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**Summary record of the 2717th meeting**

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State. The Commission needed to examine whether such examples required a special rule exempting them from the scope of the rule on the exhaustion of local remedies or whether they were already covered by existing rules. In many such cases, the injury to the claimant State by the respondent State was direct. If the Commission accepted the preponderance rule which he had proposed in draft article 11, it would find that the local remedies rule would be excluded in many such situations because the injury was direct. That was true of most cases of transboundary environmental harm, the accidental shooting down of aircraft and the transboundary abduction of a national. There might be situations in which the claimant State proposed not to bring a direct claim, and it might then be argued that the local remedies rule should be applied, but there, too, in all likelihood an effective remedy would not be available. That brought him back to the arguments raised against expecting persons injured by the Chernobyl disaster to exhaust local remedies in the Soviet Union. Jiménez de Aréchaga had argued persuasively that it would be inequitable to require an individual to attempt effective remedies in a foreign State<sup>8</sup> (para. 86 of the report).

53. He had an open mind on the subject and could see the reasons for including such a rule; that was why he had proposed subparagraphs (c) and (d) of article 14. But he was prepared to accept that, in most instances, the existing exceptions to the rule on the exhaustion of local remedies, namely the absence of a need to exhaust local remedies for a direct injury and the absence of an effective remedy, would cover those cases. He left it to the Commission to decide whether it wished to follow the course taken at its forty-eighth session and allow the matter to develop in State practice, or whether it felt there was a need to intervene *de lege ferenda*.

*The meeting rose at 11.40 a.m.*

<sup>8</sup> E. Jiménez de Aréchaga, "General course in public international law", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Sijthoff and Noordhoff), vol. 159, p. 296.

## 2717th MEETING

*Wednesday, 8 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. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda,

Mr. Pellet, Mr. Sreenivasa Rao, 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. GAJA said that waiver played different roles in the field of diplomatic protection. Article 45, subparagraph (a), of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>4</sup> considered waiver by an injured State, whereas subparagraph (b) of the present draft referred to waiver by the respondent State. In practice, the respondent State's waiver usually related to the obligation to exhaust local remedies, but it might also concern other aspects of admissibility of claims, such as the nationality of claims. It would seem more logical to formulate a general provision on waiver in the field of diplomatic protection, either by the claimant State or by the respondent State, and also a general provision on acquiescence or estoppel, which were considered in article 45, subparagraph (b), of the draft articles on State responsibility for internationally wrongful acts with regard to the injured State and, with regard to the respondent State, in article 14, subparagraph (b), of the text under discussion. If the Commission nevertheless considered that a specific—rather than a general—provision on waiver of the requirement to exhaust local remedies was necessary, it would be better to separate that provision from those relating to the effectiveness of local remedies or the presence of a significant link between the individual and the respondent State, as the latter dealt with the scope and contents of the rule, whereas waivers mostly concerned the exercise of diplomatic protection in a specific case. Furthermore, waivers should not be confused with agreements between the claimant State and the respondent State to the effect that exhaustion of local remedies was not required, for such agreements had the same function but were instances of *lex specialis* and should not be considered when codifying general international law.

2. Like the Special Rapporteur, and although practice on the question was divided, he thought that, in the absence of a voluntary link between the individual and the respondent State, or when the respondent State's conduct had taken place outside its territory, it might be unfair to impose on the individual the requirement that local

<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).

<sup>4</sup> See 2712th meeting, footnote 13.

remedies should always be exhausted, and that it was justifiable to provide for exceptions to the exhaustion of local remedies rule in the context of progressive development. However, the text of subparagraphs (c) and (d) of article 14 perhaps went too far in categorically stating that both the absence of a voluntary link and the fact that the respondent State's conduct had not been committed within its territorial jurisdiction were *per se* circumstances that totally excluded the requirement that local remedies should be exhausted. Consequently, he suggested formulating a single provision allowing for an exception to the rule on the exhaustion of local remedies in either of those two cases, where the circumstances justified it.

3. Ms. ESCARAMEIA said that she agreed with the exception proposed by the Special Rapporteur in article 14, subparagraph (b), and that she would thus have no objection to that provision's being referred to the Drafting Committee.

