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Summary record of the 3036th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-SECOND SESSION

Held at Geneva from 3 May to 4 June 2010

3036th MEETING

Monday, 3 May 2010, at 3.10 p.m.

Outgoing Chairperson: Mr. Ernest PETRIČ

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-second session of the International Law Commission.

Tribute to the memory of Sir Ian Brownlie, former member of the Commission

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note as Commission members recalled the accidental death of Sir Ian Brownlie, of which he had informed them in January 2010. Sir Ian's untimely death had deprived the international law community of one of its most brilliant practitioners and academics. As a former member of the International Law Commission and one of its Special Rapporteurs, Sir Ian had contributed immensely to the Commission's work.

At the invitation of the outgoing Chairperson, the members of the Commission observed a minute of silence.

Statement by the outgoing Chairperson

3. The OUTGOING CHAIRPERSON provided a brief overview of the discussion held in the Sixth Committee during its consideration of the report of the International Law Commission on the work of its sixty-first session, a topical summary of which was contained in document A/CN.4/620, except for the comments on the draft articles adopted on first reading on the topic "Responsibility of international organizations", which were summarized in document A/CN.4/620/Add.1. International Law Week had provided an opportunity for delegations to engage in dialogue with some Commission members and Special Rapporteurs present in New York, as they had been encouraged to do by the General Assembly in paragraph 12 of its resolution 59/313 of 12 September 2005. The particular subjects addressed were the responsibility of international organizations, universal jurisdiction and the strengthening of the interaction between the Sixth Committee and the International Law Commission. That dialogue had been continued at the meetings of legal advisers.

4. Based on the consideration of the report of the Commission by the Sixth Committee, the General Assembly had adopted resolution 64/114 of 16 December 2009, in paragraphs 2 and 5 of which it expressed its appreciation to the Commission for the completion, on first reading, of the draft articles on the topic "Responsibility of international organizations"[1] and drew the attention of Governments to the importance for the Commission of receiving their comments and observations by 1 January 2011 on the draft articles and commentaries on the topic. In paragraph 6 of the same resolution, the General Assembly took note of the report of the Secretary-General on assistance to special rapporteurs of the International Law Commission[2] and of paragraphs 240 to 242 of the report of the Commission on the work of its sixty-first session,[3] and requested the Secretary-General to submit to the General Assembly at its sixty-fifth session options regarding additional support for the work of special rapporteurs.

Election of officers

Ms. Xue was elected Chairperson by acclamation.

Ms. Xue took the Chair.

5. The CHAIRPERSON thanked the members of the Commission for the confidence they had placed in her and

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[1] *Yearbook ... 2009*, vol. II (Part Two), chap. IV, pp. 19 *et seq.*, paras. 50–51.

[2] A/64/283.

[3] *Yearbook ... 2009*, vol. II (Part Two), pp. 151–152.

paid tribute to the contribution the outgoing Chairperson had made to the success of the sixty-first session.

Mr. Dugard was elected first Vice-Chairperson by acclamation.

Mr. Galicki was elected second Vice-Chairperson by acclamation.

Mr. McRae was elected[4] Chairperson of the Drafting Committee by acclamation.

Mr. Vasciannie was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/619)

The provisional agenda was adopted.

The meeting was suspended at 3.35 p.m. and resumed at 4 p.m.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the Commission's session. The Commission would begin by considering the topic "Reservations to treaties" at the current meeting. Thereafter it would consider the revised draft articles on protection of the human rights of persons who had been or were being expelled and the new draft workplan with a view to structuring the draft articles on the expulsion of aliens, which would be introduced by Mr. Kamto, the Special Rapporteur on the topic. The Drafting Committee would continue its work on reservations to treaties and on the expulsion of aliens. Members who wished to participate in the Drafting Committee in connection with those two topics were invited to contact the Chairperson of the Drafting Committee. In addition, the Commission would receive a visit from the Legal Counsel of the United Nations. Lastly, the Bureau proposed that the next plenary meeting be dedicated to the memory of the late Sir Ian Brownlie.

The programme of work for the first two weeks of the session was adopted.

Reservations to treaties[4] (A/CN.4/620 and Add.1, sect. B,[5] A/CN.4/624 and Add.1–2,[6] A/CN.4/626 and Add.1,[7] A/CN.4/L.760 and Add.1–3[8])

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR[9]

7. The CHAIRPERSON invited the Special Rapporteur to present the chapter of his fourteenth report on reservations to treaties dealing with the effects of reservations and interpretative declarations (paras. 179–290).

