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Summary record of the 2716th meeting

Topic:
Diplomatic protection

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paragraph 102 of his third report that it was generally accepted that the burden of proof was on the party which made an assertion. On the other hand, the question arose whether there was in fact any need for such a provision, which, in the absolute, seemed to be dictated by the litigated and adversarial nature of the question of local remedies and also by the desire to ensure a sound and balanced administration of justice. More thought should thus be given to the matter, though much depended on the extent to which it was considered necessary to mark out a path for judges and parties, with a view to facilitating their work.

36. With regard to the question whether the Commission should content itself with codifying article 15, paragraph 2, his first impression was that, in the absence of agreement on paragraph 1, it might envisage a provision along the same lines as that appearing in paragraph 2, provided that any problems of substance or form were resolved. However, he did not yet have any specific proposal in that regard.

37. As to the proposal by Kokott, he noted that the Special Rapporteur described it as "concise" and "not inaccurate". Insofar as it offered a useful and less problematic solution in terms of both substance and form, that proposal could be adopted. But other formulations could also be envisaged. He had no marked preference for any one solution proposed by the Special Rapporteur and thus reserved his position on the question.

The meeting rose at 11.30 a.m.

2716th MEETING

Tuesday, 7 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

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

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

[Agenda item 4]

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

1. Mr. SIMMA said he was aware that, in commenting on articles 14, subparagraphs (*a*), (*e*) and (*f*), and article 15, he was traversing ground that was already well trodden. It seemed to him, however, that in the interests of achieving consensus on the draft articles, the risk of repeating points already made was one worth taking.

2. All in all, the proposals made with regard to article 14 were sound and well balanced. The Special Rapporteur followed the principle that relief from the obligation to exhaust local remedies should not be made too easy: wrongs committed against foreigners should, as far as possible, be remedied by a State's own legal and judicial machinery. Option 2 in Article 14, subparagraph (*a*), namely, that local remedies need not be exhausted where they offered no reasonable prospect of success, did not require the rule on the exhaustion of local remedies to be taken sufficiently seriously, excluding the claimant too readily from compliance with that rule. The statement by Fitzmaurice cited by the Special Rapporteur in paragraph 35 of the third report (A/CN.4/523 and Add.1), that "the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule",[4] was highly pertinent in that regard. There must be a reasonable possibility, not of obtaining a remedy, but of an effective remedy's existing.

3. According to paragraph 31 of the report, option 1, namely, that local remedies need not be exhausted where they were obviously futile, meant that it must be "obviously and manifestly clear that the local remedy would fail". If that criterion were to be applied, the threshold would be too high and the risk for the claimant too great. Thus, option 3, according to which local remedies need not be exhausted if they provided no reasonable possibility of an effective remedy, covered an adequate middle ground and offered a balanced view, though the somewhat repetitious wording stood in need of editing changes.

4. Article 14, subparagraph (*e*), relating to undue delay was not, in his view, rendered superfluous in the light of article 14, subparagraph (*a*). The cases covered by article 14, subparagraphs (*a*) and (*e*), were in a sense consecutive in time: an existing local remedy which might at first appear to be a "reasonable possibility" from the standpoint of article 14, subparagraph (*a*), might sub-

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[1] For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

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

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

[4] G. Fitzmaurice, "Hersch Lauterpacht—the scholar as judge", *BYBIL, 1961*, vol. 37, p. 60.

sequently not need to be pursued further, in the light of undue delay in its application. Application of article 14, subparagraph (*e*), would of course very much depend on individual circumstances: complex litigation might be involved, or the undue length of the proceedings might be partly attributable to the claimant. Yet it did not seem feasible to find any more precise term than "undue" to cover all those contingencies. The standards developed in human rights jurisprudence concerning, for instance, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), on due process, might offer some guidance as to the use of the term in general international law.

