Document:-
A/CN.4/SR.2746

Summary record of the 2746th meeting

Topic:

Extract from the Yearbook of the International Law Commission:-

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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) were adopted.

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

Paragraphs (9) and (10) were adopted.

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) 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.

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.

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

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. Katska, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodriguez 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.
Paragraph 2

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

Paragraph 2

2. Mr. SIMMA proposed that the first part of the quotation from the 1931 *Dickson Car Wheel Company* case should be eliminated, since it reflected a position that was inappropriate and no longer politically correct. The quotation would therefore read: “No State is empowered to intervene or complain on behalf [of an individual lacking nationality] either before or after the injury.”

3. Mr. DUGARD (Special Rapporteur) said the Commission should not have to hide the harsh realities of international law, and that the quotation simply set out the position in 1931. He would prefer to keep the paragraph as it was, but if political correctness prevailed, he would not object.

4. Mr. TOMKA said that he agreed with Mr. Simma. However, there appeared to be a contradiction between the first sentence, which stated, “The general rule is...”, and the phrase which stated that the rule was out of step with contemporary international law. The first sentence should be amended to read “The general rule was...”; then the quotation could remain unchanged.

5. Mr. BROWNLIE agreed that the first sentence should be rephrased, as the current version was quite dogmatic and gave the impression that the Commission accepted that the law continued to be as it had been in 1931. The Commission should not give the impression that it was making a complete about-turn; the present position was more nuanced. Some members of the Commission had long thought that habitual residence granted a status, even though the individual concerned might also have refugee status, for example.

6. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Tomka’s and Mr. Brownlie’s suggestions, which made it clear that the *Dickson Car Wheel Company* case reflected an earlier position. The first two sentences could be amended to read: “The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. For instance, in 1931, the United States–Mexican Claims Commission...”. Then the sentence following the quotation could be changed to read: “This dictum no longer reflects the accurate position in international law of both stateless persons and refugees. Contemporary international law reflects a concern for the status of both these categories of persons.”

Paragraph 3

7. Mr. PELLET proposed that the definition of stateless persons set out in the paragraph should be followed by a sentence reading: “This definition may be regarded as having become customary.”

Paragraph 3, as amended, was adopted.

Paragraph 4

8. Ms. ESCARAMEIA proposed that, in order to reflect the views of several members of the Commission, a sentence stating: “Some members thought that the 1997 European Convention on Nationality should not be the model for diplomatic protection, since this issue differs from that of acquisition of nationality” should be added to the footnote. For the same reason, the third sentence should be amended to read: “… this threshold is too high and would lead to situations of effective lack of protection for the individuals involved, the majority took the view...”.

9. Mr. TOMKA said that, although he understood Ms. Escaramedia’s views, the commentary should not reflect the Commission’s discussion; rather, it should comment on the provisions of the draft articles. Moreover, no one had suggested that the European Convention on Nationality dealt with diplomatic protection, so her first proposal seemed redundant. He questioned whether it was necessary to refer to the Convention and proposed that, to avoid confusion, the first sentence should be deleted. Since the right to provide diplomatic protection was a right of the State, it set a threshold for a State to be entitled to exercise diplomatic protection and not for individuals seeking protection, because under international law they were not entitled to such protection.

10. Mr. GALICKI said that there appeared to be a misunderstanding about the purpose of the first sentence of paragraph 4. The intention was merely to state that the Commission had used the European Convention on Nationality as a source of the words “lawful and habitual residence”. The formula proposed by the Special Rapporteur was better balanced. It explained the source of the terminology and then reflected the discussion on whether the threshold was too high or too low. The text should be retained as it was, with the addition of the second amendment proposed by Ms. Escaramedia, which explained why some members of the Commission considered that the threshold was too high.

