

Document:-
A/CN.4/SR.2719

Summary record of the 2719th meeting

Topic:
<multiple topics>

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

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it could add voluntary-link reasoning in the commentary, but not as an exceptional clause.

74. Ms. ESCARAMEIA endorsed the view of those members who felt that the question of voluntary link was a substantive question on which the Commission was very divided, and she agreed with Mr. Mansfield and others that it could not be included in subparagraph (a) of article 14. She did not think that the Drafting Committee was the appropriate place to resolve substantive differences of opinion. In any case it had a limited membership and did not necessarily reflect the differences of opinion in plenary. Was there not some mechanism for informal consultations in such cases?

75. The CHAIR said that informal consultations could be held, but that normally the matter was sent to the Drafting Committee which, although limited in membership, was open to all members of the Commission. If members did not endorse the Special Rapporteur's suggestions, another means of reaching agreement would have to be found.

76. Mr. PAMBOU-TCHIVOUNDA said that the comments by members had shown how difficult it was to achieve progressive development of law on such an old question. He did not think that the Commission should take the risk of considering something other than diplomatic protection. He was in favour of a traditional approach to the subject and was thus strongly opposed to including the so-called concept of voluntary link in the draft articles.

77. Mr. SIMMA said he shared Mr. Brownlie's view that the voluntary link concept did not belong in the list of exceptions to the rule on the exhaustion of local remedies. He therefore suggested submitting article 14 on two exceptions to the Drafting Committee and giving further thought to the question of voluntary link, either by holding informal consultations or by mandating the Special Rapporteur to produce a report incorporating the various views on the subject for the upcoming session. The Commission could still add something after article 10 or 11 if the preponderant view turned out to be in favour of voluntary link. The Commission could proceed with article 14, because voluntary link did not constitute an exception to the rule on the exhaustion of local remedies.

78. Mr. CHEE, noting that paragraph 83 (b) referred to the case of the shooting down of an aircraft outside the territory of the respondent State or of aircraft that had accidentally entered the respondent State's airspace as an exception to the rule on the exhaustion of local remedies, asked what happened if there were no relations between two States because of lack of recognition. When Korean Airlines flight 007 was shot down, the case had been taken up by ICAO, but as the Soviet Union and the Republic of Korea had not recognized each other, even if the injured persons had wanted to exhaust local remedies, it would not have been possible. Hence the need to take into account that recognition of a State was a precondition for the exhaustion of local remedies.

79. Mr. TOMKA said that the Commission should be careful about including the issue of voluntary link in the discussion of the justification of the rule on the exhaustion of local remedies, because it might then be argued that if there was no voluntary link, the rule did not apply. He was opposed to including the concept of voluntary link as an exception, because the rationale for the exhaustion of local remedies was to give a State an opportunity to redress an injury; only when it failed to do so could a local claim be transformed into an inter-State one. All other exceptions listed in article 14 had to do either with a State's legal system or with its behaviour, whereas the non-voluntary link exception as proposed was not related to the State, but to a person. The rule on the exhaustion of local remedies protected a State from international claims by giving it an opportunity to redress the injury caused to aliens. For that reason, there was no justification for including the absence of voluntary link as an exception.

80. Mr. OPERTTI BADAN said that he endorsed Mr. Simma's proposal that the Special Rapporteur should be asked to report on the subject at greater length and agreed with Mr. Brownlie that if the subject of voluntary link was referred to the Drafting Committee, the Commission first had to define what the concept meant.

The meeting rose at 1 p.m.

2719th MEETING

Tuesday, 14 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, 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. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (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. DUGARD (Special Rapporteur), summing up the debate on the topic of diplomatic protection, said that there seemed to be support for his desire to confine the draft articles to issues relating to the nationality of claims and to the rule on the exhaustion of local remedies so that it might be possible to conclude the consideration of the topic within the current quinquennium. He realized that Mr. Pellet disliked the term “nationality of claims”, viewing it as having a common-law connotation; however, in the *Reparation for Injuries* case, it had been used by the President of ICJ, who was not an anglophone. In any case, the term “nationality of claims” was unlikely to appear in the draft articles.