5. As to subparagraph (*f*) of article 14, on denial of access, his impression was that both the Special Rapporteur and Kokott, rapporteur of ILA, construed that exception narrowly and physically. Mr. Gaja and others had drawn attention to the fact that it would not be necessary for the injured individual personally to have access to the courts if, for instance, a lawyer was hired to represent the individual. There should, however, be some reference, at least in the commentary, to the problem posed where the individual or lawyer was dissuaded, by means of intimidation, from taking up the case. There would also be a need for such a provision in cases where an individual's personal presence was required in domestic litigation proceedings. The question nevertheless remained whether the case provided for in article 14, subparagraph (*f*), might not be regarded as covered by article 14, subparagraph (*a*). The Special Rapporteur's argument in that regard, set forth in the last sentence of paragraph 100 of the report, was not convincing. It would be better to delete article 14, subparagraph (*f*), and to include the relevant points made in the report and during the debate in the commentary to article 14, subparagraph (*a*).

6. With reference to article 15, he shared various members' doubts as to the relevance of the human rights jurisprudence—developed on the basis of specific treaty provisions within the framework of a procedural system—to the task of delineating the burden of proof in general international law. While the rule proposed by the Special Rapporteur was appealing in its simplicity, the picture was bound to be much more complex in practice. In his comments (paras. 105, 106, 114 and 116 of the report), the Special Rapporteur appeared to take a much more circumspect view about the need for the article. Personally, he saw no need for the provision, either from the systematic or from the policy standpoint. Accordingly, subparagraphs (*a*) and (*e*) of article 14 should be referred to the Drafting Committee, while article 14, subparagraph (*f*), and article 15 should be deleted.

7. Mr. KOSKENNIEMI, speaking first on articles 12 and 13, commended the Special Rapporteur for his very enlightening discussion of the distinction between procedural and substantive rules—a discussion which, however, did not really support the articles themselves. His own conclusion was that the Commission could live without either article. The idea of exhaustion of local remedies as a substantive rule was, as the Special Rapporteur had pointed out, equivalent to thinking of it in terms of a denial of justice—a primary rule in the first place, the breach of which constituted the wrongful act. On the other hand, denial of justice was also a complex issue that, strictly speaking, fell outside the scope of diplomatic protection. In his view, denial of justice was closely bound up with the various detailed arrangements that existed, for instance, between the Nordic countries on non-discrimination and equal access and led to a number of complex criteria on the basis of which denial of justice could be delineated.

8. Article 13 dealt quite cursorily with the question of denial of justice, as a case in which non-exhaustion of local remedies would of itself be a breach. If one took the view that a denial of justice was not necessary—for instance, because including it would mean defining in much greater detail what constituted a denial of access or discriminatory treatment of aliens in the context of domestic processes—then article 13 would be unnecessary.

9. If so, the question arose of what purpose was served by article 12, which maintained the symmetry of the "third position" outlined by the Special Rapporteur, by juxtaposing the substantive and procedural approaches in articles 13 and 12 respectively. If article 13 were eliminated, the concept of exhaustion of local remedies became exclusively a procedural one. As now formulated, article 12 merely defined local remedies through reference to the background academic debate about substantive and procedural rules. Its objectives were already fulfilled by article 11, which adequately enunciated the rule on the exhaustion of local remedies. To further define that normative requirement as a procedural precondition added nothing, if it had already been decided that as a substantive rule it had no place in the scope of the exercise. Thus, inasmuch as article 13 was unnecessary, article 12 lost its justification as a definition; both articles should be deleted, and he reserved his position as to the formulation of article 11.

10. He agreed that options 1 and 2 in article 14, subparagraph (*a*), were respectively too stringent and too loose to be acceptable. No alternative was left but option 3. However, as to the drafting, he wished to make the general poin—for the first but doubtless not for the last time—that use of the term "reasonable" was superfluous and invidious inasmuch as it implied *a contrario* that people would behave unreasonably unless specifically instructed to behave reasonably. It would be sufficient to say "where they provide no effective remedy". The assessment of reasonableness, in that and all other connections, was inherent in the legal function of assessment of effectiveness.

11. He could accept Mr. Simma's proposal that article 14, subparagraph (*f*), should be deleted. Were the article to be retained, however, he wondered what point there was in limiting the condition to cases where it was the respondent State that denied the injured individual access to local remedies. Other, non-State actors might constitute obstacles to such access: mafia and terrorist organizations were obvious examples. Subparagraph (*f*) should be reformulated so as to take account of such situations.