8. Mr. PELLET (Special Rapporteur) said that, for a number of reasons, much of the sixty-second session would be devoted to the consideration of reservations to treaties. First of all, the time had come to complete the study, which had been in progress for more than 15 years, owing to the highly technical nature of the topic and the complex problems of principle to which it gave rise. Secondly, the Special Rapporteur was particularly anxious to finish it, as he planned to leave the Commission at the end of the sixty-third session. Lastly, it so happened that the Commission, and in particular the Drafting Committee, did not have a large amount of other work scheduled for the first part of the session. Reservations to treaties would therefore constitute the bulk of the programme of work.

9. The Commission had before it, among other things, the chapter of his fourteenth report on reservations to treaties dealing with the effects of reservations and interpretative declarations (paras. 179–290). He would begin by introducing the draft guidelines under the subsection beginning with draft guideline 4.1 (Establishment of a reservation) (paras. 179–236); they constituted the first section of Part 4, which dealt more generally with the legal effects of reservations and interpretative declarations. He would then introduce the draft guidelines under section 4.2 (Effects of an established reservation) (paras. 237–290). These sections 4.1 and 4.2 constituted the final chapter of the fourteenth report, consideration of which the Commission had begun at its sixty-first session.[10] However, the Commission still needed to finalize sections 3.4, 3.5 and 3.6 concerning the permissibility of acceptances of and objections to reservations of interpretative declarations and of approval of, opposition to or recharacterization of an interpretative declaration—the formulation of which had been revised by the Drafting Committee (A/CN.4/L.760) but had not yet been debated by the plenary Commission.[11]

10. Other documents were also before the Commission, and he hoped that they could be discussed in a plenary meeting and by the Drafting Committee prior to the end of the first part of the session. He was referring, in particular, to his sixteenth report (A/CN.4/626 and Add.1), which dealt with reservations in the case of the succession of States. The greater part of that report was based on the excellent memorandum that had been prepared by the Secretariat on the matter.[12] As the sixteenth report would form the basis for Part 5 of the Guide to Practice, he proposed that the Commission begin considering it as soon as it had completed its consideration of the fourteenth report. If he seemed to have skipped over his fifteenth report (A/CN.4/624 and Add.1–2), it was because it was in a sense merely a continuation of his fourteenth report and had been assigned a separate symbol for technical reasons that appeared to be somewhat rigid in nature. He also planned to introduce a seventeenth report, which, in keeping with his previous practice, would begin with a summary of the preceding session. The seventeenth report would also

[4] For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *ibid.*, chapter V, section C, pp. 94 *et seq*.

[5] Mimeographed; available on the Commission's website.

[6] Reproduced in *Yearbook ... 2010*, vol. II (Part One).

[7] *Idem.*

[8] Mimeographed; available on the Commission's website.

[9] *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2.

[10] *Ibid.*, vol. II (Part Two), chap. V, sect. B, pp. 79 *et seq*.

[11] See, below, the 3051st meeting, paras. 78–113.

[12] *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/616.

contain two annexes: one on the reservations dialogue and the other on the settlement of disputes concerning reservations. It would mark the end of the Guide to Practice, and the Commission would then have to decide whether it wished to proceed to a traditional second reading or to envisage a special procedure, in view of the exceptional nature of the instrument.

11. Introducing the chapter of his fourteenth report dealing with the effects of reservations and interpretative declarations (paras. 179–290), he said that it concerned a crucial aspect of the topic under consideration, namely the legal effects of reservations and interpretative declarations, which would constitute Part 4 of the Guide to Practice. He expressed his appreciation for the valuable contribution made by Daniel Müller to that effort. The question of the effects of reservations was covered in an often partial and ambiguous fashion by articles 20 and 21 of the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention"); nevertheless, the Commission had agreed not to tamper with the substance of the provisions of those Conventions, despite their peculiarities, and he was therefore bound to respect that agreement. An analysis of the articles and the *travaux préparatoires* relating to them could be found in paragraphs 183 to 196 of the report.

