

Document:-
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Summary record of the 2747th meeting

Topic:

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Palestinian or Syrian from Israel. The notion was absurd. The situation of colonialism, which was covered by paragraph 43 of the report, was quite different. He trusted that his views would be fully reflected in the summary record.

90. The CHAIR, after saying that all positions would undoubtedly be reflected in the record, urged the Commission not to debate the legal merits of what the Special Rapporteur had said but merely to accept paragraph 44 as a faithful account of what had been said.

91. Mr. KAMTO, after pointing out that it was perfectly legitimate for each member to want to express an opinion, said that, in view of the debate that had just taken place, there must be a question as to whether paragraph 44 truly reflected the feeling of the Commission. The debate showed virtually no support for the present wording of the paragraph. The first sentence should be recast to read: "The Special Rapporteur noted further that there had been a proposal to include within the scope of the study the exercise of diplomatic protection by a State which administered, controlled or occupied a territory." If the Commission wished, a further sentence could say: "This proposal did not receive any support."

92. Mr. DUGARD (Special Rapporteur) said that such wording flew in the face of the facts. Mr. Pellet had made his proposal and, according to his recollection, a number of people had supported the idea.

93. Mr. PELLET confirmed that there had been support for his proposal that the inhabitants of occupied territories should not be left without diplomatic protection, notably from Mr. Simma, who was currently out of the room. He would raise no objection to the first part of Mr. Kamto's suggested text; but to say that there had been no support for the proposal was simply untrue.

94. Mr. DUGARD (Special Rapporteur) said that the suggested text implied that Mr. Pellet had made a ridiculous proposal and that he had been isolated in the Commission. Although he himself, in common with most other members, had opposed it, the proposal had been perfectly rational in the context of the discussion on topics that might or might not be dealt with under the subject of diplomatic protection.

95. Mr. AL-BAHARNA said that the Commission's views would be reflected if a sentence was inserted in the report, along the following lines: "Some members objected to the use of the word 'occupied'."

96. Mr. MOMTAZ said that, while he was personally sympathetic to Mr. Pellet's proposal and to the concern that lay behind it, deletion of the word "occupied" would not diminish the force of that concern in any way. Administration or controls did not preclude occupation, but the word "occupied" resonated very disagreeably with many members of the Commission.

97. Mr. AL-MARRI suggested that a phrase should be added at the end of the first sentence, saying: "provided that the provisions of the Geneva Conventions of 12 Au-

gust 1949 relative to the protection of war victims were not thereby violated".

98. The CHAIR said that he saw no prospect of compromise on the issue. It was Orwellian that the Commission was unable to report what had been said. Unless he heard any formal objection, he proposed that paragraph 44 should be adopted as it stood.

At the request of Mr. Kemicha, a vote was taken.

Paragraph 44 was adopted by 15 votes to 9, with 3 abstentions.

99. The CHAIR said he very much regretted that it had proved necessary to take a vote, which was a most unusual occurrence in the Commission.

The meeting rose at 1 p.m.

2747th MEETING

Tuesday, 13 August 2002, at 3.05 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Koskeniemi, Mr. Mansfield, Mr. Momtaz, Mr. Opertti Badan, Mr. Pellet, 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 (concluded) (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, section B, of the draft report of the Commission.

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.619 and Add.1 and 6)

Paragraph 45 (A/CN.4/L.619)

2. Mr. TOMKA said that the commentary to article 3 [5] did not refer either to the Calvo clause or to the "clean hands" principle in connection with the *Nottebohm* case. He therefore proposed that the words "as well as in the

commentary to article 3 [5] in the context of the *Nottebohm* case” should be deleted.

Paragraph 45, as amended, was adopted.

Paragraph 46

3. Mr. DUGARD (Special Rapporteur) said that paragraph 46 dealt with the question of denial of justice, which was discussed in a practically identical way in the last part of section B of the report. He therefore proposed that paragraph 46 should be deleted.

Paragraph 46 was deleted.

Paragraphs 47 to 51

Paragraphs 47 to 51 were adopted.

Paragraphs 52 and 53

Paragraphs 52 and 53 were adopted with editing changes.

Paragraphs 54 to 56

Paragraphs 54 to 56 were adopted.

Paragraph 57

4. Mr. PELLET said it should be stated that the distinction referred to at the end of the penultimate sentence had not been retained “on second reading”.

Paragraph 57, as amended, was adopted.

Paragraph 58

Paragraph 58 was adopted.

Paragraph 59

5. Mr. GAJA proposed that the words “from a smaller State’s perspective” in the second sentence should be deleted because they implied that it was the State which exhausted local remedies. He also proposed that the word “always” should be added after the words “was not”.

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 63

Paragraphs 60 to 63 were adopted.

