Document:-
A/CN.4/SR.2513

Summary record of the 2513th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1997, vol. I

to begin the sentence with the words "Some members, however,".

93. The CHAIRMAN said that the word "was", in the same sentence, should be replaced by "would have been". Paragraph (3) gave the impression that it applied to the draft articles as a whole. In view of article 19, however, and the distinction drawn between Parts I and II, the explanation was too rigid. It would be better to indicate that, in regard to the obligations—in the strict legal sense—of States under Part I, but not under Part II, reference should be made to article 19.

94. Mr. MIKULKA (Special Rapporteur) asked what would then become of the article on unification. Was it not an obligation, despite the fact that it appeared in Part II?

95. The CHAIRMAN said greater precision was needed. The commentary should spell out that respect for the principles set out in the draft articles was called for when such principles were binding. Often the principles in Part II however, were not binding.

96. Mr. ECONOMIDES said that none of the provisions, either in Part I or in Part II, had binding force.

97. The CHAIRMAN, speaking as a member of the Commission, said he disagreed. What was at issue was the legal value of principles, not of provisions.

98. Mr. ROSENSTOCK said that the English version was quite careful in its use of the word "should". The current discussion was, in fact, either a non-issue or a confusion based on what had originally been concepts of the distinction between Parts I and II but which could not be accurately so described at the current time.

99. The CHAIRMAN, speaking as a member of the Commission, said he would not insist on his objection, but he found the end of paragraph (1) was not clear.

100. Mr. MIKULKA (Special Rapporteur) said the French text did not convey exactly the same meaning as the English. The matter could perhaps be resolved by slightly recasting the French version.

101. Mr. BENNOUNA said he agreed that there was a problem of translation which the secretariat could resolve.

The commentary to article 5, as amended, was adopted.

Commentary to article 6 (Effective date)

102. The CHAIRMAN said that the distinction drawn in the French version of paragraph (1) between *principes généraux de droit* and *principles généraux du droit international* caused a problem. What was intended was the general principles of law, referred to in article 38, paragraph 1 (*c*), of the Statute of ICJ.

The commentary to article 6, as amended in the French version, was adopted.

The meeting rose at 6.05 p.m.

2513th MEETING

Tuesday, 15 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Diplomatic protection (A/CN.4/L.537)

[Agenda item 6]

REPORT OF THE WORKING GROUP

1. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection), introducing the report of the Working Group (A/CN.4/L.537), said that diplomatic protection was a traditional topic in international law and also one of the oldest institutions, since it was tied in with the very existence of the State and one of those which had made it possible to take individuals and non-State entities into consideration in international life. The Working Group had therefore kept the subject's title, which was the one it had had for centuries. It had sought to distinguish diplomatic protection from certain forms of intervention by diplomatic or consular agents provided for in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, so as to clearly mark the difference between diplomatic protection and diplomatic and consular relations. It had noted that the institution had evolved and had adapted with time, in order to take account of the fact that individuals had more and more access to international bodies and could even be parties in international courts. The Working Group had considered that, in view of the increased cross-border exchanges in persons and in trade, claims submitted by States on behalf of their nationals would remain an area of significant interest.

2. For the purposes of its work, the Working Group had borne in mind the general outline contained in the report of the Commission to the General Assembly on the work of its forty-eighth session,[1] the topical summary of the discussion held by the Sixth Committee at the fifty-first session of the General Assembly (A/CN.4/479, sect. E.6) and written comments submitted by Governments. It had decided to retain from the general outline only material dealing with diplomatic protection *stricto sensu*, taking

[1] *Yearbook . . . 1996*, vol. II (Part Two), annex II, addendum 1.

the view that the topic should not extend to claims deriving from direct harm caused by one State to another. It would address only indirect harm caused to natural or legal persons whose case was taken up by a State.

