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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FOURTH SESSION

Rapporteur: Mr. Valery Kuznetsov

CHAPTER V

DIPLOMATIC PROTECTION

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CONTENTS (continued)

A. Introduction

1. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[1] In the same year, the General Assembly in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[2] The Working Group submitted a report at the same session which was endorsed by the Commission.[3] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[4]

2. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

3. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

4. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[5] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[6]

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[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and annex II, addendum 1.

[2] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[3] Ibid., para. 171.

[4] Ibid., paras. 189-190.

[5] A/CN.4/484.

[6] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 108.

5. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic,[7] after Mr. Bennouna was elected a judge to the International Criminal Tribunal for the Former Yugoslavia.

6. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[8] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

7. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)). The Commission considered document A/CN.4/506/Add.1 at its 2680th and 2685th to 2687th meetings, held on 25 May and 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, held on 12 to 17 July 2001. Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the next session. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

8. At its 2688th meeting, the Commission established an open-ended Informal Consultation on article 9, chaired by the Special Rapporteur.

B. Consideration of the topic at the present session

9. At the present session, the Commission had before it the remainder of the second report of the Special Rapporteur (A/CN.4/514 and Corr.1 and 2 (Spanish only)), concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1). The Commission

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[7] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 19.

[8] The report of the informal consultations is contained in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

considered the remaining parts of the second report, as well as the first part of the third report, concerning the state of the study on diplomatic protection and articles 14 and 15, at its 2712th to 2719th and 2729th meetings, held on 30 April to 14 May and 4 June 2002, respectively. It subsequently considered the second part of the third report, concerning article 16, at its 2725th, 2727th to 2729th meetings, held on 24 May, 30 May to 4 June, respectively.

10. The Commission decided to refer draft article 14, paragraphs (a), (b), (d) (to be considered in connection with paragraph (a)), and (e) to the Drafting Committee at its 2719th meeting, held on 14 May 2002. It further decided, at its 2729th meeting, held on 4 June 2002, to refer draft article 14, paragraph (c) to the Drafting Committee to be considered in connection with paragraph (a).

11. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8], at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and 6 at its 2732nd meeting.

12. At its … to … meetings, held on …, the Commission adopted the commentaries to the aforementioned draft articles.

1. General comments on the study

(a) Introduction by the Special Rapporteur

13. The Special Rapporteur, in introducing his third report (A/CN.4/523), noted that diplomatic protection was a subject on which there was a wealth of authority in the form of codification attempts, conventions, State practice, jurisprudence and doctrine. No other branch of international law was so rich in authority. However, practice was frequently inconsistent and contradictory. His task was to present all the authorities and options so that the Commission could make an informed choice.

14. As to the scope of the draft articles, the Special Rapporteur reiterated his reluctance to go beyond the traditional topics falling within the subject of diplomatic protection, namely nationality of claims and the exhaustion of local remedies. However, he observed that, during the course of debate in the previous quinquennium, suggestions had been made to include a number of other matters within the field of diplomatic protection, such as functional protection by international organizations of their officials, the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned, the case where one State

exercises diplomatic protection of a national of another State as a result of the delegation of such a right, and the case where a State or an international organization administers or controls a territory. In response, while noting the importance of those issues, he maintained that they should not be considered by the Commission in the context of the present set of draft articles, especially if it intended to adopt the draft articles on first and second reading by the end of the quinquennium. Furthermore, he cautioned that the debate on some of those issues, for example that of the case where a State or an international organization administered or controlled a territory, could go well beyond the traditional field of diplomatic protection.

15. In addition, he noted that it was impossible for the Commission to complete a study on diplomatic protection without examining denial of justice and the Calvo clause, both of which had featured prominently in the jurisprudence on the subject.

16. The Special Rapporteur further confirmed his intention to consider in his next report the nationality of corporations.

(b) Summary of the debate

17. The Special Rapporteur was congratulated on his report, and on the open-minded manner in which he approached the issues at hand. At the same time, the view was expressed that the Special Rapporteur's approach appeared to be too generalist. Hence, support was expressed for the consideration of the additional issues listed by the Special Rapporteur in his third report.

18. The view was expressed that the question of functional protection by international organizations of their officials should be excluded from the draft articles since it constituted an exception to the nationality principle, which was fundamental to the issue of diplomatic protection. In the Reparation for injuries suffered in the service of the United Nations Advisory Opinion,[9] the International Court of Justice had made it clear that the claim brought by the Organization was based not on the nationality of the victim, but on his status as an agent of the Organization. Similarly, in its judgement of 11 September 1964,[10] the Administrative Tribunal of the International Labour Organization (ILO) had stated that the privileges and immunities of ILO officials were granted solely in the interests of the Organization.

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[9] 1949 *I.C.J. Reports*, p. 174.

[10] *In re Jurado*, Judgment No. 70.

19. Conversely, it was proposed that the Commission should consider the consequences for the State of nationality of an international organization's entitlement to exercise diplomatic - not functional - protection. The question of the competing claims of the State of nationality and the United Nations with regard to personal injuries to United Nations officials had been raised by the International Court of Justice in the *Reparation for Injuries* Advisory Opinion. It was proposed that the relationship between functional protection and diplomatic protection be studied closely, with some reference to functional protection being made in the draft articles. Similarly, it was suggested that it be made clear that, as the Court had noted in its advisory opinion, the possibility of competition between the State's right of diplomatic protection and the organization's right of functional protection could not result in two claims or two acts of reparation. Hence the Commission could consider the need to limit claims and reparations.

20. It was also noted that the question of functional protection of their officials by international organizations was of interest to small States some of whose nationals were employed by international organizations for, if the possibility of protection rested solely with the State of nationality, there would be a risk of inequality of treatment.

21. Others questioned whether such protection could be characterized as diplomatic protection. If the Commission agreed to exclude protection of diplomatic and consular officials from the scope of the topic, the same logic would apply to officials of international organizations. Similarly, members of armed forces were normally protected by the State in charge of those forces, but protection as such was not regarded as "diplomatic protection".

22. In terms of a further view, the distinction between diplomatic and functional protection did not necessarily apply in the context of diplomatic protection exercised on behalf of members of the armed services. Such cases represented an application of the legal interests of the State to whom the troops in question belonged. While the link of nationality was the major expression of legal interest in States' nationals, national corporations and agencies, the law recognized other bases for legal interest, such as membership in the armed forces.

23. In support of the proposal to extend the scope of the draft articles to cover diplomatic protection of crew members and passengers on ships, the example was cited of *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)* case[11] where the

[11] *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* International Tribunal for the Law of the Sea, Judgment of 1 July 1999.

International Tribunal for the Law of the Sea found that the ship's State of nationality was entitled to bring a claim for injury suffered by members of the crew, irrespective of their individual nationalities; thus, the State of nationality did not possess an exclusive right to exercise diplomatic protection. At the same time, caution was advised regarding the *M/V Saiga* case, which had been brought before the International Tribunal for the Law of the Sea under the special provisions contained in article 292 of the United Nations Convention on the Law of the Sea, and not as a general case of diplomatic protection.

24. It was also noted that the evolution of international law was characterized by increasingly strong concern for respect for human rights. Hence, it was suggested that, if crew members could receive protection from the State of nationality of the vessel or aircraft, that merely provided increased protection and should be welcomed.

25. Others maintained that the Special Rapporteur was correct to propose that the Commission exclude from the scope of the draft articles the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers. It was stated that the issue was not how a State should protect its nationals abroad, but rather how to avoid conflicting claims from different States. If the ship flew a flag of convenience, the State of registration would have no interest in exercising diplomatic protection should the crew's national Governments fail to do so. Such cases would, according to this view, in any event be covered by maritime law.

26. It was also observed that the question of the protection of a ship's crew was covered both by the United Nations Convention on the Law of the Sea,[12] but also in earlier international agreements. It thus called for a closer examination of other international instruments.

27. It was also observed that the legal principles regulating questions relating to the nationality of aircraft were already set out in international law, in particular in many instruments, such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, which laid down, for example, the obligation to allow crew and passengers to continue their journey. In that example, the determining factor was the special link between the State of nationality or the State of registry and a given ship or aircraft. It did not involve persons and, although the international instruments in question in certain instances granted a State the right to

[12] United Nations, *Treaty Series*, vol. 1833, p. 3.

exercise prerogatives which might, at first glance, have a similarity with diplomatic protection, that protection was of another nature. Thus, such questions had no place in the consideration of the subject of diplomatic protection.