4. In her view, subparagraphs (c) and (d) touched on the crux of the matter, namely, the nature of the institution of diplomatic protection; hence the need to include those provisions in the draft articles. It was gratifying to note that the Special Rapporteur had taken account of recent world developments such as the growth in travel, as a result of which individuals were more likely than in the past to be injured by a State with which they had no connection. In some cases, it would not be fair, reasonable or practical to require local remedies to be exhausted; nor should the victims be left in suspense as to the ultimate outcome of the court proceedings. The debate on the question revealed the existence of two conflicting conceptions of diplomatic protection. According to the first, more conservative conception, States were the only actors, and it was for States to assess whether diplomatic protection should be exercised. Under that conception, there was not much scope for exceptions; the emphasis was on nationality and on the exhaustion of local remedies, rules that protected the sovereignty of the claimant State and the respondent State, respectively, and the situations to which diplomatic protection was applicable were limited. They would not include, for instance, situations of environmental transboundary harm. The other conception, which took fuller account of the contemporary world in which people were constantly on the move, of transboundary harm and of the fact that non-State entities were involved, placed more emphasis on injury to the individual; it was more willing to accept exceptions to the nationality rule or to the rule on the exhaustion of local remedies and to extend diplomatic protection to situations of transboundary harm. The Commission could, of course, draft a flexible formulation, using ambiguous words, or balance the view taken in one paragraph by putting forward a contrary view in another paragraph, or even defer the problem to the stage of application of the text by the courts. Still, on the two points under consideration, a choice must be made, and the Commission must decide whether it wished to reflect the changes that the contemporary world had undergone. For her own part, she hoped that would be the way chosen.

5. Mr. KATEKA said he was relieved to note that members were endeavouring to avoid getting bogged down in a debate on whether the principle of the exhaustion of

local remedies was substantive or procedural. His view was that article 12 could be referred to the Drafting Committee, while article 13 might need to be relegated to the commentary. In his second report on diplomatic protection (A/CN.4/514), the Special Rapporteur had made it clear that local legal remedies covered both judicial and administrative remedies; however, not many examples of administrative remedies had been given. Such examples might enrich the study of the subject.

6. In his third report on diplomatic protection (A/CN.4/523 and Add.1), the Special Rapporteur indicated his intention of producing an addendum, or two separate addenda, on the questions of the Calvo clause and denial of justice. In his view, the Calvo clause was relevant, and it would be appropriate to include some consideration of denial of justice in the study.

7. With regard to article 14, subparagraph (a), he favoured the intermediate option ("provide no reasonable possibility of an effective remedy"). Subparagraph (e), on the notion of undue delay, should be retained, and subparagraph (f) had some merit. The formulation of subparagraph (b) seemed to him to pose problems, for he was not sure how an implied waiver could be clear and unequivocal. The "hardship cases" covered in subparagraphs (c) and (d) should be retained as exceptions to the rule on the exhaustion of local remedies. Finally, he considered that the question of the burden of proof could be incorporated in the commentary.

8. Mr. PELLET, reminding members that he was in favour of referring subparagraphs (a), (e) and (f) of article 14, but not article 15, to the Drafting Committee, said that subparagraphs (a), (e) and (f) nonetheless offered matter for discussion. On the principle, it was clear that an obligation to exhaust local remedies existed only if those remedies provided a real possibility of success within an acceptable period of time; it was there that the concept of denial of justice, which was inseparable from the question dealt with in subparagraph (a), came into play. He noted that, in paragraph 21 of his report, the Special Rapporteur reproduced the definition of denial of justice given in article 9 of the articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law, held at the Hague in 1930,<sup>5</sup> but attributed to it a dual scope which it did not in fact have. According to that definition, the exhaustion of local remedies was clearly not obligatory in case of denial of justice, but it was a consequence of that denial of justice. In his view, now was not the time to engage in a debate on whether the concept was a primary or a secondary rule. Denial of justice seemed to him in any case to be covered by subparagraphs (a), (e) and (f). It was thus not necessary to devote a specific provision to it, and the point should be stressed in the commentary. What was important was that remedies were inaccessible, and that the fact was clear to any impartial observer.