3. As to the scope of the topic, the Working Group had considered that the study of diplomatic protection would be confined to codifying secondary rules and had distinguished the topic from that of the status of aliens and the minimum rules that every State should respect in that regard. As far as the nature and the definition of diplomatic protection were concerned, the Commission had adopted a pragmatic approach and for that reason the Working Group had not thought it necessary to take sides in the various doctrinal debates on the subject. Its point of departure was the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case[2] and it had pointed out that it was link of nationality which provided the basis for the State's right to take up a case for its nationals. The Working Group had, in that regard, discussed certain questions which the Special Rapporteur should study in his preliminary report, such as the question of whether there was a right to diplomatic protection for the benefit of nationals or whether their agreement was needed in order for the State to be able to exercise its protection.

4. In the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,[3] ICJ had recognized that international organizations had the right to protect their agents—one spoke in such cases of functional protection—on the basis not of nationality but of status as an agent of the organization. In view of the links between diplomatic protection and functional protection, the Working Group had decided for the time being that the latter formed part of the topic and that it was for the Commission to decide on that matter once the Special Rapporteur had submitted his preliminary report. The two types of protection were analogous in many ways, but there were also some differences and they were not mutually exclusive.

5. The Working Group had recalled that diplomatic protection related solely to indirect harm, since the State intervened to ensure respect for international law in the person of its nationals, because they did not have access to the international sphere. Some questions arose with regard to legal persons (theory of control, rights of shareholders, for example) that the Special Rapporteur would have to take up in his preliminary report. He would draw members' attention to section II (Content of the topic) of the report of the Working Group, and particularly the outline it contained. The Planning Group would have to decide how the study of the topic was to be devised.

6. Some mistakes had crept into the report and should be corrected. In paragraph 13 of the French version, the word *ou* should be preceded by *et*. On pages 3 and 4 of the English version, the word "Reparations" should be placed in the singular and, on page 5, in section C, the words "aircrafts" and "spacecrafts" obviously did not need the final "s". The words "in special cases" in section B.3 should be deleted. Lastly, he suggested that the heading of section A of chapter IV should be replaced by: "Final settlement between the parties".

7. Mr. LUKASHUK said that tribute should be paid to the Chairman of the Working Group for the way in which he had conducted its work, in which unanimity had prevailed. The Special Rapporteur would have to consider the very notion of diplomatic protection, which was increasingly geared in modern law more and more to the rights of the individual, who currently had greater access to the international sphere. As the Working Group indicated in paragraph 11, the study should focus on the consequences of an internationally wrongful act which caused indirect injury to the State usually because of injury to its nationals. Diplomatic protection had become one of the principal means of protecting human rights and the Special Rapporteur would also have to take up that issue.

8. He would also have to envisage his study from the standpoint of modern constitutional law, since diplomatic protection was based on nationality, and nationality, which was essentially a matter for internal law, was currently regarded as a bilateral link between the State and individual that entailed rights and obligations for both of them. Accordingly, it could be said that, as far as modern international law was concerned, a right to diplomatic protection did indeed exist and, for that reason, he did not believe—to mention an issue raised in paragraph 16 of the report of the Working Group—that diplomatic protection was based on jurisdiction *ratione personae* over the individual.

9. Again, the Special Rapporteur's preliminary report should start with an introduction which, following a brief background to the topic, would set out the state of international law at the current time. It would also have to be pointed out that protection of the rights of nationals was one of the State's principal functions and that diplomatic protection was one of the oldest forms of protection of human rights.

10. Mr. CANDIOTI said he fully shared Mr. Lukashuk's views concerning the rights of individuals, which should be studied along with the rights of States exercising diplomatic protection. A proper balance meant that both of them should be discussed, and the situation of the State against which protection was exercised would also need to be considered.

11. Latin America had made a major contribution to the historical development of the law on diplomatic protection, particularly in the last century, when such protection had given rise to abuses. Lastly, the really fundamental issue that would have to be examined was that of exhaustion of local remedies.

12. Mr. Sreenivasa RAO said that the report of the Working Group was excellent and shed light on important issues. The topic, however, had not seemed convincing in the beginning, especially as it had had an unfortunate history at a time when diplomatic protection could be seen as an extension of colonial power. In the modern world, it was still a delicate issue and of great concern above all to small States and to developing countries. But those doubts disappeared on reading the report, which clearly showed that the subject could be scrutinized in a professional

[2] *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.*

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

manner. Furthermore, the time had arrived to re-evaluate the long-standing principles on which diplomatic protection was based.

13. Paragraph 17 referred to the case of agents of international organizations, for which the organizations provided "functional" protection. According to the paragraph, diplomatic protection properly speaking was to be clearly distinguished from such "functional" protection, the idea being supported by a quotation from the advisory opinion of ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*. He nonetheless doubted whether the Court had actually adopted the position attributed to it. In any event, as Mr. Lukashuk had said, if a State was to exercise its diplomatic protection, in addition to and independent of the "functional" protection of an international organization, the basis should be clearly identified and it must be for a different violation, for a different cause or for a different purpose; otherwise, it might lead to twofold protection, a situation that it would be better to avoid. But if the act causing the exercise of protection could not be covered by functional protection alone and was liable to bring diplomatic protection into play, the State should preserve the right to protect its nationals. He wished to keep an open mind on such complex issues and he awaited with interest the development of the Commission's views.

14. In his professional activities he had found in the modern world a tendency towards excessive broadening of diplomatic protection. It occurred chiefly in the context of negotiation of foreign investment agreements, particularly in the case of some exporting Western States. That matter would have to be borne in mind and it related to issues of the exhaustion of local remedies such as when could such remedies be said to be exhausted; to the nationals of which States were they offered; and for what purpose.

15. Other aspects of diplomatic protection would doubtless be taken up in the course of the work, such as equity in the protection afforded to individuals, the needs of the economy and the requirements of inter-State cooperation, the effective provision of local remedies, and so on. Diplomatic protection should be neither the reason nor the pretext for promoting excessive "internationalization" of what was nothing more than a State's economic policy.

16. Mr. ROSENSTOCK said he endorsed the comments by Mr. Lukashuk and would emphasize the importance of the Working Group's decision to focus on secondary rules. In his opinion, it would not be profitable to discuss primary rules as well, and still less foreign investment law.

17. Mr. Sreenivasa RAO said he agreed with Mr. Rosenstock that there could be no question of studying primary rules, and certainly not foreign investment law. He had simply wished to draw the Commission's attention to certain issues which would not fail to arise in terms of primary rules in connection with consideration of certain points in the proposed outline: right of espousal, the role of the State in diplomatic protection, or exhaustion of local remedies, for example.

18. Mr. PAMBOU-TCHIVOUNDA said that it would be useful to include in paragraph 21, so that it also featured in the report of the Commission to the General Assembly, the Commission's plan to consider the topic of diplomatic protection. It would also give an idea of the Commission's overall strategy.

19. The first phrase in paragraph 11, "Just like the topic of State responsibility", was awkward and should be deleted. Nor did the remainder of the paragraph seem very clear: if an obligation was breached, the breach was in the context of inter-State relations, in other words a matter of direct international responsibility of the classic type. The paragraph spoke, however, of an internationally wrongful act which caused indirect injury to the State, something which was rather difficult to grasp in conceptual terms.

20. Limiting the work to codification of the secondary rules on the subject, as stated at the beginning of paragraph 12, should not hide the fact that, as the Commission moved ahead, that exclusive focus on the secondary rules would make the work more delicate and more difficult. The Commission would in any event have to study the conditions under which diplomatic protection was exercised, which would form the subject of chapter III, the "clean hands" rule and exhaustion of local remedies, all of them complex questions which would necessarily mean venturing into the field of the primary rules.

21. Mr. SIMMA thanked Mr. Sreenivasa Rao and Mr. Pambou-Tchivounda for drawing the Commission's attention to a number of important aspects of the topic it intended to take up. He endorsed more particularly what Mr. Pambou-Tchivounda had said about how close some of the issues to be studied were to the primary rules. That was certainly the case with the "clean hands" rule which was really on the borderline between primary and secondary rules. The Commission could not dogmatically avoid studying problems pertaining to the primary rules. Moreover, the principle inferred from the *Mavrommatis Palestine Concessions* case and the decision to discuss only the secondary rules were in fact simply points of departure. Furthermore, the decision to leave out the primary rules from the consideration of the topic of State responsibility[4] was an old decision and should be reviewed in the light of the current situation.