12. Finally, he too thought that article 15 was unnecessary. In view of the traditional requirements regarding the burden of proof, it seemed unlikely that any judicial or

other body would feel constrained by that extremely complex additional provision.

13. Mr. FOMBA said that the rule on the exhaustion of local remedies was very important, especially from the teleological standpoint, and must in principle be applied in the strictest and most absolute manner.

14. With regard to article 14, subparagraph (*a*), in the first place there was a difference between option 1, on the one hand, and options 2 and 3, on the other, in that option 1 made no explicit reference to the idea of result. On the face of it, he could see no fundamental difference between options 2 and 3, but if a choice had to be made from among the three options, he would favour option 3, the purpose of which was implicit in option 1, for the reasons given by the Special Rapporteur.

15. The two provisions set out in subparagraphs (*e*) and (*f*) of article 14 seemed not to constitute specific categories, inasmuch as a proper reading of article 14, subparagraph (*a*), whether drafted in the form of option 1 or of option 3, would encompass the exceptions provided for in subparagraphs (*e*) and (*f*) of that article.

16. Thus, his position of principle was that a distinction must be drawn between two main hypotheses. The first would cover all those truly exceptional cases in which there were no local remedies to be exhausted. An example would be the situation of Rwanda in 1994, where, following the genocide, the judicial apparatus and all its premises and documents had been destroyed and its officers and staff decimated. The second hypothesis would cover all cases in which there was no reasonable possibility that the existing local remedies would be effective—cases in which there was a presumption of non-exhaustion because of an acknowledged risk that the remedies would not be effective. A number of such cases had been identified by the Special Rapporteur, and they would need to be carefully sifted so as to single out those most worthy of serious attention and credence. That would constitute a substantial task for judges and, in the first instance, for the Commission. One way of overcoming the difficulties might be to consider establishing some central mechanism to monitor and scrutinize local remedies, so as to simplify assessment of their application and effectiveness. In any event, it was his opinion that article 14 should now be referred to the Drafting Committee.

17. Mr. MANSFIELD said that, generally speaking, he was comfortable with the elements of article 14 introduced thus far, and with the Special Rapporteur's approach to the article as a whole. On subparagraph (*a*), he would join those who found the arguments in favour of option 3 convincing. As to subparagraph (*e*), there would seem to be substantial authority for the proposition that local remedies need not be exhausted where there had been undue delay in making the remedy available. What constituted undue delay would be a matter of fact to be judged in each case, but he tended to the view that the case should constitute a separate heading, rather than being covered by subparagraph (*a*), as a component of futility.

18. The case for a separate heading for the circumstances covered in subparagraph (*f*) was less clear. If the respondent State effectively prevented the injured alien from gaining access to the courts, then in practice there was certainly no reasonable possibility of an effective remedy. But he accepted that there could be cases where the respondent State created a situation that in practice denied the alien access to a remedy that was, on the face of it, available and apparently effective. Mr. Koskenniemi had been right to raise the point that reference should be made to cases where it was not the State but other actors within the State that precluded access. On balance he was inclined to favour including that matter as a separate heading and referring it to the Drafting Committee, which might ultimately conclude that the case need not be covered. In any event, it should be explored in more detail.

19. While he could find nothing objectionable in article 15, he wondered whether the material was included merely for the sake of completeness. What was needed would be determined in each particular case, and he was not convinced that there was a need for codification in that particular area. It might be better to omit article 15 and to include in the commentary some explanation of the reasons for excluding it.

20. The CHAIR, speaking as a member of the Commission, said he wished to pursue the example given by Mr. Koskenniemi. Suppose the mafia barred someone from exercising his or her rights in country A. He could readily agree that country A was involved in its own failure to make it possible for local remedies to be exhausted and therefore, in a certain sense, bore responsibility. What happened, however, if it was country B that made it impossible for country A to permit the exhaustion of local remedies? The rationale for suspending the rule on the exhaustion of local remedies in such a situation was not necessarily the same as in the first situation. There was a major difference between failure based exclusively on another country's having arrested an individual or cordoned off its territory, for example, and failure by the State itself to maintain law and order such that people would not go to court for fear of being shot to death on the courthouse steps. Would Mr. Koskenniemi care to comment on that?