9. With regard to the formulation of subparagraph (a), he was persuaded by the Special Rapporteur's arguments in favour of option 3. But, whatever option was adopted, the

<sup>5</sup> *Ibid.*, footnote 18.

terms proposed left very considerable scope for subjective interpretation, whether of the term “futile” or of the term “reasonable”, which, though more familiar to practitioners of common law, was not unknown in public international law. However, the criterion of reasonableness was vague and related to the problem of the burden of proof, for which reason he had asked the Special Rapporteur to introduce article 14 and article 15 together, in the hope of finding that article 15 contained a limitation to the apparent arbitrariness of the criterion adopted in article 14. That, however, had proved not to be the case; for article 15 was grounded in contentious proceedings, and that was of debatable value in the case of international law, which was essentially a system of law without judges; and the purpose of the draft was to indicate to States what they must do when faced with problems of diplomatic protection. Furthermore, the burden of proof was not a problem specific to the exhaustion of local remedies. Last but not least, the question was not with whom the burden of proof lay, but what was to be proven. Consequently, the concept of reasonableness should be further defined in the context of diplomatic protection, bearing in mind that the State committing the wrongful act giving rise to the injury was supposed to be acquainted with its own internal law and could thus assess the chances of a remedy’s succeeding, whereas that State’s law was not familiar to the injured individual or to the State intending to protect him, so that such an assessment was difficult for both.

10. In that connection, he could not help but think of “imperfect ratifications”, certainly a complex issue but one that had been decided in an acceptable and generally accepted manner by article 46 of the Vienna Convention on the Law of Treaties (hereafter “the 1969 Vienna Convention”), entitled “Provisions of internal law regarding competence to conclude treaties”. Paragraph 1 of the article provided that only a violation by a State of a provision of internal law that was manifest and of fundamental importance could invalidate a treaty, while paragraph 2 indicated that “A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”. He was not saying that that wording could be transposed unchanged to the topic of diplomatic protection, but he thought that the problem was comparable. In both cases, it was a matter of enabling protector State B or the injured person, which were unfamiliar with the internal law of State A that had caused the injury, to ascertain whether the internal law of State A offered remedies that had reasonable chances of success; and, in both cases, there was certainly a presumption in favour of State A and of the existence of domestic remedies in its law. He was not convinced that the wording of article 46, paragraph 2, of the 1969 Vienna Convention was a panacea or that the words “objectively evident” were better than the word “reasonable”, but it did seem to him that the Special Rapporteur and the Drafting Committee should think further along those lines, since the inclusion in the draft of references to normal practice and good faith would introduce a less subjective criterion, thereby reducing the causes of friction and disputes among States.

11. Summing up his position on the matter, he said that article 15 should be abandoned and that subparagraph (a) of article 14 should be referred to the Drafting Commit-

tee, with the contents having been clarified, even if option 3 was taken as the starting point.

12. He had similar comments to make on subparagraph (e) of article 14. It was true that a decision had to be obtainable “without undue delay”, but the text undoubtedly could and should specify what was abusive. In fact, perhaps subparagraph (e) could be combined with subparagraph (a), to which it should at all events be moved closer, as it was clearly the necessary and obvious extension of that provision. Since he was not a member of the Drafting Committee, he would take the opportunity to propose something along those lines now, in plenary. The proposal might read: “Local remedies do not need to be exhausted where the law of the State responsible for the internationally wrongful act offers the injured person no objective possibility of obtaining reparation within a reasonable period of time”. It would then be explained that “The objective possibility of obtaining reparation within a reasonable period of time must be assessed in good faith [in the light of normal practice] or [in conformity with general principles of law]”.

13. He agreed with Mr. Gaja that subparagraph (f) was either to be interpreted broadly, in which case it obviously duplicated subparagraph (a), or, if it was interpreted literally, it meant that the injured person was physically prevented from gaining access to the institutions that administered domestic remedies. In fact, judging by the position the Special Rapporteur had taken in paragraph 101 of his third report, it was the latter interpretation that was correct. But that interpretation was quite simply a mistake, and probably a human-rightist-type mistake, since it was entirely possible to exhaust local remedies through a lawyer or a representative. That was true, of course, as long as the financial burden was not disproportionate, because, if it was, then that was right in line with subparagraph (a). He really could not see why a remedy could not be reasonable and effective simply because the responsible State did not wish to allow the injured person to enter its territory: it merely had to let the person be represented in an appropriate manner.

