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Summary record of the 2745th meeting

Topic:

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corruption and recommendation (2000) 10 on codes of conduct for public officials. The monitoring mechanism for that effort was GRECO, which supervised the extent to which signatories of the agreement respected the guiding principles and the relevant conventions. The endeavour seemed to be effective, particularly in view of the significant attention paid by civil society to the evaluation rounds carried out by GRECO in member States.

74. Mr. KAMTO said that he would be interested to know whether GRECO had compiled specific elements on national practice and whether it had identified cases of corruption within the European Union or elsewhere (involving companies, for example) which had been prosecuted in the national jurisdiction. The international press had exposed cases of corruption involving Heads of State in some countries.

75. Mr. BENÍTEZ (Observer for the Council of Europe) said that GRECO was not mandated to consider specific cases of corruption within the national jurisdiction. It examined to what extent national legislation, its implementation, and all the administrative and judicial bodies could respond effectively to the phenomenon of corruption. Each year, GRECO chose some of the 20 guiding principles and examined whether States had legislation or systems that allowed them to be implemented. For example, the first evaluation cycle had looked at the system of public prosecutors in GRECO member States to see whether they had sufficient independence to ensure that cases of corruption could be prosecuted effectively and without interference from the political authorities, particularly when the individuals concerned occupied important public positions. Parliamentary immunity had also been examined to see whether it was an obstacle to prosecuting certain persons accused of acts of corruption.

76. The CHAIR thanked the Observer for the Council of Europe for an extremely interesting report.

The meeting rose at 1 p.m.

2745th MEETING

Monday, 12 August 2002, at 3 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemi-cha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr.

Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session

CHAPTER V. *Diplomatic protection* (A/CN.4/L.619 and Add.1–6)

1. The CHAIR invited the members of the Commission to start their consideration of the draft report with chapter V on diplomatic protection. He suggested that the Commission should first consider section C of that chapter.

C. *Text of articles 1 to 7 of the draft articles on diplomatic protection with commentaries thereto provisionally adopted by the Commission* (A/CN.4/L.619/Add. 2–5)

Paragraphs 1 and 2 (A/CN.4/L.619/Add.2)

Paragraphs 1 and 2 were adopted.

Part One: General provisions

Article 1 (Definition and scope)

Article 1 was adopted.

Commentary to article 1

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

2. Mr. GAJA proposed that the words “Although analogous to diplomatic protection” should be deleted and that the rest of the sentence should be amended accordingly in order not to give the impression that States could not also be concerned by functional protection. Non-nationals could be employed by the State, in the armed forces, for example.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

3. Mr. DAOUDI said that, during the informal consultations, the Special Rapporteur had submitted a document on the diplomatic protection of ships’ crews, but he was not sure whether the last two sentences of paragraph (8) accurately reflected the conclusions of the informal consultations on that point.

4. Mr. DUGARD (Special Rapporteur) said that he intended to prepare a report on the diplomatic protection of ships' crews for the next session. As Mr. Daoudi had pointed out, the end of paragraph (8) did not reflect the support that had been expressed during the informal consultations for a provision on that question.

5. Ms. ESCARAMEIA said that she agreed with Mr. Daoudi's comment and was surprised that the results of the lengthy consultations held on the document submitted by the Special Rapporteur were not mentioned.

6. Mr. TOMKA said that the commentary was intended to explain the text of provisions, not to indicate the Commission's future intentions. He therefore proposed that the last two sentences of paragraph (8) should be deleted and that, before coming back to the question, the Special Rapporteur should submit a report on which the Commission would take a decision.

7. The CHAIR said that informal consultations were part of the Commission's internal work and were held for its benefit and that of the Special Rapporteur. If he heard no objection, he would take it that the Commission agreed to Mr. Tomka's proposal.

It was so decided.

Paragraph (8), as amended, was adopted.

Article 2 [3] (Right to exercise diplomatic protection)

Article 2 [3] was adopted.

Commentary to article 2 [3]

Paragraph (1)

8. Mr. PELLET proposed that the words "more carefully" in the second sentence should be deleted because PCIJ had used the exact wording of what Vattel had written.

9. Mr. TOMKA said that, in order to reflect faithfully what Vattel had written, the word "indirect" should be added before the word "injury" in the first sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

10. Mr. TOMKA said that the word "limited" at the end of the first sentence was unfortunate because any right exercised as part of a procedure must follow that procedure. He therefore proposed that paragraph (3) should read: "The right of a State to exercise diplomatic protection is subject to the parameters defined in the present articles."

11. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Tomka's comment but thought that it would be better to amend paragraph (3) to read: "The right of a State to exercise diplomatic protection can be exercised only within the framework of the parameters defined in the present articles."

It was so decided.

Paragraph (3), as amended by Mr. Dugard, was adopted.

Part Two: Natural persons

Article 3 [5] (State of nationality)

Article 3 [5] was adopted.

Commentary to article 3 [5]

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

12. Mr. PELLET said that the penultimate sentence was ambiguous and should be amended because the automatic acquisition of nationality by marriage was contrary to international law only if it was discriminatory.

13. The CHAIR suggested that that problem might be solved by deleting any reference to husbands and wives and referring only to "spouses".

14. Mr. DUGARD (Special Rapporteur) said that he was prepared to amend the sentence and asked whether Mr. Pellet had a proposal to make.

15. Mr. PELLET proposed the following wording: "Where marriage to a national automatically results in the acquisition of nationality, problems may arise in respect of the consistency of such an acquisition of nationality with international law when the acquisition is discriminatory."

16. Ms. ESCARAMEIA said that she did not entirely agree with Mr. Pellet's point of view. If it was true that the automatic acquisition of nationality was discriminatory and, therefore, contrary to international law only if women were involved, the fact of imposing nationality as a result of an act such as marriage, which had nothing to do with nationality, was contrary to the fundamental principles of human rights, regardless of whether men or women were involved.

17. Mr. TOMKA said that he had the same doubts, but, in view of the reference to article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women contained in paragraph (7) of the commentary, the sentence under consideration should not be amended.

18. Mr. AL-BAHARNA said that it was not clear how the fact that internal law provided for the automatic ac-

quisition of the nationality of the spouse was contrary to international law, if the persons concerned so agreed. He was thus also in favour of amending the penultimate sentence.

19. Mr. OPERTTI BADAN said that, in the Spanish version at least, the last sentence should also be amended because States did not acquire nationals; persons acquired nationality.

20. Mr. PELLET, noting that the problem arose in the French text as well, proposed that the beginning of the last sentence might be amended to read: "A person may also acquire nationality as a result...". With regard to the automatic acquisition of nationality by marriage, he proposed, as the Chair had done, that the sentence in question should be amended to read: "When marriage to a national automatically results in the acquisition by one spouse of the nationality of the other...".

21. Mr. CANDIOTI suggested that, in the third sentence, the words "to a national" should be deleted, that the same change should be made in the fourth sentence and that the text should then be amended along the lines indicated by the Chair and Mr. Pellet. He proposed the following wording for the last sentence: "Nationality may also be acquired as a result of...".

22. Mr. GALICKI said that, out of such concern for generality, the Commission might be creating something impossible. In practice, he did not know of any case where internal law provided for the automatic acquisition of the nationality of the wife by the husband. If no one could tell him of such a case, he would continue to be in favour of retaining the wording proposed by the Special Rapporteur because it was realistic.

23. Mr. MOMTAZ said that the reference to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women faithfully reflected the discussion in the Drafting Committee. The problem which arose was the result of the fact that the other human rights instruments had no equivalent article relating to men.

24. Mr. KAMTO said that Mr. Candiotti's proposal would solve the problem and that more general wording was desirable because, while it was true that the automatic acquisition of nationality by marriage usually concerned women, the Commission could not claim to know what provisions in that regard were contained in the internal law of all countries.

25. The CHAIR suggested that the wording proposed by Mr. Candiotti should be adopted and that the words "See, for example, article 9, paragraph 1,..." should be added to the footnote.

It was so decided.

Paragraph (4), as amended by Mr. Pellet and Mr. Candiotti, was adopted.

Paragraph (5)

26. Mr. PAMBOU-TCHIVOUNDA said that the wording of the third sentence was too categorical. In many cases, residence was not enough to establish proof of nationality. It would be better to indicate that residence could or might constitute proof of nationality.

27. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Pambou-Tchivounda's comment.

Paragraph (5), as amended, was adopted.

Paragraph (6)

28. Mr. KAMTO said that the wording of the first sentence was not really correct because, in the *Nottebohm* case, it had been for the national, not the State, to provide proof of an effective link. He proposed that that sentence should be amended to read: "Article 3 (2) does not require proof of the existence of an effective link between the State and its national, as in the *Nottebohm* case."

29. Mr. PAMBOU-TCHIVOUNDA said that he agreed with the wording proposed by Mr. Kamto, but that, since the role of the State had to be borne in mind, the words "by the State" should be added after the word "proof".

30. Mr. PELLET, noting that he agreed with Mr. Pambou-Tchivounda's comment, said that it was indeed the State which had to prove that an effective link existed, since ICJ dealt only with cases involving States. In view of the lack of agreement on that point in the Commission, he proposed that the words "Despite diverging opinions in the Commission on the interpretation of that judgement..." should be added at the beginning of the second sentence.

31. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Pellet: the first sentence was right and its wording should be retained. The proposed addition to the second sentence was justified.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

32. Mr. PELLET said that the construction of article 3 [5] was rather strange because paragraph 2 dealt with natural persons and it could therefore be expected that there would also be a paragraph on legal persons. He proposed that a paragraph (9) should be added to the commentary to indicate that the Commission reserved the right to add a paragraph 3 to the article.

33. Mr. DUGARD (Special Rapporteur) pointed out that paragraph (4) of the commentary to article 1 explained that "the term 'national' covers both natural and legal persons" and that "Later in the draft articles ... where necessary, the two concepts are treated separately."

34. Mr. PELLET said that the problem was one of structure and that since article 3 [5], paragraph 1, applied both to natural and to legal persons, the wording as it now stood would make it necessary to say so again in the provision on legal persons.

35. The CHAIR proposed that a note should be added to indicate that the Commission might look again at the wording of the article when it came to consider the case of legal persons.

It was so decided.

Article 4 [9] (Continuous nationality)

Article 4 [9] was adopted.

Commentary to article 4 [9]

Paragraph (1)

36. Mr. PAMBOU-TCHIVOUNDA said that the words *opinions judiciaires* in the first sentence did not mean anything in French. The words *décisions judiciaires* should be used instead.

37. Mr. TOMKA said that reference was being made to the opinion of one judge, not to a judicial decision. The footnote showed that reference was being made to the comments by Sir Gerald Fitzmaurice in the *Barcelona Traction* case.

38. Mr. KABATSI said that, when reference was made to the opinion of one judge, it was not a personal opinion that was meant, but an opinion that formed part of a judicial decision.

39. The CHAIR said that the term was entirely correct in English.

40. Mr. DAOUDI said that there was a mistake in the Arabic version: contrary to what was indicated, what was meant was the individual opinion of one judge, not an advisory opinion.

41. Mr. PAMBOU-TCHIVOUNDA said that what was meant could be either an individual or a dissenting opinion, but certainly not a “judicial opinion”.

42. Mr. PELLET, agreeing with Mr. Pambou-Tchivounda, said that, for those trained in the civil law system, the concept of “judicial opinion” did not exist. Such persons considered that judges could have feelings, but that had nothing to do with a judicial decision. What was meant was “doctrine”. In his opinion, it would therefore be better to refer only to “doctrine” and to merge the footnotes corresponding to the last part of the sentence so that they would refer both to the comments of Fitzmaurice and to those of Wyler.

43. Mr. DUGARD (Special Rapporteur) said that that concept did exist in common-law systems, but not in civil-law systems. He was therefore prepared to accept Mr. Pellet’s proposal.

Paragraph (1), as amended by Mr. Pellet, was adopted.

Paragraph (2)

44. Mr. TOMKA said that the last sentence, which stated that “the Commission decided against including the requirement that nationality be retained between injury and presentation of the claim”, contradicted article 4, paragraph 1, in which the principle of continuous nationality was very clearly stated, as the title of that article confirmed.

45. Mr. PELLET said that such continuity was emphasized in the French text of article 4, paragraph 1, by the use of the words *a toujours cette nationalité*. At the very least, the word *toujours* should be deleted because it was not used in the other language versions.

46. Following an exchange of views in which Mr. GAJA, Mr. KOSKENNIEMI, Mr. OPERTTI BADAN, Mr. PAMBOU-TCHIVOUNDA, Mr. GALICKI and Mr. DUGARD (Special Rapporteur) took part, the CHAIR requested the Special Rapporteur and all interested members to submit a drafting proposal for the last sentence to take account of the comments by Mr. Tomka and Mr. Pellet and of the other comments made.

47. Mr. DUGARD (Special Rapporteur) proposed that the last sentence should be replaced by the following: “In these circumstances, the Commission decided to leave open the question whether nationality should be retained between injury and presentation of the claim.”

48. The CHAIR asked the Chair of the Drafting Committee whether that drafting proposal was acceptable to him. If he heard no objection, moreover, he would also suggest that, in view of the lack of consistency between the different language versions, the word *toujours* in the French text of article 4, paragraph 1, should be deleted.

49. Mr. YAMADA (Chair of the Drafting Committee) said that, during the drafting of article 4, the ambiguous wording of paragraph 1 had deliberately been retained because there was no uniformity in the practice of States as to whether nationality must be retained between the time of the injury and the date of the official presentation of the claim. It was up to the plenary Commission to decide on the wording of paragraph (2) of the commentary. The proposal by the Special Rapporteur was fully acceptable to him.

50. The CHAIR said that, if he heard no objection, he would take it that paragraph (2) of the commentary, as amended by the Special Rapporteur, was adopted and that, in the French text of article 4, the word *toujours* in the first sentence of paragraph 1 should be deleted.

It was so decided.

Paragraph (2), as amended, was adopted.

Paragraph (3)

51. Mr. GAJA said that the second and last sentences were redundant. The idea had obviously been to emphasize the fact that, in the context of the article in question, the rule on the exhaustion of local remedies was to be excluded for practical reasons, but it was perhaps not necessary to say so more than once. He therefore proposed that the last sentence should be deleted and that the call-out for the footnote, which would have to be renumbered, should be placed at the end of the second sentence, after the words “the date of the injury”. The penultimate sentence, which stated that “The Commission has, however, refrained from giving approval to this approach” (according to which the exhaustion of local remedies rule would be regarded as a substantive condition), was also not very clear.

52. Mr. PELLET said he also found that the penultimate sentence was very ambiguous and that the mysterious footnote to which it referred did not make matters any clearer. Perhaps the footnote should be more explicit. In any event, it should be explained that the “approach” to which reference was being made had been retained in the draft article on State responsibility on first reading, but abandoned on second reading.

53. Mr. DUGARD (Special Rapporteur) said that the footnote which Mr. Pellet had described as “mysterious” referred to a discussion in the Commission during which it had been decided to reject draft articles making the exhaustion of local remedies rule a substantive condition. Mr. Gaja’s proposal that the last sentence of paragraph (3) should be deleted was entirely acceptable.

54. Mr. PELLET said that paragraph (3) could not contain a footnote simply referring to a “discussion” in the Commission. That was too vague. Perhaps reference could be made to the relevant report of the Special Rapporteur, explaining that he had proposed that the exhaustion of local remedies rule should be adopted as a substantive condition, but that that proposal had not been agreed to by the Commission. The reader would find such a footnote much clearer. The words “on first reading” should also be added in the penultimate sentence between the words “included” and “in the draft articles”.

55. Mr. TOMKA said that article 4, paragraph 1, referred to “the time of the injury”, not to the time of the breach of international law, as in the draft articles on State responsibility. In order not to confuse the reader, he proposed that the problems to which the exhaustion of local remedies rule gave rise should not be referred to, since no decision had been taken in that regard, and that only the first two sentences of paragraph (3) should be retained.

56. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

57. Mr. PELLET said he had been assured that the words “nationality of claims” would not be used. He was therefore surprised to find them in paragraph (4). He pointed out that paragraph 39 of the Commission’s draft report stated that that concept was confusing.

58. Mr. DAOUDI said that the Arabic version of paragraph (4) did not refer to the nationality of the claim.

59. Mr. DUGARD (Special Rapporteur) said he had assured Mr. Pellet that those words would not be used in the draft articles, but it was difficult not to use them in the commentaries.

60. Mr. PELLET said that he could agree to the retention of those words, provided that the following footnote was added: “According to one opinion, the concept of ‘nationality’ is confusing. It is taken directly from common law and has no equivalent in other legal systems.”

61. Mr. GAJA proposed that the words *dies ad quem* in the second sentence should be deleted and that the same words in the third sentence should be replaced by the words “the date of the claim”.

62. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the proposals by Mr. Pellet and Mr. Gaja.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

63. Ms. ESCARAMEIA said that she did not see why marriage was not placed on the same footing as succession of States and adoption. She therefore proposed that the third sentence should be deleted, because it implied that loss of nationality could in a way be voluntary. The second sentence should be amended to read: “In the case of succession of States and, possibly, adoption and marriage, where a change of nationality automatically follows, nationality will be lost involuntarily.”

Paragraph (7), as amended, was adopted.

Paragraph (8)

64. Mr. MOMTAZ proposed that, in the French text of the last sentence, the word *douloureux* should be replaced by the word *exceptionnel*.

65. Mr. DUGARD (Special Rapporteur) proposed that reference should be made to “cases involving compulsory acquisition of nationality”.

Paragraph (8), as amended by the Special Rapporteur, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

66. The CHAIR invited the members of the Commission to continue their consideration of chapter V, section C, of the draft report.

Article 5 [7] (Multiple nationality and claim against a third State) (A/CN.4/L.619/Add.3)

Article 5 [7] was adopted.

Commentary to article 5 [7]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

67. Mr. PELLET proposed that, at the end of the first sentence, the words “the weight of authority is against such a requirement” should be replaced by the words “the weight of authority does not require such a condition”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Article 6 (Multiple nationality and claim against a State of nationality) (A/CN.4/L.619/Add.4)

Article 6 was adopted.

Commentary to article 6

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

68. Mr. PELLET pointed out that the Convention on Certain Questions relating to the Conflict of Nationality Laws was still in force and the word “declared” should therefore be replaced by the word “declare”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

69. Mr. GAJA proposed that, at the beginning of the fourth sentence, the words: “The [Italian–United States Conciliation] Commission made it clear” should be replaced by the words “The Commission held” in order not to give the impression that the International Law Commission supported what the Italian–United States Conciliation Commission had said, when in fact it did not, as was shown in paragraph (5) of the commentary.

70. Mr. PELLET said that, in the first sentence, the words “arbitral decisions” should be replaced by the words “some arbitral decisions”.

Paragraph (3), as amended by Mr. Gaja and Mr. Pellet, was adopted.

Paragraphs (4) to (8)

Paragraphs (4) to (8) were adopted.

The meeting rose at 6 p.m.

2746th MEETING

Tuesday, 13 August 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session (*continued*)

CHAPTER V. *Diplomatic protection* (continued) (A/CN.4/L.619 and Add.1–6)

1. The CHAIR invited the members of the Commission to continue their consideration of chapter V of the draft report.