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Summary record of the 20th meeting
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Chairman: Mr. Prandler . . . . . (Hungary)

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The meeting was called to order at 10.20 a.m.

Tribute to the memory of Mr. Valery I. Kuznetsov (Russian Federation) Member of the International Law Commission

1. *At the invitation of the Chairman, the members of the Committee observed a minute of silence.*

Agenda item 156: Report of the International Law Commission on the work of its fifty-fourth session (A/57/10 and Corr.1)

2. **Mr. Rosenstock** (Chairman of the International Law Commission), introducing the Commission's report on the work of its fifty-fourth session (A/57/10 and Corr.1), said that he would deal primarily with the topic of diplomatic protection (chapter V), reserving for two further statements the topic of reservations to treaties (chapter IV) and the remaining topics considered by the Commission (chapters VI to X), including the additional topics selected by the Commission to be taken up during the new quinquennium: international liability in case of loss from transboundary harm arising out of hazardous activities, responsibility of international organizations, fragmentation of international law, and shared natural resources. If delegations would follow the same pattern, they would maximize the chances for productive exchange and derive full benefit from the presence of senior personnel. He also wished to draw attention to chapter III, which highlighted the issues on which comments would be of particular interest to the Commission, and to stress how important it was for Governments to express their views on those issues either orally or in writing.

3. The Commission had devoted a substantial portion of the fifty-fourth session to the topic of diplomatic protection. It had continued its consideration of the second and third reports submitted by the Special Rapporteur and had referred several draft articles to the Drafting Committee. It had also discussed and provisionally adopted the first seven draft articles prepared by the Drafting Committee together with commentaries.

4. With regard to scope, suggestions had been made to include several matters not usually considered in the context 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 the passengers; the question of the delegation of the right to exercise diplomatic protection; and the cases where a State or an international organization administered or controlled a territory. After an extensive discussion there had been support for confining the draft articles to issues relating to the nationality of claims and the exhaustion of local remedies rule, especially in light of the Commission's intention to conclude the consideration of the topic during the current quinquennium.

5. Draft articles 12 and 13 as submitted by the Special Rapporteur dealt with the question of whether the exhaustion of local remedies rule was one of procedure or substance. The prevailing view in the Commission had been that maintaining a strict distinction between the procedural and substantive positions or adopting a 'mixed' approach was not really necessary. Neither article had enjoyed the general approval of the Commission, and it had been decided not to refer them to the Drafting Committee.

6. Draft article 14 as submitted by the Special Rapporteur dealt with the exceptions to the exhaustion of local remedies rule. With regard to the exception of futility, as proposed in paragraph (a), the Commission had had before it three suggested tests for determining whether a local remedy was ineffective and had referred the paragraph to the Drafting Committee with instructions to decide between two of the proposed tests, namely, whether the local remedies offered no reasonable prospect of success or whether they provided no reasonable possibility of an effective remedy.

7. With regard to waiver or estoppel as an exception to the local remedies rule (paragraph (b)), the Commission had agreed that express waiver should be included as an exception, but had referred the provision to the Drafting Committee with the recommendation that it should exercise caution when considering implied waiver and estoppel.

8. The Commission had also considered two provisions (paragraphs (c) and (d)) dealing with the absence of a voluntary link or a territorial connection as grounds for an exception to the local remedies rule, the rationale being that in the modern era States had increasingly been faced with transboundary harm being caused to their nationals, for example, by pollution,

radioactive fall-out, falling man-made space objects, the shooting down of foreign aircraft or the abduction of a foreign national by agents of the respondent State outside its territory. Although some had felt that the provision concerned not so much an exception to the local remedies rule as a precondition for the exercise of diplomatic protection, or had objected to the examples cited because they were covered by other topics or involved direct injury to the State, the Commission had nonetheless decided to refer both provisions to the Drafting Committee to be considered in the context of the provision on futility as part of the concept of reasonableness.

9. The remaining two proposed exceptions to the local remedies rule concerned undue delay and denial of access (paragraphs (e) and (f)). Although some had felt that undue delay was covered by the concept of reasonableness, the Commission had referred the provision to the Drafting Committee. However, the concept of denial of access had been considered to be adequately covered by the provision on futility. The different views regarding the pertinence of such a provision had been felt to reflect the greater importance accorded to physical presence in common law as compared to civil law systems.