Paragraph 64

6. Mr. PELLET proposed that the last sentence should be amended to read: “The exhaustion of local remedies

rule was not peremptory, but was subject to the agreement of the parties.”

Paragraph 64, as amended, was adopted.

Paragraphs 65 to 79

Paragraphs 65 to 79 were adopted.

Paragraph 80

7. Mr. PELLET said that, in the French text, the words *droit romain* should be replaced by the words *droit romano-germanique* or *droit d’origine latine*.

8. Mr. SIMMA said that the fifth and sixth sentences dealt with the relevance of human rights jurisprudence and that they should therefore be incorporated in paragraph 82 dealing with that question.

Paragraph 80, as amended, was adopted.

Paragraph 81

Paragraph 81 was adopted.

Paragraph 82

Paragraph 82 was adopted with the addition of the fifth and sixth sentences of paragraph 80.

Paragraphs 83 and 84

Paragraphs 83 and 84 were adopted.

Paragraph 85

9. Mr. PELLET said that he did not understand the penultimate sentence.

10. Mr. DUGARD (Special Rapporteur) said that that sentence was not absolutely necessary and proposed that it should be deleted.

Paragraph 85, as amended, was adopted.

Paragraph 86

Paragraph 86 was adopted.

11. The CHAIR invited the members of the Commission to consider the remainder of chapter V, section B, of the draft report, which dealt with articles 14 and 16.

A/CN.4/L.619/Add.1

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

12. Mr. SIMMA proposed that the word “generic” in the first sentence should be deleted.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 13

Paragraphs 3 to 13 were adopted.

Paragraph 14

13. Mr. SIMMA, supported by Mr. PELLET, said that it should be explained in a footnote which document the reference to the *ELSI* case was taken from.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 27

Paragraphs 15 to 27 were adopted.

Paragraph 28

14. Mr. GAJA said that, in the *Trail Smelter* case, the United States had been the claimant State and Canada the respondent State, and not the other way around. The penultimate sentence should therefore be amended accordingly.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 31

Paragraphs 29 to 31 were adopted.

Paragraph 32

15. Mr. PELLET said that the last sentence should contain a reminder of what the course taken in 1996 had been.

16. Mr. DUGARD (Special Rapporteur) said that that sentence referred back to the last sentence of paragraph 26. He agreed with Mr. Pellet that an explanation was necessary.

17. Mr. GAJA proposed that the reference to 1996 should be deleted because, in any event, the decision had been taken in the 1970s. The last sentence should therefore be amended to read: “As such, he left it to the Commission to decide whether to allow the matter to develop in State practice or whether it felt there was a need to intervene *de lege ferenda*.”

Paragraph 32, as amended by Mr. Gaja, was adopted.

Paragraphs 33 to 43

Paragraphs 33 to 43 were adopted.

Paragraph 44

18. Mr. GAJA, referring to the last sentence, said that European multilateral conventions did not have the purpose of limiting the liability of the contracting parties, but of settling the question of civil liability. He therefore proposed that the end of that sentence should be amended to read: “which had the very purpose of settling the question of civil liability in the event of such an accident”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 48

Paragraphs 45 to 48 were adopted.

Paragraph 49

19. Mr. SIMMA said that the words “as confirmed by the changing nature of State responsibility” in the second sentence did not mean anything and were unnecessary. He therefore proposed that they should be deleted and that the sentence should end with the word “codification”.

20. Mr. PELLET said that the words “Any attempt to exhaust local remedies” in the penultimate sentence were quite awkward and should be replaced by the words “Requiring the exhaustion of local remedies”.

21. Mr. DUGARD (Special Rapporteur) said that the words “Any attempt” might be replaced by the words “The requirement”.

Paragraph 49, as amended by Mr. Simma and Mr. Pellet, was adopted.

Paragraph 50

Paragraph 50 was adopted.

Paragraph 51

22. Mr. GAJA, referring to the penultimate sentence, said that it was not an alien who could submit a direct claim, but his State of nationality. The words “a direct claim by him” should be replaced by the words “a direct claim by that State”.

23. Mr. BROWNLIE, referring to the first sentence, said that it was not enough to mention liability because a claim might, depending on the circumstances, be based on State responsibility.

24. Mr. PELLET, supported by Mr. DUGARD (Special Rapporteur) and referring to the comment by Mr. Brownlie, proposed that the end of the first sentence should be

amended to read: “the context was not that of responsibility covering diplomatic protection, but that of liability.”

Paragraph 51, as amended by Mr. Gaja and Mr. Pellet, was adopted.

Paragraph 52

25. Mr. SIMMA said that the word “obstruct” was too strong.

26. The CHAIR proposed that the word “obstruct” should be replaced by the word “hamper”.

Paragraph 52, as amended, was adopted.