12. It seemed logical to address the issue of effects beginning with the effects produced by valid reservations, and in particular, those referred to as "established". Valid reservations were those that met the conditions for formal validity and for permissibility, terms defined in the Guide to Practice, in Parts 2 and 3, respectively. Common article 21 of the 1969 and 1986 Vienna Conventions was based on a logical and clear distinction—albeit only in appearance—between the various effects of an established reservation. Paragraph 1 of that article deserved careful consideration, as it referred to the effects of a "reservation established with regard to another party in accordance with articles 19, 20 and 23". It therefore specified when and how a reservation was established, which was important, as it implied that the establishment of a reservation was a condition for the reservation to produce the normal effects attributed to it by article 21 in the absence of an objection. (The effects of an objection would be dealt with subsequently in the fifteenth report.) In view of the fact that articles 19, 20 and 23 of the Vienna Conventions would be reproduced in full in the Guide to Practice, it might seem necessary and sufficient to adopt a guideline stating that a reservation was deemed to be established from the moment it met the conditions set out in the guidelines reproducing those three articles. While that would be convenient, things were unfortunately not that simple, since the comprehensive references in article 21 to articles 19, 20 and 23 were rather cavalier. Article 23, for example, set out only some of the conditions for the formal validity of reservations, while article 20, paragraph 4 (*b*), merely described the legal effect of an objection to a reservation.

13. That was perhaps attributable to ineptitude or, more likely still, to a past legacy. It was only at a very late stage in the drafting of the Vienna Convention that States had decided to reverse the traditional presumption that an objection to a reservation precluded the entry into force of a treaty, at least as between the reserving and objecting States. That presumption had been maintained by the Commission, despite its belated conversion to the flexible system of reservations. The consequence of that traditional presumption was that the question of the effect on treaty relations of a reservation to which an objection had been made did not arise, since the reservation precluded such relations. That was the position that had been maintained by the International Law Commission and its Special Rapporteur, Sir Humphrey Waldock, until 1966,[13] as indicated in paragraphs 202 and 203 of the current report.

14. Things would nevertheless change with the reversal of that traditional notion. Once it became possible for the reserving State and the objecting State to be bound by a treaty in spite of the reservation, the reservation would produce certain effects on their relations; it would do so even though the reservation in question was not established, inasmuch as there was no consent, which was in conformity with article 20 of the 1969 Vienna Convention, but to which article 21, paragraph 1, nevertheless referred. The non-establishment of the reservation was consistent with the principle enunciated by the International Court of Justice (ICJ) in its advisory opinion of 1951 on *Reservations to the Convention on Genocide*—a principle that had been recalled by Sir Humphrey Waldock in his first report[14] and that, in the view of the Special Rapporteur, remained completely valid; in that opinion, the Court stated: "It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto" [p. 21]. In other words, not only were the comprehensive references to articles 20 and 23 debatable, but also, and most importantly, the *chapeau* of article 21 remained rather allusive in its description of basic elements specifying what constituted an established reservation, namely that a reservation was established: (*a*) if it met the requirements for permissibility set out in article 19—which meant that it must be compatible with the object and purpose of the treaty; (*b*) if it also met the conditions for formal validity set out in article 23 of the Vienna Convention; and (*c*) if it was accepted by the other contracting party. If the latter formulated an objection, the reservation could possibly produce certain effects but it could not be deemed to be established.

15. That was the sense of draft guideline 4.1, which appeared in paragraph 206 of the fourteenth report and which read: "A reservation is established with regard to another Contracting Party if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the other Contracting Party has accepted it." However, that was merely a general principle that needed to be qualified and to which certain exceptions applied, as demonstrated by article 20 of the 1969 Vienna

[13] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, draft articles on the law of treaties, p. 193. See also *Yearbook ... 1962*, vol. II, document A/CN.4/144 (first report on the law of treaties by Sir Humphrey Waldock), pp. 62–68 (commentary to draft articles 17– 19).

[14] *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 63 (para. (2) of the general commentary to articles 17–19).