11. Mr. SIMMA proposed that, to emphasize Mr. Galicki’s point, the first sentence should be made into a separate paragraph, thus clarifying that it merely referred to the source of the terminology used. With regard to Mr. Tomka’s comment that the different views of members of the Commission were not generally reflected in the commentary, he believed that if something was really controversial, the point could be made in the text adopted on first reading and the attention of States could be drawn to it. He therefore agreed with Mr. Galicki that the text should remain unchanged, except for the additional wording proposed by Ms. Escaramedia for the last sentence.
12. The CHAIR said that there was a substantive difference between the first and second readings. On the first reading the text should include the divergent opinions of the members of the Commission, whereas on second reading it should indicate a single position.

13. Mr. DUGARD (Special Rapporteur) said that, in general, he had not reflected the divergences of opinion of the members of the Drafting Committee. To satisfy the concerns voiced, the paragraph should be amended so that it started: “The requirement of both lawful residence…” Then, in a footnote, it could be explained that the terminology “lawful and habitual residence” was taken from the European Convention on Nationality, which dealt with acquisition of nationality. The final sentence would be amended as suggested by Ms. Escarameia.

14. Mr. GALICKI said that he agreed with the Special Rapporteur’s proposal. The European Convention on Nationality did not, however, deal only with acquisition of nationality, so the footnote should clarify that, in the Convention, the term “lawful and habitual residence” was used in connection with acquisition of nationality.

**Paragraph 4, as amended, was adopted.**

Paragraphs 5 and 6

**Paragraphs 5 and 6 were adopted.**

Paragraph 7

15. Ms. ESCARAMEIA said that paragraph 4, which dealt with residence requirements in the case of stateless persons, had accurately reflected the divided opinions of members of the Commission. That was not the case in paragraph 7, which covered the same issue with regard to refugees. It gave the idea that the Commission had a single opinion, and she proposed that the beginning of the first two sentences should be amended to read: “The majority of the Commission...”.

16. Mr. KOSKENNIEMI said that he shared Ms. Escarameia’s concern; those who had expressed the minority view believed that the point concerned both stateless persons and refugees. The rationale and justification were the same in both paragraphs 4 and 7, something that would be useful to reflect. Paragraph 7 should indicate that, “as in paragraph 4 above, some members of the Commission considered that the threshold was too high”.

17. The CHAIR said that, instead of referring to paragraph 4, it would be preferable to add the following sentence: “Some members took the view that the threshold was set too high for refugees as well as for stateless persons.”

18. Mr. KATEKA (Alternate Rapporteur) pointed out that there would be a contradiction if the paragraph started by saying that “The Commission decided” and then went on to speak of “Some members...”. For the sake of consistency, the beginning of the paragraph should read: “Most members of the Commission decided...” and then say: “while some members held the view...”.

19. Mr. TOMKA said that paragraph 7 related to paragraph 2 of article 7, which had been adopted by the Commission unanimously. While it was true that divergent views had been expressed in the debates leading up to its adoption, those views had been fully expressed in the Commission’s reports on its fifty-second and fifty-third sessions. However, as the commentaries were being adopted on first reading, he could accept the inclusion of a sentence along the lines proposed, in deference to the wishes of new members.

20. Mr. KATEKA (Alternate Rapporteur) said the record must make clear that some members—not all of them “new” members—had been opposed to including any provision on diplomatic protection of refugees and stateless persons.

21. After a discussion in which Mr. SIMMA, the CHAIR and Mr. KEMICHA took part, Mr. DUGARD (Special Rapporteur) said that the simplest solution would be to incorporate the contents of the footnote at the end of the paragraph in the main body of the text, after the words *de lege ferenda.*

**Paragraph 7, as amended, was adopted.**

Paragraphs 8 to 10

**Paragraphs 8 to 10 were adopted.**

Paragraph 11

22. Mr. SIMMA said that the words “State of refugee” should read “State of refuge”.

**Paragraph 11, as amended, was adopted.**

Paragraph 12

**Paragraph 12 was adopted.**

Chapter V, section C, of the Commission’s draft report, as amended, was adopted.

23. The CHAIR invited the Commission to take up consideration of section A and the first part of chapter V, section B, of the Commission’s draft report.

A. Introduction (A/CN.4/L.619)

Paragraphs 1 to 5

**Paragraphs 1 to 5 were adopted.**

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1 See *Yearbook... 2000*, vol. II (Part Two), chap. V, p. 72.
2 See *Yearbook... 2001*, vol. II (Part Two), chap. VII, p. 196.
Paragraph 6

24. Mr. TOMKA said that the verb in the expression “established an open-ended informal consultation”, also to be found in paragraph 8, should be changed to “convened” or “held”.

25. Mr. PELLET said it appeared that English-speaking members who raised points affecting only the English version were treated with indulgence, whereas speakers of other languages were asked to address their comments to the secretariat. The same rules should be applied to all members, regardless of their working language.

26. Mr. BROWNLIE said that in his view the language used in paragraph 6 was perfectly acceptable.

Paragraph 6 was adopted.

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Section A was adopted.

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

Paragraph 9 (A/CN.4/L.619)

Paragraph 9 was adopted.

Paragraph 9 bis

27. The CHAIR drew attention to a new paragraph 9 bis, which read:

“At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended Informal Consultation, to be chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.”

Paragraph 9 bis was adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were adopted.

Paragraph 13

28. Mr. TOMKA said that the second sentence of the paragraph begged the question whether diplomatic protection was a branch of international law. Furthermore, the assertion that “no other branch of international law was so rich in authority” was in any case debatable. Accordingly, the sentence should be deleted.

29. The CHAIR said that the sentence reflected not the Commission’s but the Special Rapporteur’s opinion on the matter.

Paragraph 13 was adopted.

Paragraphs 14 to 17

Paragraphs 14 to 17 were adopted.

Paragraph 18

Paragraph 18 was adopted with a minor editing change.

Paragraph 19

30. Mr. DUGARD (Special Rapporteur) said that the report contained a number of statements attributed to himself with which the Commission could not agree. It would, however, constitute a bad precedent if the Commission were to censor his errors at that late stage.

31. Mr. SIMMA, referring to the first sentence of paragraph 19, said it was not clear how a distinction could be drawn between the entitlement of an international organization to exercise diplomatic protection and the entitlement of the organization to exercise functional protection. Did the former entitlement in fact exist?

32. Mr. PELLET said that the statement was correct. Some members had raised the question whether in certain circumstances, for example, when an international organization administered a territory, it could perhaps exercise a protection that was diplomatic rather than functional in nature. In that regard, he was at a loss to understand some members’ determination to censor others’ remarks.

33. The CHAIR said he agreed with Mr. Pellet. If an international organization went beyond the exercise of functional protection by asserting full diplomatic protection, that might raise questions for the State of nationality.

34. Mr. SIMMA said that the United Nations could not exercise diplomatic protection in the proper sense.

35. Mr. GAJA recalled that, in the Reparation for Injuries advisory opinion, ICJ had addressed two questions: first, functional protection, and second, the possibility for the United Nations to assert a claim for personal injury. The Court had concluded that both the State of nationality and the United Nations could assert such a claim. He appealed to Mr. Simma to leave the text unchanged.

36. Mr. SIMMA proposed that the words “exercise diplomatic—not functional—protection” should be replaced by “assert a claim for personal injury”.

37. Ms. ESCARAMEIA supported Mr. Simma’s remarks. Her recollection was that, in the case cited, personal protection had in any case been seen as a form of functional protection. The reference to diplomatic protection in paragraph 19 was extremely confusing and should be deleted. At the very most, it should be replaced by a reference to personal protection.
Mr. GAJA proposed, for the sake of compromise, that the words “diplomatic—not functional—” should be deleted.

\textit{Paragraph 19, as amended, was adopted.}

Paragraph 20

\textit{Paragraph 20 was adopted.}

Paragraph 21

Mr. SIMMA asked for clarification of the meaning of the second sentence of the paragraph.