Paragraphs 53 to 63

Paragraphs 53 to 63 were adopted.

A/CN.4/L.619/Add.6

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

27. The CHAIR, speaking as a member of the Commission, asked whether it was really necessary to refer to the Vattelian “fiction” and whether the word “approach” might not be used.

28. Mr. BROWNLIE said that, instead of referring to a “fiction”, it would be better not to mention Vattel at all because, for Vattel, the problem had not been a fiction but a reality.

29. Mr. PELLET said he regretted that the Chair had deemed it necessary to reopen the debate on a question which the Commission had discussed for hours. He stressed that there was no possible doubt that a fiction was involved and that, in any case, that was what the Special Rapporteur had said.

30. Mr. DUGARD (Special Rapporteur) said that the Vattelian fiction had often been referred to and that he had used the term when he had introduced article 16. He would therefore prefer to keep it.

Paragraph 2 was adopted.

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

31. Mr. SIMMA proposed that, in the second sentence, the word “intervention” should be replaced by the word “protection”.

32. Mr. DUGARD (Special Rapporteur) said that the word “intervention” was broader in meaning than the word “protection” and he had chosen “intervention” purposely.

Paragraph 4 was adopted.

Paragraph 5

33. Mr. BROWNLIE proposed that, in the second sentence, the words “Western States” should be replaced by the words “capital-exporting States”.

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted.

Paragraph 9

34. Ms. ESCARAMEIA said that paragraph 9 did not reflect one of the points of view expressed, namely, that article 16 was not properly speaking a Calvo clause, but related instead to the exhaustion of local remedies. She therefore proposed that the following sentence should be added after the second sentence: “The view was expressed that the proposed article did not deal with the Calvo clause in its classical sense, but with a mere obligation of exhaustion of local remedies in particular circumstances”.

35. The CHAIR proposed that, in the light of the beginning of the paragraph, the beginning of the new sentence should be amended to read: “Some also expressed the view that the draft article...”.

It was so decided.

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were adopted.

Paragraph 13

36. Mr. GAJA proposed that the word “only” in the fourth sentence should be deleted. The fifth sentence should also be deleted because it did not mean anything.

37. Mr. PELLET said that, if the word “only” was deleted, the sentence would not mean anything at all. Since the wording of the sentence was awkward, he proposed that it should be amended to read: “The alien could, however, place himself exclusively under the protection of the laws of the host country.” The fifth sentence could not be deleted, but its wording could be improved.

38. Mr. GAJA said that he could agree to the wording proposed by Mr. Pellet for the fourth sentence. In his opinion, however, the fifth sentence would have to be reworded if it was to be kept, because diplomatic protection

was the prerogative of the State, not of the alien. Perhaps it could be said that the alien would have to waive his right to invoke the protection of his State.

39. Mr. OPERTTI BADAN said that Mr. Pellet's proposal might restrict the scope of diplomatic protection.

40. Mr. PELLET said that a waiver of the protection of international law did, of course, involve a waiver of diplomatic protection, but those were nonetheless two different types of waiver. In his opinion, the word "respect" was the cause of the problem. It could not be said that the alien undertook to "respect" the laws of the host country. He had no choice in the matter. He had to do so.

41. Mr. GAJA, supported by Mr. BROWNLIE, proposed that the words "respect only" should be replaced by the words "rely only on" and that the fifth sentence should be deleted.

Paragraph 13, as amended, was adopted.

Paragraph 14

42. Mr. OPERTTI BADAN said that the beginning of the first sentence had to be amended because it was too vague.

43. The CHAIR proposed the following wording: "Some also stated that...".

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

44. Mr. GAJA said that he had made the suggestion referred to in paragraph 16, but the paragraph did not faithfully reflect what he had meant to say. He had suggested not that article 16 should be reformulated but that a general provision on waiver should be drafted.

45. Mr. DUGARD (Special Rapporteur) said that that suggestion was to be found elsewhere in the text as well and that account must be taken of it if it was decided that paragraph 16 should be redrafted.

46. Mr. GAJA proposed the following wording: "The Commission further considered a suggestion that a general provision on waiver should be drafted".

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 19

Paragraphs 17 to 19 were adopted.

Paragraph 20

47. Mr. PELLET said that, by adopting Mr. Gaja's suggestion that the reference to the Drafting Committee in paragraph 16 should be deleted, the Commission had made paragraph 20 very difficult to understand. Since the suggestion that the Committee should draft an omnibus waiver clause had been deleted, it was no longer clear what the Special Rapporteur was referring to in paragraph 20. The words "before a full consideration of such a provision was undertaken by the plenary" were also not clear. Unless that suggestion was included in the report of the Special Rapporteur, it was not obvious how it could have been "drafted" without being considered in plenary.