14. He had not been won over by the Special Rapporteur’s explanation on that point, in which he maintained that the problem arose from a lack of understanding between practitioners of civil law and common law. In fact, it was generally possible to submit pleadings by proxy in countries of the civil law tradition as well as those where the common law, Islamic law or even socialist legal systems were used, and even the European Court of Human Rights seemed to accept that. On the other hand, if the remedy proved to be abusively onerous because a lawyer’s services had to be used, it could not be described as effective, and he wondered whether that idea should not be explicitly mentioned in subparagraph (a).

15. If, as he hoped, the ideas expressed in subparagraphs (a), (e) and (f) were retained, it then seemed quite unnecessary to add a reference to “adequate and efficient” domestic legal remedies in article 10, as that would be redundant. The draft formed a whole, and there was no need to say vaguely in article 10 what would be developed and explained further in article 14. It would be enough, in

article 10, to set out the obligation to exhaust local remedies and, in article 14, to spell out the limits of that obligation.

16. Before referring to subparagraphs (b), (c) and (d) of article 14, he pointed out that one idea he regarded as important was missing: for an individual to be deemed to have exhausted local remedies, it was not enough for him to have brought a case before the competent domestic court; he must also have put forward the relevant legal arguments if they were not based on public policy. The *ELSI* and *LaGrand* cases adjudicated by ICJ and the *De Wilde* case heard by the European Court of Human Rights provided material that was worth studying and would undoubtedly lead to the inclusion of a provision on that subject, either as an additional paragraph of article 14 or as a new article in the draft.

17. Turning to subparagraph (b) of article 14, he said he did not understand how the question whether the rule laid down was procedural or substantive could have any effect on the problem with which the Commission was dealing. The objective in any case was to protect the responsible State that had committed an internationally wrongful act, and that State could waive such protection if it chose. That having been said, he accepted the principle set out in the article, although he had some reservations about the wording. First, he was not enthusiastic about including the concept of estoppel or even the word itself. Not only were they typical of common law and viewed with some suspicion by practitioners of civil law, but, in addition, the idea of estoppel was covered by the broader concept of implicit waiver. Next, he thought it desirable to state that waiver must be clear and unambiguous, even if it was implicit. The judicial decisions and doctrine cited by the Special Rapporteur seemed to point in that direction. Last, and above all, it being the fundamental issue, he said that he was disturbed, to say the least, by the sudden incursion of the words “respondent State”, which seemed to be associated with the drafting of a text on contentious proceedings and which did not seem to have appeared in the articles already referred to the Drafting Committee or in article 12 or 13. He could see no justification for them and thought that there was every reason, at the present stage, to stick to the terminology used in the articles on State responsibility for internationally wrongful acts. In the present context, the protagonists were a State injured in the person of its national and another State that was responsible for that injury.

18. With regard to subparagraphs (c) and (d) of article 14, he admitted that his reading of the report had aroused his curiosity about the concept of voluntary link (subpara. (c)), but had not entirely dispelled his confusion. His confusion was caused more by the way in which the Special Rapporteur presented the idea—by examining it together with the concept of territorial connection (subpara. (d))—than by the concept itself, which in his view was attractive and quite appropriate, even though it reflected doctrine more than practice. As he understood it, the idea of “voluntary link” meant that local remedies did not have to be exhausted in a case when a State caused injury to a person who had had nothing to do with his own misfortune, had not taken any risk, had not initiated any contact, had not