Mr. DUGARD (Special Rapporteur) said that the sentence reflected remarks made by Ms. Xue, as reported in the summary record. It was surely not the function of the Commission at the current stage to correct the expression of opinion of a member.

\textit{Paragraph 21 was adopted.}

Paragraphs 22 and 23

\textit{Paragraphs 22 and 23 were adopted.}

Paragraph 24

\textit{Paragraph 24 was adopted with a minor editing change.}

Paragraph 25

Mr. MOMTAZ said that, in the last sentence of the paragraph, the reference should be not to “maritime law” but to “the law of the sea”.

\textit{Paragraph 25, as amended, was adopted.}

Paragraph 26

\textit{Paragraph 26 was adopted.}

Paragraph 27

Mr. SIMMA said that the phrase “which laid down, for example, the obligation to allow crew and passengers to continue their journey”, at the end of the first sentence, was irrelevant and should be deleted.

Mr. GALICKI said that the sentence revealed the wide variety of sources of obligations and of possibilities for the exercise of protection of crew members and passengers, and should thus be retained.

Mr. MOMTAZ said that the obligation was incumbent on the State on whose territory the offence had taken place. In the interests of clarity, wording to that effect should be added to the sentence.

Mr. SIMMA said it was not the entire paragraph but just the end of the first sentence that he wanted to see deleted. The obligation of a State on whose territory an aircraft had landed to allow crew and passengers to continue their journey had nothing to do with diplomatic protection. Diplomatic protection came into play only if, for example, the aircraft had been hijacked and landed in another State’s territory. That State was then under an obligation to let the crew and passengers go, and if it did not, their State of nationality could exercise diplomatic protection. It was an entirely different matter from the point being made in paragraph 27, which was that certain treaties contained leges speciales on the diplomatic protection of crews and passengers. He again urged that the last phrase in the first sentence of the paragraph be deleted.

The CHAIR said that it set the general context of the special laws that could apply in such cases. Hence it was not incorrect and reflected comments that had been made during the discussion.

Mr. BROWNLIE said he had no problems with the inclusion of that phrase, but an important point of principle was involved. As he and Mr. Pellet had once remarked, diplomatic protection had a close relative, something that could be described as “protection law”, but that was not part of the Commission’s remit. A great deal of law and practice related to the significance of carrying a passport, for example, but that pertained to the direct duties of a State and had nothing to do with diplomatic protection. The M/V “Saiga” (No. 2) case was not about diplomatic protection but about direct injuries, ordinary duties deriving from the United Nations Convention on the Law of the Sea.

Mr. KAMTO said he thought that paragraph 27 referred not to diplomatic protection but to cases in which international law offered protection to the crews of aircraft or ships through various conventions or treaties. The paragraph contrasted with the arguments given in earlier paragraphs. The only problem was the lack of clarity about which State was under the obligation mentioned in the first sentence. Was it the State of nationality of a ship or aircraft? Was it the State in which the incident or accident had occurred? If that point was clarified, the paragraph should be acceptable.
50. Mr. DUGARD (Special Rapporteur) stressed once again that the first sentence made an accurate and relevant statement, but added that the amendment proposed by Mr. Momtaz was entirely acceptable.

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 32

Paragraphs 28 to 32 were adopted.

Paragraphs 33 and 34

51. Mr. PELLET said that the first two sentences of paragraph 34 constituted criticism of the suggestion that the draft articles should refer to the "clean hands" doctrine, and that paragraph 33 also comprised such criticism, whereas paragraph 34 defended the suggestion. The two sentences in question should be placed at the end of paragraph 33.

It was so decided.

52. The CHAIR, responding to comments by Mr. ALBAHARNA and Mr. PELLET, suggested that, as a consequence of that amendment, the word "Conversely," at the start of the third sentence of paragraph 34, should be changed to "On the other hand".

It was so decided.

53. In response to remarks by Mr. MOMTAZ and Mr. SIMMA, Mr. BROWNLIE proposed that the words "except as a prejudice argument", in the second sentence of paragraph 34, should be replaced by "and then mainly as a prejudice argument".

It was so decided.

Paragraphs 33 and 34, as amended, were adopted.

Paragraphs 35 and 36

Paragraphs 35 and 36 were adopted.

Paragraph 37

54. The CHAIR, replying to remarks by Mr. KAMTO and Mr. PELLET, noted that even if a proposal was not taken up, it was customary to reflect it in the report.

Paragraph 37 was adopted.

Paragraph 38

Paragraph 38 was adopted.

Paragraph 39

55. Mr. DUGARD (Special Rapporteur) said it had been drawn to his attention that the second sentence was inaccurate: the phrase "nationality of claims" had been used not by the President of ICJ but by the Court itself in its Reparation for Injuries advisory opinion. He therefore proposed that the words "then President of the" and "who was not an anglophone" should be deleted.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

56. Mr. GAJA said that the point actually was that ICJ had used the French phrase nationalité de réclamations in its opinion. The end of the second sentence should be amended to read "it had been used also in French by ICJ in the Reparation for Injuries advisory opinion".

57. The CHAIR, responding to remarks by Mr. BROWNLIE, Mr. SIMMA and Mr. PAMBOUTCHIVOUNDA, said that all references to the opinion of ICJ would be shortened and corrected to read "Reparation for Injuries".

58. Mr. SIMMA said that, in the first sentence, the characterization of the concept of nationality of claims as an "anglophone concept" was problematic. Was there such a thing? Should it not rather be referred to as a common law concept? It had been pointed out, not that the phrase did not have its analogue "in other official languages", but that it did not exist in certain other legal systems.

59. Mr. PELLET said the sentence faithfully reflected something he himself had said, but it was true that the concept should be described not as being anglophone but as pertaining to the common law. As such, it was incomprehensible to practitioners of anything other than the common law. The French Government, as he had already emphasized, had vigorously protested the use of the phrase "nationality of claims" in the draft on State responsibility, and on that point he fully agreed with it.

60. Mr. KAMTO, supported by Mr. PAMBOUTCHIVOUNDA, said that the phrase "nationality of claims" could be better described as an expression than as a concept.

61. Mr. PELLET, recalling that it was his remarks that were being quoted, reaffirmed that he had referred to the phrase as a concept.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

62. Mr. DUGARD (Special Rapporteur), responding to remarks by Mr. PELLET and Mr. BROWNLIE, suggested that the paragraph should be rephrased to read: "The Special Rapporteur noted that there was a division of opinion on 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. He noted that further consideration would be given to this matter."

Paragraph 42, as amended, was adopted.
Paragraph 43

Paragraph 43 was adopted.

63. Mr. SIMMA said that the phrase at the end of the first sentence about a State which “administered, controlled or occupied a territory” seemed rather unclear. He proposed that the words “not its own” should be appended at the end of that sentence.

64. The CHAIR said that seemed to suggest that there was some question as to the legitimacy of the State’s presence in a territory.

65. Mr. BROWNIE said it was indeed necessary to avoid giving the impression that the exercise of diplomatic protection had anything to do with jurisdiction: it did not. It was dangerous to appear to connect control of territory, whether or not such control was sovereign, with the power to exercise diplomatic protection.

66. Mr. SIMMA said the first sentence referred to the fact that the Commission did not want to take up the question of whether something like diplomatic protection might be possible in situations in which a State administered, controlled or occupied a foreign territory. As it stood, however, it was unclear what territory was meant. At the least, the sentence should indicate that it did not refer to cases in which a State administered its own territory, because that constituted normal diplomatic protection.

67. Mr. DAOUDI asked for clarification as to the kind of occupation envisaged. If the Special Rapporteur had in mind a military occupation which transgressed the rules of the Geneva Conventions of 12 August 1949 relative to the protection of war victims, the Commission might, by using such terminology, be lending some legitimacy to foreign occupation.

68. Mr. PAMBOU-TCHIVOUNDA said he endorsed that view. If the reference was to a military occupation such as that of Palestine, the use of the word “occupied” would not be acceptable to the Sixth Committee.

69. Mr. DUGARD (Special Rapporteur) said that when he had first raised the matter, he had mentioned two obvious examples, the occupation by Morocco of the Western Sahara and the occupation by Israel of Palestine. The reference had clearly been to foreign territories. He had no objection to inserting the word “foreign” before the word “territory” or adding the words “other than its own”. He failed to see, however, how the sentence could be interpreted as giving legitimacy to occupation; it was simply a statement that the Commission did not intend to take up the issue.

70. Mr. MOMTAZ supported the view expressed by Mr. Daoudi: he had difficulty with the word “occupation”, particularly since occupation was an illegal act under international law. It stretched belief that occupation could be the basis for diplomatic protection by an occupying State.

71. Mr. OPERTTI BADAN concurred. In using the word, even if it was qualified by the fact that Mr. Pellet’s proposal had received little support, the Commission would be taking the first step on the road to legitimizing occupation. The issue of diplomatic protection should not be confused with situations which were in breach of international law.

72. Mr. PELLET said that the discussion had run into problems of both substance and form. The fact that an occupation—whether of Palestine by Israel or of Namibia by South Africa, to take but two examples—was illegal did not affect the question of why the inhabitants of an occupied territory should be deprived of protection, whether diplomatic or not. As for the form of the sentence to which several members had taken exception, the fact was that it accurately reflected what he and others had said, and hence there was no reason to delete the word “occupied”. The question of whether members agreed or disagreed with his original proposal was immaterial.

73. Mr. DUGARD (Special Rapporteur), after repeating that he could not see how the sentence in question raised the question of the legitimacy or not of a state of occupation, pointed out that the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) acknowledged the lawfulness of occupation and established a legal regime correspondingly. When, in March 2002, the Secretary-General had called the occupation of Palestine illegal,3 he had been alluding to the fact that the occupation was a violation of article 49, paragraph 6, of the Convention.

74. Mr. PAMBOU-TCHIVOUNDA said he challenged those in favour of retaining the word “occupied” to cite just one case in which a State illegally occupying a territory had exercised diplomatic protection on behalf of those inhabiting that State.

75. The CHAIR, after pointing out that the issue concerned not States but individuals caught in a particular set of circumstances, wondered whether members needed to preclude certain expressions because of their views on the legality of those circumstances.

76. Mr. TOMKA said that there had been a request for an example of a situation in which an occupation had not been illegal. The occupation of Germany in late 1945 and early 1946, when the German State as a subject of international law had not existed, had been legal.

77. Mr. SIMMA said that Mr. Pambou-Tchivounda had in fact requested an example of diplomatic protection being given to inhabitants of an occupied territory by the occupying Power.

78. The CHAIR said that, in post-war Germany, if one of the four occupying Powers had, for example, removed trolley tracks for use in its own country, one of the other

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3 See S/PV.4488.
four might have intervened to prevent such action, on behalf of a German trolley company.

79. Mr. DAOUDI said that, because in practice there was no known case of diplomatic protection being exercised by an occupying State, the situation was hypothetical, and that fact should be reflected in the report. As for the substance, he questioned how an occupying authority could possibly protect the inhabitants of the occupied territory, when, as in the case of Palestine, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) was not being applied in reality. Military protection might be another matter.

80. Mr. DUGARD (Special Rapporteur) said that the topic, which also related to the question of recognition, could be the subject of a most interesting debate. For example, Jordan had occupied the West Bank from 1949 to 1967. Although it had considered itself the sovereign Power and had been recognized, he believed, only by Pakistan and the United Kingdom, in the eyes of the rest of the world it had been an occupier. It had, however, issued Palestinians on the West Bank with passports and protected such passport holders in various parts of the world. Similarly, South Africa had on occasion protected some Namibians when it was occupying their country. However, though the subject was a fruitful one for discussion, it was unconnected with the first sentence of paragraph 44, which simply stated that Mr. Pellet had made a given suggestion that had been rejected by the Commission as being beyond its mandate.

81. Mr. KOSKENNIEMI said that, from 1940 to 1990, the Baltic States had been occupied by the Soviet Union, which had regularly exercised diplomatic protection for those living under the occupation.

82. Mr. KEMICHA said the mere suggestion that diplomatic protection was available to those living in occupied territories smacked of cynicism. Occupation was illegal and, for him personally, shocking. He therefore proposed that the phrase “administered, controlled or occupied a territory” should be amended to read “administered or controlled a territory”.

83. The CHAIR invited the Commission to consider the proposal, which would be without prejudice as to whether occupation was covered by administration or control.

84. Ms. ESCARAMEIA said that the term “occupied territory” was often associated with the situation in the Middle East. If, however, it were given a broader sense, to include any situation in which a de facto occupation was contested by the inhabitants of the territory concerned or the rest of the world, it was possible to find many examples of diplomatic protection provided by an occupying Power, particularly if colonies and former colonies were taken into account. There were some cases in which Portugal had exercised diplomatic protection on behalf of the inhabitants of Macau, even though the latter had not, since 1976, been considered Portuguese territory and had, since the Sino-Portuguese Joint Declaration of 1987, been regarded as just an administration, without territorial sov-

ereignty. That had not prevented Portugal from providing diplomatic protection, or at least some sort of protection, for inhabitants of Macau, for example, when a woman had been sentenced to death in Singapore. Neither Singapore itself nor China had raised any objection. Diplomatic protection was compatible with occupation, but if occupation was automatically taken to mean illegal occupation, she could understand the position of members who were opposed to the first sentence of paragraph 44.

85. Mr. DUGARD (Special Rapporteur) said that he wished to place on record his extremely strong objection to any change in the first sentence. Deletion of the word “occupied” would be an assault on freedom of speech. He did not like occupation more than anyone else. Indeed, he was Special Rapporteur for the Commission on Human Rights on human rights violations in the occupied Palestinian territories. All his reports were directed at the illegitimacy of the occupation. Occupation was, however, a fact of international life. Mr. Pellet had actually made a proposal; and he was opposed to suppressing what had been said simply because some people thought the subject was too sensitive to be mentioned.

86. Mr. CHEE pointed out that when Syngman Rhee, the Korean president at the time, had travelled to the United States as a private citizen to plead with the United States Congress for the independence of Korea during the period between 1945 and 1948, when the country was occupied by United States forces, the United States had issued him travel documents. He was not sure if that qualified as diplomatic protection.

87. The CHAIR said that the Commission had strayed from the question of whether paragraph 44 reflected what had been said on a particular occasion to a general discussion on occupation. He accepted the Special Rapporteur’s request that the word “occupied” should not be deleted.

88. Mr. PELLET said that, whereas Mr. Kemicha and others were shocked by his position, which he persisted in defending, he himself was shocked by the fact that, according to some members of the Commission, the Palestinians, for example, who had endured occupation for so many years, were condemned to enjoy no diplomatic protection, if an occupying Power was denied that possibility. He passed no judgement on the legality of the occupation; simply, if occupation there was, the inhabitants of the occupied territory needed diplomatic protection. He believed his position to be justified de lege ferenda, while under lex lata a whole range of examples could be found to support his case. As for the use of the word “occupied”, he strongly supported the stance of the Special Rapporteur; any other course of action was pure censorship. The views expressed by himself and others might be wrong, but it was even more wrong to suppress what they had said. It was not for one member of the Commission to censor the views of another.

89. Mr. DAOUDI said that he well understood the case made by the Special Rapporteur, who had provided examples on the basis of which diplomatic protection could be exercised by an occupying Power. He defied anyone, however, to quote a case in which a resident of the Sahara had received diplomatic protection from Morocco or a
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 August 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. Koskenniemi, Mr. Mansfield, Mr. Montaz, 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