48. Mr. DUGARD (Special Rapporteur) said he recognized that paragraph 16 had been amended without taking account of paragraph 20. He remembered, even if Mr. Gaja did not, that he had indeed proposed that the Drafting Committee should be requested to prepare an omnibus waiver clause. In any event, in order to bring paragraph 20 into line with paragraph 16, the reference to the Committee in paragraph 20 could be deleted and it might simply be stated, for example: "The Special Rapporteur further pointed out that it would not be appropriate to draft an omnibus waiver clause before a full consideration of such a provision was undertaken by the plenary."

49. Mr. PELLET said that the French text used the word *inapproprié*, not the word *approprié*.

50. Mr. DUGARD (Special Rapporteur) said that that was a mistake. The French text should read: *qu'il ne serait pas approprié*.

51. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to Mr. Gaja's proposal that the reference to the Drafting Committee in paragraph 20 should be deleted.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

52. Mr. PELLET said that paragraph 22 was a rather abrupt end to what had been a very lengthy discussion. Perhaps one or two sentences should be added to explain why the Commission had decided not to refer article 16 to the Drafting Committee.

53. The CHAIR, supported by Mr. BROWNLIE, said that the commentary simply reflected matters as they stood. The Commission did not have to explain why it had decided not to refer article 16 to the Drafting Committee. In addition, the reasons why various members had made a decision to that effect were many and varied, and the motives could not be described in detail.

54. Mr. AL-BAHARNA said that one solution would be to add paragraph 22 at the end of paragraph 21. The last sentence of paragraph 21 would then read: "However, the

Commission decided not to refer article 16 to the Drafting Committee.”

55. The CHAIR said that the word “However” might give rise to problems. Perhaps it could be left out. As to substance, he believed that there had been an “indicative vote” on the question whether or not article 16 should be referred to the Drafting Committee and that opinions had been divided.

56. Mr. DUGARD (Special Rapporteur) said that he would prefer that reference not be made to that vote because the results had not been very clear-cut.

57. Mr. PELLET said that the reasons why the Commission had decided not to refer article 16 to the Drafting Committee were explained in paragraphs 12 to 15. On the basis of Mr. Al-Baharna’s suggestion, perhaps paragraph 22 could be deleted and paragraph 21 could end with the following wording: “However, for the reasons explained in paragraphs 12 to 15 above, the Commission decided not to refer article 16 to the Drafting Committee”.

58. Mr. SIMMA said that the reasons given in paragraphs 12 to 15 were basically negative, but the members of the Commission had been divided “almost evenly”, as was indicated at the beginning of paragraph 21. It would therefore be better to adopt Mr. Al-Baharna’s original proposal.

59. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed that paragraph 22 should be deleted and that its content, except for the words “subsequently”, should be added at the end of paragraph 21.

It was so decided.

Paragraph 21, as amended, was adopted.

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

60. Mr. BROWNLIE proposed that the words “relating to the treatment of foreign nationals” should be added after the words “State responsibility” at the end of the second sentence.

61. Mr. TOMKA said that the rules of State responsibility relating to the treatment of aliens were primary rules, not secondary rules. He therefore wondered whether it would not be better to add the wording proposed by Mr. Brownlie in the first sentence, the end of which would then read: “Denial of justice was not limited to judicial action or inaction, but included violations by the executive and the legislature of international law relating to the treatment of foreign nationals, thereby covering the whole field of State responsibility.”

62. The CHAIR questioned whether it could be said that international law relating to the treatment of foreign nationals “covered” the whole field of State responsibility.

63. Mr. BROWNLIE said that, although that wording did not change the meaning of the paragraph, it did place too much emphasis on the executive and the legislature, whereas the concept of “denial of justice” was now very commonly used in arbitral procedure, where it constituted the basis of many legal cases brought in order to obtain compensation for injury to foreign nationals.

64. Mr. GAJA said that the words “State responsibility” might be replaced by the words “the conduct of States”.

65. Mr. SIMMA said that the juxtaposition of the words “international law relating to the treatment of foreign nationals” and “thereby covering the whole field of State responsibility” did give rise to a problem. The latter phrase should be amended.

66. Following a discussion in which Mr. DUGARD (Special Rapporteur), Mr. BROWNLIE, Mr. SIMMA and Mr. TOMKA took part, the CHAIR suggested that the words “thereby covering the whole field of State responsibility” should be deleted, thereby solving the problem of the definition of the scope of State responsibility.

It was so decided.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Chapter V, section B, as amended, was adopted.

Chapter V, as amended, was adopted.

The meeting rose at 6 p.m.

2748th MEETING

Wednesday, 14 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto,