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Summary record of the 2689th meeting

Topic:

Diplomatic protection

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

2689th MEETING

Friday, 13 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

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

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

[Agenda item 3]

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

1. Mr. GOCO said that the second report on diplomatic protection (A/CN.4/514) provided a deep insight into the genesis of a well-established rule of customary international law, namely the exhaustion of local remedies. Failure to comply with that principle would lead to the dismissal of a claim by an international tribunal, since a State's executive branch had to be given a chance to correct or redress an error before the matter was brought before an international court. Articles 10 and 11 embodied that rule, while article 14 set out exceptions to it. Nevertheless, in the context of diplomatic protection, the rule applied only when the claimant State had been injured indirectly through injury to its national. Since it was, however, difficult to draw the line between direct and indirect injury and there was even a category of "mixed" injury, combining elements of injury to both the State and its national, it was alarming that no conclusive finding on that subject could be issued until the tribunal or arbitral body had reached its decision, because the *Ambatielos Claim* had established the very significant precedent that the whole system of legal protection had to be put to the test before it could be asserted that all local remedies had been exhausted.

2. A variety of tests could be used to determine whether a claim was direct or indirect and he was in favour of the wording in square brackets in article 11, but thought that it should also contain a reference to the parties involved. Article 11 should perhaps require the court or tribunal to rule on any preliminary objection that local remedies had not been exhausted, as that had been the procedure followed in the *Interhandel* case.

3. Similarly, a number of factors had to be taken into consideration in deciding what was meant by direct, indirect and mixed injury. A book by Mr. Brownlie[4] shed some light on the role of the local remedies rule in diplomatic protection and its implications for the determination of the existence of direct or indirect injury.

4. Parties were sometimes justifiably apprehensive about bringing a case before local courts because, although the independence of the judiciary was guaranteed in some countries, in others courts were subservient to the executive and cases might not be decided on their merits in accordance with the law. Indeed, he had had personal experience of a hearing where the jury might well have been biased. Some international agreements which specified the forum obviated any disputes about the exhaustion of local remedies.

5. He was concerned about the gist of the decision in the *Finnish Ships Arbitration* that local remedies had to be exhausted first, even though the right of appeal had been illusory or ineffective. The right of appeal was a factor deserving consideration when examining all the aspects involved in the exhaustion of local remedies.

6. From the formulation of the draft articles, it appeared that the principle of the exhaustion of local remedies applied only to civil claims. Presumably, the reason why criminal cases were excluded was that a national court trying the national of another State indicted for a breach of a local criminal law had sole jurisdiction over the case. Was there any scope for diplomatic protection in criminal cases? After all, the national deserved the protection of the State to which he owed allegiance. In criminal cases where States had attempted to provide diplomatic protection, they had had to operate without any fixed rules and had had to wait until their national had already been convicted and imprisoned before they could intervene at the highest level and secure that person's release.

7. In his opinion, articles 10 and 11 should be referred to the Drafting Committee for minor changes.

8. Mr. PELLET said that the exhaustion of local remedies was certainly a well-founded rule or principle of customary international law which should be embodied in the articles on diplomatic protection, for the exhaustion of local remedies, along with the nationality link, constituted one of the two undisputed and traditional conditions for the exercise of such protection.

9. Regrettably, in paragraph 4 of the report the Special Rapporteur announced five articles on diplomatic protection, whereas the document contained only four. That

[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 . . . 2000*, vol. II (Part One).

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

[4] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998).

made it difficult to gain an overall picture, especially as article 10 adverted to a non-existent article 15, presumably on the potential effectiveness of remedies. Moreover, he saw no need to refer expressly to that article in article 10, paragraph 1.* Again, why had legal persons suddenly been mentioned in article 10 but not in the previous provisions? The expression "natural or legal person" should be omitted, as it was perfectly clear that the articles applied to both categories of person, unless expressly stated otherwise. The same comment held good for paragraph 2 of the article. Subject to those two reservations, he was in agreement with article 10.

10. On the other hand, the theoretical argument about the distinction between primary and secondary rules in paragraphs 7 to 10 of the report served no useful purpose and was not pertinent to article 10. Moreover, he thought that the Special Rapporteur was wrong to challenge what had proved to be a helpful distinction, without which the Commission would never have completed its work on the draft articles on the responsibility of States for internationally wrongful acts. That distinction should be borne in mind, without necessarily adopting too rigid a conception of the matter, in the continuation of the work on the topic.

11. The introduction of the notion of a denial of justice in the draft was inadvisable. As several members had asserted, the rule of the exhaustion of local remedies presupposed not only their availability, but also their effectiveness. Perhaps wording to that effect should be included in article 10. It would seem that the Special Rapporteur intended to refer to that requirement in future articles, the contents of which were broadly outlined in paragraph 67 of the report. If there was a denial of justice it would signify that local remedies were ineffective. While the lack of effectiveness could have many causes, the consequences were the same. Either the principle of the exhaustion of local remedies did not apply or those remedies had been exhausted. In the event of a denial of justice, even if the remedies were ineffective, the rule applied. It was hard to see what could be gained from embarking on the difficult issue of what, from the standpoint of international law, constituted a denial of justice in municipal law. The crucial question was whether internal remedies had been exhausted, or whether any such remedies that appeared to be reasonably effective did exist. He therefore saw no point in attempting to codify the concept of denial of justice as such. It was but one example of a situation in which the remedies were ineffective. Nor was he sure that drawing a distinction between primary and secondary rules offered any assistance in deciding that issue.

12. As to the Special Rapporteur's presentation of the draft articles, he was troubled by the word "tribunal" in the first sentence of paragraph 14 of the report, since the remedy in question would be an appeal to an administrative officer and not one lodged with a tribunal. The sentence should be rectified, because an appeal to an administrative officer or to an ombudsman was also a local remedy and had to be taken into consideration.

13. He doubted whether the principle mentioned in paragraph 16 of the report, namely that all the means invoked in international proceedings must also have been exhausted in the course of domestic proceedings, was as established or well founded as the Special Rapporteur alleged. The purpose of the rule of the exhaustion of local remedies was not to turn international courts into courts of appeal against the decisions of domestic courts. The text ignored the inherent difference between municipal and international law. A decision that was consistent with municipal law could well be unlawful in international law, or vice versa. The statement made by the arbitrator in the *Finnish Ships Arbitration*, which the Special Rapporteur had cited, but with a reference to the wrong footnote, was erroneous, because it was not the contentions that had to be identical in municipal and international proceedings, but the submissions. Different arguments would naturally be advanced in municipal and international courts. In his view, the reasoning behind the *Finnish Ships Arbitration* was poor and not a valid precedent.

14. Some drafting changes should be made to article 11. In paragraph 31 of the report, the Special Rapporteur had expressed doubts about the wisdom of retaining the sentence in brackets, but since the latter set out criteria, rather than examples, and as any decision on the matter in question was rather subjective and rested on a nexus of fairly complex factors, it was perfectly legitimate to keep the sentence in brackets. His main criticisms were directed more at the explanation and the terminology employed by the Special Rapporteur than at the text of the draft article itself. On several occasions a distinction had been drawn between direct and indirect injury and even between a direct and an indirect claim. In his opinion, such terminology was highly misleading and ought to be avoided at all costs. Indirect injury did not stem directly from an internationally wrongful act; the latter was merely a contributory factor, whereas direct injury was the direct result of such an act. Since that was not, however, the point at issue, there would be merit in using a different vocabulary. In the French-speaking world, legal theorists distinguished between *dommage médiat* and *dommage immédiat* ("mediate" and "immediate" injury). "Immediate" injury was that suffered directly by the State. "Mediate" or remote injury was that suffered by the State in the person of its nationals. If those were the types of injury referred to in the draft articles, the Commission was unfortunately cleaving to the fictive aspect of the *Mavrommatis* case and, if that was so, the French terminology would be greatly preferable to that used by the Special Rapporteur.

15. The passage, cited in paragraph 26 of the report, of the judgment by ICJ in the *Interhandel* case showed how artificial the *Mavrommatis* fiction was. The statement by the Court that "one interest and one alone" [p. 29] was the sole cause of the proceedings reflected the reality in an infinitely more convincing manner, in that cases involving diplomatic protection were concerned solely with the interest of the protected person.

16. Lastly, while from the point of view of legal theory he disagreed with the Special Rapporteur, he agreed with the draft articles and proposed that they should be referred to the Drafting Committee.

* The report was corrected as follows: in the last sentence of paragraph 4, for "no less than five articles" read "several"; and in article 10, paragraph 1, for "article 15" read "article 14" (A/CN.4/514/Corr.1).

17. Mr. HERDOCIA SACASA, describing the report as well balanced and containing no major surprises, said it dealt with the topic in a fairly traditional manner. Proposed articles 10 and 11 provided a good basis for discussion. The exhaustion of local remedies was a well-established rule and an important principle of customary international law.

18. The Convention relative to the Rights of Aliens, of 1902,[5] stated that, when aliens brought claims against States, those claims should not be made through diplomatic channels unless there was a manifest denial of justice by a court, unusual delay or an obvious violation of principles of international law. The principle had been expressed in similar terms in 1925 by the American Institute of International Law in Project No. 16 concerning "Diplomatic Protection".[6] The Seventh International Conference of American States, held in Montevideo in 1933, had taken the same view in its resolution on "International responsibility of the State".[7]

19. It had been rightly said during the discussion on article 9 that there were differences between the protection of human rights and diplomatic protection, but it was important to establish what those differences were. In the case of protection of human rights, the exhaustion of local remedies made reference to international law: the new rules of the Inter-American Commission on Human Rights established that the Commission would verify whether local remedies had been exhausted in accordance with the generally recognized principles of international law. There was a similar provision in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The Inter-American Court of Human Rights, in the *Velásquez Rodríguez* case had pointed out that the reference to the principles of international law showed, inter alia, that those principles were relevant not only to determine in which situations the exhaustion of local remedies was exempt but also because they were necessary elements for the analysis by the Court of problems related to the way in which non-exhaustion of local remedies must be proved or the question of who bore the burden of proof, or even the meaning to be attached to "local remedies".

20. Principles had been developed by commissions and courts concerning the effectiveness, sufficiency and nature of local remedies. In his third report on State responsibility, García Amador had asked what would happen if local remedies were ineffective, or did not exist, or if there was too great a delay in securing them.[8] That was not dealt with in article 10, which spoke only of the exhaustion of all available local legal remedies. There was a discrepancy between that article and article 45 of the draft articles on the responsibility of States for internationally wrongful acts, which said that the responsibility of a State might not be invoked if the claim was one to which the rule of exhaustion of local remedies applied and any available and effective local remedy had not been exhausted. The concepts of availability and effectiveness were of crucial importance and should appear in the draft article. The commentary to article 45 reaffirmed that only those local remedies that were available and effective had to be exhausted before invoking the responsibility of a State. In other words, the word "all", in article 10, would impose an excessive burden on the injured person, although it was anticipated that the possibility of an injured person being prevented from exhausting local remedies would be covered in a future draft article.

21. The rule of exhaustion of local remedies was far from being a dogma and there could be exceptions which were linked to their effectiveness and appropriateness. Article 22 of the draft on State responsibility originally proposed by Special Rapporteur Ago,[9] had referred to "effective" local remedies.

22. In the Spanish version, paragraph 1 of article 10 said that a State may not bring an international "action" (*acción*) arising out of an injury to a national. Article 45 of the draft articles on the responsibility of States for internationally wrongful acts used the word "claim" (*reclamación*), and he wondered what the Special Rapporteur's view was on that matter. He agreed with the Special Rapporteur that there was a close link between exhaustion of local remedies and denial of justice, which raised the question of whether a flexible analysis should be made in regard to the distinction between primary and secondary rules.

23. As for article 11, he agreed with other members that the sentence in square brackets, or at least the items mentioned in the sentence, should be retained.

24. Mr. OPERTTI BADAN said that local remedies had to be available and effective, and the exhaustion of local remedies in each State was posited on respect for the sovereignty and jurisdiction of that State. Accordingly, it was a question of deciding what the remedies were that had to be exhausted. Each State regulated its remedies in accordance with its own procedures, which depended on the legal family to which it belonged. In many cases, constitutional law was responsible for establishing principles regarding procedural guarantees. When considering remedies and their exhaustion it was essential to find a way of distinguishing between those remedies which were by definition mechanisms for defence in the service of justice and those which were mechanisms directed to control of the State's legislative activity and the effects and scope of that activity.

25. At the fifty-second session, Mr. Brownlie had said that diplomatic protection could be exercised if a foreign national was able to prevent the injury in question through a legislative act that was under discussion. That was a typical case of a remedy which was not *stricto sensu* available and effective to the person making the claim. Care had to be taken in referring to exhaustion of remedies that reference was not made to other mechanisms that were available: the remedies had to be available to any interested citizen and not just to injured persons.

[5] Partially reproduced in *Yearbook . . . 1956*, vol. II, p. 226, document A/CN.4/96, annex 5.

[6] See 2680th meeting, footnote 6.

[7] Reproduced in *Yearbook . . . 1956*, vol. II, p. 226, document A/CN.4/96, annex 6.

[8] *Yearbook . . . 1958*, vol. II, p. 47, document A/CN.4/111, at pp. 55–60.

[9] See 2688th meeting, footnote 6.

26. The remedy of cassation, which differed depending on the legal system, was available in some cases only, keeping a check on the law and not on acts. While that remedy was concerned with the regularity or irregularity of the law applied and the act of application of the applicable legal rule, it could not be assimilated to a body of third instance nor was it compulsory. It was a remedy which must be available so that the person concerned could determine whether it was appropriate to apply it.

27. Another important element to consider was that of contentions. In paragraph 16 of his report the Special Rapporteur mentioned that all the contentions of fact and propositions of law should be exhaustively presented in municipal proceedings. The arguments of a claim naturally constituted a unity, and there should be no innovation in submitting the claims in international courts. But it was clear that at the international level the bringing of an international claim added to the local arguments. Hence, the reference to the identity of arguments should be nuanced in order to acknowledge the diversity of jurisdictions in which claims were made. In local courts, for example, a claim would necessarily exhaust the arguments for local remedies, but not the contentions for international remedies.

28. As for the basis of an injury, paragraphs 18 and 19 of the report went to the heart of the matter. He agreed with Mr. Pellet and others that it would be preferable and certainly clearer to speak of "mediate" and "immediate", rather than "indirect" and "direct", injury. In any event, the terms should refer not to the effect but to the fact which gave rise to the claim. Plainly, an injury that was "immediately" caused by the unlawful act of a State called for exhaustion of local remedies, and until that had occurred no diplomatic protection could be exercised. That was the idea of denial of justice, but there should be no link between exhaustion of local remedies and denial of justice because the latter did not in itself imply the former; it could come from a failure to exhaust local remedies. It was an autonomous hypothesis that should not conceptually be rigidly linked with the principle of exhaustion.

29. International diplomatic protection did not add a new instance to local remedies, so that an act of the State could not establish a *litis consortio* that was active between the subjective litigant and the State. It was the State that defined its status as the claimant, and that was something that had to do with the discretionality with which protection was exercised. It was in part political law. A State could reach the conclusion that it was appropriate and reasonable to exercise protection, but it could also decide otherwise. It struck a balance between the act and its scope and the appropriateness of taking action. Diplomatic protection must be clearly separated from the other means of protection of human rights, which had mechanisms in which discretionality disappeared and under which it was the person who had the right, not the State itself, that was the individual subject of the claim.

30. Lastly it was quite clear that protection of legal persons opened up too broad an area for diplomatic protection in a globalized world. It was impossible to reason in the same way as a few years ago, and the Commission should be very careful in its use of language that ranked diplomatic protection of individuals with protection of legal persons. The issue was a very sensitive one and the text, directly or indirectly, alluded to legal persons as if they could be assimilated to individuals. It raised the danger of extending diplomatic protection in such a way as to cause difficulties for States. In his opinion, it would be better to leave references to legal persons in brackets.

31. Mr. HAFNER, referring to article 10 said that he disagreed with certain conclusions drawn by the Special Rapporteur in connection with denial of justice. A clear distinction must be made between denial of justice and the rule on exhaustion of local remedies, from the standpoint of access to local remedies. Under the primary rules, States had a duty to grant access to local remedies, yet such access was also a procedural obligation for the exercise of diplomatic protection. Access to remedies could thus be the subject of two different legal issues, denial of justice, in which the State was under an obligation, and exhaustion of local remedies, in which the obligation was upon the claimant. The problem could be seen merely as an academic one; however, in his view there was no need to deal with denial of justice in the context of the current approach to diplomatic protection.

32. What was far more important was the definition of "local legal remedies". He agreed with Mr. Lukashuk that more light should be shed on the rich practice of the European Court of Human Rights, with Mr. Gaja that the article 10 should include more on such remedies and with Mr. Pellet that the term "legal remedies" had to be clarified. It certainly included administrative procedures, although the first sentence in paragraph 14 of the report was misleading in that it referred to redress from a tribunal. Administrative authorities were not tribunals, unless the reference was to administrative tribunals only. The last sentence of the paragraph was likewise misleading, as it implied that many administrative procedures common in many countries fell outside the local remedies rule.

33. The question could be raised as to what "legal" meant. The Special Rapporteur indicated that it did not mean discretionary remedies, but might be taken to include all those legal institutions from which the individual had a right to expect a decision, whether negative or positive. The word "local" had already been queried: did it include a complaint before the European Court of Human Rights? A request for a preliminary ruling by the European Court of Justice? At the current time, a direct claim by an individual against a State was not possible in the latter institution, but the possibility was under consideration.

34. Changes in the whole system of international law had to be taken into account. The instrument of diplomatic protection, including the rule of exhaustion of local remedies, had been established when individuals had had no access to international institutions to present claims against States, but that situation was changing. The Commission must respond to the change, or at least consider it, especially as it had already been addressed in the literature. Local remedies should not necessarily be deemed to include international institutions accessible by individuals, but some thought should be given to the matter.

35. International environmental law presented a particular case in respect of the definition of local remedies. Was an individual who suffered transboundary damage from acts attributable to a neighbouring State required to exhaust local remedies in that State before diplomatic protection could be granted? That issue had already found its way into the literature. It could be argued that the rule on exhaustion of local remedies had to be applied, since that would give the State the opportunity to make good the original wrong. That position could nonetheless be attacked as unfair, since the individual would be required to go before judicial or administrative authorities in a different country, something that would increase the costs and risks of the procedure. It could also be described as unfair inasmuch as the individual had not voluntarily placed himself or herself under the legal or factual influence of the State, but had been so placed by necessity, namely through proximity to the border. Accordingly, the rule could be deemed not to apply in such a situation.

36. Various recent international instruments stipulated, however, that there was a duty to give foreigners access to judicial and administrative institutions in the event of transboundary damage. The State of origin of the damage could easily say that, because it was obliged to grant access to local remedies, the individual was obliged to exhaust them. However, that reasoning would have to take account of transboundary damage that occurred at great distances, in which case it would be extremely difficult to use institutions in the State of origin, even if they were open to foreigners. For the time being he was inclined to discount the obligation of exhaustion of local remedies in such situations and to consider that the rule applied only if injury originated and occurred within a State's borders. Nevertheless he would be interested to see the Special Rapporteur's reaction on that point. Very little was said in the report about the circumstances in which local remedies did or did not need to be exhausted, yet it was a decisive issue.

37. Article 11 covered a complex matter and he favoured a radical solution: deletion of the article, as it tended to go beyond diplomatic protection. In the situation addressed by the article, different claims could be presented at the same time for two kinds of damage, as Mr. Pellet had pointed out. The question would be whether the separate claims should be combined. In some cases resulting from aerial incidents, for instance, different claims had been submitted for one and the same incident by private individuals as well as by the State. The State itself could be deemed to have been injured by the attack on an aeroplane it owned, but damage, of a different nature, had likewise been done to individuals. That was why he was not convinced of the need for a draft article on the subject, but if it was thought necessary to include one, he agreed with Mr. Gaja that only one criterion should be used to decide whether or not the exhaustion of local remedies should be required.

38. Article 10 should be referred to the Drafting Committee and he would not oppose the referral of article 11 if that was the wish of the Commission.

39. Mr. LUKASHUK said he wished to respond to one point raised in the detailed and incisive statement by Mr. Hafner concerning the dual nature of legal remedies. Legal remedies were determined by the legal system of the State, but they also included administrative measures. For example, the release of an alien who had been unjustly detained was an administrative matter, not a judicial one. The Special Rapporteur should give a brief explanation of that point in the commentary.

40. Mr. PELLET, referring to Mr. Hafner's point about bringing cases before regional human rights institutions, asked whether he was envisaging a complement to the exhaustion of local remedies, namely the exhaustion of regional human rights remedies. If so, it was an attractive idea but one that needed further elaboration. The rule on exhaustion of local remedies would appear not to enter into play at all if a State opposed a claim for diplomatic protection on the pretext that regional remedies had not been exhausted: the State would be bound by the treaty creating the regional human rights court.

41. Mr. HAFNER said he fully agreed with Mr. Lukashuk that the definition of legal remedies should be fleshed out and that additional criteria should be addressed: he had wished to provoke discussion on precisely those points. The experience of applying article 6 of the European Convention on Human Rights could be used, judiciously, in relation to the definition of tribunals and local remedies. Responding to Mr. Pellet, he said he did not think that the exhaustion of local remedies entailed the submission of a complaint to, for example, the European Court of Human Rights, but that possibility should nevertheless be mentioned in the commentary, since it had already been raised in the literature.

42. Mr. GOCO said he thought the term "local remedies" was generally understood by both laymen and lawyers as relating to the entire system of legal protection within a municipal system.

43. Mr. BROWNLIE said the report was helpful and thorough. Although he experienced some difficulties with articles 10 and 11, he was in favour of referring them to the Drafting Committee. He agreed with Mr. Gaja's suggestions regarding a more synthetic approach and in particular the replacement of "available" remedies by "effective" remedies.

44. Everyone agreed that a customary rule did exist, yet there was a limit to the specificity that could be required in legal regulation in that area. The local remedies rule was applied in a highly contextual manner, as could be seen from the range of relevant cases, including the *Finnish Ships Arbitration*, which dated back to the 1930s.

45. He was uncomfortable with the relationship posited by the Special Rapporteur in paragraph 27 between direct injury and the seeking of declaratory relief by a State, for he was not convinced that the relationship existed. What troubled him most, however, was that no one seemed to have looked into the policy basis for the local remedies rule, and he would like to hear other members' views on that matter. In his opinion, there was a highly pragmatic reason for it: busy foreign ministry officials did not wish to see private claims get in the way of government, particularly relations with other States, and sought to dispatch private claims, to the extent possible, for settlement in local courts.

46. The result was very similar to the workings of the jurisdiction established by the European Convention on Human Rights, although the policy basis there was different. That jurisdiction was not a system of appeals from local courts but instead a monitoring arrangement. The assumption, as set out in article 13 of the Convention, was that States had to make local remedies available and that the Convention applied domestically, but only as a correction of the situation created under domestic legislation. The Convention was neither a substitute for nor an invasion of domestic jurisdiction, at least not in law, because it was treaty-based. Examples from its workings could be informative, but they should be used with some caution, precisely because of the differing policy background. Looking at the policy background to diplomatic protection might also facilitate the fine tuning that had to be done in relation to such issues as whether a private claimant should have a voluntary link with the jurisdiction concerned as a condition for application of the local remedies rule.

47. Mr. LUKASHUK said that Mr. Brownlie's statement had crystallized an idea that had been taking form in his mind: it might be worthwhile to incorporate in a separate article a positive obligation for States to establish effective remedies against the violation of foreigners' rights.

48. Mr. ECONOMIDES said that the report was clear, detailed and very useful. Article 10 presented some problems, but they were merely of a drafting nature. To whom, for example, must a State submit an international claim—another State, an international organization or a domestic or international court? Surely, it should be to the State which, through an internationally wrongful act, had injured a national—a natural or legal person—of the State that was exercising diplomatic protection, but that should be made clear in article 10, paragraph 1.

49. He queried the French phrase *formuler une réclamation internationale* (bring an international claim) and would prefer the words *présenter une requête de protection diplomatique* (submit a request for diplomatic protection). He agreed with other members that the phrase "available local legal remedies" should be explicated. Article 22 of the draft on State responsibility proposed by Roberto Ago, quoted in paragraph 4 of the report, had spoken of "effective local remedies available". He agreed with Mr. Herdocia Sacasa that it was only effective remedies, not all the remedies theoretically available, that were involved. The word "legal" before "remedies" was superfluous and could be deleted in both paragraphs 1 and 2, as the remainder of paragraph 2 clearly explained that the remedies were legal in nature.

50. Article 11 was highly complex and its application would be difficult, if not impossible. The preponderance of injury to a State as opposed to injury to a national was a difficult notion, as Mr. Goco had pointed out. Again, the reference to a request for a declaratory judgement related to the claim complicated matters further. The provision should be radically simplified by stressing the essential points. First, it should be made clear that the requirement of exhaustion of local remedies applied solely to cases of diplomatic protection, but that was already stated quite well in article 10 and must not be repeated. Next, it should be indicated, in article 11 or elsewhere, that if the main victim was in fact the State that had suffered the injury, the national of that State being only secondarily or incidentally affected, the rule of exhaustion of local remedies did not apply, since the situation was one of direct responsibility between States.

51. A third situation might arise if preponderance could not be applied because the injury suffered by the State was equivalent, or nearly so, to that suffered by the individual. That situation was not envisaged in the report and to his knowledge there were no relevant rules of international law. Preponderance could be given to injury to the State, in which case the rule of exhaustion of local remedies would not apply, or to injury to the individual, in which case the rule would operate. Parallel claims could also be envisaged—by the State, in the context of international responsibility, and by the national, under diplomatic protection.

52. He agreed with Mr. Lukashuk that article 11 should be revisited with a view to simplifying or even deleting it, as suggested by Mr. Hafner. Lastly, he concurred that the article should deal with the important issue of denial of justice.

Reservations to treaties[10] (*continued*)* (A/CN.4/508 and Add.1–4,[11] A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,[12] A/CN.4/L.603 and Corr.1 and 2)

[Agenda item 5]

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

53. Mr. PELLET (Special Rapporteur), introducing his sixth report (A/CN.4/518 and Add.1–3), regretted that, for a variety of reasons, including his ever-growing realization of how complex the subject was, his task had not been completed. The decision of the Commission to give priority to other topics, however, made the delay less important. There would not be time for the Drafting Committee to consider all 14 draft guidelines, but he hoped that the Commission would at least refer them to the Committee, which would then consider them under a newly elected Commission.

54. The introduction to the report sought to bring all the latest information to bear on the topic. In particular, paragraphs 20 to 23 contained the latest information on the difficulty that seemed to have arisen between the International Law Commission and the Subcommission on the Promotion and Protection of Human Rights, which, by its resolution 1999/27 of 26 August 1999, had appointed Ms. Françoise Hampson Special Rapporteur with the task of preparing a comprehensive study on reservations to human rights treaties. Her report had not yet appeared, as far as he knew. Moreover, given the lack of

* Resumed from the 2679th meeting.

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

[11] See footnote 2 above.

[12] See footnote 3 above.

enthusiasm displayed by members of the International Law Commission for the idea that he should approach Ms. Hampson directly, he had not taken any further action over the past two months. The report also gave indications concerning new events regarding reservations to treaties; in that context, he asked any members who were aware of any jurisprudence, practice or studies not mentioned in the report to inform him.

55. Chapter II of the report discussed the fairly minor—although unexpectedly complicated, since, as Mr. Brownlie had said, the devil was in the detail—issue of the formulation of reservations. He wished to emphasize that for the time being only reservations were being considered; acceptance or objection was to be considered at the next session. Some of the draft guidelines appearing in the annex to the sixth report, containing the consolidated text of all the guidelines on the formulation of reservations and interpretative declarations proposed in the fifth (A/CN.4/508 and Add.1–4) and sixth reports, were already obsolete, since the Drafting Committee had, to his considerable displeasure, deleted some of them. The annex would, however, be useful in indicating how he had proceeded.

56. He proposed to begin by introducing guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2, which included two bis drafts (2.1.3 bis and 2.4.1 bis) that were currently in square brackets and might be deleted from the final version. He was also submitting two alternatives for guideline 2.1.3.

57. Guideline 2.1.1 (Written form) related to the form of reservations, which had to be in writing. There was no equivalent with regard to interpretative declarations, although the requirement of the written form was taken up in guideline 2.4.2 (Formulation of conditional interpretative declarations). Guideline 2.1.1 reproduced the text of the first sentence of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions. He considered it important that the Guide to Practice should be able to stand on its own. It should therefore contain all the information needed to formulate and implement reservations and interpretative declarations, whether they appeared in the Conventions or not. The corollary of that was that, if provisions on reservations to treaties appeared in the Conventions, they should be reproduced word for word in the Guide. Paragraphs 40 to 47 of the report recalled the *travaux préparatoires* for the Conventions, in connection with which he pointed out that there had been practically unanimous agreement that it went without saying that reservations must be in writing. "Practically" unanimous, because the question had arisen during the discussions in the Commission as to whether a reservation could be formulated orally. It was not impossible but, as Sir Humphrey Waldock had observed, that was of little practical consequence, because under article 23, paragraph 2, of the Conventions, a reservation had to be formally confirmed at the time of the definitive consent to be bound. That undoubtedly implied that confirmation should be in written form, as stated in guideline 2.1.2 (Form of formal confirmation). Some reservations were "perfect" and did not need confirmation, in cases where they were made at the time of the signature of a treaty that was not subject to ratification. In such cases, however, it was clearly essential that the reservation should be in writing from the outset. There was no need to devote a separate guideline to the matter: it was required under guideline 2.1.1 and was again taken up in guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), which had been retained by the Drafting Committee.

58. It remained to be seen whether the rules, which he doubted would pose particular problems, could be transposed to interpretative declarations. That question was broached, and some solutions sought, in paragraphs 83 to 90. Practice, which was far from accessible, was not very helpful in that respect. A distinction should be drawn between "simple" and conditional interpretative declarations. The former—in accordance with the definition contained in guideline 1.2 (Definition of interpretative declarations)—had the sole object of specifying or clarifying the meaning or scope that the author gave to the treaty or to certain of its provisions. There was no reason to require them to take any particular form nor did the rare decisions on the subject do so. That was why guideline 2.4.1 (Formulation of interpretative declarations) contained no requirements as to the form of interpretative declarations. The problem was, however, quite different in cases of conditional interpretative declarations, which guideline 1.2.1 (Conditional interpretative declarations) defined as declarations whereby the State or international organization subjected its consent to be bound to a specific interpretation of the treaty or of certain provisions thereof. In such cases, there was no reason to do away with the accepted rule on reservations, whereby a State or international organization making a conditional interpretative declaration wished to set its interpretation against that of the other parties. The latter should, of course, be aware of that and be ready to react if need be. That was the justification for requiring the written formulation of reservations and the same should therefore apply to conditional interpretative declarations, as provided for in guideline 2.4.2.

59. In that context, he would point out that the rules applying to conditional interpretative declarations were identical to those on reservations, even if their definitions were not. Some members of the Drafting Committee had therefore considered it superfluous to devote specific provisions to conditional interpretative declarations. While that might be true, he urged the Commission to wait until it had considered the effects of reservations and of conditional interpretative declarations before reaching a final decision. Only then, if it was found that the two followed the same rules, would he be fully in favour of deleting all the guidelines relating specifically to conditional interpretative declarations and adopting a single guideline stating that the rules relating to reservations would also apply *mutatis mutandis* to conditional interpretative declarations. Meanwhile, it would be prudent not to change course abruptly. He acknowledged that some members of the Commission knew far more than he about the law on reservations and interpretative declarations, but he would still urge that the Commission should not compromise the possible force of the Guide to Practice by taking a decision that it might later regret.

60. Returning to specifics, he said that the consequences of formulating a reservation or a conditional interpretative declaration were dealt with, respectively, in paragraphs 53 to 82 and paragraphs 85, 86 and 89 to 95. The Commission was not constrained by the 1969 and 1986 Vienna Conventions in that regard, since they did not mention any consequences. Sir Humphrey Waldock, however, had successfully suggested, in article 17 of the draft articles on the law of treaties,[13] that they should specify not only the kind of instruments in which reservations should appear—it was pointless for the Guide to Practice to broach the matter, since the list was not exhaustive and Sir Humphrey Waldock had acknowledged that there were no special rules in that regard—but also the person or the organization competent to do so. As stated in paragraph 54 of the report, Waldock's definition was unsatisfactory, being both repetitive, non-restrictive and somewhat tautological. In that regard, he drew attention to an error in the footnote to that paragraph: paragraph 43 of his report, referred to therein, contained the text of article 18, paragraph 2 (*a*), of the draft articles on the law of treaties adopted by the Commission at its fourteenth session,[14] which was silent on the question of competence. The reference should have been to article 17 proposed by Sir Humphrey Waldock.

61. The Commission was not entirely without guidance, however, since reservations had an effect not on the formal instrument that constituted the treaty, which remained unaffected, but on the parties, or the *negotium* itself. It would therefore be logical to ascribe the competence to make reservations to those authorized to commit the State or international organization to the treaty itself, and to them alone. And those competent authorities were fully enumerated in article 7 of the 1969 and 1986 Vienna Conventions. The practice was wholly confirmed by that of the United Nations Secretary-General, who systematically called for reservations sent to him by an authority other than the "three authorities" mentioned in article 7, paragraph 2 (*a*), to be regularized by one of those authorities or the grant by one of them of full powers to another representative. Nevertheless, as indicated in paragraphs 63 and 64 of the report, one might well ask whether the ambassador to the depositary State and the permanent representative to an international organization which was a depositary could not, without being given special powers, be authorized to formulate a reservation, the more so as that was the practice in OAS and the Council of Europe, which were, after all, significant depositaries. He had given much consideration to the question of whether to suggest giving more flexibility to the rules of article 7, which, incidentally, did not formally relate to reservations, or whether to retain the requirement for the three authorities—which, in fact, amounted to more than three under the 1986 Vienna Convention—listed in article 7, paragraph 2. He would welcome the advice of the Commission.

62. Meanwhile, he had produced alternative texts for guideline 2.1.3 (Competence to formulate a reservation at the international level), appearing in paragraphs 69 and 70, which were both hybrids, reproducing the rules in article 7 but preceded by the phrase "Subject to the customary practices in international organizations which are depositaries of treaties". That had the advantage of challenging neither the principles of article 7 nor the practices of the Council of Europe and OAS—and, he believed, IMO—which seemed not to have caused any particular problems, judging by the replies given by those organizations to the questionnaire on reservations to treaties. He was open to persuasion: both solutions had their merits and drawbacks. A decision must, however, be taken one way or the other.

63. He also sought the advice of the Commission on the two drafts of guideline 2.1.3. His own preference was for the longer version contained in paragraph 70, which, with the addition referred to earlier, reproduced the text of the 1986 Vienna Convention; the Guide to Practice should be able to stand on its own and, if the shorter version were adopted, the user would need to refer to the Convention. It would be possible to omit from the longer version paragraph 2 (*d*), in which, although it came from article 7 of the Convention, the hypothesis envisaged was marginal. He was nonetheless ready to retain it for the sake of completeness.

64. The considerations that applied to reservations also applied, *mutatis mutandis*, to interpretative declarations, whether conditional or not, although "simple" interpretative declarations did not require as much formalism as reservations. They could not in themselves commit a State or an international organization making them unless they were made by a person with the authority to do so. To avoid any abuse, therefore, such authorization should be limited to people or bodies competent to represent the State for the adoption or authentication of a treaty, or to express consent to be bound. That notion was expressed in guideline 2.4.1.

65. Reservations and interpretative declarations were, like treaties themselves, at the interface between internal and international law. Before being formulated at the international level, reservations were made at the internal level. That obvious truth had led him to wonder whether the Guide to Practice should include guidelines on internal procedures for the formulation of reservations and interpretative declarations and, in particular, on the requisite competence. Replies to the questionnaire on reservations to treaties showed that no general rule was followed; States and international organizations differed widely in their practice and international law had nothing to say on the subject. Simply to set his mind at rest, he had drafted two guidelines to cover that point—2.1.3 bis for reservations and 2.4.1 bis for interpretative declarations—but he doubted that they were really needed. Users of the Guide would not be illiterate in legal matters, after all, and those draft guidelines really stated the obvious. Even if international law was silent on internal procedures, the fact remained that a breach of internal regulations might invalidate a reservation, or a ratification, at the international level. Article 46 of the 1969 and 1986 Vienna Conventions dealt with the matter in an admirably pragmatic way, saying that the violation of a provision of its internal law regarding competence to conclude treaties did not invalidate a State's consent to be bound inter-

[13] *Yearbook . . . 1962*, vol. II, p. 60, document A/CN.4/144.
[14] *Ibid*., p. 176, document A/5209.

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

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

The meeting rose at 1 p.m.

2690th MEETING

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

Chairman: Mr. Peter KABATSI

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

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

[Agenda item 3]

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

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

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

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

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

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

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