Convention. According to that article, the rules applicable to the normal effects of a reservation did not, in fact, apply when the reservation was expressly authorized by the treaty, when the treaty was a multilateral treaty all provisions of which had to be applied in their entirety and/or when the treaty was the constituent instrument of an international organization. The first hypothesis, that of expressly authorized reservations, was addressed in article 20, paragraph 1: "A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States". That was logical, since in that case the other parties' consent to the reservation had been given in advance. But it was also necessary, in that case, for the authorization to be express and not implicit, as had wrongly been envisaged by the Commission in its draft article in 1966, a position that would not be compatible with the basic principle of respecting the object and purpose of the treaty. That conclusion followed from guideline 3.1.3, which had been provisionally adopted by the Commission at its fifty-eighth session[15] and appeared in the Guide to Practice. The same reasoning applied when the treaty authorized reservations in general: granted, they were authorized by the treaty, but the authorization must be interpreted as being subject to the general regime of reservations in the framework of the Vienna Conventions, since a reservation could not logically be considered to be established if it deprived the treaty of its substance, in other words, if it was contrary to the object and purpose of the treaty.

16. It was clear from those considerations that the expression "[a] reservation expressly authorized by a treaty" referred either to reservations expressly excluding certain provisions of the treaty or to what was sometimes referred to as "negotiated reservations"—reservations whose very content was contained in the treaty.

17. Those complex and varied considerations were the ones that draft guideline 4.1.1 (Establishment of a reservation expressly authorized by the treaty) (para. 220) attempted to synthesize in three paragraphs:

"A reservation expressly authorized by the treaty is established with regard to the other Contracting Parties if it was formulated in accordance with the form and procedure specified for the purpose.

"A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and organizations, unless the treaty so provides.

"The term 'reservation expressly authorized by the treaty' applies to reservations excluding the application of one or more provisions of the treaty or modifying the legal effect of one or more of its provisions or of the treaty as a whole, pursuant to and to the extent provided by an express provision contained in the treaty."

18. What was important in that regard was to make it clear that the authorization to formulate a reservation was not a sort of blank check or licence to undermine the object and purpose of the treaty, since, if it was not compatible with the object and purpose, the reservation could not be deemed to be established. Of course, as was indicated in paragraph 222 of his report, if a reservation was thus established, it meant that the contracting parties could no longer object to it. He nevertheless had not proposed an express draft guideline along those lines because, in his view, that conclusion seemed to go without saying, and it would suffice to mention it in the commentary.

19. The second specific case was that envisaged in article 20, paragraph 2, of the 1969 Vienna Convention concerning treaties with limited participation. Such treaties were the only remaining vestiges of the traditional system that required the unanimous acceptance of reservations before they could be considered established. Paragraphs 224 to 228 of the fourteenth report described the *travaux préparatoires* of that provision and showed how it had been profoundly changed following the general reorientation of the project by Sir Humphrey Waldock, when he had persuaded the Commission to switch to the flexible system recommended by the ICJ in its 1951 advisory opinion. From then on, treaties with limited participation were no longer defined solely by the number of participants to which they were opened for signature, but also, and perhaps more so, by the intention of the parties to preserve the integrity of the treaty completely, which might be based on its object and purpose. However, that clarification hardly helped to narrow down the notion of a treaty with limited participation. As he had shown in paragraphs 230 to 232 of his report, the wording of article 20, paragraph 2, contained other "mysteries", or rather gaffes, in the wording of the Vienna Convention. However, he had not considered it appropriate to correct the drafting weaknesses of that paragraph when he had elaborated draft guideline 4.1.2 (Establishment of a reservation to a treaty with limited participation), which followed article 20, paragraph 2, rather closely and read:

"A reservation to a treaty with limited participation is established with regard to the other Contracting Parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if all the other Contracting Parties have accepted it.

"The term 'treaty with limited participation' means a treaty of which the application in its entirety between the parties is an essential condition of the consent of each one to be bound by the treaty."

20. Draft guideline 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization) expressed the general principle deriving from article 20, paragraph 3, of the Vienna Convention, that the establishment of a reservation to the constituent instrument of an international organization required the acceptance of the competent organ of that organization. That requirement had already been recalled in guideline 2.8.7 of the Guide to Practice, but that reminder appeared in Part 2 of the Guide and concerned the procedure for the acceptance of a reservation to a constituent instrument of an international organization. Guideline 2.8.7 reproduced the text of article 20, paragraph 3, common to the 1969 and 1986 Vienna Conventions, whereas guidelines 2.8.8 to 2.8.11, which the Commission had already adopted,

[15] *Yearbook ... 2006*, vol. II (Part Two), pp. 154–155.

spelled out the meaning and consequences of the concepts of the organ competent to accept a reservation to a constituent instrument, the modalities of the acceptance of a reservation to a constituent instrument, the acceptance of a reservation to a constituent instrument that had not yet entered into force and the reaction by a member of an international organization to a reservation to its constituent instrument (para. 235 of the report). He proposed the following wording for draft guideline 4.1.3:

> "A reservation to a constituent instrument of an international organization is established with regard to the other Contracting Parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the competent organ of the organization has accepted it in conformity with guidelines 2.8.7 and 2.8.10."