28. Disagreement was expressed with the Special Rapporteur's suggestion that the Commission not consider the case of a State exercising diplomatic protection of a national of another State as a result of the delegation of such a right. At issue was the means of implementing State responsibility. Therefore, there was in principle no reason why a State could not exercise diplomatic protection in such circumstances. Others noted that if diplomatic protection was viewed as a discretionary right of the State, the point could be made in the commentary that the State had a right to delegate to other subjects of international law the exercise of diplomatic protection on behalf of its citizens or of other people with genuine links to it within the framework of the established exceptions to the nationality principle. However, what was important was not to confuse the rules relating to diplomatic protection with other types of protection of individuals or their interests.

29. Support was expressed for the Special Rapporteur's view that the draft articles ought not consider the case where an international organization controls a territory. It was noted that it involved a very specific form of protection, one at least as closely related to functional protection as to diplomatic protection; and, as in the case of the articles on State Responsibility, the Commission should disregard all issues relating to international organizations. At the same time, support was expressed for the proposal that the draft articles should consider the situation where a State administering or controlling a territory not its own purports to exercise diplomatic protection on behalf of the territory's inhabitants.

30. In terms of another view, in the case where an international organization administers a territory, the international organization fulfils all the functions of a State and should accordingly exercise diplomatic protection in respect of persons who might be stateless or whose nationality was not clear. Furthermore, while the link of nationality had been of some importance in the past, when States had been the sole actors on the international stage, it had become less important in a world where international organizations had an increasingly larger role to play alongside States. It was accordingly suggested that the issue be covered by the draft articles. Conversely, it was stated that it was risky to assume that the special and temporary functions which were transferred to, for example, the United Nations as administrator of a territory, were analogous to the administration of territories by States.

31. In terms of a further view, it was maintained that the core of the issue of diplomatic protection was the nationality principle, i.e. the link between a State and its nationals abroad. When a State claimed a legal interest in the exercise of diplomatic protection for an internationally wrongful act derived from an injury caused to its national, the link between the legal interest and the State was the nationality of the national. If, the proposed additional issues where covered in the draft articles, even as exceptional cases, it was opined that they would inevitably affect the nature of the rules on diplomatic protection, unduly extending the right of States to intervene.

32. It was also suggested that if the Commission were to decide not to consider those additional issues, they should at least be mentioned in the commentary.

33. The Commission further considered several other suggestions for issues that could be included within the scope of the draft articles. It examined the question of whether it might be necessary to include a reference in the draft articles to the "clean hands" doctrine. The view was expressed that while the doctrine was relevant to the discussion on diplomatic protection, it could not be given special treatment in the draft articles. The example was cited of the treatment of the doctrine in the context of the Commission's work on the topic of State responsibility, where the Commission decided that it did not constitute a circumstance precluding wrongfulness.[13] Similarly, it was suggested that the fact that a person did not have "clean hands" would not warrant a deprivation of diplomatic protection.

34. Further reservations were expressed about the legal status of the "clean hands" concept. It was noted that it was little used, except as a prejudice argument, and the Commission had to be careful not to legitimate it "accidentally". Conversely, it was stated that it was legitimate to raise the issue in connection with diplomatic protection. The question whether or not the person on behalf of whom diplomatic protection was exercised had "clean hands" could not be ignored and, whatever the conclusions drawn therefrom, it was important for the issue to be raised. Still others noted that the Commission should best not take any position on the "clean hands" rule either way.

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[13] See, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chp. V.B.48 (A), paras. 411-415.

35. The Commission also considered the necessity of including a provision on denial of justice. It was recalled that the Commission had previously not envisaged referring to it explicitly in the draft articles. It was also maintained that the concept of denial of justice was part of substantive law and of the subject of the treatment of aliens, and not directly related to diplomatic protection. It happened that, when aliens used the courts, there was sometimes a denial of justice and that could happen quite apart from any circumstances involving recourse to local remedies as such. To take up the subject would thus be illogical and would involve the Commission in enormous difficulties.

36. Conversely, it was pointed out that the question of denial of justice touched on a substantive problem inasmuch as it concerned equal treatment of aliens and nationals with regard to access to judicial systems. That subject was extensively treated in private international law and conventions existed on the subject, particularly at the inter-American level, which provided for the right of aliens to have access to the same remedies as nationals - a right reaffirmed by other more recent texts. As such, it was difficult to disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection.