10. Draft article 15 as submitted by the Special Rapporteur dealing with the question of the burden of proof in matters relating to the exhaustion of local remedies had not been referred to the Drafting Committee. The general consensus had been that such a provision was unnecessary and was better left to the rules of procedure of the international forum or the relevant domestic law.

11. The Commission had decided not to refer draft article 16, on the Calvo clause, to the Drafting Committee; the view was expressed that the clause was not a rule of law but merely a contractual drafting device which did not lend itself to codification.

12. The Special Rapporteur had offered to produce an addendum to consider the place of denial of justice within the draft articles. However, the prevailing view in the Commission had been that it was not necessary to consider the issue, since strictly speaking it fell outside the scope of diplomatic protection and had been replaced to a large extent by the standards of justice set forth in international human rights instruments.

13. The Commission had also provisionally adopted draft articles 1 to 7 with commentaries thereto, divided into Part One dealing with general provisions applicable to both natural and legal persons and Part Two dealing with natural persons, in anticipation of a future Part Three dealing with legal persons. Draft article 1, “Definition and scope”, identified the key elements of diplomatic protection, namely, that it was exercised through peaceful means, by a State adopting “in its own right” the cause of its national, in respect of an injury to that national arising from an internationally wrongful act of another State. Although the default position was that diplomatic protection was exercised on the basis of nationality, provision was made in paragraph 2 for exceptional cases, as identified in article 7, where diplomatic protection might be exercised on behalf of non-nationals. A key issue in article 1 was that, in the exercise of diplomatic protection, a State was asserting its own legal interest. Draft article 2 affirmed the discretionary right of the State to exercise diplomatic protection, reflecting Vattel’s notion that an injury to a national was an indirect injury to the State.

14. The first draft article in Part Two, draft article 3, “State of nationality”, asserted the principle that it was the State of nationality of the injured person that was entitled, though not obliged, to exercise diplomatic protection and defined what was meant by State of nationality. Although it was for the State of nationality to determine who qualified for its nationality, the draft articles recognized that international law imposed certain limits.

15. Draft article 4 dealt with the continuous nationality rule, upholding the traditional view that the injured person must be a national of the State exercising diplomatic protection both at the time of the injury and at the date of presentation of the claim. However, paragraph 2 provided for well-defined exceptions to accommodate cases in which unfairness might otherwise result, as in the case of a loss of nationality and acquisition of a new one for a reason unrelated to the bringing of the claim. Such exceptions were limited by paragraph 3, which prevented the exercise of diplomatic protection by the new State of nationality against a former State of nationality in respect of an injury incurred when the person was a national of the former State of nationality.

16. Draft article 5, recognizing that it was increasingly common for individuals to acquire dual or even multiple nationality, provided for their diplomatic protection by any of the States of nationality, or two or more jointly, without requiring the existence of an effective link, against a third State of which such an individual was not a national. Draft article 6 dealt with the scenario in which one State of nationality could bring claims for diplomatic protection against another in the case of an individual with dual or multiple nationality, provided the nationality of the claimant State was predominant.

17. Draft article 7 represented progressive development of international law in that it provided for exceptions to the traditional rule that only nationals might benefit from the exercise of diplomatic protection by extending protection to stateless persons and refugees. However, the Commission had expressly decided to set a high threshold for such exceptions by stipulating that the individuals concerned must be lawfully and habitually resident in the State exercising diplomatic protection both at the time of the injury and at the date of the official presentation of the claim.

18. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries, said the work done so far on the topic of diplomatic protection represented a solid basis for codification. He supported the inclusion in the draft articles provisionally adopted of diplomatic protection for refugees and stateless persons, as well as the proposed requirements for continuous nationality.