Expulsion of aliens[16] (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2,[17] A/CN.4/628 and Add.1[18])

[Agenda item 6]

Draft articles on the protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur[19]

21. Mr. KAMTO (Special Rapporteur) introduced the changes made to chapter 4 (Protection of the human rights of persons who have been or are being expelled) of the draft articles on the expulsion of aliens following the Commission's consideration of the fifth report on the topic.[20] He explained that when the Commission had considered the report, it appeared that a large majority of the Commission members did not understand what he had meant to say about the protection of the human rights of persons who had been or were being expelled as a limitation on the State's right of expulsion. The Commission had wanted the principle of full protection of the rights of persons who had been or were being expelled to be clearly stated in the context of the expulsion of aliens and had therefore requested that draft article 8 be reformulated in that sense.

22. Following the same logic, the Commission had also requested a restructuring of draft articles 9 to 14 that took into account the changes proposed to some of those draft articles during the debate, so that the set of draft articles 8 to 14 contained in the fifth report could be referred to the Drafting Committee.

[16] At its sixty-first session in 2009, the Commission began the consideration of the fifth report of the Special Rapporteur (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611) and decided to leave to the sixty-second session the consideration of draft articles 8 to 14 as revised and restructured by the Special Rapporteur in light of the discussion in plenary (*ibid.*, document A/CN.4/617) (*Yearbook ... 2009*, vol. II (Part Two), chap. VI, sect. B, p. 129, para. 91). For the Commission's consideration of draft articles 1 to 7 introduced by the Special Rapporteur, see *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

[17] Reproduced in *Yearbook ... 2010*, vol. II (Part One).

[18] *Idem*.

[19] *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617.

[20] *Ibid.*, document A/CN.4/611.

23. As set out in the document containing the revised and restructured draft articles on the protection of the human rights of persons who have been or are being expelled (hereinafter "restructured draft articles"), the set of draft articles had been restructured into a chapter 4[21] with four sections entitled, respectively, "General rules", "Protection required from the expelling State", "Protection in relation to the risk of violation of human rights in the receiving State" and "Protection in the transit State".

24. The general rules were set out in draft articles 8, 9 and 10.

25. Draft article 8 (General obligation to respect the human rights of persons who have been or are being expelled) incorporated the changes proposed during the plenary debate. The term "fundamental rights" had been replaced by the broader and non-limitative term "human rights". The phrase "in particular those mentioned in the present draft articles" had been inspired by the plenary debate; its purpose was to emphasize not only that there was no intention to establish a hierarchy among the human rights to be respected in the context of expulsion, but also that the rights specifically mentioned in the draft articles were neither exhaustive nor exclusive.

26. Draft article 9 (Obligation to respect the dignity of persons who have been or are being expelled) corresponded to former draft article 10 but had been moved forward in section A, "General rules", in order to emphasize that it was general in scope. Paragraph 1 of former draft article 10, setting forth the general rule that human dignity was inviolable, had been eliminated in order to indicate that the right to dignity was being considered in the specific context of expulsion rather than in a general context.

27. Draft article 10 (Obligation not to discriminate [Non-discrimination rule]), which corresponded to former draft article 14, had also been moved forward into section A, "General rules", in order to emphasize that it was general in scope. In paragraph 2, the phrase "among persons who have been or are being expelled" had been added to take into account the comments of several Commission members who had stressed that, in that context, the discrimination prohibited was discrimination among the aliens subject to expulsion, not discrimination between such aliens and the nationals of the expelling State.

