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**Summary record of the 3064th meeting**

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5. Draft article C1 contained a long list of procedural guarantees for regular aliens, among which the right to be informed and the right to have the decision on expulsion reviewed by an independent body were essential. Another important right, which was not specified, was the right to have the execution of expulsion deferred until the review decision was handed down. That right, which might be subject to some conditions, was very important in practice, because most aliens would face great difficulties in returning once they had been sent back to a distant country. Article 13 of the International Covenant on Civil and Political Rights might provide an argument in favour of the existence of that right. It gave an alien the right to have his or her case reviewed and to be represented for that purpose before the competent authority unless there were “compelling reasons of national security”. The reference to national security could only be understood as relating to the presence of the alien on the expelling State’s territory; it followed that if the alien’s presence did not threaten national security, expulsion should be suspended until the review was completed.

6. State practice cited in support of the procedural guarantees listed in draft article C1 was not always relevant. The practice of States members of the European Union analysed in paragraphs 394 to 401 [paras. 118–125], in particular, was of little significance. European Union rules concerning aliens from third countries were certainly pertinent, but those that concerned the free movement of persons inside the European Union and gave rights to European Union nationals hardly seemed relevant when trying to establish a rule under international law. That remark applied for instance to the *Pecastaing* case, mentioned in paragraph 397 [para. 121], in which the Court of Justice of the European Communities had been confronted with a clash between the principle, always viewed in a positive light, of free movement of nationals of member States on the one hand, and a negative appraisal of the purpose of that movement in the case in hand.

7. In conclusion, he said that he had no objection to referring the three draft articles for further analysis to the Drafting Committee, provided that an additional text was drafted to give irregular aliens certain procedural guarantees.

*The meeting rose at 10.15 a.m.*

### 3064th MEETING

*Wednesday, 14 July 2010, at 10.05 a.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

### Filling of a casual vacancy in the Commission (article 11 of the statute)

[Agenda item 2]

1. The CHAIRPERSON said that the Commission was required to fill a casual vacancy. The election would take place, as was customary, in a private meeting.

*The meeting was suspended at 10.05 a.m. and resumed at 10.15 a.m.*

2. The CHAIRPERSON announced that the Commission had elected Mr. Huikang Huang (China) to fill the casual vacancy occasioned by the resignation of Ms. Xue.

### Expulsion of aliens (*continued*) A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. The CHAIRPERSON invited the Commission to resume its consideration of the second part of the sixth report on expulsion of aliens (A/CN.4/625 and Add.1–2).

4. Mr. PERERA said that he wished to thank the Special Rapporteur for the second part to his sixth report on expulsion of aliens pertaining to expulsion procedures, which contained three draft articles, and for the useful introductory statement he had made the previous week. Before commenting on the draft articles, he had a few general observations on the approach that should be adopted in relation to expulsion procedures. Throughout the consideration of the topic, the Special Rapporteur had taken into account the fact that the conditions of entry, residence and expulsion of aliens were the sovereign prerogative of the State. The Commission’s task was to strike an appropriate balance between the State’s prerogatives in matters of expulsion and respect for due process *vis-à-vis* the alien subject to expulsion, so that minimum international standards were preserved in the exercise of such prerogatives.

5. Such considerations were particularly crucial with regard to expulsion procedures, a matter that was eminently within the domain of domestic legislation. In that regard, the Special Rapporteur very pertinently stated in paragraph 315 [39] of the addendum that

as the rules on the conditions of entry and residence of aliens are a matter of State sovereignty, it is legally and practically appropriate to leave the establishment of such rules up to the legislation of each State. With regard to the procedure for expelling aliens, we believe that the exercise of codification, possibly even the progressive development of international law, should be limited to the formulation of rules that are established indisputably in international law and international practice, or that derive from the clearly dominant trend of State practice.

6. Thus, the draft articles relating to expulsion procedures posed a critical challenge for the Commission, namely, on the one hand, to identify which general principles were “established indisputably” in international law and international practice and, on the other hand, to determine which rules, if any, were derived from “the clearly

dominant trend of State practice". In determining rules of procedure for expulsion, a clear distinction must be drawn between the expulsion of aliens lawfully present in the territory of a State and the expulsion of aliens who had entered the territory of a State illegally. The fundamental distinction between aliens lawfully in the territory of the expelling State and those unlawfully present was clearly recognized in the International Covenant on Civil and Political Rights and other relevant legal instruments; the Special Rapporteur had taken that into account when structuring the draft articles contained in this second part.