19. Concerning the protection of vessels and their crews and passengers in the light of the judgement of the International Tribunal for the Law of the Sea in the *Saiga* case, he noted that a question had arisen as to the relationship between applicable principles and rules of the international law of the sea, and the rules on diplomatic protection. The rules in the United Nations Convention on the Law of the Sea governing the status of ships and their crews reflected universal principles of customary international law. Moreover, article 311 of the Convention reflected the assumption that the principles of the Convention were consistent with other agreements. When considering the protection of foreigners on board ships, the starting point would normally be to ensure full respect for the well-established principle that the flag State had jurisdiction, especially where the protection related to the vessel as an organic unit. However, there could be other grounds, such as human rights grounds, for exercising diplomatic protection with regard to foreign crew members or passengers. In principle, diplomatic protection by the flag State must cover the interests of all crew members and passengers, although in some cases it might be exercised by their State of nationality. Protection by other States might become necessary where it was obvious that flag State jurisdiction would not be effectively exercised, as in the case of certain flags of convenience.

20. With regard to the protection of shareholders' interests in light of the Judgment of the International Court of Justice in the *Barcelona Traction* case, he recalled that the Court had rejected the view that States could exercise diplomatic remedies on behalf of their nationals who had suffered losses as shareholders merely as a result of injuries inflicted by another State on a foreign company. The Court had, however, recognized that if the company went into liquidation, or if the injuries were directed at shareholders as such, diplomatic protection might be exercised by way of exception. That jurisprudence was well grounded in customary international law. The basic rule was that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. In an era when share ownership could be transferred at the speed of lightning, allowing the States of nationality of the shareholders to exercise it would jeopardize legal certainty and predictability. Moreover, because multinational companies could have millions of shareholders in different countries, there might well be no majority of shareholders in any one country. To overturn the general rule established in the *Barcelona Traction* case would cause added confusion. Moreover, the inability to claim protection from their own country was among the commercial risks assumed by shareholders when buying shares in a foreign company.

21. The *Barcelona Traction* decision did not, however, exclude other exceptions. Account must be taken of the case law of the Iran/United States Claims Tribunal and the decisions of the United Nations Compensation Commission. Moreover, the general rule in *Barcelona Traction* did not preclude the application of specific treaty-based rules in accordance with agreements on the protection of foreign investments. That raised the question of defining direct foreign investments, as opposed to shareholdings in general. However, diplomatic remedies were the last resort of claimants in cases involving the former, which were

normally settled through arbitration or through local courts. It would be unwise to open up debate on the protection of foreign investments, direct or indirect, and to do so might risk delaying the codification of diplomatic protection in general.

22. There was no need, in his view, for a separate article on the Calvo clause. The clause was essentially a contractual device related to the application of law rather than to its codification.

23. In the process of codification, it was important not to undermine legal certainty with regard to the law of the sea and maritime affairs. The Nordic countries saw little value in attempting to explore new rules of diplomatic protection which could not readily be derived from the law of the sea and other relevant areas of the law. Instead, language covering the issues raised by the *Barcelona Traction* and *Saiga* cases should be included so that appropriate references could be inserted to applicable rules of international law. For instance, the comments already made in respect of ships might also be relevant for aircraft. There was no need for further time-consuming studies on the topic, and he believed it was ripe for finalization.

24. **Ms. Taylor** (Australia) agreed with the Special Rapporteur's view that the scope of the draft articles should not encompass the right of the State of nationality of a ship or aircraft to bring a claim on behalf of its crew or passengers. That issue was already adequately covered by the law of the sea. In any event, it was open to a State to exercise diplomatic protection on behalf of its nationals at any time.

25. **Mr. Schaefer** (Germany) commended the Commission on drafting rules on the diplomatic protection of natural persons which were both practical and flexible. The Commission had been well advised to define nationality in a formal sense, disregarding the "genuine link" requirement of the *Nottebohm* case. Taking that requirement into account would complicate the exercise of diplomatic protection in an increasingly globalized world where for economic, political or other reasons, millions of people who lived and worked outside their States of origin did not possess the nationality of their host States. By allowing for the exercise of diplomatic protection by the new home State in cases where the injured person had involuntarily lost his or her nationality, the Commission had also provided a necessary element of flexibility. Likewise, in the rules on multiple nationality it had allowed not only for the joint exercise of diplomatic protection by the different States of nationality, but also for the possibility that one such State might present a claim against another if the nationality of the former State was predominant. He also welcomed the provision of diplomatic protection for stateless persons and refugees.

26. The Commission had endeavoured to clarify the concept of exhaustion of local remedies, which derived from the customary law on the topic. Although there was general agreement that the theoretical existence of a local remedy was not enough, because the remedy must also be effective, defining the required level of effectiveness was no easy matter. The clauses in draft article 14, especially the third option referring to the reasonable possibility of an effective remedy, seemed a useful basis for developing the concept further. Germany viewed the notion of an implied waiver of the local remedies rule with great circumspection. There was a danger that such a waiver could be used by more "interventionist" States as a pretext for dispensing with the principle altogether. Its application should, therefore, be limited to cases where an impartial observer would have no doubt that the respondent State had indeed intended to waive the rule. On the other hand, an explicit waiver on the lines of the Calvo clause would be inappropriate. It would undermine the very basis of the codification exercise, namely the idea that diplomatic protection was a right of the State rather than of the individual.

27. Turning to the topic of reservations to treaties, and especially the role of depositaries in cases of manifestly impermissible reservations, he said that in such cases the depositary should have competence to indicate to the State making the reservation that it was impermissible. That would help to avoid triggering a host of negative legal actions vis-à-vis the reservation by other parties to the treaty. Unless the State concerned withdrew its reservation, the depositary should inform all the parties about its communication with the State in question. His delegation was open to discussion whether the depositary, when transmitting the impermissible reservation to other States parties, should also communicate to them the reasons for its finding. There should, however, be clear criteria for determining which reservations were impermissible, and the goal of safeguarding the integrity of a multilateral treaty should prevail.

28. Commenting on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that although States had apparently accepted the principle of strict liability for certain specific regimes, as in the case of damage caused by space objects, there was no evidence that the principle was part of customary international law. States had also accepted that their freedom to carry on or permit activities in their territory or otherwise under their control was not unlimited. The Commission's understanding, according to the current report, was that failure to perform duties of prevention would entail State responsibility. Germany agreed with that view in principle. However, not every case of non-compliance with a preventive measure would automatically render the State responsible. A causal link would have to be established between non-compliance and the harm in question; if compliance would not have prevented the harm, the State should not ipso facto be obliged to provide compensation. His delegation agreed that the innocent victim should not, in principle, have to contribute to the compensation, provided that the victim did not benefit in some way from the activity causing the harm. It also agreed with the Commission that the operator should bear the primary liability in any regime for allocating losses, according to the "polluter pays" principle.

29. Lastly, he welcomed the decision to include the topic of fragmentation of international law in the Commission's long-term programme of work. The topic had become increasingly relevant with the proliferation of new international norms, regimes and institutions, especially during the 1990s. The fragmentation of international law had come about as a result of the progressive extension of international law, following upon globalization, into new subject areas which had hitherto been regarded as unsuitable for international regulation. A second causal factor was the regionalization of international law through the creation of regional regimes, notably in the fields of human rights, international trade and environmental protection. Although the topic could not be sensibly dealt within the form of draft articles, he hoped that the Commission would go beyond a mere descriptive analysis of fragmentation processes to address some of the practical problems caused by them, and to offer solutions. The first step would be to undertake a comprehensive survey of the rules and mechanisms dealing with possible conflicts of norms which could be found in the relevant international instruments. Next, the rules of general international law, especially the relevant principles of the law of treaties, should be analysed to determine whether they were still adequate in the light of recent trends in international regulation. In fields such as environmental and economic law, those regulations were increasingly taking on the character of self-contained regimes.

30. The Commission had correctly taken the view that it should not act as a referee in the relationships between institutions. However, the proliferation of jurisdictional bodies was creating serious problems for the unity and coherence of international law and should therefore be included in the Commission's work on the topic of fragmentation.

31. **Ms. Xue** Hanqin (China) said that formulating legal rules for diplomatic protection was of great theoretical and practical significance. Making the link of nationality a condition for diplomatic protection and allowing an exception only for refugees and stateless persons was consistent with the theory and practice of customary international law and constituted a restriction which would prevent diplomatic protection from being abused. In the case of the functional protection by international organizations of their officials or the protection of crews by the States in which the vessels and aircraft concerned were registered, no link of nationality existed; the inclusion of those topics in the sphere of diplomatic protection was therefore not supported by either theory or practice. When exercising protection in such cases the organizations and States in question usually relied on specific legal instruments. The nature of diplomatic protection would be affected if it were to be extended to those areas and the right of States to intervene would sometimes be overextended.

32. Since the exhaustion of local remedies was already widely accepted as a rule of customary international law governing diplomatic protection, the Commission should be careful to strike a proper balance between that rule and any exceptions to it. If the scope of application of the exceptions to the rule were enlarged inappropriately, it would constitute an infringement of the domestic jurisdiction of the State where the foreigner was located and, in some instances, it would result in conflicts over jurisdiction between two States and impinge on their relations. For that reason, such exceptions should meet explicit criteria and their application should be clearly defined. They should, however, be allowed when local remedies were

manifestly ineffective or entailed undue delays, or when the respondent State waived its request for the exhaustion of local remedies. China hoped that the Commission would include diplomatic protection as a priority item at its next session.

33. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, she emphasized the need for continuity in its consideration, and accordingly welcomed the reappointment of Mr. Sreenivasa Rao as Special Rapporteur. She endorsed the rationale established by the Commission that the operator should bear primary liability in any loss-sharing scheme and that loss should be apportioned among the relevant actors through a special regime or insurance scheme. It was to be hoped that when the Commission formulated the draft articles on liability, it would strive for a balance between the rights and obligations of the operator, the beneficiary and the victim.

34. The basic rules the Commission had already established concerning the concepts of responsibility and international organizations and the relationship between the responsibility of international organizations and State responsibility would guide the further examination of the topic of responsibility of international organizations. The proliferation of the latter and the expansion of their fields of activities meant that the study of their responsibility was of practical importance.

35. Her delegation was in favour of including the topic of fragmentation of international law in the Commission's agenda, because it was a phenomenon that had both positive and negative aspects. Since the end of the cold war, the rapid development of international law, the diversification of international legislation, the establishment of international judicial institutions and the operation of international treaty-monitoring mechanisms had all had a significant impact on the coherence and unity of international law. The resulting challenges to certain norms and legal frameworks warranted the attention of States and she therefore hoped that the Commission would consider that issue in depth.

Agenda item 158: Establishment of the International Criminal Court (*continued*) (A/C.6/57/L.16/Rev.1)

36. **The Chairman** drew attention to draft resolution A/C.6/57/L.16/Rev.1.

37. **Mr. Mikulka** (Secretary of the Committee), explaining the administrative and financial implications of the draft resolution, said that the requirements for servicing the various meetings mentioned in paragraph 5 of the draft resolution had been set out in document PCNICC/2002/2/Add.1. The requirements for the resumed first session of the States Parties in February 2003 had been estimated at €1,571,800 and included €157,200 for programme support costs and a contingency reserve of €205,000. The requirements for the resumed first session in April 2003 were computed as €746,200, including €74,700 for programme support costs and €97,300 as a contingency reserve. The requirements for a second session in August 2003 had been put at €1,187,700, including €118,800 for programme support costs and a contingency reserve of €154,800. The requirements of the meeting of the Committee on Budget and Finance in August 2003 had been calculated as €845,000, including €84,500 for programme support costs and a contingency reserve of €110,200. The mechanism for the advance payment of the cost of services rendered to the Assembly of States Parties that might accrue to the United Nations as result of the implementation of the draft resolution took the form of a trust fund. Consequently, if the General Assembly were to adopt the draft resolution, no additional appropriations would be needed in the Programme Budget for the biennium 2002/2003. It would, however, be necessary for the Court to ensure that enough funds were transferred to the Secretariat well before scheduled meetings.

38. **Mr. Rosand** (United States of America) explaining his delegation's position, said that, for the reasons given in his delegation's statement of 14 October on the item (A/C.6/57/SR.14), his country was unable to join the consensus and therefore would not participate in the adoption of the draft resolution. Since it valued consensus, it would not, however, call for a vote to be taken.

39. *Draft resolution A/C.6/57/L.16/Rev.1 was adopted without a vote.*

The meeting rose at 11.50 a.m.