28. Section B (Protection required from the expelling State) comprised draft articles 11, 12 and 13.

29. Draft article 11 (Obligation to protect the lives of persons who have been or are being expelled) combined paragraph 1 of former draft guideline 9 and paragraph 1, which had become paragraph 2, of former draft article 11. That rearrangement was in response to the strongly expressed desire of some Commission members to differentiate the obligations of the expelling State from those

[21] Chapter 4 and its title, "Protection of the human rights of persons who have been or are being expelled", correspond to the new draft workplan presented by the Special Rapporteur (*ibid.*, document A/CN.4/618). It replaces the text entitled "Limits relating to the requirement of respect for fundamental human rights", contained in the fifth report (*ibid.*, document A/CN.4/611).

of the receiving State. The phrase "in a territory under its jurisdiction" had been added in paragraph 2 in order to take into account the concerns expressed by other Commission members.

30. Draft article 12 (Obligation to respect the right to family life) corresponded to former draft article 13. The phrase "to private life" had been eliminated from the title and from paragraph 1 of the draft article, as some Commission members wished. The words "by law" had been changed to read "by international law", as other Commission members had requested.

31. Draft article 13 (Specific case of vulnerable persons) had been taken from former draft article 12, which had dealt with the specific case of the protection of children being expelled. It had been expanded to cover all vulnerable persons, as indicated by its title. Paragraph 1 specified what persons were meant, and paragraph 2 was a new provision, which replaced paragraph 2 of the former draft article. It stressed that when a child was involved in expulsion, the child's best interests must prevail; in some cases the child's best interests might require the child to be detained in the same conditions as an adult so that the child was not separated from the adult.

32. In his sixth report (A/CN.4/625 and Add.1–2), he planned to formulate a draft article (x) on conditions of custody (or detention, since those two terms were examined in his sixth report) of persons who had been or were being expelled.

33. Section C (Protection in relation to the risk of violation of human rights in the receiving State) consisted of draft articles 14 and 15.

34. Draft article 14 (Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled) was a reformulation of former draft article 9, particularly paragraph 1 thereof, which sought to take into account the desire expressed by some Commission members to extend the scope of protection of the right to life to all expelled persons. That provision of general scope also covered the situation of asylum seekers, which therefore did not require separate treatment. Some Commission members would have preferred to generalize the principle of *non-refoulement* in order for the protection thus afforded to extend to all persons who had been or were being expelled, whether or not they were lawfully present. On that point, it should be recalled that the principle of *non-refoulement* was a fundamental principle of international refugee law. As such, it had been incorporated, since the 1951 Convention relating to the Status of Refugees, in many conventions and declarations of principle at both the universal and regional levels. However, the principle of *non-refoulement* had passed beyond the bounds of international refugee law to become part of international humanitarian law, and it was also deemed to be an integral part of international human rights protection.

35. With specific reference to the field of human rights, the principle had been introduced into a number of international instruments, notably in article 22, paragraph 8, of the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica" and in article 3, paragraph 1, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

36. However, only the provisions of the American Convention on Human Rights: "Pact of San José, Costa Rica" expressly accorded the principle of *non-refoulement* general scope with respect to human rights. Article 22, paragraph 8, of the Convention provided: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." That provision echoed article 3 of the Universal Declaration of Human Rights,[22] which stated: "Everyone has the right to life, liberty and security of person." The provision had been taken up, with differences or nuances of formulation, in a variety of international human rights instruments (International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights, Arab Charter on Human Rights[23]).

37. While noting the preference expressed by some Commission members for a formulation tending towards the abolition of the death penalty, he did not believe that he should make changes in that sense to the provision contained in paragraph 2 of draft article 14 for the reasons explained in paragraph 58 of his fifth report.

38. Paragraph 3 had been added in order to address a concern expressed by the Drafting Committee when it had considered draft article 6 (Non-expulsion of stateless persons).

39. Draft article 15 (Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment) corresponded to former draft article 11, which had been divided in two because of the need, strongly expressed by some Commission members, to distinguish, when restructuring former draft articles 8 to 14, between the protection of the human rights of an alien who had been or was being expelled which was required in the expelling State and the protection required in the receiving State. Draft article 15 drew on paragraphs 2 and 3 of former draft article 11. The words "and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection" had been added to former paragraph 3 in order to reflect the jurisprudence of the European Court of Human Rights in the case of *H.L.R.* v. *France*.

40. Section D (Protection in the transit State) consisted of draft article 16 (Application of the provisions of this chapter in the transit State). The provision had been added in order to complete the set of provisions governing the rights of the expelled person during the entire process and the whole of the journey from the expelling State to the receiving State. Of course, the question had arisen as to whether all the provisions relating to the protection of human rights applied automatically in the transit State. At

[22] General Assembly resolution 217 A (III) of 10 December 1948.