37. In terms of other suggestions, it was proposed that some thought be given to considering the effects of the exercise of diplomatic protection as part of the present study.

38. Support was also expressed for the Special Rapporteur's proposal to consider the question of the diplomatic protection of corporations.

39. In terms of the use of terms, it was pointed out that the concept of "nationality of claims" was confusing and, as an anglophone concept, did not have its analogue in other official languages. In response, the Special Rapporteur acknowledged that the phrase had a common law connotation, but pointed out that it had been used by the then President of the International Court of Justice, who was not an anglophone, in the *Reparations for injuries suffered in the service of the United Nations* opinion.

(c) Special Rapporteur's concluding remarks

40. The Special Rapporteur observed that, in general, there seemed to be support for his desire to confine the draft articles to issues relating to the nationality of claims and to the exhaustion of local remedies rule so that it might be possible to conclude the consideration of the topic within the Commission's quinquennium.

41. As regards the issues identified in his third report which were linked to the nationality of claims, but did not traditionally fall within that field, the Special Rapporteur noted that there had been no support for a full study of 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 question II in the *Reparations for injuries suffered in the service of the United Nations* opinion 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. He proposed to deal with the matter in the context of competing claims of protection within the commentary to article 1, although he was still open to the possibility of including a separate provision on the subject.

42. The Special Rapporteur noted that there also seemed to be little support for the proposal to expand 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, he noted that the issue would likewise be dealt with in the commentary with special reference to the *M/V Saiga* case.

43. As to the case in which one State delegated the right to exercise diplomatic protection to another State, he observed that it did not arise frequently in practice and there was very little discussion of it in the literature. He also noted that the issue was partly dealt with in the context of the article on continuous nationality.

44. The Special Rapporteur noted further that there had been some, albeit little, support for the proposal to include within the scope of the study the exercise of diplomatic protection by a State which administered, controlled or occupied a territory. He noted furthermore that some members had proposed the consideration of the question of protection by an international organization of persons living in a territory which it controlled, such as the United Nations in Kosovo and (formerly) in East Timor. While there had been some support for the idea, in his view, the majority of the Commission believed that the issue might be better addressed in the context of the responsibility of international organizations.

45. As regards the "clean hands" principle, the Special Rapporteur noted that it could arise in connection with the conduct of the injured person, the claimant State or the respondent State, thus making it difficult to formulate a rule applicable to all cases. He also observed that the issue would be covered in the addendum to his third report, relating to the Calvo clause

(A/CN.4/523/Add.1), as well as in the commentary to article 3 [5] in the context of the *Nottebohm* case[14] and in connection with the nationality of corporations in the context of the *Barcelona Traction* case.[15]

46. With regard to denial of justice, the Special Rapporteur noted that, while he was not in favour of including an article on denial of justice, it had to be recognized that, as in the case of the Calvo clause, it had figured prominently in the evolution of diplomatic protection, particularly in Latin America, and several of the members of the Commission from that region had repeatedly raised the issue. His evaluation of the debate in the Commission was 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, while others had pointed out that denial of justice did arise in a number of procedural contexts and was thus a form of secondary rule. Yet, the content of the notion of denial of justice was 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.[16] As the Commission clearly believed that the concept did not belong to the study, he no longer intended to produce an addendum on it.

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[14] *I.C.J. Reports 1955*, p. 4.

[15] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3.

[16] United Nations, *Treaty Series*, vol. 999, p. 171.

2. Articles 12 and 13[17]

(a) Introduction by the Special Rapporteur

47. The Special Rapporteur recalled that articles 12 and 13 were taken up in his second report, submitted at the fifty-third session of the Commission in 2001, but were not considered then for lack of time. He observed that the two provisions should be read together, and thus proposed to deal with them jointly. Both concerned the question of whether the exhaustion of the local remedies rule was one of procedure or of substance - one of the most controversial issues in the field of exhaustion of local remedies.

48. It was noted that the Commission had previously taken a position on the matter, in the context of the topic State responsibility. He recalled that a provision had been adopted in 1977 and confirmed in 1996 as part of the first reading of the draft articles on that topic.[18] However, in his view, the rule was essentially one of procedure rather than of substance, and the matter had therefore to be reconsidered.