gone to the territory of the responsible State, and had not invested there. Leaving practice aside, the idea seemed reasonable: it would solve the problems he had raised at the preceding meeting and cover the cases mentioned by the Special Rapporteur in paragraph 83 of his third report. He could understand that the Special Rapporteur saw the idea as “clearly” having “substance”, but he could not understand why, by way of conclusion, he leaned towards rejecting the rule established in subparagraph (c). The underlying principle seemed to be a matter of common sense and equity. True, the rule had not been clearly enshrined in judicial decisions, but it would seem to be justified by the practice cited by the Special Rapporteur, although there also seemed to be practice to the contrary, specifically in respect of compensation for damage caused by pollution. In that connection, he regretted having mentioned maritime pollution of the *Torrey Canyon* or *Amoco Cadiz* type at the preceding meeting, since, from that point of view, they were outside the topic. In subparagraph (c), the Commission nevertheless had an excellent opportunity to engage in the progressive development of international law, and he endorsed the principle of referring that provision to the Drafting Committee, noting that it would probably be better to define the term “voluntary link”, which was neither obvious nor a given, not in the commentary but in the article itself.

19. He saw no merit in subparagraph (d) of article 14, however, because, as submitted by the Special Rapporteur, it seemed to be only a subconcept of the concept dealt with in subparagraph (c). When interpreted literally, moreover, it unhelpfully contradicted the idea of “voluntary link”. For example, in the case of an aerial incident, an aircraft shot down in the territory of a State A by that State A, there was no voluntary link between State A, the author of the internationally wrongful act committed within its territorial jurisdiction, its airspace and the injured party, but what justified the voluntary link was particularly applicable: the persons on board the aircraft had obviously not chosen any territorial link, but it so happened that they had been in the territory of State A. It would therefore be better to drop subparagraph (d).

20. Mr. BROWNLIE, referring to subparagraph (c), said that he was astonished that the Special Rapporteur was so tentative in his approach to the concept of voluntary link. He disagreed with the assertion in paragraph 70 of the third report that there was no clear authority either for or against the requirement of a voluntary link. In fact, there was considerable support for that requirement from various sources. As for the general question of direct injury, he pointed out that, for reasons of personal interest, European States had reacted to the Chernobyl accident with great caution. The British Government, for example, had not made any claim. But in such situations pressure groups could lobby their Governments to take action. He was therefore in favour of retaining subparagraph (c) and referring it to the Drafting Committee. However, far from being an exception to the rule on the exhaustion of local remedies, the provision was a condition of the rule’s application and as such was out of place in article 14, which dealt with exceptions to the rule and whose structure needed to be reviewed.

21. He agreed with Mr. Pellet that subparagraph (*d*) of article 14 was unacceptable; it was not very helpful, it did not have much authority behind it, and it was not really compatible with subparagraph (*c*).

22. Mr. KOSKENNIEMI said that he was increasingly inclined to agree with Mr. Brownlie that the discussions did not have to do with a minuscule exception, but with the very rationale for the rule. He understood the policy considerations behind the concept of voluntary link, as explained by the Special Rapporteur and referred to by many other members of the Commission, but he was afraid that those discussions might put the Commission on the wrong path. There were in fact cases where, despite the existence of a voluntary link, it was desirable to be able to exercise diplomatic protection. The opposite was also true: in certain situations in which there was no voluntary link, it was still not desirable to provide for such protection. He therefore wondered whether the concept of voluntary link was relevant. Rather, the fundamental question was who needed diplomatic protection and who did not really need it. When persons were injured, especially those who were particularly vulnerable, what was important was that they could be protected. That was the case with Asian workers in Kuwait who had had to leave that country when it had been invaded by Iraq in 1990 and who had taken refuge in neighbouring countries, such as Iran or Saudi Arabia. In his view, they should be able to enjoy the diplomatic protection of their States of nationality *vis-à-vis* these latter States even if they found themselves in their territory not really on the basis of voluntary choice. On the other hand, in the case of multinational commercial entities engaged in transnational activities, for example, on the Internet, that was not necessarily desirable. Here as well, one could say that there was no voluntary link with any particular State; still, there was no social or moral need to dispense with the need for exhaustion of local remedies. Thus, the question of the existence or absence of a voluntary link was not the ideal perspective for addressing certain situations and must not be placed on the same footing with other exceptions under article 14.

23. Mr. TOMKA said that the point was not whether or not to accord diplomatic protection, but to examine practice and set out rules. With regard to the example of Asian workers in Kuwait, it must be borne in mind that the injury they had suffered had not been caused by Kuwait, with which they had established a voluntary link, but by Iraq, with which no such link had existed. The State of nationality exercising diplomatic protection should therefore address its claim to Iraq.