21. Mr. KOSKENNIEMI said that, in a complex relationship of dependence where a third State could manipulate the State in which the claim had arisen to such an extent as to compel it to withhold local remedies, in his opinion the third State was involved in a wrongful act of a different type than the one represented in his own example. Insofar as the individual was concerned, however, it made no difference which State, the one in which the remedy existed or some other State, prevented the remedy from being used: the remedy was still unavailable.

22. Mr. BROWNLIE said he had to confess to continuing frustration with the way the debate was structured. The question of the voluntary link still remained off limits, and many of the specific issues now being discussed did not relate in a very obvious way to the normal problems of delay and the like. Mr. Koskenniemi's point led to a broader spectrum of circumstances in which individuals or even groups of individuals were required to exhaust

local remedies in a jurisdiction with which they perhaps had absolutely no connection. The example of Chernobyl could be cited: the organization involved in the disaster was not a State organization and, had they made any claim, the hill farmers of Cumberland and other parts of the United Kingdom, for example, would have been required to exhaust local remedies in the courts of Ukraine. Requiring groups of people that were not big corporations or well-funded bodies like Greenpeace to exhaust local remedies in such circumstances was oppressive. Because the Commission had not yet dealt with the question of voluntary link, however, the major question of the whole rationale behind the rule on the exhaustion of local remedies had to be left aside.

23. Mr. PELLET said he was surprised to hear the Chernobyl example cited and did not see why local remedies should not be exhausted in such a case. In the case of severe pollution provoked by the sinking of the *Amoco Cadiz*, for example, all the victims (communities, farmers, etc.) had combined forces to bring cases before the courts of the United States.

24. Mr. BROWNLIE said Mr. Pellet's remark only highlighted the fact that the basic rationale of the rule on the exhaustion of local remedies was not being discussed and that the Commission should be considering whether local remedies should or should not be excluded in specific cases. Instead, it was debating the general issue of what was oppressive, Mr. Koskenniemi having given the very useful example of local conditions that in reality made it dangerous and virtually impossible to use the local courts because of threats from local private organizations. The whole question whether the *locus in quo* provided legal aid, of what was oppressive and of the voluntary link, a question that he thought was absolutely basic, was not being discussed because the Commission was as yet precluded from addressing subparagraphs (*c*) and (*d*) of article 14.

25. Mr. SIMMA, recalling that the Commission had engaged in a brief exchange of views on Chernobyl-type disasters, said he had at that time drawn attention to the tensions between what the Commission was doing in the codification of general international law and developments regarding various treaty instruments. The Commission had included a provision on equal access in its draft articles on prevention of transboundary harm arising out of hazardous activities. That meant, for instance, that the farmers of Cumberland should have equal access to remedies available in Ukraine. Such provisions, which were found in almost all the state-of-the-art environmental treaties, encouraged the individuals who were affected and lived in other countries to make use of the remedies available in the country of origin of the pollution. What the Commission was doing in article 14, however, was in a sense to discourage people from doing that unless their connection to the country of origin was voluntary. That threw light on the overarching problem of fragmentation in international law. When the Commission did something in the field of general international law, it should keep in mind developments in more specific areas that might diverge from what it was doing.

26. Mr. Sreenivasa RAO said that the third-State problem raised by the Chair was essentially one of effective control of a territory. If the State which lacked control over the mafia nonetheless retained control over the overall territory and the third State had no control, the articles on State responsibility should be consulted to determine whether an internationally wrongful act could be attributed to the first State.

27. Mr. PELLET asked why, in the case of Chernobyl, persons injured outside the territory of Ukraine should not have to exhaust local remedies before diplomatic protection could be exercised on their behalf.

28. Mr. Sreenivasa RAO replied that he agreed with Mr. Simma that everyone who was affected by an incident within a territory, even if they were non-nationals, must have access to the courts and must be given an opportunity to exhaust local remedies.

