

Document:-  
**A/CN.4/SR.2713**

**Summary record of the 2713th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**2002, vol. I**

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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<sup>1</sup> (*continued*) (A/CN.4/514,<sup>2</sup> A/CN.4/521, sect. C, A/CN.4/523 and Add.1,<sup>3</sup> 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

<sup>1</sup> 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.

<sup>2</sup> See *Yearbook ... 2001*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).

article 12 by removing the parts regarded as unnecessary by several members of the Commission. The view had often been expressed that the Commission should not take a position on a doctrinal matter, such as whether the exhaustion of local remedies was a procedural or a substantive issue. If the controversial elements were removed, namely, the words “is a procedural precondition”, the beginning of article 12 became redundant and could be replaced by the words “Local remedies must be exhausted before a State may bring an international claim”. The resulting text was virtually identical to that of article 10, which also set out the principle of the exhaustion of local remedies, with the exception of the last words: “where the act complained of is a breach of both local law and international law”. The Special Rapporteur had explained that that was based on what he considered to be one of the most important studies on the subject, namely, that of Fawcett,<sup>4</sup> who referred to three cases. The question was whether, in any of those cases, deleting article 12 entirely and simply retaining article 10 would cause a problem.

5. In the first case, namely, where the injury was caused by a breach of international law, but not of domestic law, it was clear that the exhaustion of local remedies rule did not come into play. In the second case, where the injury resulted from a breach of domestic law, but not of international law, the issue of denial of justice arose. He was fully prepared to consider the possibility that the Commission was codifying a rule on denial of justice, but, in any case, that had nothing to do with the question whether the exhaustion of local remedies was a substantial or a procedural rule. In his opinion, the third case, in which the injury was a breach of both domestic and international law, was already fully covered by draft article 10. In conclusion, he agreed with Mr. Brownlie that the question of the distinction between the procedural rule and the substantive rule was inescapable, but it would be better dealt with in the commentary.

6. Mr. BROWNLIE said that he had serious reservations about the legal status of the “clean hands” concept, which was not really part of the topic of diplomatic protection. The Commission should perhaps state that, even if it was assumed that the principle had a legal status, it was not something which would affect the right of a State to exercise diplomatic protection. The concept was little used, however, except as a prejudice argument, and the Commission must therefore be careful not to legitimate it, in a sense, “accidentally”. Concerning the distinction between substance and procedure, he hoped that the Commission would produce practical results, and, if the Special Rapporteur was willing to reassess the importance of that distinction, he would like the Commission to follow Mr. Simma’s practical suggestions.

7. The CHAIR, speaking as a member of the Commission, said he hoped that the Commission was not in the process of taking a position on the “clean hands” rule, but simply indicating that it was leaving the question aside.

8. Ms. ESCARAMEIA said that, in her view, articles 12 and 13 were useful, but not as they now stood. She had al-

ways regarded the issue of local remedies as a procedural question, but, after hearing Mr. Gaja’s comments at the preceding meeting and having read some material on the subject, she acknowledged that the approach according to which the exhaustion of local remedies was a substantive condition was relevant in that it helped prevent an unfair result, for example, where there had been a change in nationality which limited the possibility for the claimant State to intervene on behalf of its national and the change had been entirely involuntary. If the Commission argued that the right to formulate a claim arose at the time the injury was caused, the result might not be fair. However, the main question which articles 12 and 13 must answer was that of the time as of which a claim could be made. It might be possible to say that the right to formulate a claim usually began at the time the wrongful act occurred, but that there were exceptions. If they were so worded, articles 12 and 13 would not duplicate article 10. She agreed that prevention was an important issue, but it must be dealt with carefully because certain acts which might occur prior to the commission of the wrongful act did not necessarily come under diplomatic protection.