24. Mr. KOSKENNIEMI said that actually he had in mind that they might enjoy diplomatic protection in other countries of the region where they had voluntarily taken refuge.

25. Mr. PELLET said that he was not at all convinced by Mr. Koskenniemi's line of reasoning. Rather, the example of refugees from Kuwait which he had cited spoke in favour of the concept of voluntary link, although it really could not be said that the link was voluntary in their case. Perhaps the link was a "necessary" one. The aim of the rule on the exhaustion of local remedies was to pro-

tect the respondent State by allowing it to compensate for the damages which it had wrongfully caused, not to protect persons. Needless to say, it could be deleted, and he would personally be in favour of recognizing the international legal personality of individuals, but that was not the question at issue. The other example, that of transnational corporations, was somewhat more convincing because it prompted the Commission to think about what the link was, but it was such an unspecific case that there was no need to dwell on it.

26. However, he strongly supported Mr. Brownlie's proposal that subparagraph (*c*) should be separated from the rest of the provision. The rules it embodied were of a different nature, and it would therefore be much better to consider the concept of voluntary link on a completely separate basis.

27. Ms. XUE said that the Special Rapporteur's comments on article 14 were very useful; they provided a clear analysis of the question and cited several interesting sources. Of the three options proposed in article 14, subparagraph (*a*), the third deserved special attention. Three elements should be considered for drafting purposes. First, during earlier discussions in the Commission and in the Sixth Committee on article 10, it had been suggested that the provision should be amended to require that all "adequate and effective" local remedies should be exhausted. Second, the words "reasonable possibility" should be looked at more closely, since the terms "reasonable" and "possibility" in the current wording might denote a subjective assessment by the claimant State. The first part of article 14 and subparagraph (*a*) should therefore be redrafted. Third, subparagraph (*a*) seemed to overlap somewhat with subparagraphs (*c*), (*d*), (*e*) and (*f*), which dealt with specific situations for which there might be no possibility of an effective remedy. However, she agreed that subparagraph (*a*) should be referred to the Drafting Committee.

28. Subparagraphs (*e*) and (*f*) both placed emphasis on the responsibility of the State where the injury occurred for ensuring that local remedies were provided. That was the right approach, but the two provisions could be recast in light of the amendment to subparagraph (*a*).

29. In respect of subparagraph (*b*), it would be better not to mention estoppel, a concept which was often a source of misunderstanding. As for implied waiver, it might not be unequivocal in all cases. It would therefore be preferable to simply provide that the respondent State must expressly and unequivocally waive the requirement that local remedies should be exhausted. Subject to that change, subparagraph (*b*) could also be referred to the Drafting Committee.

30. With regard to subparagraphs (*c*) and (*d*) of article 14, the concept of voluntary link was very useful for explaining why local remedies must be exhausted before diplomatic protection could be exercised. But when there was neither a voluntary link nor other jurisdictional connections, a possible solution lay in the rules of international law. As the Special Rapporteur had pointed out in his report, it would be unreasonable to require an injured

alien to exhaust domestic remedies in such difficult cases as transboundary environmental harm, but to treat no voluntary link as an exception to the rule on the exhaustion of local remedies would unduly expand the scope of diplomatic protection.

31. Mr. DUGARD (Special Rapporteur) noted that a number of speakers had suggested that subparagraph (c) deserved special attention and that the question should be considered separately. Should he conclude that they wanted the provision to be moved to article 11, which dealt with the principle of the exhaustion of local remedies? If that was the case, he had no objection; he must simply inform the Drafting Committee.

32. Mr. BROWNLIE, replying to the question asked by the Special Rapporteur, said that he found the various proposed structural amendments interesting. He had no specific proposal to make, but he, too, was of the view that the Special Rapporteur and the Drafting Committee might move the provisions on voluntary link to a more appropriate spot, for example, in article 11.