29. Mr. TOMKA said that in the earlier discussion on Chernobyl he had queried the appropriateness of the example, because he had serious doubts as to whether the accident had been a breach of international law. It was certainly an issue of liability, but not one of responsibility. As he understood it, diplomatic protection was tied to responsibility, not liability. The Chernobyl incident was not in his view germane to the discussion of exhaustion of local remedies because it came under the rubric of liability for injurious consequences of acts not prohibited by international law, not that of responsibility for a breach of international law.

30. The CHAIR said he entirely agreed with that viewpoint but found the subject a fascinating one for discussion on the basis of a hypothesis that responsibility existed, even though it did not.

31. Mr. BROWNLIE said that people still seemed to be missing the point. If one assumed that a Chernobyl-type disaster struck in Ruritania, caesium salts from the radioactive cloud rained down on the United Kingdom, and hill farmers there were told they could not market their lambs but would be given compensation—in other words, that there was *prima facie* responsibility on the part of Ruritania for damage caused by a Chernobyl-type disaster and the installation that had caused the damage was not a State installation—then, according to one view of the law, the rule on the exhaustion of local remedies would have to be applied. It seemed merely common sense to say it would be oppressive for the small farmers to have to go to Ukraine, a society of which they had no experience, and find the funds to pursue remedies in that particular *locus in quo*. Precisely since the Commission had a mandate involving the progressive development of international law and was also concerned with human rights, it should in a logical fashion look into determining what were oppressive circumstances for individuals to have to exhaust local remedies in other jurisdictions.

32. Mr. OPERTTI BADAN said he fully agreed with Mr. Brownlie. Article 14, subparagraph (*f*), covered solely a situation in which the respondent State prevented access to local remedies. It failed to cover one in which the

obstruction operated with respect to the injured individual not as a consequence of an attitude of the respondent State, but rather as a result of a *de facto* situation that was not necessarily attributable exclusively to the respondent State. Other principles of procedural law could be recalled: for example, the old but valid adage about suspension of time limits, namely that the limits did not apply when, for good reason, the person concerned was prevented from complying with them. In other words, no negative consequences could be derived for the exercise of one's rights from the inability to meet a requirement. The draft would be significantly improved if the Commission did not limit the scope of article 14, subparagraph (*f*), to prevention by the respondent State but extended it to *de facto* situations which made it difficult to gain access to justice and consequently to exhaust local remedies.

33. Mr. PELLET said he was not sure he agreed with Mr. Brownlie entirely, though there was indeed food for thought in what he had said. One could not dispense with the question of when local remedies were exhausted by saying that it was when something was contrary to the general notion of human rights. One had to look at what rule had been violated, the violation of a rule *erga omnes*, for example, or whether injury had been caused to the common heritage of mankind, and so forth. In such cases, he agreed that local remedies did not need to be exhausted.

34. The position taken by Mr. Tomka and endorsed by the Chair about Chernobyl's not having entailed the responsibility of the State was untenable and raised the issue of whether liability had any content whatsoever. Responsibility definitely came into play for failure to respect the duty of prevention. The Soviet Union could not conceivably be considered to have complied with the obligation of prevention: otherwise the draft articles on prevention of transboundary harm arising out of hazardous activities adopted at the previous session served no purpose.

35. Ms. XUE said that in regard to the mafia example, it was still the responsibility of the respondent State to make sure that a remedy was provided without undue delay. In the situation suggested by the Chair, when country B prevented a claim from being made, effective control or the sovereignty of the respondent State was what mattered. Country B might have a certain influence on the respondent State, but the question was to what extent. If the pressure was such that the respondent State could not fulfil its international obligations, it would be a serious matter, but of a different nature. If, on the other hand, despite some pressure on it, the respondent State could still provide local remedies, that was quite different. In short, in the mafia example, there were no grounds for the respondent State to fail in its responsibility or for the claimant State simply to say there was a threat that led it to believe local remedies would not be available. It was a question of effective control or sovereign rights and duties on the part of the respondent State.