2. Members of the Commission had also given their views on the issues which were raised in paragraph 16 of his third report (A/CN.4/523 and Add.1) and were linked to the nationality of claims, but did not traditionally fall within that field. There had been no support for a full study of the first of those issues, functional protection by organizations of their officials; however, several speakers had stressed the need to distinguish between diplomatic protection and functional protection in the commentary, with special reference to the Court’s reply to the second question in the *Reparation for Injuries* case, on how the exercise of functional protection by the United Nations was to be reconciled with the right of the State of nationality to protect its nationals; the question would be dealt with in the context of competing claims of protection. He would deal with that question in the commentary to article 1, but it might be necessary to include a separate article on the subject. There seemed to be very little support for the second proposal contained in paragraph 16 of the report, that of expanding the draft articles to include the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the latter’s crew and passengers. However, it had been suggested that the issue should be dealt with in the commentary with special reference to the *M/V “Saiga” (No. 2)* case, and that would be done. The third case mentioned in paragraph 16, in which one State delegated the right to exercise diplomatic protection to another State, did not arise frequently in practice, and there was very little discussion of it in the literature. Nevertheless, he would investigate the matter further and hoped for the assistance of the members of the Commission who had made a study of the subject, particularly Mr. Daoudi. The fourth issue which might fall within the scope of the study was the exercise of diplomatic protection by a State which administered, controlled or occupied a territory. With the exception of Mr. Pellet, who had been strongly

in favour of its inclusion, there had been little support for that proposal. Finally, some members had suggested that he might consider the question of protection by an international organization of persons living in a territory which it controlled, such as Kosovo or East Timor. There had been some support for that idea, but the majority of the members believed that the issue might be better addressed in the context of the responsibility of international organizations.

3. On the subject of preliminary matters, Mr. Candiotti had raised the question of “clean hands” or, as Mr. Pellet had put it, the question whether a private individual could benefit from diplomatic protection when he himself had not complied with the rules of international or domestic law. He would deal with that question in his addendum on the Calvo clause, in the commentary to article 5 in the context of the *Nottebohm* case and in connection with the nationality of corporations in the context of the *Barcelona Traction* case. In addition to the addendum on the Calvo clause, paragraph 13 of his third report mentioned another addendum on the denial of justice. The current debate had revealed that the majority of the members were hostile or, at best, neutral regarding the inclusion of that question in the study. Several members had stressed that it was a primary rule; however, as Mr. Operti Badan had pointed out, denial of justice did arise in a number of procedural contexts and was thus a form of secondary rule. The content of the notion of denial of justice was, to put it mildly, uncertain. At the beginning of the twentieth century, it had involved a refusal of access to the courts; Latin American scholars had included judicial bias and delay of justice, while others took the view that denial of justice was not limited to judicial action or inaction, but included violations of international law by the administration and the legislature, thereby covering the whole field of State responsibility. At present, the general view was that denial of justice was limited to acts of the judiciary or judicial procedure in the form of inadequate procedure or unjust decisions. In any case, it featured less and less in the jurisprudence and had been replaced to a large extent by the standards of justice set forth in international human rights instruments, particularly article 14 of the International Covenant on Civil and Political Rights. As the Commission clearly believed that the concept did not belong to the study, he did not intend to produce an addendum on it.

4. Articles 12 and 13 had been subjected to considerable criticism. Mr. Brownlie had suggested that they did not offer a useful framework for the consideration of the topic and that it would have been more helpful to offer a rationale of the rule on the exhaustion of local remedies by considering the reasons for which international law had established it, such as the existence of a voluntary link between the alien and the host State and the need to have facts determined expeditiously, something which local courts could do more rapidly. Mr. Brownlie had also made that point;⁴ however, he went on to say that the function of the rule on the exhaustion of local remedies was easier to discern if three situations were distinguished: those advanced by Fawcett,⁵ on which he had relied as a

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 I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), pp. 496–497.

⁵ See 2712th meeting, footnote 11.

framework for articles 12 and 13 and which thus seemed nevertheless to provide a useful way of approaching the subject. Moreover, his second report⁶ had included an introductory section on the rationale of that rule, but it had not been particularly well received by the Commission. He would remedy the omission in the commentary on article 10. In any event, it must be acknowledged that articles 12 and 13 had not met with general approval and had been viewed as too conceptual, irrelevant, premised on the dualist position and overly influenced by the distinction between procedure and substance, although in reality they were based on a debate which featured very prominently in the literature, had important practical implications and provided a foundation for the Commission's earlier attempt to codify the rule on the exhaustion of local remedies. Of course, some criticisms of article 13 were well founded. For example, Mr. Tomka and Mr. Pellet had noted that diplomatic protection came into play where an international rule had been violated, whereas article 13 dealt mainly with situations where no international wrong had yet occurred. Ms. Escameia and others had pointed out that article 13 dealt mainly with the issue of when an internationally wrongful act was committed; thus, it clearly did not fall under the rule on the exhaustion of local remedies. Although some members had supported article 12, several others had suggested that the Drafting Committee should simply bear it in mind when drafting article 10. He therefore proposed that articles 12 and 13 should not be referred to the Committee, a solution which would at least have the advantage of avoiding the question whether the rule on the exhaustion of local remedies was procedural or substantive in nature and would leave members free to hold their own opinions on the matter.

