvo clause should perhaps be studied from the more general perspective of the waiver of diplomatic protection (not necessarily by means of a Calvo clause), whether by the beneficiary or by the State entitled to exercise it. Thus, while the Commission needed to look more closely at the Calvo clause and to adopt a firm position on it, without sitting on the fence, the Special Rapporteur should approach the question from a broader standpoint.

30. It was gratifying that the Special Rapporteur had recalled his commitment to tackle the question of the diplomatic protection of corporations, and the proposal to establish a working group on that sensitive issue was a good idea. However, the group should consist of only a few members, for the subject was highly technical and did not lend itself to "legal tourism".

31. As to paragraph 16, he reiterated his firm opposition to the idea of "nationality of claims". Nationality attached not to the claims but to the persons, ships or aircraft involved. Nationality of claims was a common-law concept which had no place in international law. Nevertheless, the Special Rapporteur was right to seek to exclude from the scope of the draft articles functional protection and the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers (para. 16, cases (*a*) and (*b*)). Both those matters were extensions of the topic under consideration. However, he was persuaded by Mr. Gaja's argument that the Commission should consider functional protection when it arose in conjunction with diplomatic protection. The Special Rapporteur was also right to rule out consideration of the case where an international organization controlled a territory. It was a very specific form of protection, one at least as closely related to functional as to diplomatic protection; and, as in the case of the articles on State responsibility, the Commission should disregard all issues relating to international organizations. On the other hand, he was much more reluctant to abandon the other case referred to under case (*d*) of paragraph 16, that of a State administering or controlling a territory not its own. Nor could he agree to the elimination of case (*c*), that of a State exercising diplomatic protection of a national of another State as a result of the delegation of such a right. Both those cases fell squarely within the scope of the topic.

32. The reason was that diplomatic protection was merely an extension of the topic of State responsibility, in the context of which it should, in his view, have been considered. The present topic had, for various reasons, been artificially detached from the topic of State responsibility. The question was to determine how a State could obtain reparation for the injury caused to one of its nationals by the internationally wrongful act of another State. At issue was the means of implementing State responsibility, and he saw no reason for excluding the two cases he had cited. The case of control of a territory by a State could be inferred from several of the articles on State responsibility for internationally wrongful acts, in particular articles 8 and 11.

33. He also wondered whether the topic of diplomatic protection would be fully covered without some discussion of the effects of the exercise thereof. The Special Rapporteur should perhaps address that aspect of the topic in future reports.

34. With reference to articles 12 and 13, he endorsed the comments by Mr. Brownlie and Mr. Gaja almost unreservedly. As he had already had occasion to remark, he failed to understand the Special Rapporteur's fascination with the question of whether the rules of diplomatic protection were of a procedural or a substantive nature. He could understand why Mr. Roberto Ago had taken an interest in the question in the context of the original topic of State responsibility: for Ago, the point at issue had been at what moment an internationally wrongful act arose. Ago, however, had clearly been biased by his positions in the *Phosphates in Morocco* case, and it had to be said that those positions were not tenable. Nonetheless, it had been legitimate to put the question in those terms. However, when viewed purely in the context of diplomatic protection, the question seemed to lose its relevance; and he agreed with Schwarzenberger's view that the distinction was purely theoretical.[14] The postulate was that an internationally wrongful act had been committed; the only question to be considered was thus on what conditions—and perhaps under what procedures—reparation could be required when an individual was injured; for in the absence of an internationally wrongful act, diplomatic protection would not arise.

35. Seen from that perspective, the issue was straightforward: diplomatic protection was a procedure whereby the international responsibility of the State could be implemented; exhaustion of local remedies was a prerequisite for implementation of that procedure; and whether it was a substantive or a procedural rule mattered little. That contention was illustrated not only by the draft article 10 proposed by the Special Rapporteur during the previous session[15] but also by the excellent formulation adopted in 1929 by the Preparatory Committee of the Conference for the Codification of International Law, held at the Hague in 1930,[16] and cited in paragraph 37 of the second report. It was also the position taken in article 44, subparagraph (*b*) of the draft articles on State responsibility for internationally wrongful acts adopted at the previous session. On the other hand, he failed to see what purpose was served by the qualification of the word "precondition" with the adjective "procedural" in the draft article submitted to ILA[17] and cited in paragraph 43 of the second report.

