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Summary record of the 2732nd meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
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43. The CHAIR said that, in the light of the comments by the Special Rapporteur and the Chair of the Drafting Committee, the Commission might wish to retain the existing text of article 7 and to state in the commentary that a substantial number of members had raised that point and had stressed the need to ensure that the persons covered by the provision were not unduly disadvantaged by the use of the term “habitually”.

44. Mr. KOSKENNIEMI said that he had doubts as to the relevance of the opposition between facts and concepts. Where it was relevant, he himself would always favour the former. However, while the situations of refugees certainly differed widely and each must be considered on its own merits, that was precisely the intended purpose of the discretionary system that the Commission was seeking to establish, namely, that it was up to States themselves to decide whether or not to take up a person’s cause. That being the case, why was it necessary absolutely to prohibit them from taking up claims of refugees? The same was true of the opposition between rules and exceptions; the two terms could easily be transposed. He himself could easily conceive of the whole exercise as relating to the great rule that it was up to the State to decide whether or not to exercise diplomatic protection, the exception—which must be interpreted narrowly—being that it could do so only with regard to its own nationals. Thus, it was not necessarily true that article 7 dealt with an exception which, for some metaphysical reason, must be interpreted limitatively, with that limitation happening to coincide with situations in which refugees were left in the lurch.

45. The CHAIR said that the views expressed seemed to concern the rationale of the basic rule of diplomatic protection and the extent to which that rule must be a matter for the State and must not be approached from the individual human rights perspective, important though that perspective was.

46. Mr. SIMMA, referring to the example of the situation of the German Jews who had emigrated to France or Switzerland in the 1930s, said he wondered whether it would have been realistic, or even conceivable, to ask those two countries not only to admit those refugees—itself no easy feat—but also to exercise diplomatic protection on their behalf against Nazi Germany. Admittedly, times had changed, and the world was now permeated by “human rights thinking”, but examples could still be found of countries with grave human rights problems, towards which neighbouring countries and the rest of the world adopted a very cautious stance. As it stood, article 7 represented a reasonable balance from which human rights considerations were not absent. Perhaps the Chair’s proposal could be expanded by putting a specific question to member States on that issue.

47. Mr. Sreenivasa RAO said that he supported Mr. Simma’s comments.

48. Mr. BROWNLIE said that Mr. Koskenniemi had not been the only member to express views on the policy question and that, on the facts, some members had felt that the policy question was not as clear as Mr. Koskenniemi took it to be. It should thus also be stated in the commentary that, while some members had raised the policy

question, others had considered that, given the facts, the policy premise was not justified.

49. Mr. KAMTO said that the provision under consideration had initially provoked strong opposition, until the situation had changed, resulting in the current formulation, which had been supported by a majority in the Drafting Committee. There was thus no reason to refer to specific opinions in the commentary to that provision, particularly because all the views expressed were recorded in the summary records. Furthermore, while facts prevailed over concepts, concepts conferred a structure on the facts and guided the codification exercise. The rules of diplomatic protection could not be changed to accommodate particular circumstances.

50. Mr. DAOUDI said that he supported Mr. Kamto’s remarks.

51. The CHAIR said that it was not unusual, on first reading, to indicate in the commentary differences of opinion that had arisen in the Commission. He thus suggested retaining the text as it stood; indicating in the commentary that a “substantial” (or, perhaps, “significant”) number of members had favoured deleting the word “habitually”; summarizing the arguments for and against; and requesting States’ views on the matter by means of a question addressed to the Sixth Committee.

It was so decided.

52. The CHAIR said that the Commission had thus completed its consideration of articles 1 to 5 and 7 on first reading.

53. Mr. TOMKA asked whether the Drafting Committee might reconsider the title of article 1, which, in his view, should be entitled “Definition” or “Definition and scope” so as to better reflect its contents.

54. The CHAIR said that the Drafting Committee would look into that question when it met to consider draft article 6.

The meeting rose at 11.25 a.m.

2732nd MEETING

Friday, 7 June 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, 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, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (concluded) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIR said that, at the previous plenary meeting, the Commission had requested the Drafting Committee to reconsider the title of article 1 of the draft articles on diplomatic protection and also the text of article 6. A copy of the title and text worked out by the Committee the previous afternoon (A/CN.4/L.613/Rev.1) had now been distributed.

2. Mr. YAMADA (Chair of the Drafting Committee) said that the Drafting Committee had held a brief meeting the previous day, upon the adjournment of the plenary, to consider the proposal made by Mr. Gaja for an amendment to article 6, as well as a proposal made by Mr. Tomka for a new title for article 1.

3. With regard to article 6 (Multiple nationality and claim against a State of nationality), the Drafting Committee had had before it a drafting proposal, based on the proposal made in the plenary (2731st meeting, para. 16), to add a comma after the word “predominant” at the end of paragraph 1, and to continue with the following text: “both at the time of the injury and at the date of the official presentation of the claim”. Paragraph 2 would thus be deleted.

4. The Drafting Committee had considered that different interpretations might be given to the word “former” in article 4, paragraph 3. While that term conveyed the idea that someone had lost his or her nationality, the word could be given a different interpretation, thereby creating an overlap with article 6. It had been felt that the proposed amendment, while meeting the concern of the current paragraph 2, would avoid that problem because, unless the person in question already had the nationality at the time of the injury, diplomatic protection could not be exercised.

5. The Drafting Committee had decided to accept the proposal as a way of clarifying article 6. Hence the existing paragraph 2 would be deleted, and article 6 as pro-

posed by the Committee would now read: “A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.”

The title of article 6 remained unchanged.

6. It would be recalled that, at the previous plenary, a proposal had been made to consider a new title for article 1, already adopted by the Commission. The Drafting Committee had agreed with the view that article 1 included some definitional elements. It had considered as alternative titles “Definition and scope” and “Nature and scope” and had settled for the former as being more accurate. The Committee thus proposed that the new title for article 1 should read “Definition and scope”.

7. Finally, the Drafting Committee had taken note of some of the suggestions made in plenary for technical corrections to the draft articles and had requested the secretariat to take those corrections into account when producing the next version of the draft articles.

8. In concluding, he recommended that the Commission should adopt article 6, as amended, and also the new title for article 1.

9. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the title of article 1 as proposed by the Drafting Committee.

It was so decided.

10. The CHAIR said that, if he heard no objection, he would take it that the Commission also wished to adopt article 6 in its revised version.

It was so decided.

11. The CHAIR said that the Commission had thus concluded the adoption of draft articles 1 to 7 on diplomatic protection on first reading.

Organization of work of the session (concluded)*

[Agenda item 2]

12. The CHAIR said that the Commission had thus concluded its business for the first part of its fifty-fourth session. The first plenary meeting of the second part of the session would be held on Monday, 22 July 2002, at 3 p.m.

The meeting rose at 10.15 a.m.

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, para. 1, p. 35.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

* Resumed from the 2727th meeting.