49. There were three positions: the substantive, the procedural and what he called the "mixed" position. Those in favour of the substantive position, including Borchard and Ago, maintained that the internationally wrongful act of the wrong doing State was not complete until

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[17] Articles 12 and 13 read:

Article 12

The requirement that local remedies must be exhausted is a procedural precondition that must be complied with before a State may bring an international claim based on injury to a national arising out of an internationally wrongful act committed against the national where the act complained of is a breach of both local law and international law.

Article 13

Where a foreign national brings legal proceedings before the domestic courts of a State in order to obtain redress for a violation of the domestic law of that State not amounting to an international wrong, the State in which such proceedings are brought may incur international responsibility if there is a denial of justice to the foreign national. Subject to article 14, the injured foreign national must exhaust any further local remedies that may be available before an international claim is brought on his behalf.

[18] Art. 22. See *Yearbook ... 1977*, vol. II (Part Two), para. 31; *Yearbook ... 1996*, vol. II (Part Two), para. 65.

the local remedies had been exhausted. There, the exhaustion of local remedies rule was a substantive condition on which the very existence of international responsibility depended.

50. Those who supported the procedural position, for example Amerasinghe, argued that the exhaustion of local remedies rule was a procedural condition which must be met before an international claim could be brought.

51. The mixed position, argued by Fawcett, drew a distinction between an injury to an alien under domestic law and an injury under international law. If the injury was caused by the violation of domestic law alone and in such a way that it did not constitute a breach of international law, for instance through a violation of a concessionary contract, international responsibility arose only from the act of the respondent State constituting a denial of justice, for example, bias on the part of the judiciary when an alien attempted to enforce his rights in a domestic court. In that situation, the exhaustion of local remedies rule was clearly a substantive condition that had to be fulfilled. On the other hand, if the injury to the alien violated international law, or international law and domestic law, international responsibility occurred at the moment of injury, and the exhaustion of local remedies rule was a procedural condition for bringing an international claim.

52. He observed further that, while some had argued that the three positions were purely academic, the question of the time at which international responsibility arose was often of considerable practical importance. Firstly, in respect of the nationality of claims, the alien must be a national at the time of the commission of the international wrong. Hence, it was important to ascertain at what time the international wrong had been committed. Secondly, there might be a problem of jurisdiction, as had happened in the *Phosphates in Morocco* case,[19] where the question had arisen as to when international responsibility occurred for the purpose of deciding whether or not the court had jurisdiction. Thirdly, it would not be possible for a State to waive the exhaustion of local remedies rule if the rule was a substantive one, as no international wrong would be committed in the absence of the exhaustion of local remedies.

53. The Special Rapporteur noted the difficulty that the sources were not clear as to which approach should be followed. He further summarized various previous attempts at codification,

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[19] 1938 *P.C.I.J. Reports*, Series A/B, No. 74.

as described in his report. It was observed that while, in 1977, the Commission had preferred the substantive view in its then article 22 of the draft articles on State responsibility, in 2000 Kokott had taken a purely procedural position in the International Law Association.

54. The Special Rapporteur further observed that judicial decisions were also vague and open to different interpretations that lent support for either the procedural or the substantive position. For example, concerning the *Phosphates in Morocco* case, Special Rapporteur Ago had maintained that the Permanent Court had not ruled against the substantive position. However, the current Special Rapporteur's interpretation of a key passage in the decision was that the Court had supported the French argument that the local remedies rule was no more than a rule of procedure.

55. The Special Rapporteur also noted that State practice was of little value, because it usually took the form of arguments presented in international proceedings and, inevitably, a State was bound to espouse the position that best served its own interests. Hence, no clear conclusion could be drawn from arguments put forward by States.

56. Furthermore, it was noted that academic opinion was also divided on the issue. He acknowledged that the third position, which he preferred, had received little attention. For example, a State which tortured an alien incurred international responsibility at the moment when the act was committed, but it might also find itself in violation of its own legislation. If a domestic remedy existed, it must be exhausted before an international claim could be raised; in such a case, the local remedies rule was procedural in nature. Draft articles 12 and 13 sought to give effect to that conclusion, and academic opinion offered some support for such a position.

57. The Commission was also faced with the decision to depart from the position it had adopted in former article 22 of the draft articles on State responsibility. However, in proposing that article, the then Special Rapporteur on State responsibility had assumed that the document in its final form would distinguish between obligations of conduct and result, a distinction which had not been retained. Hence, in the Special Rapporteur's view, the Commission was free to adopt the position he was proposing.

(b) Summary of the debate

58. In support of the substantive position, it was observed that where local remedies were required to be, and had not been, exhausted, diplomatic protection could not be exercised. Therefore, no claim in relation to an alleged breach could be put forward and countermeasures could not be taken. As such, it was not clear what the practical significance was of an alleged

breach which had no consequences at the international level for either the State or the individual concerned, and for which no remedy was available. As such, since the precondition applied to all procedures relating to such a case, it must be regarded as substantive.

59. Others expressed support for the procedural position. It was observed, in connection with the rendering of a declaratory judgement in the absence of exhaustion of local remedies, that from a smaller State's perspective the exhaustion of local remedies was not a practical possibility, for example, because of the prohibitive cost of the procedure. A declaratory judgement obtained in the absence of the exhaustion of local remedies could be a potentially significant satisfaction leading to practical changes. Such a possibility would, however, be precluded if the exhaustion of local remedies rule was characterized as substantive.

60. A preference was also expressed for the "third view" espoused by Fawcett, as described by the Special Rapporteur in his report. Conversely, the view was expressed that the various possibilities mentioned in Fawcett's study relating to the distinction between remedies available under domestic law and those available under international law might lead to a theoretical debate that would complicate the issue unnecessarily.

61. The prevailing view in the Commission was that draft articles 12 and 13 should be deleted since those articles added nothing to article 11. It was recognized that while some implications might follow from the adoption of one or another of the theories, and that the question whether such remedies were substantive or procedural in nature was, to some extent, inescapable in special circumstances such as those of the *Phosphates in Morocco* case, they were not of primary importance and did not justify inclusion of the draft articles in question. Similarly, it was stated that the distinction was not very useful or relevant as a global approach to the problem of the exhaustion of local remedies. Nor was it of much practical purpose. Indeed, the concern was expressed that such a distinction could greatly complicate the Commission's task, since it would involve detailed consideration of the remedies to be exhausted. It was also stated that articles 12 and 13 either duplicated the statement of the principle contained in articles 10 and 11, or else merely pointed to notions, such as denial of justice, which they failed fully to articulate.

62. Furthermore, it was noted that when viewed purely in the context of diplomatic protection, the distinction seemed to lose its relevance. The postulate was that an internationally wrongful act had been committed; the only question to be considered was thus on what conditions - and perhaps, under what procedures - reparation could be required when an

individual was injured; for in the absence of an internationally wrongful act, diplomatic protection would not arise. Seen from that perspective, the issue was straightforward: diplomatic protection was a procedure whereby the international responsibility of the State could be implemented; exhaustion of local remedies was a prerequisite for implementation of that procedure; and whether it was a substantive or a procedural rule made little difference.

63. It was recalled that the distinction had initially been made in the context of the determination of the precise moment when an unlawful act was committed during the consideration of the topic of State responsibility. The question was whether the responsibility of the State came into play as soon as the internationally wrongful act was committed, independently of the exhaustion of local remedies. It was proposed, therefore, that, in the interests of harmonization, the Commission follow the approach taken in article 44, "Admissibility of claims", of the draft articles on State responsibility. Similarly, it was noted that the drafting of article 12 was open to question: it was queried how a breach of local law could of itself constitute an internationally wrongful act. That seemed to contradict both the spirit and the letter of the articles on State responsibility for internationally wrongful acts, and, in particular, article 3 thereof.

64. In addition, some speakers took issue with the assertion that waivers were inconsistent with the substantive nature of the local remedies rule. States could waive a precondition for admissibility with regard to either a substantive or a procedural issue. Some rules were not peremptory in nature but were open to agreement between States.

65. It was further noted that the question of the nature of the local remedies rule raised difficult theoretical questions and had political implications since the procedural theory was perceived as belittling the importance of a rule that many States considered fundamental. In view of those problems and the lack of consensus within the Commission, it was considered unwise to endorse any of the competing views.

66. The view was also expressed that the Commission might instead consider an empirical study of the local remedies rule on the basis of policy, practice and history. For example, it was stated that the principle of assumption of risk, the existence of a voluntary link between the alien and the host State and the common sense application of the local remedies could be of greater relevance than issues of procedure or substance.

67. In terms of a further suggestion, the issue could be treated in the commentaries to articles 10, 11 and 14.

68. Others maintained that articles 12 and 13 were useful, but not in the form presented. The view was expressed that the local remedies rule, while being a procedural matter, could have substantive outcomes as well. It was thus proposed that exceptions be created to take account of situations where the application of the rule could be unfair, such as when there was a change of nationality or refusal to accept the jurisdiction of an international court. In such a case, it would be necessary to establish the time from which the right of the State to claim diplomatic protection ran, and that would probably be when the injury to the national of that State occurred. If worded in those terms, articles 12 and 13 would not duplicate article 10.

69. The suggestion was also made that only article 12 be referred to the Drafting Committee, and article 13 deleted as being outside the scope of the draft articles since it dealt with a situation where injury was the result of a violation of domestic law.

(c) Special Rapporteur's concluding remarks

70. The Special Rapporteur confirmed that he did not have a strong preference for retaining the distinction between the procedural and substantive positions in the draft articles. He agreed with the assertion that it was not a general framework for the study of diplomatic protection. However, it could not be entirely ignored in a study on exhaustion of local remedies, as it had featured prominently in the first reading of the draft articles on State responsibility, specifically article 22 thereof, as well as in all the writings on the local remedies rule. It also had practical implications in determining the time when the injury occurred, which was an issue that arose in respect of nationality of claims, because the injured alien must be a national of the State in question at the time the injury occurred.

71. In response to the suggestion that it would have been more helpful to offer a rationale of the exhaustion of local remedies rule by considering the reasons for which international law had established it, he observed that his first report had included an introductory section on the rationale of the local remedies rule, but that it had not been particularly well received by the Commission. He would further remedy the omission in the commentary on article 10.

72. He observed that articles 12 and 13 had been subjected to considerable criticism and had not been met with general approval. It had been viewed as too conceptual, irrelevant, premised on the dualist position and overly influenced by the distinction between procedure and substance. He conceded that some criticisms of article 13 were well founded. He cited as an example the

fact 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. He also noted that some members 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 exhaustion of local remedies rule.

73. Therefore he proposed that articles 12 and 13 not be referred to the Drafting Committee, a solution which would have the advantage of avoiding the question whether the exhaustion of local remedies rule was procedural or substantive in nature and would leave members free to hold their own opinions on the matter.

3. Article 14

[*See: A/CN.4/L.619/Add.1*]

4. Article 15[20]

(a) Introduction by the Special Rapporteur

74. The Special Rapporteur observed that the burden of proof in the context of international litigation related to what must be proved and which party must prove it. It was a difficult subject to codify, first because there were no detailed rules in international law of the kind found in most municipal law systems, and second, because circumstances varied from case to case and general rules that applied in all instances were difficult to lay down. Nevertheless, in his view the subject was important to the exhaustion of local remedies rule and therefore warranted inclusion in the draft.

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[20] Article 15 reads:

Article 15

1. The claimant and respondent State share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.

2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:

(a) the burden of proof is on the respondent State to prove that the international claim is one to which the exhaustion of local remedies rule applies and that the available local remedies have not been exhausted;

(b) the burden of proof is on the claimant State to prove any of the exceptions referred to in Article 14 or to prove that the claim concerns direct injury to the State itself.

75. He observed further that, as a general principle, the burden of proof lay on the party that made an assertion. Article 15, paragraph 1, reflected that principle. However, in his view, the general principle was not enough and therefore, he suggested two additional principles which were incorporated in paragraph 2. They related to the burden of proof in respect of the availability and effectiveness of local remedies. He recalled that previous attempts to codify the local remedies rule had avoided the temptation to elaborate provisions on those subjects.

76. It was observed that the subject had been considered at some length by human rights treaty monitoring bodies, and that their jurisprudence supported two propositions, namely, that the respondent State must prove that there was an available remedy that had not been exhausted by the claimant State, and that if there were available remedies, the claimant State must prove that they were ineffective or that some other exception to the local remedies rule was applicable. However, he conceded that such jurisprudence was guided strongly by the instruments that established the treaty monitoring bodies, and that it was questionable whether the principles expounded by those bodies were directly relevant to general principles of diplomatic protection.

77. As to judicial and arbitral decisions, the Special Rapporteur remarked that some support for the principles he had outlined could be found in the *Panevezys-Saldutiskis Railway* case,[21] the *Finnish Ships Arbitration*,[22] the *Ambatielos* claim,[23] the *ELSI* case,[24] the *Aerial Incident of 27 July 1955* (*Israel v. Bulgaria*) case[25] and the *Norwegian Loans* case.[26] Two conclusions could be drawn from those cases: first, the burden of proof was on the respondent State in that it had to show the availability of local remedies, and second, the claimant State bore the burden of proof for showing that if remedies were available, they were ineffective or that some other exception applied, for instance, that there had been a direct injury to the claimant State.

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[21] 1939 *P.C.I.J. Reports*, Series A/B, No. 76.

[22] *Finnish Vessels Arbitration* (1934), 3 *U.N.R.I.A.A.* 1479.

[23] (1956) 12 *U.N.R.I.A.A.* 120.

[24] *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15.

[25] (Preliminary Objections) 1959 *I.C.J. Reports*, 127.

[26] 1957 *I.C.J. Reports* 41.

78. At the same time, he conceded that it was difficult to lay down general rules, since the outcome was linked to the facts of each case. He recalled the *Norwegian Loans* case, which involved a specific fact pattern and in which context Judge Lauterpacht laid down four principles which enjoyed considerable support in the literature: it was for the plaintiff State to prove that there were no effective remedies to which recourse could be had; no such proof was required if there was legislation which on the face of it deprived the private claimants of a remedy; in such a case, it was for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence could reasonably be assumed; and the degree of burden of proof ought not to be unduly stringent.

79. The Special Rapporteur confirmed that, in his view, the four principles adduced by Lauterpacht resulted from the unusual circumstances of the *Norwegian Loans* case. As such, they did not undermine his own hypothesis that there were essentially two rules on the availability and effectiveness of local remedies, as set out in article 15, paragraph 2 (a) and (b).

(b) Summary of the debate

80. While some support for article 15 was expressed, strong opposition was voiced in the Commission to the inclusion of article 15 on the burden of proof. It was doubted that rules of evidence should be included within the scope of the topic. Furthermore, customary rules of evidence, if they did exist, were difficult to establish. Reference was made to the differences between common law and civil law systems regarding issues relating to the burden of proof. Similarly, it was noted that rules of evidence also varied greatly, depending on the type of international proceedings. Moreover, the same treaty body might have different rules of evidence at each stage of the proceedings. The example of the European Court of Human Rights was cited in that regard. It was further observed that, in view of the traditional requirements regarding the burden of proof, it seemed unlikely that any judicial or other body would feel constrained by what was an extremely complex additional provision.

81. It was observed that the respondent State was in a much better position than judges or the claimant to demonstrate the existence of remedies. Similarly, the State of nationality was best able to provide evidence on the nationality of the individual. There, the burden of proof was on the claimant State. Thus, the position of the State as a claimant or respondent seemed to be less important than the availability of evidence.

82. Furthermore, doubts were expressed 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 situation was bound to be much more complex in practice. It was also noted that it would be difficult to reach an agreement on the subject matter of article 15.

83. It was suggested that the burden of proof could best be left to the rules of procedure or *compromis* in the case of international judicial forums, and to the law of the State in cases of resort to domestic forums of adjudication. It was also proposed that the commentary could include a discussion of the question of the burden of proof.

84. Concerning paragraph 1, the view was expressed that it provided little guidance to state as a general principle, that the party that made an assertion must prove it. What mattered was not the allegation, but the interest which the party might have in establishing a certain fact that appeared to be relevant. Conversely, the view was expressed that paragraph 1 was useful and should be included.

85. As regards, paragraph 2, the view was expressed that the distinction between the availability of a remedy, which should be shown by the respondent State, and its lack of effectiveness, which should be demonstrated by the claimant State, was artificial. A remedy that offered no chance of success, i.e. was not effective, was not one which needed to be exhausted. Thus, the respondent State's interest went further than establishing that a remedy existed: it had to also show that it had a reasonable chance of success. At issue, was the effectiveness of a remedy in the absence of pertinent judicial precedents at the time of the injury. In terms of a further view, the problem was simply one of drafting, which the Drafting Committee could look into.

(c) Special Rapporteur's concluding remarks

86. The Special Rapporteur observed that, while article 15 had been considered innocuous by some and too complex by others, a large majority had been opposed to its inclusion. He could therefore not recommend that it should be referred to the Drafting Committee.