[23] Adopted at Tunis in May 2004, at the 16th Summit of the League of Arab States (for the English version, see *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147).

the current stage of reflection on the topic, he did not see why, in that regard, a distinction should be made in regard to the protection of human rights depending on whether the person in question was in the expelling State or the transit State, or even in the receiving State.

41. With regard to the new draft workplan presented by the Special Rapporteur with a view to structuring the draft articles,[24] he explained that he had felt the need to introduce it following the plenary debates on his third[25] and fifth[26] reports on the expulsion of aliens, where on occasion it had happened that members' comments, despite being well founded and legitimate, had anticipated chapters that had not yet been elaborated. He had therefore considered it useful to provide an overview of the treatment of the topic as he envisaged it through the new workplan, Parts Two and Three of which were obviously not very detailed as they were still in the process of being developed.

42. Part One, which concerned general rules, had been completed at the same time as his sixth report, which he would introduce at the sixty-third session of the Commission.

43. With regard to the two last parts, which concerned, respectively, expulsion procedures and the legal consequences of expulsion, he intended to prepare a report on them, which he would submit to the Commission in the course of the current session, his objective being to submit the entire set of draft articles on the topic to the Commission at its sixty-second session.

The meeting rose at 5.40 p.m.

3037th MEETING

Tuesday, 4 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Sir Ian Brownlie, former member of the Commission (*concluded*)

1. The CHAIRPERSON recalled that at the previous meeting, members of the Commission had observed a minute of silence in memory of Sir Ian Browlie, who had served on the Commission from 1997 to 2008 and had chaired it in 2007. In his many appearances before the International Court of Justice, he had helped to shape its jurisprudence; as lead counsel for Nicaragua,[27] he had played a crucial role in the Court's historic judgment in *Military and Paramilitary Activities in and against Nicaragua*. His scholarly writings addressed a wide range of topics, including African boundaries, State responsibility and human rights; his *Principles of Public International Law*[28] was a classic text on that subject.

2. In the International Law Commission, he had made a substantial contribution as Special Rapporteur on the effects of armed conflicts on treaties. He would be remembered for his sound judgement, formidable integrity and independent mind.

3. Mr. PELLET said he had been devastated to hear of the passing of a mentor, accomplice—and sometimes adversary. As a junior member of the team headed by Sir Ian in the *Military and Paramilitary Activities in and against Nicaragua* case, he had been impressed by his intimate knowledge of the Court and its proceedings. When they had subsequently worked on the same or opposing legal teams, he had always had great respect for Sir Ian, even when they disagreed. Within the Commission, while they had sometimes differed on the substance of legal matters, they had still been good friends. Sir Ian had been an excellent companion, a good-natured man with a wonderful sense of humour.

4. Mr. HASSOUNA said that in his work entitled *International Law and the Use of Force by States*,[29] Sir Ian had gained the admiration of African legal experts for his defence of the small, fragile States of that region. His *African Boundaries: a Legal and Diplomatic Encyclopaedia*,[30] was a much valued text. *Basic Documents on Human Rights*,[31] which he had edited, attested to his profound belief in the need to defend human rights.

5. As a member and Chairperson of the Commission, he had combined academic depth with a barrister's experience. He had been able to forge compromise, sometimes using his British sense of humour to defuse tension. He would be remembered for his achievements by academics, as well as by practitioners of international law.

6. Mr. VARGAS CARREÑO noted that Sir Ian had consistently enriched the Commission's debates through his profound knowledge of international law. His efforts as Special Rapporteur on the effects of armed conflicts on treaties had culminated in the adoption on first reading of the relevant draft articles. His writings were essential texts for the teaching of international law, noteworthy for their clarity.

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[24] *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/618.

[25] *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

[26] *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

[27] *I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, vol. III, pp. 41–79 and pp. 98–101, and vol. V, pp. 147–174 and 224–234.

[28] I. Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008.

[29] I. Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1991.

[30] I. Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, London, C. Hurst and Co, 1979.

[31] I. Brownlie and G. S. Goodwin-Gill (eds.), *Basic Documents on Human Rights*, 5th ed., Oxford University Press, 2006.