7. At the same time, the Special Rapporteur had attempted to strike a careful balance in draft article A1, on the scope of the rules of procedure, by seeking to extend some measure of protection to illegal aliens. While limiting the scope of the rules, in principle, to cases of expulsion of aliens lawfully in the territory of the expelling State, the draft article nevertheless allowed the expelling State some room for manoeuvre to apply the rules to illegal aliens as well, in the specific cases covered in paragraph 2.

8. In his statement at the previous meeting, Mr. Gaja had pertinently raised the issue of providing greater protection for illegal aliens. He himself could go along with that idea, as long as such protection was aimed at ensuring the observance of basic due process requirements such as the requirement for conformity with the law dealt with in draft article B1, and not at putting the two categories of aliens on the same level with regard to the range of procedural guarantees to be granted. If that was done, the fundamental distinction between the two categories provided for in other legal instruments would be obliterated.

9. In dealing with procedural guarantees applicable to aliens lawfully in the territory of the expelling State, article 13 of the International Covenant on Civil and Political Rights constituted the logical starting point:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Those elements constituted the principle criteria established in international law, with which domestic legal rules were required to conform. General principles of that nature should serve as the basic framework for formulating the procedural rights of aliens facing expulsion.

10. Draft article B1, setting out the requirement for conformity with the law, accurately reflected the principle that an alien could be expelled only in pursuance of a decision reached in accordance with law.

11. On the other hand, draft article C1, on procedural rights of aliens facing expulsion, set out a wide range of rights, some of which might not be considered as being "established indisputably in international law" or derived from "the clearly dominant trend in State practice". For example, the International Covenant on Civil and Political Rights did not expressly recognize the right

to a hearing, and the decisions of the national tribunals showed that they were divided on the issue, as underlined in paragraphs 365 and 366 [paras. 89–90]. It should also be recalled that for Commonwealth courts, an expulsion decision was purely administrative in character and not judicial or quasi-judicial. Concerning the right to legal aid, he noted that treaty law did not expressly provide a basis for it, although the Special Rapporteur contended that one could be established, in line with the progressive development of international law, by drawing on European community law. Whether procedural rules of general application could be formulated based on such limited experience was open to question, however. The institution of a right to legal aid, even in respect only of nationals, would raise serious resource problems, particularly for developing countries. The right to translation and interpretation services posed similar problems.

12. Accordingly, draft article C1 on procedural rights of aliens facing expulsion should confine itself to broad procedural guarantees relating to due process, such as those set out in paragraphs 1 (a) to (e), while avoiding being overprescriptive. Furthermore, it would be useful to include in the draft article the national security caveat set forth in article 13 of the International Covenant on Civil and Political Rights. The text should also expressly reiterate that it applied to aliens lawfully in the territory of the expelling State, in keeping with article 13 of the Covenant and the overall structure of Part Two of the draft articles, on the understanding that the basic guarantees extended to all aliens. In conclusion, he said that he was in favour of the referral of the three draft articles to the Drafting Committee.

13. Mr. HMOUD said that, at the outset, he would like to thank the Special Rapporteur for his report on expulsion procedures, which provided a thorough analysis of relevant treaty provisions, State and regional practice and judicial decisions. Part Two of his report on expulsion of aliens was important because it set out the practical guarantees for the protection of the rights of the alien in the process of expulsion and ensured that the process was transparent and in conformity with minimum standards of legality. The report showed clearly that in terms of procedural protection, a distinction had to be made between an alien facing expulsion who was legally in the territory of the expelling State and an alien who was not, it being understood, as Mr. Gaja and Mr. Perera had observed, that the latter must be given minimum procedural guarantees.

14. A State had the right and the duty to control entry, stay and residency in its territory, but the right of the State to expel an alien who was illegally present did not mean that the expulsion procedure was at its absolute discretion: it had the duty not to violate the alien's fundamental rights. As the Special Rapporteur indicated in paragraph 315 [39], since there was no uniform State practice on matters relating to the expulsion of aliens, the Commission should propose a set of minimum procedural guarantees as a form of progressive development so as to protect the fundamental rights of the individual regardless of whether he or she was legally present in the territory of a given State. On the other hand, an alien legally in the territory of a State should be entitled to additional procedural guarantees, as evidenced by the relevant

provisions of international instruments, international and regional practice and national and international judicial decisions.