9. Mr. PELLET said that he found the concept of prevention confusing. Since diplomatic protection came into play only after injury had been caused, what was being prevented? Preventing diplomatic protection would be meaningless, and preventing the commission of an illegal act lay outside the scope of the discussion. He was surprised that prevention was referred to in the context of diplomatic protection, because it had nothing to do with the topic. As far as the “clean hands” rule was concerned, however, he disagreed with Mr. Brownlie and believed that it was legitimate to raise the issue in connection with diplomatic protection. The question whether or not the person on behalf of whom diplomatic protection was exercised had “clean hands” could not be ignored and, whatever the conclusions drawn from it, it was important for the issue to be raised. The Special Rapporteur should therefore provide the Commission with further information on that matter, which was far more important than the denial of justice and was, moreover, directly linked to the topic under consideration.

10. Mr. GAJA, referring to the various possibilities mentioned in Fawcett’s study, said that the distinction between remedies available under domestic law and those available under international law reflected a dualist view and might lead to a theoretical debate that would complicate the issue unnecessarily; that was another reason for deleting article 12.

11. Mr. DUGARD (Special Rapporteur) said that he would prefer not to pursue the debate on the “clean hands” rule. The “clean hands” doctrine might arise in connection with the conduct of the injured person, the claimant State or the respondent State; it was difficult to formulate a rule applicable to all cases. He hoped that he need not construe the interventions of certain members as a suggestion that he should formulate a general rule on the subject, which would be better addressed in the commentary.

12. Mr. SIMMA said he thought that there had been a misunderstanding. Neither Mr. Candiotti, at the last meet-

<sup>4</sup> See 2712th meeting, footnote 11.

ing, nor he himself, at the current one, had meant to say that the Special Rapporteur should prepare a draft article; they had merely said that the issue was perfectly relevant in the context of diplomatic protection and that it should be dealt with in the commentary.

13. Ms. XUE said that the three hypotheses concerning the exhaustion of local remedies in articles 12 and 13 might be sound theoretically but served little practical purpose; the real question was the extent to which injured persons were required to exhaust the local remedies available to them, which was reflected in article 14. A distinction between conditional and substantive requirements would greatly complicate the Commission's task, since it would involve detailed consideration of the remedies to be exhausted. It would be better to say that internationally wrongful acts which could not be addressed at the local level should be addressed at the international level. Article 14 tried to make clear the exceptions to the application of the rule on the exhaustion of local remedies. In such cases, the understanding was that the local law to which the person in question entrusted himself should include both national law and international law (conventions or customary law) to which the State was a party. Thus, even a breach of international law did not immediately allow the State of nationality to bring the case to the international plane; the injured person must first exhaust local remedies. That would be a practical approach to the whole matter, since, whether the condition was characterized as substantive or procedural, it would be quite clear that local remedies must be exhausted before a State could make an international claim.

14. Mr. PELLET said he did not think that the Special Rapporteur should undertake a comprehensive study of the "clean hands" issue, especially in the overblown interpretation adopted by certain members of the Commission. That was particularly true when it was asked whether the State responsible for an internationally wrongful act had "clean hands"; it must necessarily have "unclean hands" by virtue of having committed an internationally wrongful act. However, it was fair to ask whether the fact that the injured person had himself committed an internationally wrongful act or had placed himself in a situation where he could be accused of having "unclean hands" prevented the exercise of diplomatic protection. That issue was entirely relevant and he saw no reason why the Special Rapporteur should not address it.

15. With regard to articles 12 and 13, as Ms. Escameia had noted, the problem was whether there was a general rule, on the one hand, and an exception, on the other. There was, in fact, a general rule, that of the exhaustion of local remedies, and there were situations in which it was not compulsory. When a failure to comply with the right to a remedy was in question and it constituted the internationally wrongful act, it was obviously impossible to apply the rule. That case could be viewed as an exception, but it confirmed that articles 12 and 13 were indeed unnecessary.

16. Mr. SIMMA said he thought that he was one of the members who, according to Mr. Pellet, had an overblown concept of "clean hands". In that context, he had men-

tioned the situation in which a State of residence was accused of having violated the rights of an alien, thereby triggering the scenario of diplomatic protection, but he had merely been imagining all possible cases before working by process of elimination. In fact, he had eliminated the case in question using the arguments put forward by Mr. Pellet. He apologized for having followed a process of Teutonic reasoning.

17. Mr. DUGARD (Special Rapporteur) said that, at the risk of disappointing Mr. Pellet, he had written an addendum to the report in which he dealt with the Calvo clause, giving an example of "unclean hands" in which an individual entered into a contract with a Government in which he undertook to abide by local remedies and then, without any attempt to exhaust those remedies, proceeded immediately to the international level and requested diplomatic protection from his own Government. That question would be considered in due course and was doubtless one of the most important contexts in which it was necessary to examine the doctrine of "unclean hands" and diplomatic protection.

18. Mr. FOMBA began with the general remark that the reconvening of the Commission was an exploratory period for its new members. Efforts should thus be made to ensure that they were well prepared, by notifying them in advance, whenever possible, of the first topic in the debate, sending them the relevant documentation and indicating the status of work on each topic. He was thus grateful to the Special Rapporteur for having succinctly summarized, in the introduction to his third report on diplomatic protection (A/CN.4/523 and Add. 1), the present state of the study on the topic. From that summary, it could be learned that during its forty-ninth and fiftieth sessions, held in 1997 and 1998, the Commission had established two working groups, which had submitted reports<sup>5</sup> that had been endorsed by the Commission. Those reports might usefully be made available, as they would provide an insight into the genesis of the topic and an understanding of its evolution. It would also be helpful to know how the Special Rapporteur saw his own approach in the context of the conclusions and recommendations reached by those working groups. Personally, he broadly endorsed the approach to the topic proposed by the Working Group established at the fiftieth session of the Commission and endorsed by the latter, which was described in subparagraphs (a) to (d) of paragraph 4 of the third report. With regard to the referral of draft articles 9, 10 and 11 to the Drafting Committee, it would be helpful to make the texts of those draft articles available and to provide a summary of the debate which had taken place on them.

19. The approach adopted by the Special Rapporteur, who invited the Commission to choose between rules that, depending on the criteria adopted, were competing, raised the question of the statutory role of the Commission with regard to codification and progressive development and of the difficulties to which that gave rise. Furthermore, while the Special Rapporteur had said that he did not seek to impose any one solution, he must nevertheless endeavour to convince the Commission of the relevance and techni-

<sup>5</sup> See *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 171, and *Yearbook ... 1998*, vol. II (Part Two), p. 49, para. 108.

cal soundness of any solution proposed. He noted with satisfaction that, to assist the Commission, the Special Rapporteur had prepared an explanatory section of the report mentioning the various rules and their variants, accompanied by the relevant jurisprudence. That approach should assist members of the Commission in coming to a decision.

20. With regard to the future direction of the draft articles, he thought it essential to clarify the nature of the dialectical link between the internationally wrongful act, the international responsibility entailed thereby and the implementation of that responsibility, as had been pointed out by Mr. Pellet at the preceding meeting. Like Mr. Pellet, he thought that the expression “nationality of claims” was incorrect from the standpoint of French-speaking jurists.

21. The exhaustion of local remedies rule was sometimes described as a substantive, sometimes as a procedural condition. That gave rise to stimulating debates, which should not allow one to lose sight of the essential objective, namely, that the rules be functional and that the solutions proposed be as broadly acceptable as possible. The difficulties that raised might be circumvented by considering that rule simply as a condition, without further qualification—in other words, by adopting a more neutral formulation. As to denial of justice, which was presented as one of the important manifestations of the exhaustion of local remedies rule, it was useful and important to bear in mind that, as Mr. Pellet had pointed out, the Commission had not envisaged referring to it explicitly. If the scope of the draft was to be broadened, that too must be done in a neutral manner.

22. The distinction between primary and secondary rules also called for a pragmatic and flexible approach. As for the Calvo clause, over and above the legal questions it obviously raised, it should be studied, but from a general perspective, in the context of the overall approach to the question of waiver of diplomatic protection. On the question of the protection of corporations, he supported the Special Rapporteur’s suggestion that a small working group should be established.

23. Several of the other subjects, including functional protection and control of a territory by an international organization, related to the question of the responsibility of international organizations. In his view, those matters should not be mixed up, and things should be clarified by grouping together questions relating to that general problem. Consideration might also be given to the subject referred to, *inter alia*, in paragraph 16 of the third report, as well as to other subjects such as the delegation of the right of protection or the effects of the exercise of diplomatic protection.

24. Finally, with regard to articles 12 and 13, he fully supported the views expressed by Mr. Pellet, for the reasons so brilliantly set out by the latter. Thus, should there be a majority in favour of referring those articles to the Drafting Committee, he would naturally be ready to join that majority.

25. Mr. BROWNLIE said that he had listened with interest to the excellent *tour d’horizon* by Mr. Fomba, who had, however, made one point with which he disagreed, namely, that the Commission should associate the work on diplomatic protection with some study of denial of justice. He occasionally felt that the Commission had suicidal tendencies. Denial of justice was part of substantive law and of a bigger subject treatment of aliens. It was by no means related to diplomatic protection. It simply happened that, when aliens used the courts, there was sometimes denial of justice, and that could happen quite apart from any circumstances involving recourse to local remedies as such. It could occur whenever a physical or moral person voluntarily used the national courts of a given State. It thus seemed wholly unnecessary to take up the subject of denial of justice. To do so would be wholly illogical and would involve the Commission in enormous difficulties. He simply did not understand why some members took the contrary view.

26. Mr. OPERTTI BADAN said that the question of denial of justice touched on a substantive problem inasmuch as it concerned equal treatment of aliens and nationals in access to judicial systems. That subject was extensively treated in private international law, and conventions existed on the subject, particularly at the inter-American level, such as the two Additional Protocols to the Montevideo Treaties on Private International Law, which provided for the right of aliens to have access to the same remedies as nationals—a right reaffirmed by other, more recent texts. It seemed to him difficult to totally disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection.

27. Mr. MANSFIELD said that, while he sat in his capacity as an independent expert, he felt that he could bring the perspective of a small, remote country to the proceedings. He saw nothing surprising in the fact that, despite the wealth of doctrine and jurisprudence on the topic, much of it was, as the Special Rapporteur had pointed out, inconsistent or contradictory. Each State’s practice was influenced by very many factors, such as the possible effect of the exercise of diplomatic protection on its relations with the other States concerned at that point in time, the severity of the harm caused, and the public attention accorded to the case—all considerations that would be felt more acutely in small States. While codification work was useful, it was unlikely that practice would ever appear consistent. He therefore agreed with the Special Rapporteur that, where it was necessary to choose between competing rules, it was necessary to be guided not simply by the weight of authority but also by the fairness of a given rule in contemporary international society.

28. As to the scope of the draft articles, it seemed to him preferable, for practical reasons, not to expand it unduly, even though there might be linkages to other areas in need of codification. The question of functional protection of their officials by international organizations was of interest to small States, many of which had nationals employed by international organizations. If the possibility of protection rested solely with the State of nationality, there would be a risk of inequality of treatment among such officials. It should, however, be dealt with as a separate topic. An-

other topic mentioned had been the exercise of diplomatic protection under delegation. On the face of it this issue seemed significant for small countries and one which might merit inclusion in the draft articles. On reflection, however, he thought that in practice a State might be willing to lend various forms of assistance to another State less able to protect one of its nationals, but that in most cases this assistance would stop short of the lodging of a formal claim under delegation. For that reason, he agreed with the Special Rapporteur that it was not necessary to deal with that matter in the draft articles.