33. Mr. SIMMA said that Mr. Gaja had been right in saying that express waivers could be viewed as *lex specialis*; thus, they would not fall within the category of waiver which the Special Rapporteur had envisaged in article 14, subparagraph (b). There were few unambiguous cases of implied waiver, and its existence should not be assumed; on the contrary, the point made by the Special Rapporteur in paragraph 56 of his report was corroborated by the fact that one of the few treaties on general dispute settlement, the European Convention for the Peaceful Settlement of Disputes, had an express provision indicating that local remedies must be exhausted. Similarly, in the *LaGrand* case, which had been brought on the basis of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes and could be compared to what the Special Rapporteur called a general arbitration agreement, the United States as respondent had contested the German argumentation on the basis of diplomatic protection, but had not claimed that local remedies therefore did not need to be exhausted. The question of estoppel had led to many misunderstandings. Subparagraph (b) of article 14 was not unrelated to the scenario invoked by the Special Rapporteur in subparagraph (f), in which the respondent State prevented an individual from gaining access to local remedies. The examples that the Special Rapporteur gave with regard to estoppel were, without exception, cases in which an award or a judgement had stated that, since the respondent State had been silent regarding the failure to exhaust local remedies, it could not invoke that failure at a later stage. The consequences were the same as if a State had explicitly stated that local remedies need not be exhausted and had later had second thoughts on the matter. There might be some overlap between the types of estoppel mentioned in subparagraphs (b) and (f) of article 14 in the case involving estoppel by conduct rather than the respondent State's failure to state explicitly that local remedies must be exhausted.

34. With regard to the issue of voluntary link and the question of territoriality (art. 14, subparas. (c) and (d)), he

joined Mr. Brownlie in wondering why the Special Rapporteur was so hesitant regarding the principle that, where there was no voluntary link, there was no obligation to exhaust local remedies. But that tentative attitude could be called bizarre only if the Special Rapporteur was as strongly convinced of the soundness and convincingness of the voluntary link principle as Mr. Pellet apparently was; paragraphs 65 and 89 of the report suggested that such was not the case. However, the more fundamental problem with the concept of voluntary link, as expressed in virtually all case law and doctrine, was that the "link" was almost a physical concept, a nineteenth-century view of the physical movement of people. For example, in the *Norwegian Loans* case (para. 73 of the report), France had argued that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway because they had no voluntary link with that country. However, moving from the 1940s or 1950s to the current situation of economic globalization, it was clear that individuals could make whole economies tremble or even collapse without major barriers under international law. He therefore wondered whether an "anti-human-rights" approach should not be taken and whether the rule on the exhaustion of local remedies was not designed to protect the respondent State, whose interests must be taken into consideration. Of course, in 85 per cent of cases, it was the individual rather than the State who was vulnerable, but the other scenario must also be taken into account. With respect to transboundary pollution cases, he wondered whether it was a good idea to force the Chernobyl case into the paradigm of diplomatic protection. Diplomatic protection presupposed an internationally wrongful act, the existence of which had not been proven in the Chernobyl case, and it would be artificial and clumsy to consider that the measures taken by the United Kingdom and other countries in that case constituted the exercise of diplomatic protection. Environmental law was a new field which should not be forced to conform to old models.

35. Furthermore, too little attention had been paid to borderline cases of physical presence: Was a three-hour stopover between two flights or a six-day or two-week vacation sufficient to establish a voluntary link? That issue was addressed only marginally by the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens<sup>6</sup> (para. 81 of the report) and by Roberto Ago, but it was nevertheless important as people became increasingly peripatetic, and the consequences of that fact for the concept of voluntary link must be established. The Special Rapporteur was right that, in the most spectacular instances, there would be direct injury to the individual's State of origin, which would therefore not need to resort to diplomatic protection. In other cases, the preponderance test envisaged in article 11 would resolve the problem. Still other cases would be covered by subparagraph (a) of article 14 and could be explained convincingly in that context. If there was a growing consensus that the concept of voluntary link should be singled out and placed, for example, after article 11, however, such an approach would be acceptable, subject to a fuller debate on the matter.

<sup>6</sup> Reproduced in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", *AJIL*, vol. 55, No. 3 (July 1961), p. 548.