15. He agreed that the legality of an alien's presence in the territory of a State must be determined in accordance with the laws of the State: that was a principle well-established in international law. However, the State should not abuse such a sovereign right *vis-à-vis* the alien in order to bypass the procedural guarantees applicable to expulsion. A State might well withdraw a residence permit, in full accord with its national laws, thereby making the presence of the alien in its territory illegal so that it was no longer obliged to provide the individual in question with the procedural guarantees to which a legal alien was entitled. For that reason, the draft articles should stipulate that a State could not change the status of an alien in order to avoid complying with the obligation to provide procedural guarantees.

16. As for draft article A1, its wording and position in the draft articles would depend on whether the Commission decided to adopt provisions on the expulsion procedure applicable to an alien illegally present in the territory of a State. Turning to the question of the conformity of the expulsion decision with the law, he said that the Special Rapporteur made it clear that there was a solid basis in international law for imposing such a condition. As a minimum, the State must uphold its own laws when carrying out the expulsion procedure. In that regard, no distinction should be drawn among aliens, whether they were legally present in the territory of a State or not. Thus, draft article B1 should apply to both categories. The procedural rights set out in the second part of the report were mainly based on international and regional instruments and national laws. While some rights could be extended to both legally present and illegally present aliens, other rights could prove difficult to apply in all cases. The right to be notified or informed of the expulsion decision could apply to both categories of aliens, although the extent of that right might vary. Nevertheless, the draft articles did not need to dwell on the matter, but merely to provide that aliens enjoyed such a right, whether they were legally or illegally present in the territory of a State.

17. In the same vein, any alien, regardless of his or her status under the law, must be able to understand the expulsion decision, and the expelling State must be obliged, as far as possible, to provide translation into a language that the alien can understand. The alien also had the right to communicate with the consular officers of his or her State of nationality—a right guaranteed by article 36 of the Vienna Convention on Consular Relations—whether or not he or she was legally present in the territory of the expelling State. The rights to challenge the expulsion decision and to have access to an effective remedy for that purpose were based on article 13 of the International Covenant on Civil and Political Rights, which provided legal grounds for granting such rights to aliens who were legally present in the territory of the expelling State. However, there was no support in international and State practice for extending those rights to aliens who were illegally present in a State's territory: those rights were not so fundamental in nature as to warrant their extension to that category of aliens.

18. Regarding the application of the principle of non-discrimination to the right of access to an effective remedy, he said that it was not clear whether the Special Rapporteur was referring to the treatment of nationals or to non-discrimination between different categories of aliens. The scope of the application of the principle should therefore be clearly defined. In his opinion, non-discrimination did not necessarily mean according aliens the same treatment as nationals in terms of guaranteeing access to effective remedies.

19. Clearly, the right to legal aid was not well established in international law and would place too many burdens on States. Accordingly, it should not be prescribed in absolute terms: States should be given some flexibility in granting legal aid. Lastly, he would like to know why the restriction on procedural guarantees for reasons of national security laid down in article 13 of the International Covenant on Civil and Political Rights had been dropped from draft article C1. The Special Rapporteur considered dispensing with the restriction to be a form of progressive development, yet national, regional and international judicial bodies considered that the restriction should remain part of the law. The Commission must decide to what extent the expelling State could restrict procedural guarantees for compelling national security reasons. In conclusion, he recommended that draft articles A1, B1 and C1 contained in the second part of the sixth report be referred to the Drafting Committee.

20. Mr. NOLTE said first of all that he wished to congratulate the Special Rapporteur on Part Two of his excellent sixth report; since procedural rights were essential for non-citizens who were subject to expulsion, the Special Rapporteur was also to be commended for focusing on that issue. As the Special Rapporteur pointed out, the distinction between "legal aliens" and "illegal aliens" was well established and should be taken into account, but always bearing in mind the statement in paragraph 286 [10] of the report that illegal aliens "remain human beings whatever the conditions under which they entered the expelling State". He agreed with Mr. Gaja that it was neither satisfactory nor appropriate that "illegal aliens" should have no procedural rights. Draft article A1, paragraph 2, merely indicated that a State could apply the rules relating to legal aliens to illegal aliens also. One possible source of inspiration for the formulation of the procedural rights of illegal aliens might be Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals.<sup>271</sup> The Directive was to be transposed into domestic legislation by member States of the European Union by the end of 2010 so that any discrepancies between the different laws of those States would disappear. In that connection, he wished to say that the description in paragraphs 294 to 296 [18–20] of the report of German legislation on the procedure for expulsion of illegal aliens was incomplete and might therefore be misleading. In Germany, illegal aliens were in fact entitled to procedural rights relating to the expulsion measures that must be applied when they would not leave the country voluntarily.