29. With regard to articles 12 and 13, the wealth of written material on the subject tended to obscure the various rationales for the exhaustion of local remedies rule, which were important and should be included in the commentary. At the same time, he thought it necessary to determine whether the issue was substantive or procedural. In his view, the third position referred to in paragraph 32 of the second report (A/CN.4/514) was the most satisfactory. In his view the question whether it was essential to take a decision at the current stage hinged on whether practical consequences would follow. In that regard he drew attention to the example, mentioned in paragraph 33 of the second report, of the implications for the rendering of a declaratory judgement in the absence of exhaustion of local remedies. There again, from a smaller State's perspective, in some cases the exhaustion of local remedies was simply not a practical possibility, for example, because of the prohibitive cost of the procedure. A declaratory judgement obtained in the absence of the exhaustion of local remedies might indeed be a potentially significant satisfaction which in fact led to practical changes. Such a possibility would, however, be precluded if the exhaustion of local remedies rule was characterized as substantive. Personally, he favoured the third position and considered that articles 12 and 13 should be retained, although they might need to be redrafted.

30. Mr. TOMKA congratulated the Special Rapporteur on his determination to complete the work on diplomatic protection during the quinquennium that was now beginning.

31. Despite the multitude of different texts, the question was one of choosing not between competing rules but between differing interpretations of the customary rule. The Commission's job was to propose a formulation for the rule which States would either approve or disapprove, or they might subsequently propose new rules.

32. He considered that it was not necessary to go into the topic of functional protection by international organizations of their officials.

33. Concerning articles 12 and 13, it was interesting to discuss whether the exhaustion of local remedies rule was procedural or substantive in nature, but it should be recalled that the distinction had initially been made in another context, that of the determination of the precise moment when a wrongful act was committed. He proposed, in the interests of harmonization, that the Commission should follow the approach taken at the preceding session during the work on article 44, "Admissibility of claims",

of the draft articles on State responsibility for internationally wrongful acts.<sup>6</sup>

34. He shared the view that article 12 did not contribute much compared with article 10, but agreed that it should be referred to the Drafting Committee, which should be asked to consider it in conjunction with article 10. Article 13, on the other hand, had no place in the draft, since it dealt with a situation where injury was the result of a violation of domestic law. In order for diplomatic protection to play a role, however, there had to have been a breach of international law. Article 13 should therefore be omitted from the text.

35. Mr. DUGARD (Special Rapporteur), introducing his third report, said that he would take up only subparagraphs (a), (e) and (f) of article 14 at the current meeting. The debate on articles 12 and 13 remained open, however, and at a later stage he would make his concluding comments on those articles and whether they should or should not go to the Drafting Committee.

36. Article 14 was an omnibus provision which dealt with exceptions to the exhaustion of local remedies rule. It thus responded to the criticism of article 10 formulated both by the Commission and by the Sixth Committee of the General Assembly at their most recent sessions on the grounds that it was only all available adequate and effective local legal remedies that ought to be exhausted. He was very happy to go along with that idea as long as a separate provision was devoted to the ineffectiveness or futility of local remedies. The main reason was that, as was stated in article 15, the burden of proof was on both the respondent State and the claimant State, the former having to show that local remedies were available, whereas the latter had to prove that local remedies were futile or ineffective. Suggesting that the generic term "ineffective" should be discarded as being too vague, and even though article 22 of the draft articles on State responsibility adopted on first reading<sup>7</sup> had simply required the exhaustion of "effective" remedies, he submitted for the Commission's consideration three tests, grounded in judicial decisions and the literature, for determining what an "ineffective" local remedy was. Local remedies were ineffective where they were obviously futile, offered no reasonable prospect of success or provided no reasonable possibility of an effective remedy. Denial of justice, which was inextricably linked with many features of the local remedies rule, including that of ineffectiveness, could as such be said to have a secondary character. The place of denial of justice in the present draft articles would be considered in an addendum to the third report, and he looked forward to observations by members of the Commission on that subject.

37. The first test, that of obvious futility, which required the futility of the local remedy to be immediately apparent, had been criticized by authors, as well as by ICJ in the *ELSI* case, as being too strict. The second test, that the claimant should prove only that local remedies offered no reasonable prospect of success, had been deemed too

<sup>6</sup> See 2712th meeting, footnote 13.

<sup>7</sup> *Ibid.*, footnote 7.

weak. The third test, a combination of the first two, under which local remedies offered no reasonable possibility of an effective remedy, was, in his view, the one that should be preferred.

38. In support of his position, he cited circumstances in which local remedies had been held to be ineffective or futile: where the local court had no jurisdiction over the dispute, for example, in the *Panevezys-Saldutiskis Railway* case considered by PCIJ (para. 38 of the report); where the local courts were obliged to apply the domestic legislation at issue, for example, legislation to confiscate property (para. 40 of the report); where the local courts were notoriously lacking in independence (the *Robert E. Brown* claim, para. 41 of the report); where there were consistent and well-established precedents that were adverse to aliens (para. 42 of the report); and where the respondent State did not have an adequate system of judicial protection (para. 44 of the report). Those examples lent support to the third test, which required the courts to examine the circumstances of the case, including the independence of the judiciary in the respondent State, the ability of the local courts to guarantee a fair trial and whether there were precedents adverse to injured aliens. The Commission should therefore select the third test.

39. Article 14, subparagraph (e), which stated that there was no need to exhaust local remedies where the respondent State was responsible for undue delay in providing local remedies, was supported in various codification efforts, human rights instruments and judicial decisions, such as the *El Oro Mining* and *Interhandel* cases (para. 97 of the report). Nevertheless, that exception to the exhaustion of local remedies rule was a bit more difficult to apply in complicated cases, particularly those involving corporate entities. It could be subsumed under the exception set out in article 14, subparagraph (a), but it deserved to be retained as a separate provision as a way of serving notice on the respondent State that it must not unduly delay access to its courts.

40. Finally, article 14, subparagraph (f), which stated that local remedies did not need to be exhausted where the respondent State prevented the injured person from gaining access to its institutions which provided local remedies, was relevant in contemporary circumstances. It was not unusual for a respondent State to refuse an injured alien access to its courts on the grounds that safety could not be guaranteed or by not granting an entry visa. Human rights jurisprudence corroborated the proposition.

41. He looked forward with interest to hearing the comments of members of the Commission.

42. Mr. PELLET asked why article 14 was being introduced in such a piecemeal fashion and independently of article 15 (burden of proof), which was by no means unrelated to subparagraphs (a), (e) and (f) of article 14. He for one could not review those provisions without referring to article 15.

43. Mr. DUGARD (Special Rapporteur) said he thought that the approach he had chosen was the best. The matters dealt with in article 14 (a), (e) and (f) (futility, undue de-

lay and denial of access) were different from those dealt with in article 14, subparagraphs (b), (c) and (d) (waiver and estoppel, voluntary link and territorial connection). If the members of the Commission wished to await his introduction of article 15 before speaking on the topic, he would go along with that, however.

44. The CHAIR said that it might be advisable for the Special Rapporteur to go further with the presentation of his report.

45. Mr. SIMMA said that he had no problem with the fragmented approach to the presentation of the report but agreed with Mr. Pellet that the question of burden of proof was pertinent with regard to the questions of futility, undue delay and frustration of access to the courts. It would be artificial to deal separately with subparagraphs (a), (e) and (f) of article 14 only to return to them when considering article 15. All those provisions should be examined together. Subparagraphs (b), (c) and (d) of article 14 had nothing to do with the burden of proof.

46. Mr. DUGARD (Special Rapporteur) said that subparagraphs (b), (c) and (d) of article 14 could be considered separately from subparagraphs (a), (e) and (f) of the same article and that he was prepared to introduce article 15 at the next meeting.

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

[Agenda item 2]

47. Mr. CANDIOTI (Chair of the Planning Group) announced that the Planning Group would consist of the following members: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Tomka and Mr. Kuznetsov (member *ex officio*).

*The meeting rose at 12.50 p.m.*

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## 2714th MEETING

*Thursday, 2 May 2002, at 10 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário