Summary record of the 2732nd meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:
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. BROWNIE 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.
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.

* Resumed from the 2727th meeting.

---

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.