5. With regard to subparagraphs (a), (e) and (f) of article 14 on the question of effectiveness, Mr. Pellet had made the helpful suggestion that the word "effectiveness" should not be included in article 10. Several members of the Commission had stated at its preceding session that the concept of effectiveness should be dealt with only as an exception, as had delegations to the Sixth Committee of the General Assembly. He hoped that the Commission's silence on that subject indicated support for that position. There had been nearly unanimous support for referring article 14, subparagraph (a), to the Drafting Committee; most members had favoured option 3, although there had been some support for a combination of options 2 and 3; there had been little support for option 1. He therefore suggested that subparagraph (a) should be referred to the Committee with a mandate to consider both options 2 and 3. Opinions differed on subparagraph (e), on undue delay; one or two members had opposed it, while others had suggested that it might be dealt with under subparagraph (a), but the majority had preferred to deal with it as a separate provision. He therefore proposed that it should be referred to the Committee, bearing in mind Mr. Gaja's suggestion that it should be made clear that the delay was caused by the courts and Mr. Pellet's suggestion that the words "respondent State" should be avoided in several subparagraphs of the article. There had been some support for referring subparagraph (f) to the Committee, possibly with language covering the situation where a mafia-like syndicate rather than the respondent State prevented the indi-

vidual from gaining access to the local courts. However, the majority of members had taken the view that it would be better to deal with that issue under subparagraph (a). He therefore recommended that subparagraph (f) should not be sent to the Drafting Committee.

6. As to article 14, subparagraph (b), there had been strong support for the view that express waiver should constitute an exception to the rule on the exhaustion of local remedies, but many members had been troubled by the notion of implied waiver and had expressed the view that it should be clear and unambiguous. On the other hand, even those members had not denied that the Drafting Committee should consider the question. He therefore suggested that subparagraph (b) should be referred to the Committee with a recommendation that the latter should exercise caution regarding implicit waiver and should consider treating estoppel, to which Mr. Pellet had objected because of its common law associations, as a form of implicit waiver.

7. Subparagraphs (c) and (d) of article 14 had provoked a stimulating debate, but the conclusions to be drawn from it were not clear. There had been general agreement that, whatever became of subparagraph (c), subparagraph (d) was one of its components and did not warrant separate treatment. Many members had expressed the view that, while subparagraph (c) embodied an important principle, it was not so much an exception as a precondition for the exercise of diplomatic protection. Ms. Xue and Mr. Tomka had argued that cases of transboundary harm involved liability in the absence of a wrongful act and should be excluded completely, while Mr. Rosenstock had maintained that those issues could be dealt with in the context of reasonableness under article 14, subparagraph (a). That had been his own original proposal; it was unnecessary to include article 14, subparagraphs (c) and (d), because, in most cases, they would be covered by article 11 on direct injury or article 14, subparagraph (a), on effectiveness. Mr. Simma had put forward the view that the subject should be addressed in a separate report, while others had suggested that it was a matter for informal consultations. He thus found it difficult to determine what the Commission wished to do with those two provisions.

8. Article 15 on the burden of proof had been considered innocuous by some and too complex by others; a large majority had been opposed to its inclusion. He therefore could not recommend that it should be referred to the Drafting Committee.

9. Mr. PELLET said that the Special Rapporteur had provided a very objective account of the Commission's debates on the topic, in the light of which he had expressed justifiable misgivings about referring article 14, subparagraph (c), to the Drafting Committee. Nevertheless, it would be a pity if that provision were to be eliminated, since it had generated a substantial debate, in the course of which several members of the Commission had had second thoughts. Subparagraph (c) should be referred to the Committee, on the understanding that the Committee would be free to make it a separate provision or to retain it among the exceptions—although to do so would, in his view, be a mistake.

⁶ *Ibid.*, footnote 2.

10. The CHAIR, speaking as a member of the Commission, said it was his understanding that the Special Rapporteur was not proposing that article 14, subparagraph (c), should be deleted, but that the Drafting Committee should consider ways of incorporating it in article 14, subparagraph (a).

11. Mr. TOMKA said that the proposal to make the concept of a voluntary link an exception to the rule on the exhaustion of local remedies appeared not to have gained sufficient support among members of the Commission to justify referring article 14, subparagraph (c), to the Drafting Committee. The Committee could take account of the various views expressed in formulating article 14, subparagraph (a), and articles 10 and 11, or else refer to them in the commentary to those articles.

12. Ms. ESCARAMEIA said that, like the Special Rapporteur, she had the impression that most members did not favour treating the voluntary link as an exception. If article 14, subparagraph (c), was referred to the Drafting Committee or incorporated in article 14, subparagraph (a), or another provision, the Commission would have failed to address a substantive point, namely, that it was not an exception but a precondition. She reiterated her proposal that informal consultations should be held, pointing out that, although all members of the Commission could attend its meetings, membership of the Committee was nevertheless restricted. Another possibility would be to hold a special meeting of the Committee, in which all members of the Commission could participate on an equal footing.

13. The CHAIR said that there seemed to be two conflicting points of view, with some regarding the voluntary link as a *sine qua non*, while others saw it more as a factor to be taken into account. It seemed to him that the Special Rapporteur's proposal was a balanced one, since it did not make the absence of a voluntary link a factor with automatic effect.

14. Mr. Sreenivasa RAO said that some flexibility was necessary in order to take account of the differing positions concerning the treatment of the concept of a voluntary link; however, the point was too important to be treated simply as a kind of footnote to article 14, subparagraph (a).

15. Mr. BROWNLIE said that to redistribute the content of article 14, subparagraph (c), among other articles, as envisaged by the Special Rapporteur, might be tantamount to destroying it. Whatever fate lay in store for the provision, many members considered that it was a precondition and not an exception; accordingly, it should be discussed in the context of article 10.

16. Mr. DUGARD (Special Rapporteur) said his fear was that, if the point was not dealt with at the current session, it might not receive its fair share of attention at the next session. Accordingly, he would be willing to reformulate articles 10, 11 and 14 so as to reflect some of the views expressed in the debate. He would have no objection to referring only article 14, subparagraph (a), to the Drafting Committee.

17. Mr. PELLET reiterated his view that, as the vast majority of members seemed to agree that article 14, subparagraph (c), reflected a fundamental principle, it would be logical to refer it to the Drafting Committee, which would then decide whether to retain it as a paragraph of article 14, to redraft it as a separate article or to redistribute its content among other articles, as proposed by the Special Rapporteur.

18. Mr. TOMKA said he seriously doubted that a voluntary link was a precondition for the exercise of diplomatic protection. To adopt such a view would be tantamount to saying that, in the *Aerial Incident of 27 July 1955* case, Israel had had no right to demand compensation from Bulgaria for its shooting down of an Israeli aircraft in Bulgarian airspace—an assertion which would turn the voluntary link argument against the party invoking it. He thus thought it would be wiser to suspend the debate on article 14, subparagraph (c), and to give the Special Rapporteur an opportunity to submit a new proposal on the concept of a voluntary link, as he had expressed his willingness to do.

19. Mr. SIMMA asked whether, on the assumption that the Special Rapporteur was to submit a new proposal at the next session on how to deal with the question of the voluntary link, that proposal would be referred directly to the Drafting Committee, or whether a new debate in plenary would first be necessary.

20. Mr. DUGARD (Special Rapporteur) said that his proposal had simply been to ensure that the concept of a voluntary link was adequately covered in articles 10 and 11 and article 14, subparagraph (a). If the Commission felt that the matter should be dealt with more substantially, it might be better to refer it to informal consultations, which would make it possible to reach a consensus while the arguments were still fresh in the memory, rather than starting again from scratch at the next session.

21. Mr. KAMTO, recalling that the Special Rapporteur had said he had no intention of developing the concept of denial of justice, said that it would be useful to give some indication, either in the report or in the commentary, of the extent to which the situations covered in article 14 coincided with or differed from the concept of denial of justice, without, however, devoting a separate provision to that question.

22. Mr. BROWNLIE said that, in considering article 14, subparagraph (c), the Commission should not confine itself to the question whether the concept of a voluntary link was part of positive law, which was not certain, but that it should be tackled in the framework of progressive development, which was part of the Commission's mandate. In any case, it was a precondition, not an exception. It would be a good idea for the Special Rapporteur to prepare a draft text on the voluntary link, giving a definition of that concept, which merited a serious study in the course of which, *inter alia*, its limits could be defined.

23. Mr. PAMBOU-TCHIVOUNDA said that informal consultations would probably not result in a reconcilia-

tion of opposing positions; consequently, the question of the inclusion of the concept should be put to the vote.

24. Ms. XUE said it was obvious from the debate that the issue of voluntary link was a matter of substance and that to further prolong the debate on the question would lead nowhere. The Special Rapporteur should be given a chance to propose a new formulation taking account of all the views expressed—a course which would prove increasingly difficult if the debate was allowed to continue—any longer.

25. Mr. OPERTTI BADAN said that the problem was not one of form but of substance. To incorporate article 14, subparagraph (c), in article 14, subparagraph (a), would simply be an expedient. It was first necessary to have a proper discussion of the question of voluntary link, which, as the examples cited showed, was an important one.

26. Mr. MANSFIELD said the Special Rapporteur's idea that the wording of articles 10 and 11 and article 14, subparagraph (a), should take account of the opinions expressed during the discussion was extremely constructive. The subject was an important one, but he was not sure that informal consultations would advance the discussion on it. It would be preferable to wait to see the results of the work to be done by the Drafting Committee and the Special Rapporteur.

27. Mr. PELLET said he did not think informal consultations on the matter would be useful. As to whether the question was an exception or a condition, he thought it was a case of differing perspectives that had no practical implications. From the Special Rapporteur's standpoint, the exhaustion of local remedies was compulsory, except where no voluntary link existed; in other words, the absence of a link constituted an exception to the rule. From another standpoint, the existence of a voluntary link was a condition that had to be met in order for the exhaustion of local remedies to be required. He himself would prefer to look at the problem from another point of view by referring to a "fortuitous link". In principle, prior to any international action, local remedies had to be exhausted, but if the link with the State was fortuitous, there were no grounds for making that a requirement. Seen in that way, it was clearly an exception. In any event, he proposed that the matter should be referred to the Drafting Committee, as was the usual practice.

28. Mr. SIMMA, noting that there was a difference of opinion on whether the absence of a voluntary link constituted an exception to the rule on the exhaustion of local remedies, said that it would be unwise to refer article 14, subparagraph (c), to the Drafting Committee at the present stage. He therefore suggested that the Commission should postpone its discussion on the matter and request the Special Rapporteur to hold informal consultations and report on their results as soon as possible.

29. Mr. CANDIOTI said that he supported the proposal made by Mr. Simma.

30. Mr. CHEE said he sincerely hoped that the Commission would give further consideration to the question whether the rule on the exhaustion of local remedies applied in the absence of a voluntary link, as it was a substantive issue. He would like the absence of diplomatic relations between the injured State and the respondent State to be included among the examples of exceptions to the rule cited by the Special Rapporteur in paragraph 83 of his third report.

31. Mr. PAMBOU-TCHIVOUNDA, referring to the term "fortuitous link", which Mr. Pellet had suggested as a replacement for the term "voluntary link", said that, first of all, the problem was not merely linguistic: the concept of "voluntary link" had certain implications, and an in-depth analysis should be made of whether it facilitated the discussion of diplomatic protection. Second, it remained to be seen whether the concepts of "voluntary link" and "fortuitous link" overlapped.

32. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to refer subparagraphs (a), (b), (d) and (e) of article 14 to the Drafting Committee, to delete articles 12, 13 and 15 and article 14, subparagraph (f), and to suspend the discussion on article 14, subparagraph (c), for the time being, on the understanding that it would come back to it at a later stage.

It was so decided.

Reservations to treaties⁷ (A/CN.4/526 and Add.1-3,⁸ A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

33. Mr. PELLET (Special Rapporteur), presenting the introduction of his seventh report on reservations to treaties (A/CN.4/526 and Add.1-3), said that it was essentially a recapitulation for retrospective and even didactic purposes to sum up what had already been done and what still needed doing, especially for the benefit of new members. He described the Commission's earlier work and decisions on the topic, placing them in context and explaining how the Commission had come to include the item on its agenda by taking the unusual step of separating it from the broader topic of the law of treaties, which had already been codified. In so doing, the Commission had taken two important decisions at its forty-seventh session on which he hoped it would not go back: first, that the Vienna rules on reservations, which were on the whole satisfactory, however ambiguous and defective they might be, would not be challenged unless there was an urgent need to do so; and, second, and as a consequence of the first decision, that the Commission would adopt a guide to practice which would, in principle, not become a treaty. It was against that background that, at the Commission's