36. Consequently, he had with great regret to say that he saw no value in articles 12 and 13. Article 10, in clear terms, and article 11, more confusedly, stated what was universally recognized and had been clearly enunciated in 1929, namely, that "the State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State".[18] That was correct, and it was also sufficient. To reiterate, an internationally wrongful act must by definition have been committed before the question of diplomatic protection arose. If a State could make reparation under its municipal law for the damage sustained, it must be given the possibility of doing so. That idea was the very raison d'être of the exhaustion of domestic remedies rule. While Mr. Brownlie's comments were factually and historically correct, the State must nevertheless first be given the opportunity to make honourable amends. And if the responsibility arose from the fact that remedies were not available, it went without saying that there were no remedies to be exhausted and the case was covered by article 14. But articles 12 and 13 served no useful purpose in either case.

37. That did not mean he disagreed with the substance of the approach taken by the Special Rapporteur. Like the latter, he favoured a "third way", a contention he would illustrate with examples different from those cited by the Special Rapporteur, especially as he had not been convinced by the example of apartheid, which seemed to him irrelevant. It was not clear, in the case of apartheid, what State could have exercised its right of diplomatic protection over the victims. Two better examples could be cited to illustrate that there was no need for article 12 or 13.

38. In a first example, State A nationalized the property of a national of State B without offering the national compensation, an act that clearly violated a rule of contemporary positive international law. Under articles 1 and 2 of the articles on State responsibility, the responsibility of State A was clearly entailed; but it could make reparation for the injurious consequences; and State B could not exercise its diplomatic protection until local remedies had been exhausted. That was stated in article 10, and hence there was no need for article 12 or article 13.

39. In a second example, a national of State D brought a complaint before the courts of State C regarding the amount of a tax levied both on himself and on nationals of State C. In that case, no rule of international law was violated. However, all the courts of State C, including its Supreme Court, then rejected the application by the national of State D, on the grounds that foreigners liable to tax had no right of appeal. That would constitute unlawful discrimination, and it would be the final decision of the Supreme Court that entailed the responsibility of the State for an internationally wrongful act. Yet the problem of exhaustion of domestic remedies would not arise—domestic remedies would be either impossible or doomed to failure. Thus, the rule in article 14 would be applicable and, once again, neither article 12 nor article 13 served any useful purpose. There was in fact no scenario in which they would serve any such purpose. Article 10 covered the one case, article 14 the other; and there was no intermediate case.

40. The drafting of article 12 was also open to question. He had already voiced his opposition to the term "procedural". More serious was the question how a breach of local law could of itself constitute an internationally wrongful act. That seemed to contradict both the spirit and the

[14] G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, p. 611.

[15] See *Yearbook ... 2001*, vol. II (Part Two), chap. VII.

[16] See League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference Drawn Up by the Preparatory Committee* (document C.75.M.69.1929.V), p. 16; reproduced in *Yearbook … 1956*, vol. II, document A/CN.4/96, annex 2, Basis of discussion no. 27, p. 225.

[17] See footnote 9 above.

[18] Texts of articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930) (document C.351(c)M.145(c).1930.V); reproduced in *Yearbook … 1956*, vol. II, document A/CN.4/96, annex 3, article 4, p. 225.

letter of the articles on State responsibility for internationally wrongful acts, and in particular article 3 thereof.

41. However, his reservations with regard to articles 12 and 13 related not to their drafting—which could be amended—but to their function. In his view, they had no function whatever. Accordingly, to his great regret, like Mr. Gaja and Mr. Brownlie, he could not support the Special Rapporteur's proposal that articles 12 and 13 should be referred to the Drafting Committee, especially bearing in mind that some passages of the second report commenting on those articles could certainly be incorporated into the commentaries to articles 10, 11 and 14.

42. Mr. SIMMA asked for clarification of Mr. Pellet's remark that more needed to be said about the effects of diplomatic protection.

43. Mr. PELLET said that more thought should perhaps be given to the question of the moment from which a State was assumed to exercise its diplomatic protection. Did the fact that a State exercised diplomatic protection on behalf of a person who had dual nationality prevent the other State of which he was a national from exercising diplomatic protection? If direct international remedies were available to a natural or legal person, did the exercise of diplomatic protection, assuming such exercise to be possible, prevent him from availing himself of the channels for direct access to international law; or, conversely, did an application to an international body prevent the State from exercising diplomatic protection?

44. The CHAIR said that SMr. Simma and Mr. Pellet seemed to disagree on the formal aspects of the commencement of the process of diplomatic protection. Was there a line which, once crossed, automatically entailed consequences, or were there grey areas in which two countries could both be pursuing what would eventually be diplomatic protection?

45. Mr. PELLET said that there was no real disagreement, but that the Chair was right in saying that the problem was to determine the time from which a State exercised diplomatic protection, and that there would probably be some grey areas. The next problem was to determine what happened when a State exercised diplomatic protection: Did that have any effect other than to set the reparation mechanisms in motion? Did it, for example, prevent certain actions from being taken at the international level? Again, once the time was determined, was the matter over and done with? In his opinion, the answer was in the negative, and it was on that point that he would like to convince the Special Rapporteur.

46. Mr. PAMBOU-TCHIVOUNDA said Mr. Pellet's remarks on the effects of diplomatic protection raised the question of whether the State had a discretionary right to exercise diplomatic protection. Was it the State alone that could determine the time from which international action could begin, or could that be done by the law? Mr. Pellet's remarks also responded to the concerns raised by Mr. Simma: Once the usual notification had been made, how did the machinery operate? Who was involved and who was left out?

47. Mr. OPERTTI BADAN said consideration should be given to whether the general principle of prevention that was part of procedural law applied when an individual had multiple nationality and consequently multiple sources of protection, yet one State exercised diplomatic protection. Surely that principle, which governed actions under domestic law and according to which the institution that was initially seized of a matter followed it through to the end, also applied in international law.

48. Mr. PELLET said his idea could be illustrated by the following example: suppose a person had dual nationality, Uruguayan and French, and suffered injury inflicted by Gabon. Uruguay was faster off the mark than France and exercised diplomatic protection. Did that prevent France from exercising diplomatic protection in its own right?

49. Mr. BROWNLIE said there was fertile ground for debate on the issue of modalities of protection, but that perhaps it should be taken up in the context of the Commission's long-term programme. The Special Rapporteur's topic was already complex enough, and adding more difficult issues might not be a good idea. As to the principle of prevention, States frequently exercised what might be called anticipatory diplomatic protection: they informed other Governments that if certain conditions obtained, they might find it necessary to exercise diplomatic protection in relation to their nationals whose interests appeared to be threatened by their host State.

50. Mr. SIMMA, referring to paragraph 16 of the third report in which the Special Rapporteur listed matters whose inclusion in the draft articles he opposed, said he himself did not agree that they should be excluded. The first matter was functional protection by international organizations of their officials. He agreed with Mr. Gaja that it was a separate subject but one that had links with diplomatic protection, as ICJ had demonstrated in the *Reparation for Injuries* case. The relationship between functional protection and diplomatic protection should be studied very closely, and something would probably have to be said in the draft articles about functional protection.

51. The Special Rapporteur's approach appeared to be a decidedly generalist, traditionalist one, diplomatic protection purified of everything that was new, and he was not convinced that it was appropriate. For example, the Special Rapporteur wished to exclude from the draft articles any mention of the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew. Mr. Gaja had already drawn attention to the *M/V "Saiga" (No. 2)* case heard by ITLOS. He himself would refer to draft article 14, subparagraph (*c*), which stated that local remedies did not need to be exhausted when there was no voluntary link between the injured individual and the respondent State. The draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session[19] included a provision on equal access. To his mind, that meant that a person who had no voluntary connection with Ukraine but had been affected by an incident like Chernobyl could benefit from Ukrainian domestic remedies if Ukraine

[19] See *Yearbook ... 2001*, vol. II (Part Two), p. 146, para. 97.

opened them up to all nationals of countries affected by transboundary pollution from the incident. The issue was a very topical one, one which might well arise more and more often in the future, including in connection with internationally sponsored terrorism, yet it was not taken up in the report.

52. The third item in the list the Special Rapporteur wished to exclude, the exercise by a State of diplomatic protection for a national of another State that had delegated that right, clearly needed to be covered by the draft. He could not imagine another issue that could more genuinely be a part of what the Commission should be trying to do in its work on diplomatic protection. On the fourth item, when a State or an international organization administered or controlled a territory, he agreed with Mr. Gaja and Mr. Pellet that a distinction must be drawn between an international organization administering a territory, which was a bit closer to functional protection and which consequently should be left aside for the time being, and that of a State administering a territory other than its own when questions of diplomatic protection might arise, which should be given further study.

53. Mr. CANDIOTI said that the Commission had been applying a general approach to the topic, focusing on the rules of nationality and exhaustion of domestic remedies, yet he seemed to recall that at the start of the exercise mention had been made of the "clean hands" doctrine. Should it be mentioned in the draft articles or excluded in order to determine how far the Commission intended to go in its work of codification?

54. Mr. TOMKA, referring to Mr. Simma's example of the Chernobyl incident, said that in cases of diplomatic protection there was an underlying assumption that a breach of international law had occurred. The Chernobyl incident, however, had involved damage caused by lawful activities. Mr. Simma had likewise referred to the draft articles on prevention of transboundary harm, but they dealt with activities not prohibited by international law and were aimed at managing the risk that such activities could create.

55. Mr. PELLET said his impression was that Mr. Simma had raised the Chernobyl incident in a more theoretical context, asking whether a failure by Ukraine to provide domestic remedies to foreigners constituted a breach of international law. Chernobyl was a fairly complex and contemporary issue, and it was possible that there had been a breach of the obligation of prevention on the part of Ukraine.

56. Mr. SIMMA said his point had been that neighbouring fields in international law might be relevant to the subject of diplomatic protection. In the event of transboundary pollution, for example, if remedies were available for the local population but not for foreigners, that was of relevance to the topic of diplomatic protection and specifically to draft article 14, subparagraph (*c*). If local remedies were available for foreigners, if the latter chose not to make use of them and if their State of nationality exercised diplomatic protection on their behalf, the neighbouring State might complain that it had offered all necessary local remedies but that no one had bothered to file a claim in its courts.

57. Mr. DUGARD (Special Rapporteur), offering a preliminary response to the remarks made so far and hoping to stimulate further debate, thanked Mr. Gaja for his description of the report as innovative. Mr. Simma, on the other hand, seemed to think he had taken a highly traditionalist and orthodox view. The matters he wished to exclude from the draft articles could, Mr. Gaja had suggested, be mentioned in the commentary, and he entirely agreed.

58. Members would remember that delegation of the right to exercise diplomatic protection, mentioned in paragraph 16 (*c*) of his third report, was partly dealt with in the context of continuous nationality, and the view had been expressed that it should be covered more fully in article 9. He agreed, and that was why he was not keen to embark on a more comprehensive discussion in the context of article 14. The "clean hands" doctrine would be addressed in article 5 or possibly the commentary thereto: the point would be made that a State could bring a claim only when its national was a national in good faith.

59. Mr. Pellet had expressed some surprise that the issue of denial of justice had raised its head again. His own view was that all issues that fell squarely within the field of diplomatic protection, particularly from the traditional perspective, must be taken into account. At the present stage, he was not in favour of including an article on denial of justice, for the reasons advanced, *inter alia*, by Mr. Pellet. Yet denial of justice and the Calvo clause had figured prominently in the evolution of diplomatic protection, particularly in Latin America, and several of the members of the Commission from that region had repeatedly raised the issue. The Commission must take a decision on whether to include the subject or not, and that was why he had brought it up.

60. As to the debate about whether the local remedies rule was substantive or procedural in nature, he was not particularly exercised about the distinction, as Mr. Brownlie had suggested, although he found it interesting, and he agreed with him that it was not a general framework for the study of diplomatic protection. As Mr. Brownlie himself had pointed out, however, one could not entirely escape from the issue of exhaustion of local remedies, for a number of reasons. It featured prominently in the first part of Ago's draft articles on State responsibility as provisionally adopted on first reading by the Commission at its thirty-second session,[20] specifically article 22 thereof, and in all the writings on the local remedies rule. It had practical implications. In the *Phosphates in Morocco* case, ICJ had been concerned with the time at which the internationally wrongful act had occurred. The issue also arose in respect of nationality of claims, because the injured alien must be a national of the State in question at the time the injury occurred. When did the injury occur—at the time when the act was committed, or when local remedies had been exhausted? Waiver presented difficulties, and

[20] *Yearbook ... 1980*, vol. II (Part Two), pp. 25–61, paras. 17–34.

Mr. Gaja had raised an argument that certainly merited consideration.

61. He was prepared to accept that articles 12 and 13 were not well drafted, but the Commission could not walk away from the issue of exhaustion of local remedies. It had to decide at what time international responsibility arose in that context. He urged members to speak on the matter during the debate.

62. Mr. BROWNLIE said the Special Rapporteur had not reviewed his criticisms with sufficient care. What he had said about the procedural/substantive distinction was not that it should never be made, but that it did not provide a foundation for proper examination of diplomatic protection. The Special Rapporteur had made no reference whatsoever to the policy questions he had raised or the three rationales he had mentioned, which were really the point of his statement.

63. Mr. DUGARD (Special Rapporteur) recalled that he had announced he was giving a provisional, interim response to the discussion so far in order to facilitate further debate. He had not attempted to deal with all the important arguments made, but he would certainly do so on a future occasion.

Organization of work of the session (*continued*)

[Agenda item 2]

64. Mr. YAMADA (Chair of the Drafting Committee) announced that, account having been taken of members' wishes and of the need for equitable representation of regions and languages, it had been decided that the Drafting Committee for the topic of diplomatic protection would consist of the following members: Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Gaja, Mr. Galicki, Mr. Momtaz, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Ms. Xue, Mr. Dugard (Special Rapporteur) and Mr. Kuznetsov (Rapporteur, *ex officio*). Members of the Commission not appointed to the Committee would be entitled to attend its meetings, subject to their exercising restraint in making contributions to the proceedings.

The meeting rose at 1 p.m.

2713th MEETING

Wednesday, 1 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection[1] (*continued*) (A/CN.4/514,[2] A/CN.4/521, sect. C, A/CN.4/523 and Add.1,[3] A/CN.4/L.613 and Rev.1)

[Agenda item 4]

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

1. Mr. SIMMA said that two of the questions he wished to refer to had been raised at the preceding meeting: the "clean hands" rule and the concept of prevention. The third related to draft articles 12 and 13.

2. The "clean hands" rule, to which Mr. Candioti had referred, was entirely relevant to the discussion on diplomatic protection, but it could not be given special treatment. The same question had arisen during the consideration of the topic of State responsibility, namely, whether a reference to the "clean hands" rule should be included in the list of circumstances precluding wrongfulness. The Commission had decided that, although the "clean hands" rule should clearly be taken into account, it certainly could not constitute a circumstance precluding wrongfulness. In the context of the discussion on diplomatic protection, the issue was to decide to whom the rule must apply. It could be the State of nationality or the wrongdoing State, in which case it would be dealt with by local courts. The more relevant case for the Commission was that of the person who had sustained the injury. The fact that that person did not have "clean hands" by no means warranted his being deprived of his right to diplomatic protection. Thus, although the "clean hands" rule could not be left out, it did not have a specific place in the draft articles.

3. With regard to the concept of prevention, he agreed with the comment Mr. Brownlie had made at the preceding meeting on aspects outside the process of diplomatic protection *stricto sensu*, namely, circumstances preceding the commission of the internationally wrongful act. It would be entirely relevant to discuss them in greater detail, while being careful not to enter into considerations that might cause confusion.

4. The third and most important point related to the wording of articles 12 and 13. Following the criticism levelled at the preceding meeting, he had tried to reformulate

[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, p. 35, para. 1.

[2] See *Yearbook ... 2001*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 2002*, vol. II (Part One).