36. Mr. OPERTTI BADAN said that, without explicitly saying so, the Commission was discussing the scope of the age-old instrument of diplomatic protection, which had its own tradition, historical development and practice, but in a changing world it might be asked whether it was suitable enough and whether a new instrument should not be prepared. In all the cases mentioned, including the *Amoco Cadiz* and *Bhopal* cases, the plaintiffs had been private citizens with a choice of proving damage and seeking compensation in their national courts or those of the respondent State, but the wrongful act that had caused the damage was not part of a contractual relationship. The concept of transboundary damage had its own characteristics, which did not necessarily match those of diplomatic protection. It was a new phenomenon which did, of course, have political implications, but the law should have no fear of either the new or the political. For all those reasons, the Commission should not be too quick to refer subparagraphs (c) and (d) of article 14 to the Drafting Committee before it had considered them in depth.

37. Mr. BROWNLIE said he thought that Mr. Simma might be attaching too much importance to the uncertainty and problems of application inherent in the concept of voluntary link. Many well-established and familiar concepts—the continental shelf, for example—had subsisted for years before they had been generally agreed, and well-known concepts of private international law such as that of domicile continued to pose problems of application. With regard to transboundary pollution, all that was novel in the case of the Chernobyl disaster was the number of victims; the risk of nuclear accidents as such had been envisaged in several major European multilateral conventions which had the very purpose of limiting liability between the contracting parties in the event of such an accident. And the 1935 *Trail Smelter* case was an early example of transboundary pollution. The Commission should not ignore the importance of the voluntary link principle merely because it gave rise to problems of application.

38. Mr. RODRÍGUEZ CEDEÑO said that he endorsed the views of Mr. Kateka, Ms. Xue and Mr. Simma with regard to the possibility of an implicit waiver of the requirement that local remedies should be exhausted (art. 14, subpara. (b)). Waiver was a unilateral act which should be irrevocable and should not be assumed to have taken place. Neither jurisprudence (such as the *Barcelona Traction* case) nor doctrine made such an assumption.

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

[Agenda item 2]

39. Mr. CANDIOTI (Chair of the Planning Group) informed the Commission that the Planning Group had held two meetings. At its first meeting, held on 1 May 2002, it had decided to recommend that the Commission should include in its programme of work an item entitled “International liability for injurious consequences arising out of acts not prohibited by international law” and establish a working group on the topic; and that it should also include

in its programme of work an item entitled “The responsibility of international organizations”, appoint a special rapporteur on the topic and establish a working group to assist the special rapporteur during the current session of the Commission. At the same meeting, the Group had also decided to re-establish its Working Group on the long-term programme and to appoint Mr. Pellet to serve as its Chair.

40. At its second meeting, held on 6 May 2002, the Planning Group had decided to recommend that the Commission should include in its programme of work an item entitled “Shared natural resources”, appoint a special rapporteur on the topic and establish a working group to assist the special rapporteur during the current session of the Commission; and to establish a study group on the risk of the fragmentation of international law. The Group would meet again to consider other items on its agenda.

41. The CHAIR proposed that Mr. Sreenivasa Rao should be appointed Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, that Mr. Gaja should be appointed Special Rapporteur on the responsibility of international organizations and that Mr. Simma should be appointed Chair of the Working Group on the Risk of the Fragmentation of International Law, it being understood that consultations on the topic of shared natural resources would continue.

*It was so decided.*

42. Mr. GAJA expressed his deep gratitude to the Commission for his appointment as Special Rapporteur. He invited members interested in the topic for which he had been made responsible to discuss the direction of the study and to suggest bibliographical items and other materials to be considered.

43. Mr. SIMMA informed members interested in the topic of the fragmentation of international law that the annex to the report of the Commission to the General Assembly on the work of its fifty-second session included a comprehensive study by Mr. Hafner.<sup>7</sup>

44. Mr. Sreenivasa RAO said that the Working Group on the topic for which he was responsible would use the report of the Commission to the General Assembly on the work of its forty-eighth session<sup>8</sup> as its starting point.

*The meeting rose at 1 p.m.*

<sup>7</sup> See 2714th meeting, footnote 1.

<sup>8</sup> See *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 100.

\* Resumed from the 2714th meeting.