⁷ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

⁸ See footnote 3 above.

forty-eighth session, he had submitted in his second report a “provisional plan of the study”⁹ to which he had held more or less precisely, even though the work had gone more slowly than planned, for a number of reasons, including the formidable complexity of the topic, which stood at the crossroads of fairly fundamental problems of general international law and, in any event, of the law of treaties. Progress had nevertheless been made: to date, the Commission had adopted 41 draft guidelines, including 30 on the definition of reservations and interpretative declarations and 11 on the formulation of reservations. At its preceding session, it had transmitted 17 new draft guidelines on all the technical matters relating to the formulation of reservations to the Drafting Committee, which had been unable to consider them for lack of time but was to do so at the current session.

34. All the draft guidelines were reproduced towards the end of the seventh report, which set out in normal print the draft guidelines that had already been adopted definitively by the Commission on first reading and were not supposed to be reconsidered, at least until the consideration of the Guide to Practice on first reading had been completed. That was not true, however, of the provisions on conditional interpretative declarations, which, it had been agreed, would be abandoned if the regime applicable to them proved to be the same as that for reservations. He was neutral on that point. The draft guidelines which he had proposed in his sixth report were also set out in italics¹⁰ at the Commission’s preceding session and had been referred to the Drafting Committee. The Commission had not had an opportunity to discuss them in plenary, at least not yet. The same was true for draft guideline 2.1.3 (Competence to formulate a reservation at the international level), for which he had proposed two versions that differed only in form and not in substance, most members of the Commission having preferred the longer of the two. It was up to the Committee to choose between them.

35. The seventh report also contained a new text that was to be discussed in plenary, namely, draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations), which was a natural extension of draft guidelines 2.1.6 (Procedure for communication of reservations) and 2.1.7 (Functions of depositaries). Those provisions took up the idea of the “depositary as letter-box” on which articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereafter the 1986 Vienna Convention) had been based. At the preceding session, the idea had on the whole been supported by the members of the Commission, although Mr. Gaja and others had felt that, if a reservation was prohibited by a treaty, the depositary had to be able to reject it. He had to admit that he had not been immediately won over by that argument, if only because the idea of “prohibited reservation” was not always easy to understand, even though, in practice, some depositaries readily rejected reservations that were manifestly impermissible. It appeared that, before adopt-

ing a draft guideline along those lines, the best course of action would probably be to ask States for their opinions on “whether it lies with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty”.¹¹ The responses given in the Sixth Committee, while not entirely conclusive, did not go against the idea of enlarging the functions of the depositary. He was therefore proposing a middle course, namely, to agree not that the depositary could simply reject an impermissible reservation, but that he could draw the author’s attention to what seemed manifestly impermissible. In the event that the reserving State balked and maintained its reservation, the depositary would transmit it, together with the text of the exchange of views.

36. The inclusion of that new draft guideline would have the advantage that, without restricting the depositary to the role of a letter-box or making him the guardian of the treaty, it would allow him to say no, to speak out on a reservation that was manifestly impermissible. That practice seemed in fact to be discreetly followed by institutional depositaries such as the United Nations, OAS and the Council of Europe. The problem was that it was difficult to determine what was “manifestly impermissible”. It could be said that a reservation prohibited under article 19, subparagraphs (a) and (b), of the Vienna Conventions of 1969 and 1986 was “manifestly impermissible”, but it was not always easy to determine when a reservation was prohibited or, *a contrario*, permitted. It could also be said that draft guideline 2.1.7. *bis* was not in keeping with the trend which had taken shape more and more clearly during the preparatory work for the 1969 Vienna Convention towards making the depositary simply a channel of communication. He had no very firm ideas on that point, although he did lean towards referring the draft guideline to the Drafting Committee, which could always improve its wording. In short, the provision did not give the depositary the final word; it did not allow him to take a decision *erga omnes*, but simply gave him a useful warning function, something that fit in quite well with the general idea of the “dialogue on reservations”, a fruitful and useful concept.

37. For now, he invited the members of the Commission to indicate whether they wished to refer draft guideline 2.1.7 *bis* to the Drafting Committee so that it could, as was only logical, examine it together with draft guidelines 2.1.6 and 2.1.7, which were already before it. With that in mind, he would postpone his presentation of section C of the introduction to his seventh report, entitled “Recent developments with regard to reservations to treaties”.

38. Mr. PAMBOU-TCHIVOUNDA said that, in his seventh report, the Special Rapporteur opened new, interesting avenues with regard to the modification and permissibility of reservations to treaties and to what the Special Rapporteur had rightly referred to as sensitive questions relating to the effects of reservations. He agreed wholeheartedly with the Special Rapporteur on three points. First, he endorsed the idea that the Commission should not go back over the Vienna rules. Second, he subscribed

⁹ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 48, para. 37.

¹⁰ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1-3.

¹¹ *Ibid.*, vol. II (Part Two), p. 18, para. 25.

to the view that it should not waste time drawing a distinction between reservations and conditional interpretative declarations, but should instead try to define a system which applied to both. Third, and that was an essential point, he fully endorsed the Special Rapporteur's opinion about the inclusion in the guidelines of draft guideline 2.1.7 *bis*. However, he stressed the importance of a fundamental question which the Special Rapporteur himself had had the presence of mind to raise, namely: What was an impermissible reservation? Was it, say, a prohibited reservation? As to the word "manifestly", if the impermissible nature of the reservation was clear, there was no dilemma for the depositary.

39. Draft guideline 2.1.7 *bis* reconciled the desire for the flexibility needed to manage the dialogue on reservations with the requirement of safeguarding both the universality of the group of parties to the treaty and the universality of the treaty's provisions. Consequently, he believed that it should be referred to the Drafting Committee.

40. Mr. TOMKA drew the attention of the English-speaking members of the Commission to a technical problem that might complicate their work. In the English version of the report of the Special Rapporteur, which contained all the draft guidelines adopted on first reading by the Commission or proposed by the Special Rapporteur, a number of draft articles appeared in italics, unlike in the French version. That gave the impression that they had not yet been adopted by the Commission, whereas it was actually a typographical error. The draft guidelines concerned, namely 2.2.1, 2.2.2, 2.2.3, 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4, 2.4.5, 2.4.6 and 2.4.7, had in fact been adopted by the Commission on first reading.

41. The CHAIR thanked Mr. Tomka for his correction, which was important for the work under consideration.

42. Mr. KAMTO, referring only to draft guideline 2.1.7 *bis*, in keeping with the Special Rapporteur's wishes, said that at first glance it was attractive, but it raised legal problems, above all of a practical nature. At the legal level, it introduced the depositary into the dialogue on reservations, because the depositary no longer merely took note of the reservation but evaluated it. Thus, there was no longer simply a dialogue between two States. That reminded him of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID), and article 36, paragraph 3, of which provided that the ICSID Secretary-General could refuse to register a request for arbitration if the dispute was manifestly outside the Centre's jurisdiction. He noted that the word "manifestly" was used. The practice showed that the interpretation of that provision had been very restrictive and that, in fact, the Secretary-General of ICSID had left it to the court to judge whether an arbitration request was justified. The case of impermissible reservations was a comparable situation, and Mr. Tomka thought that it involved a problem. If it was left to the depositary to assess the permissibility of a reservation, he assumed in part the role of States. Draft guideline 2.1.7 *bis*, and its paragraph 2 in particular, also gave rise to a practical problem. The guideline provided that, if the author of a manifestly impermissible res-

ervation maintained the reservation, the depositary must communicate to States the text of the exchange of views which it had had with the author of the reservation. The text did not say for what purpose. Must States react? If so, within what time period? Those were essential questions which had not been resolved. As interesting as the draft guideline was, it might impede the dialogue on reservations by introducing those new elements.

43. In conclusion, he said that draft guideline 2.1.7 *bis* posed more problems than it solved at both the legal and the practical levels, and he was puzzled, if not to say that he had reservations, about its being referred to the Drafting Committee. The Commission should first consider it in greater depth in plenary.

44. Mr. DAOUDI thanked the Special Rapporteur for his very useful presentation of a truly difficult subject. As the Special Rapporteur had explained, draft guideline 2.1.7 *bis* represented a compromise between two approaches, the one regarding the depositary as a simple "letter-box" and the other giving him some discretionary power. Both approaches had their supporters in the Commission. He wondered whether all depositaries could be given that discretionary power. The question should be considered further. As to the wording of the draft guideline, the words "manifestly impermissible" could indeed result in very different interpretations.

45. He endorsed giving the depositary a role, in keeping with existing practice. He merely pointed out that, during discussions in the Sixth Committee, a number of representatives had preferred to confine its role to that of a "letter-box".

46. Mr. GAJA said he greatly appreciated the fact that, following discussions at the Commission's preceding session and then in the Sixth Committee, the Special Rapporteur had proposed an additional guideline. Having taken into consideration the variety of views expressed by the members of the Commission and by delegations, the Special Rapporteur envisaged a significant role for the depositary. Although it was not explicitly stated, it emerged from draft guideline 2.1.7 *bis* that the depositary could not prevent a reservation from being made, but could only raise an objection; if the reserving State insisted, the reservation had to be communicated to the other contracting States. Such a mechanism made it possible to draw the latter States' attention to the fact that a reservation might not be permissible. The practice of States in such a situation was often negligent, because they confined themselves to stipulating in a treaty that no reservation was permitted, but took no action in the case in which a State still wanted to make one. Sometimes the motives were political: it was generally thought that objecting to a reservation made by another State was not a friendly act. It would therefore be wise to give the depositary the role envisaged in the guideline.

47. It was true, however, that there could be some difficulties, in particular in determining whether a reservation was compatible with the object and purpose of the treaty. Another solution might have been envisaged in which the depositary was given the power to intervene when

the reservation was prohibited, but not when there was a problem of compatibility. However, draft guideline 2.1.7 *bis* was well-balanced and deserved to be referred to the Drafting Committee. Its advantages included the fact that, since the reserving State knew that the exchange of views with the depositary would be communicated to the other contracting States, it might reconsider its reservation. It was useful to restrain the rather widespread practice by which, contrary to the provisions of article 19, paragraph (c), of the 1969 and 1986 Vienna Conventions, even a reservation that was not in conformity with the object and purpose of the treaty could be formulated.

48. During the discussions at the preceding session, some members had expressed their interest in a text stating the obligation of the depositary to communicate interpretative declarations, regardless of when they were made. He hoped that that suggestion could be considered by the Drafting Committee, even if no additional draft guideline had been proposed.

The meeting rose at 1 p.m.

2720th MEETING

Wednesday, 15 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, 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. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. Mr. GAJA, Chair of the Working Group on responsibility of international organizations and Special Rapporteur, announced that the working group would consist of Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Simma, Mr. Tomka, Mr. Yamada and Mr. Kuznetsov (member *ex officio*).

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his seventh report on reservations to treaties (A/CN.4/526 and Add. 1–3), which had usefully summarized developments to date, and his draft Guide to Practice, which was appreciated by legal experts the world over.

3. The function of the depositary (draft guideline 2.1.7 *bis*) was an important and closely watched issue. It was generally accepted that the depositary had communication and coordination functions, including with regard to any interpretations, declarations or reservations of States. The depositary also gave States guidance in formulating their positions on an informal basis. The aim was to ensure that the treaty was properly used by States and truly reflected their position on its provisions. But problems had arisen in the past and would do so in the future if a depositary was asked to judge the State's position, whether directly or indirectly, expressly or impliedly. States had been opposed to such a function. In one instance, the Government of India had taken issue with the depositary's statement that reservations India had made were contrary to the object and purpose of a treaty and, as such, not valid. The matter had been brought before the General Assembly, which had found that the functions of the depositary did not lie in the area of judgement.

4. To say that a reservation was manifestly impermissible already implied a judgement. If something was clearly prohibited, then there was nothing manifest about it: it was simply not allowed. For example, if India declared that it was reversing its position on a convention's provisions concerning the settlement of disputes and submitted its position to the depositary, the latter could simply say that it was not permitted, and the matter would be closed. If, on the other hand, a document was submitted which a State said was not a reservation, whereas in the view of the depositary it was, what action must the depositary take? That was where the word "manifestly" came into play. There, the depositary had every right, in an informal setting, to communicate his views in writing or verbally on how a State was using a particular declaration. He had had such a dialogue with depositaries on occasion, and agreement had then been reached. As it stood, the proposition did no service to either the depositary or the State concerned. The depositary could not be placed in a position of conflict with States. There might be different positions taken at the time of the formulation of a particular principle, and there could be constructive ambiguity in the treaty that allowed certain formulations on both sides. In such situations, the 1969 Vienna Convention provided the requisite guidance. One might hope that a more

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

* Resumed from the 2717th meeting.