36. The Chernobyl example and Mr. Brownlie's argument about a voluntary link were good points. She wondered, however, if one was really talking about treatment of aliens in that kind of situation. Was it not really about extraterritorial effects? If the injured persons would not go to all the trouble of obtaining local remedies; their Government could submit an international claim on their behalf. That was the general practice. The principle of equal access was often advocated in international environmental matters. If that principle also applied, it would be contradictory for the voluntary link rule to come into play. In pollution damage cases, one had to look hard, first, at whether there was an international rule governing the international liability of the actor State; second, at whether injured parties could really use the access to justice that was theoretically designed for them; and third, at whether the case could be considered one of diplomatic protection or rather one of international liability for extraterritorial injury. Those issues should not be confused.

37. Mr. SIMMA said that Mr. Koskenniemi had initiated a debate on whether it was a good idea to limit article 14, subparagraph (*f*), to covering instances in which the respondent State did something intentionally, or whether a subjective element was involved. The overarching principle was set out in article 14, subparagraph (*a*), according to which the criterion was whether there was a reasonable possibility of an effective remedy. It would be nonsensical to say that if the respondent State prevented a person from exhausting local remedies, this person did not have to go through with the procedure, but that if a third party or even meteorological conditions denied access to the courts, the person still had to exhaust local remedies. The test had to be an objective one; the answer must not depend on whether the State in which the remedy could be provided was itself subjectively or intentionally standing in the way of such a remedy.

38. Mr. DUGARD (Special Rapporteur) said that article 14, subparagraph (*f*), had engendered an unexpectedly interesting debate. Mr. Gaja and Mr. Koskenniemi had envisaged situations in which an injured party could extraterritorially conduct legal proceedings through local lawyers or lawyers of the party's home State who might be given access to the territory in question. That pointed up the division between common law and civil law systems. In the common law system, the injured individual might have to give evidence in person before the court, and if the individual was not permitted to visit the respondent State, then no claim could be brought.

39. Article 14, subparagraph (*b*), dealt with waiver and estoppel. The rule on the exhaustion of local remedies was designed to benefit the respondent State, and consequently the respondent State could elect to waive it. That certainly could be done expressly, and whether it could be done tacitly would depend upon the circumstances. Waiver of the rule created some jurisprudential difficulties, and the distinction between procedural and substantive rules came into play. If the rule on the exhaustion of local remedies was procedural in nature, there was no reason why it should not be waived. It was simply a procedure that must be followed, and the respondent State could therefore dispense with it. The international wrong was not affected, and the dispute could be decided by an international tribunal.

40. If, on the other hand, the rule on the exhaustion of local remedies was one of substance, it could not be waived by the respondent State, because the wrong would only be completed after a denial of justice had occurred

in the exhaustion of local remedies or if it was established that there were no adequate or effective remedies in the respondent State. That explained why some substantivists did not deal with the subject and why, on a previous occasion, in adopting article 22 of the draft articles on State responsibility, the Commission had not referred to the question of waiver in the text of that provision or in the commentary. Admittedly, some substantivists, such as Borchard and Gaja, took the view that that could be reconciled with the substantive position, something he accepted. But that gave rise to jurisprudential debate. It was one of the reasons why he had argued that the procedure/substance debate could not simply be dismissed, although he had the impression that the Commission would decide to do so.

41. Waiver might be express or implied, or it might arise as the result of the conduct of the respondent State, in which case it might be said that the respondent State was estopped from claiming that local remedies had not been exhausted.

42. An express waiver might be included in an *ad hoc* arbitration agreement to resolve an already existing dispute; it might also arise in the case of a general treaty providing that future disputes were to be settled by arbitration. Such waivers were acceptable and generally regarded as irrevocable. Implied waivers presented greater difficulty, as could be seen in the *ELSI* case (para. 53 of the report): ICJ had been "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so" [para. 50 of the judgement]. Hence, there must be clear evidence of such an intention, and some jurists had suggested that there was a presumption, albeit not an irrebuttable one, against implying waiver. But when the intention to waive the rule on the exhaustion of local remedies was clear in the language of the agreement or in the circumstances of the case, it must be implied. It was impossible to lay down any general rule as to when such a waiver could be implied, but he gave four examples in the third report (paras. 56–59) in which special considerations might apply. The first was the case of a general arbitration agreement: where the respondent State had agreed to submit disputes to arbitration that might arise in future with the applicant State and where there was no mention of the rule on the exhaustion of local remedies, there was a presumption that waiver should not be implied. That seemed to follow from the decision in the *ELSI* case. Silence in a general arbitration agreement dealing with future disputes did not imply waiver. The second example was that of the question which had been addressed on one occasion before PCIJ, namely whether the filing of a declaration under the Optional Clause implied waiver. In the *Panevezys-Saldutiskis Railway* case, a dissenting judge of the Court had taken the view that it did, but the Court had not accepted that proposition, and since then, the practice of States suggested that that could not be the case. The third example was the case of an *ad hoc* arbitration agreement entered into after the dispute and where the agreement was silent on the rule on the exhaustion of local remedies. There, silence could be interpreted as waiver, but that was because the *ad hoc* agreement had been entered into after the dispute arose. The fourth example concerned the more difficult situation in which a contract between an alien and the host State impliedly waived the rule on the exhaustion of local remedies and the respondent State then refused to go to arbitration. If the State of nationality took up the claim in such circumstances, the implied waiver might also extend to international proceedings, but the authorities were divided on that point.

43. It could thus be concluded that waiver could not be readily implied, but that where there was clear evidence of an intention to waive on the part of a respondent State, it must be so implied. For that reason, he suggested that reference to implied waiver should be retained in article 14, subparagraph (*b*).

44. Similar considerations applied in the case of estoppel. If the respondent State conducted itself in such a way as to suggest that it had abandoned its right to claim the exhaustion of local remedies, it could be estopped from claiming that the rule on the exhaustion of local remedies applied at a later stage. The possibility of estoppel in such a case had been accepted by a Chamber of ICJ in the *ELSI* case and was also supported by human rights jurisprudence.

45. He wished to emphasize the need for article 14, subparagraph (*b*). Clearly, the respondent State had the power to expressly waive the rule on the exhaustion of local remedies. In certain circumstances, it might be possible to imply a waiver or to find that the respondent State was estopped from claiming that local remedies should be exhausted. Thus, the Commission must make some reference to implied waiver and estoppel, bearing in mind that they should not be easily accepted and would depend on the circumstances of the case.

46. As to subparagraphs (*c*) and (*d*) of article 14, he had suggested that the Commission should consider the provisions on voluntary link and territorial connection, which were closely linked. There was support for those rules, but it could also be adduced that the existing rule on the exclusion of local remedies might cover those two subparagraphs. When the Commission had considered the matter in respect of article 22 of the draft articles on State responsibility, it had been decided that it was unnecessary to include such provisions. It was one of the rare occasions in which he came to the defence of article 22, albeit without much enthusiasm. In his report, he raised the question of whether the Commission needed one or more separate provisions dealing with the absence of a voluntary link or a territorial connection. The debate on the subject had largely grown out of the *Aerial Incident of 27 July 1955* case, which had to do with whether Israeli nationals were required to exhaust local remedies in Bulgaria before an international claim could be brought against the latter country as a result of an El Al aircraft's being shot down over Bulgaria. Clearly there had been no voluntary link between the injured parties and Bulgaria. Meron had pointed out that in all the traditional cases dealing with the rule on the exhaustion of local remedies, there had been some link between the injured individual and the respondent State, taking the form of physical presence, residence, ownership of property or a contractual relationship

with the respondent State.[5] Meron and others had asserted that diplomatic protection had undergone major changes in recent years. In the past, diplomatic protection had been concerned with cases in which a national had gone abroad and was expected to exhaust local remedies before proceeding to the international level. Today, however, there was the problem of transboundary environmental harm; he had cited the example of Chernobyl and the *Aerial Incident of 27 July 1955* case. Obviously, those were different types of situations from those in the past, when, say, an American national went off to a country in Latin America, proceeded to exploit the local people and, having gotten into trouble, called for the assistance of Uncle Sam. Those who supported the adoption of a voluntary link or territorial connection exception to the rule on the exhaustion of local remedies emphasized that in the traditional cases there had been an assumption of risk on the part of the alien in the sense that he had subjected himself to the jurisdiction of the respondent State and could therefore be expected to exhaust local remedies.

47. Unfortunately, there was no clear authority on the need to include a separate rule. Judicial decisions were ambiguous. Those who favoured an exception to the rule on the exhaustion of local remedies had referred to the *Interhandel* case, in which ICJ had stated that "it has been considered necessary that the State where the violation occurred should also have an opportunity to redress it by its own means" [p. 27 of the judgment of 21 March 1959]. Amerasinghe had argued that the reference to the State in which the violation had occurred indicated that there must be some territorial connection.[6] Again, in the *Salem* case an arbitral tribunal had declared that "as a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence". But the question of whether there should be an exception to the rule on the exhaustion of local remedies had not arisen in either of those cases.

48. The issue had been set out more clearly in the *Norwegian Loans* case, in which France had argued that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway. The Court had not found it necessary to decide on the matter, but in a dissenting opinion Judge Read had advanced the view that there had been no authority for the French position. The issue had been argued persuasively in the *Aerial Incident of 27 July 1955* case by Rosenne, who had stressed that "all the precedents show that the rule is only applied when the alien, the injured individual, has created, or is deemed to have created, *a voluntary, conscious and deliberate connection* between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there" (para. 74 of the report). Again, the Court had not needed to decide on the matter.

[5] T. Meron, "The incidence of the rule of exhaustion of local remedies", *BYBIL, 1959*, vol. 35, p. 83; see especially p. 94.

[6] C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990), p. 145.

49. Cases involving transboundary harm tended to suggest that it was not necessary to exhaust local remedies. In the *Trail Smelter* case, local remedies had not been insisted upon. There had been no local remedies to exhaust in Canada or, for that matter, in the United States. But the *Trail Smelter* case could also be explained by saying that it dealt with a direct injury by the respondent State (Canada) to the claimant State (the United States) and that there had been no need to exhaust local remedies in that situation.

50. The proponents of the requirement for a voluntary link or territorial connection had made a strong case. The opponents were less persuasive, and it was misleading for them to cite the *Finnish Ships Arbitration* and the *Ambatielos* and *ELSI* cases (para. 76 of the report), where there had been no close connection between the individual and the respondent State. Yet there had indeed been some link, albeit not a close one, between the injured individual and the respondent State. Proponents of the voluntary link requirement had never equated it with residence. If residence were the requirement, that would exclude the application of the rule on the exhaustion of local remedies in cases of the expropriation of foreign property and contractual transactions where the injured alien was not permanently resident in the respondent State. State practice was not clear. In paragraph 79 of the report, he pointed out that, where a State had been responsible for accidentally shooting down a foreign aircraft, in many cases it had not insisted that local remedies must first be exhausted. The same applied to transboundary environmental harm; there, he had cited the Gut Dam Arbitration Agreement,[7] in which Canada had waived that requirement, and the Convention on International Liability for Damage Caused by Space Objects, which did not require exhaustion of local remedies either.

51. Early efforts to deal with codification (paras. 81–82 of the report) were silent on this subject because they had usually focused on State responsibility for damage done in the State's territory to the person or property of foreigners and on the traditional situation in which an alien had gone to another State to take up residence and do business. The Commission had refrained from including an exception to the local remedies rule on the matter because, as neither State practice nor judicial decisions had dealt with it, the Commission had felt that it was best to let it be addressed by existing rules and to allow State practice to develop, if necessary in accordance with a specific exception.

52. There was good reason to give serious consideration to including the exceptional rules in subparagraphs (*c*) and (*d*) of article 14. It seemed impractical and unfair to insist that an alien be required to exhaust local remedies in the four situations to which he referred in paragraph 83 of the report: transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects; the shooting down of aircraft outside the territory of the respondent State or of aircraft that had accidentally entered its airspace; the killing of a national of State A by a soldier of State B stationed on the territory of State A; and the transboundary abduction of a foreign national from either his home State or a third State by agents of the respondent

[7] Reproduced in *ILM*, vol. 4, No. 3 (May 1965), p. 468.

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[8] (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.

[8] 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. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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

[Agenda item 4]

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

1. Mr. 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[4] 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

[1] For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

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

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

[4] See 2712th meeting, footnote 13.