22. Mr. ECONOMIDES said that the proposed outline was very satisfying. Paragraph 12, he noted, spoke of international obligations whether under customary or treaty law. He hoped that the study would not rule out the case of a person who suffered harm because the right conferred on him by an international organization had been violated and he appealed for diplomatic protection from his State of origin. In his opinion, therefore, the paragraph should end with the phrase: "whether under customary or treaty or institutional law".

23. Mr. BENNOUNA (Chairman of the Working Group) said that the Working Group had based itself on the classic sources of law as enumerated in Article 38 of the Statute of ICJ, namely international conventions, international custom and the general principles of law. Mr. Economides probably had in mind what was termed derived international law, since he spoke of the law cre-

[4] See *Yearbook . . . 1962*, vol. II, p. 191, doc. A/5209, para. 68 and *Yearbook . . . 1963*, vol. II, p. 224, doc. A/5509, paras. 52-54.

ated by a decision of an institution based itself on treaty law. Nevertheless, not all readers would understand what the Commission meant by "institutional law".

24. The CHAIRMAN, speaking as a member of the Commission, said it would be useful to arrive at a still better definition of the topic and to use a more precise vocabulary, more particularly in paragraph 12. In his opinion, international protection was one element in the law of State responsibility and it was regrettable that the Special Rapporteurs on the latter topic had not dealt with an institution which was one of the modalities for the implementation of responsibility. Accordingly, the terminology in paragraph 12 should be changed to speak of "an internationally wrongful act" rather than "a violation of an international obligation" of the State. Moreover, that would meet the concern expressed by Mr. Economides in connection with the sources of the obligation in question and would provide a *renvoi* to the definition of an internationally wrongful act given in article 3 of the draft articles on State responsibility.[5]

25. Mr. Simma and Mr. Pambou-Tchivounda seemed to anticipate a slide towards examination of the primary rules. Actually, it was in the Commission's interest to keep strictly to the secondary rules and take up again the approach originally followed by a former Special Rapporteur on State responsibility, Mr. Ago, who had had a brilliant idea in approaching that topic from the standpoint of the secondary rules.

26. It had to be acknowledged that diplomatic protection was a topic fraught with misgivings and political difficulties. It was an institution which had historically been imposed by the developed and powerful States on the weaker countries, more particularly in Latin America. Indeed, it was for that reason that the jurists from that continent had played such a role in the juridical crystallization of diplomatic protection and also for that reason that it had materialized as a defence against what had come to be known, after a term used by Jessup, as "dollar diplomacy". A most striking thing was the complete lack of symmetry in diplomatic protection. A State whose national had been injured could exercise its diplomatic protection against the State causing the harm, but the reverse was not true: a State which had suffered harm as a result of an individual could not complain to the State of which that person was a national. Clearly, positions of political and economic strength explained why it was a one-way institution, so to speak.

27. Again, even though the concept of diplomatic protection was unquestionably a concept in positive law, one might well ask whether it was not to a large extent a fiction and whether it was not entirely outmoded on the eve of the twenty-first century. It had emerged at a time when the individual was not yet regarded as a subject of international law and when the State had had to replace him in order to assert his rights and so avoid a denial of justice. The quotation in paragraph 17 from the *Mavrommatis Palestine Concessions* case clearly showed that originally it was its own right—and not that of its national—that the State was deemed to claim. However, that postulate was contradicted by the way in which the problem of reparation was settled: such reparation should in all logic be granted on the basis of the injury suffered by the State since it was its own right that it was exercising, yet it was calculated in terms of the harm suffered by the individual. The fact that individuals were nowadays increasingly recognized as subjects of international law was a dimension that would necessarily have to be taken into account in the Special Rapporteur's first report on the topic.

28. He was bothered by the title and the content of chapter IV of the outline, concerning the "Consequences of diplomatic protection". In his opinion, the title was not clear and was not in keeping with the Working Group's general approach to the topic. As to Mr. Bennouna's suggestion that the title of section A of that chapter should be replaced by "Final settlement between the parties", he wondered who the parties were. Apparently, the Chairman of the Working Group meant the State on the one hand and the individual on the other. However, in diplomatic protection, the parties were in reality the protector State on the one hand, and on the other, the State that was the author of the internationally wrongful act. Nor was he convinced by the enumeration in sections B, C, D and E, which seemed to lack consistency. In the final analysis, he wondered whether the true consequence of diplomatic protection was not quite simply reparation.

29. Mr. MIKULKA said that Mr. Pellet's remarks added still further to the feeling of confusion he experienced in connection with paragraphs 11, 12 and 13. Initially, he had fully subscribed to the idea set out in paragraph 13 that the State had the right to act for the benefit of natural or legal persons that were victims of injury or a denial of justice in another State. From a perusal of paragraph 11, that basic idea seemed to be contradicted by the fact that the Commission in its study of diplomatic protection should focus on the consequences of an internationally wrongful act, an approach which presupposed that consideration would be given exclusively to failures to meet international obligations. Yet natural or legal persons might easily have suffered injury under internal law, even if it was at the international level that their cause was then taken up by the State representing them. That aspect seemed to have been totally overlooked. Paragraph 12, which used phrases such as "the topic will be limited only to codification of secondary rules on the subject", or again "violation of an international obligation of the State", gave the impression, taken in isolation, that State responsibility was at issue. If, as the Working Group seemed to affirm, diplomatic protection genuinely derived from secondary rules, he wondered why the Commission, when it had completed the first reading of the articles on State responsibility, had failed to mention the question as one of the consequences of internationally wrongful acts.

30. Lastly, he was puzzled by the remark by the Chairman, for whom the consequence of diplomatic protection would in fact be reparation. In his opinion, such reparation—which could incidentally be of a number of kinds—was made precisely through diplomatic protection, which meant ending up in a vicious circle.

31. Mr. THIAM said he too thought that the topic of diplomatic protection was basically one of the secondary rules on State responsibility. It was in the matter of the subjects of law that he disagreed with the outline pro-

[5] *Yearbook ... 1996*, vol. II (Part Two), chap. III, sect. D.

posed in the report of the Working Group. It was quite normal for natural persons to benefit from diplomatic protection, but the same was not necessarily true in the case of legal persons. Among the categories of legal persons enumerated, the Working Group appeared to have forgotten multinational corporations, which were often more powerful than States, to which it seemed quite paradoxical that States should grant diplomatic protection.

32. Mr. BENNOUNA (Chairman of the Working Group), responding to comments, said that, while it was increasingly common for individuals to be recognized as subjects of international law, they were recognized as such only to the extent that States agreed.

33. The Working Group had taken the view that legal persons should be included in the topic for the time being, because of the nationality link which still formed the basis for diplomatic protection. Even if, a priori, Mr. Thiam's comment about transnational corporations was relevant—and it should not be forgotten that it had never been possible to secure the adoption within the United Nations of a code of conduct for such corporations—it was impossible to ignore the nationality criterion.

34. The specific issues concerning that category of persons, whether they related to different nationalities among the shareholders, the case of legal persons which had both the nationality of the host State and that of the State deemed to ensure their protection, or again new direct remedies afforded to foreign investors, they would have to be examined as the Commission moved ahead with the topic.

35. Mr. LUKASHUK said that, unlike the Chairman, for whom modern international law was simply an expression of the balance of power, he thought that it was intended to respond to the needs of the international community. In his opinion, the problems of the survival of mankind could not be settled by power relationships.

36. The issues raised by Mr. Mikulka were both very important and highly relevant. They were, quite obviously, complex matters and he was not sure the members of the Commission were in a position to respond to them at the current time. However, they would deserve to be considered in future work on the topic.

37. Mr. FERRARI BRAVO recalled that PCIJ had said that "By taking up the case of one of its subjects . . . a State is in reality asserting its own rights".[6] It had been an old concept in which diplomatic protection had been identified with protection of the individual. The State had then been regarded as the "master" of its citizens, a theory broadly supported by the doctrine of the time. However, it was currently an outdated theory, not only because of the breakthrough of the individual as a subject of international law but also because of the increasingly complex problems of the nationality of legal persons tied in with the development of transnational corporations. As shown by the *Barcelona Traction* case,[7] for example, a company might be of a particular nationality and have shareholders who were nationals of different countries. In that case, the problem arose of the interest in taking action of the State whose nationality the company possessed.

38. They were points the Special Rapporteur would have to take up when he came to set out in his first report his view of the work to be done on the topic. However, for his own part, he hoped that the Special Rapporteur would not dwell on the matter too much, for contrary to what had been said by the Chairman, he believed that the Commission had done well, on the initiative of the former Special Rapporteur on State responsibility, Mr. Ago, to leave diplomatic protection out of the theory of responsibility.

39. The CHAIRMAN said a perusal of the first and second reports of the former Special Rapporteur, Mr. Ago[8] showed that he had been far from setting that issue aside and had probably thought in the beginning of including it in the topic that had been assigned to him.

40. Mr. DUGARD said it would perhaps be useful to indicate in the report of the Working Group that the Commission had already done preliminary work on the subject and mention more particularly the reports of the former Special Rapporteur on the topic of State responsibility, Mr. García Amador.[9] That might be of interest to the Sixth Committee.

41. The CHAIRMAN said that he feared that would be materially impossible at the current advanced stage in the work.

42. Mr. BENNOUNA (Chairman of the Working Group) said that all members of the Commission remembered the reports by the former Special Rapporteur, Mr. García Amador. However, the way in which the former Special Rapporteur had approached the topic, from the standpoint of the status of aliens, in other words, from the primary rules, had ultimately led to an impasse, and he would point out that the Commission had decided not to adopt that approach. It had currently decided to discuss the secondary rules, on the basis of harm suffered by the individual. Accordingly, it would have to clear a path between the ever-present reality of inter-State relations and the "recognition" of the rights of the individual, which could not yet, however, be regarded as forming part of positive law. The major developments in recent years also meant that the topic had to be viewed from a new and "fresher" angle. However, as a reminder of the background, paragraph 11 could easily refer to a footnote which would explain that the topic had already been taken up in the Commission by the former Special Rapporteur from a different standpoint.

43. Mr. SIMMA said the Chairman had rightly thought that the topic of diplomatic protection formed part of State responsibility as a specific aspect of the implementation

[6] *Mavrommatis Palestine Concessions* case (see footnote 2 above), p. 12.

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

[8] First report: *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1; and second report: *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233.

[9] First report: *Yearbook . . . 1956*, vol. II, p. 173, document A/CN.4/96; second report: *Yearbook . . . 1957*, vol. II, p. 104, document A/CN.4/106; third report: *Yearbook . . . 1958*, vol. II, p. 47, document A/CN.4/111; fourth report: *Yearbook . . . 1959*, vol. II, p. 1, document A/CN.4/119; fifth report: *Yearbook . . . 1960*, vol. II, p. 41, document A/CN.4/125; and sixth report: *Yearbook . . . 1961*, vol. II, p. 1, document A/CN.4/134 and Add.1.

of international responsibility. However, the reason why that issue had been excluded from the study on State responsibility was in fact quite simple: in all doctrinal works, the topic was dealt with as a corollary to the question of the treatment of aliens, which was governed by a specific set of primary rules. That clearly showed that the distinction between primary and secondary rules would be very difficult, indeed impossible, to make and that the Commission would sooner or later be obliged to take up the primary rules.

44. Mr. Sreenivasa RAO noted that in the outline, "insurers" were included among legal persons, but in a separate category. While the relevance of such a classification could be challenged, it was nonetheless acceptable for the purposes of identification. Again, with reference to chapter I, section B.3, concerning the right of espousal, and section D, on transferability of claims, he wondered about the categories of persons who would be covered by those provisions in a study on diplomatic protection. Furthermore, for the non-specialist reader, the formula *lis alibi pendens*, in chapter III, section A.5, could be replaced by the equivalent in each of the Commission's working languages and then be placed after it in brackets.

45. Mr. BENNOUNA (Chairman of the Working Group) said he agreed with the latter proposal. As to the first comment, he confirmed that insurers formed part of the category of legal persons, but, in the case of harm suffered by a person, the protection of the insurer could raise a special legal problem, which warranted separate treatment. Lastly, and with reference to the transferability of claims, the Commission would have to consider certain problems relating, for instance, to a person's death or disappearance, such as the problem of the successors to the claims, or transfers.

46. The CHAIRMAN, speaking as a member of the Commission, said it was surprising that insurers figured under the heading of legal persons, when the problem also arose for natural persons.

47. Mr. OPERTTI BADAN said that he had some doubts about chapter I, section B, which defined the categories of legal persons. More particularly, he wondered why, when item 1 (*a*) was very broad in scope, item 1 (*b*) was confined to "partnerships", which could take on various forms, depending on the State's internal law. Secondly, section B.3, concerning the right of espousal, should be updated and should take account more particularly of the special case of transnational corporations and of the jurisprudence in the *Barcelona Traction* case.

48. The CHAIRMAN recalled, in connection with chapter I, section B.3, that the Chairman of the Working Group had proposed that the phrase "in special cases" should be deleted. The concrete proposals that had been made to the main body of the text all related to paragraph 12, which, after being recast, would read:

> "12. Thus the topic would be limited only to codification of secondary rules: while addressing the requirement of an internationally wrongful act of the State as a prerequisite, it will not address the specific content of the obligations breached."

The footnote to which reference would be made after the expression "secondary rules" would indicate that that approach contrasted with the one which had been adopted at the beginning of the Commission's work on responsibility, as conducted by the former Special Rapporteur on the topic of State responsibility, Mr. García Amador.

49. In the outline, the Latin expression *lis alibi pendens*, in chapter III, section A.5, would be translated into the Commission's working languages and, a priori, the suggestion for the French version would be the term *litispendance*. The Chairman of the Working Group had agreed to word the title of chapter IV, section A, "Final satisfaction". Lastly, he would propose, as a member of the Commission, that the title of chapter IV, section B, should read "Submission of the question to a jurisdiction to determine and liquidate claims".

50. In response to a question by Mr. MIKULKA concerning the title preceding paragraph 11, which spoke of "secondary rules", he explained that the intention was to say that the Commission was not concerned with the nature of the rule violated, for it was a lesser consideration. That position was fully in keeping with article 17 of the draft on State responsibility, concerning the irrelevance of the origin of the international obligation breached.[10]

51. Mr. BENNOUNA (Chairman of the Working Group) confirmed that the secondary rules were defined *a contrario*, so to speak, and were therefore a "hold-all" category. The Commission did not intend to define the rule of international law guaranteeing the treatment of aliens or that of investment in a particular country, or to codify the primary rule concerned. It would confine itself to saying that there were rules of international law which protected aliens, and it would limit the study to the possibility, for example, of a denial of justice, as it was usual under the rule of territorial jurisdiction for the State itself to remedy the harm. In the event of serious discrimination towards aliens, or a violation of the rights that they were guaranteed under basic rules of international law, diplomatic protection was the mechanism that raised the case to the international level. It was the existing mechanism that the Commission would endeavour to clarify.

52. The disappearance of diplomatic protection would, admittedly, mark a great advance in international law, for it would mean that individuals had become subjects of international law. That, however, was not the case, since the individual possessed only a limited degree of personality recognized by States when he acceded directly to a jurisdictional or other international body in order to claim his rights. As for the Calvo clause,[11] to which some members had alluded, it was, like others, an institution certainly conceived to the detriment of the weak, and hence the need to look precisely at what developments had taken place.

53. Furthermore, when the World Bank had created the International Centre for Settlement of Investment Disputes (ICSID) in 1965, thereby giving investors direct access to an international arbitration tribunal, some coun-

[10] See footnote 5 above.

[11] See *Yearbook... 1956*, vol. II, document A/CN.4/96, pp. 206-208.

tries had viewed it as a violation of their sovereignty. In the early days, the Latin American countries had not joined ICSID.

54. Accordingly, the topic was such that the Commission stood on the borderline between the rules of internal law and of international law, as well as the rules on human rights, assuring some degree of personality for non-State bodies, and of inter-Statism, yet still in the overall field of responsibility. The former Special Rapporteur on State responsibility, Mr. Ago had made a very judicious choice in opting for the "secondary" approach and confining himself to wrongful acts, thus leaving aside activities not prohibited by international law. The study of diplomatic protection had not been at the heart of the codification exercise, and he therefore thought that it could currently be undertaken in order to supplement the major work of codifying State responsibility.

55. Mr. GALICKI, emphasizing that the Commission was simply starting on the topic, wondered whether, as a precaution, it might not delete the word "only" from the English version of paragraph 12.

56. The CHAIRMAN pointed out that the change related perhaps to other language versions in addition to the English, but it did not apply to the French.

57. Mr. BENNOUNA (Chairman of the Working Group) said that, in his opinion, the recast version of paragraph 12 as read out by the Chairman was an improvement, subject to the insertion of the word "international" before "obligations". He also endorsed the Chairman's suggestions to amend the outline.

58. Mr. SIMMA said that it was not enough to delete the word "only". It should be replaced by "essentially", the ambiguity of which would be satisfactory to all points of view. In any event, the Commission was close to the limits of an outdated terminology.

59. Mr. ROSENSTOCK said that, unlike the proposal made by Mr. Simma, the suggestion to delete the word "only" was acceptable.

60. The CHAIRMAN emphasized that the ambiguity that would be introduced by Mr. Simma's amendment would be far from constructive. If the Commission implied that it might take up things other than secondary rules, it would meet with protest from a number of States that it would be reasonable to reassure. He said that, if he heard no objection, he would take it that the Commission agreed to that view and to adopt the report of the Working Group, as amended, and to make it a chapter of the report of the Commission on the work of its forty-ninth session.

It was so agreed.

Draft report of the Commission on the work of its forty-ninth session (*continued*)

CHAPTER IV. *Nationality in relation to the succession of States* (continued) (A/CN.4/L.539 and Add.1-7)

C. Text of the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading (*continued*) (A/CN.4/L.539/Add.1-7)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.539/Add.2-7)

Commentary to article 7 (Attribution of nationality to persons concerned having their habitual residence in another State) (A/CN.4/L.539/Add.3)

61. Further to an exchange of views in which Mr. ECONOMIDES, Mr. MIKULKA (Special Rapporteur), Mr. ROSENSTOCK and Mr. KATEKA took part, the CHAIRMAN said that the question of the advisability of including in the commentaries proposals that the Commission had not adopted had been discussed for a number of years. Only by proceeding empirically and in a concrete fashion could the Commission expect to settle the problem, by endeavouring to display tolerance. It should nonetheless be acknowledged that the point of view of the Commission prevailed and that the commentary should be as concise as possible. For the continuation of the work, he therefore suggested that members who wished to add a paragraph to the commentary should draft it and communicate it in advance to the secretariat, which would ensure that it was circulated.

The meeting rose at 1.05 p.m.

2514th MEETING

Wednesday, 16 July 1997, at 10.10 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Draft report of the Commission on the work of its forty-ninth session (*continued*)

CHAPTER IV. *Nationality in relation to the succession of States* (continued) (A/CN.4/L.539 and Add.1-7)

C. Text of the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading (*continued*) (A/CN.4/L.539/Add.1-7)