<sup>271</sup> *Official Journal of the European Union*, No. L 348, 24 December 2008, p. 98.

21. Draft article A1, paragraph 2, should not leave the procedural rights of illegal aliens completely open, even though it was not easy to formulate such rights. The European Union Directive he had just mentioned drew certain important distinctions. According to article 2, paragraph 2 (a), of the Directive, member States could decide not to apply the Directive

to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.<sup>272</sup>

The provision clearly showed that the problem of the procedural rights of illegal aliens was not one that could be solved by a simple rule. The Special Rapporteur recognized this when he stated in paragraph 309 [33] of his report that “it is apparent from national laws that a summary or special expulsion procedure may be applied when the alien manifestly has no chance of obtaining entry authorization” and in certain other cases. He therefore questioned whether draft article A1 could simply be referred to the Drafting Committee for a minor technical adjustment. Mr. Gaja had mentioned important considerations of principle, some of which he found convincing, but about which he still had some doubts, in particular the suggested analogy with criminal law. A more thorough discussion on the procedural rights of the category of “illegal aliens”, within which a number of distinctions needed to be drawn, seemed necessary.

22. Turning to the question of the procedural rights of aliens lawfully residing in the expelling State, he said that he agreed with draft article B1 and with most of the reasoning underpinning draft article C1, except when the Special Rapporteur based his reasoning on European Union legislation, which applied only to the free movement of citizens of the European Union within its territory (paras. 394–402 [118–126]). He noted with satisfaction, however, that the Special Rapporteur recognized, in principle, that the rules governing the expulsion of European Union citizens applicable among member States of the European Union could be different from the general rules when he stated in paragraph 309 [33] of his report that a “special procedure may also apply when the alien is not a national of a State having a special arrangement or relationship with the expelling State”. He himself felt it important to mention that point because of the debate in the Drafting Committee concerning the non-discrimination provision contained in draft article 10.

23. He endorsed the substance of the rules set forth in draft article C1 with respect to aliens lawfully residing in a given country. He was not sure what exactly was meant by the reference to discrimination in paragraph 1 (d), although he supposed that it was an implicit reference to draft article 10 on non-discrimination. He also wondered whether, rather than to speak of the “right to interpretation and translation into a language he or she understands”, it might not be better to refer to “a right to linguistic assistance”, since in practice it was sometimes difficult to determine which language a person understood. That

concern was probably more justified in the case of “illegal aliens” than with regard to non-citizens residing lawfully in a country, however.

24. Should the Commission really recognize a right to legal aid? It would not pose a problem for European States, since that right was already recognized in Directive 2008/115/EC, but would other States be prepared to recognize it as well? Perhaps it would be more appropriate to say that aliens had a right to legal aid without discrimination when such a right was granted under national legislation to other persons and in other situations. Lastly, he noted with interest Mr. Gaja’s proposal to add a right to the list in draft article C1 under which an expulsion decision would not be enforced until a review decision was handed down. Mr. Gaja based that proposal on an interpretation of article 13 of the International Covenant on Civil and Political Rights, but he himself considered that article 13 had a somewhat wider significance, in that it might provide justification for certain restrictions imposed on grounds of national security. He therefore suggested that a reference to national security should be included somewhere in the list of rights contained in draft article C1, along the lines of article 13 of the Covenant. All in all, he was in favour of referring draft articles B1 and C1 to the Drafting Committee but did not think that the question of the procedural rights of “illegal aliens” could simply be resolved by referring draft article A1 to the Drafting Committee. Like Mr. Gaja, he considered that the draft articles should recognize that “illegal aliens” should have procedural rights, but the Commission needed to look more closely at how such rights should be formulated; it should not leave it to the Drafting Committee to deal with that complicated issue.

25. Mr. CAFLISCH began his comments on the sixth report on expulsion of aliens by thanking the Special Rapporteur for the clarity of his very readable report and for the incredible amount of relevant background material that he had been able to find. He wished to make two general remarks, to be followed by comments on the draft articles. His first general remark concerned the sources consulted by the Special Rapporteur: general, regional and bilateral treaties; the resolutions of international organizations; and some general principles of law. As long as those texts ran along similar lines there was no problem, but that was not always the case, as the Special Rapporteur demonstrated, particularly in the lengthy descriptions of the grounds for expulsion in paragraphs 73 to 210 of the sixth report. The conclusions that could be drawn from those texts were sometimes questionable and to be viewed with caution; the prevailing uncertainty showed that the topic was perhaps not yet ripe for codification. There was nothing to prevent the Commission from identifying and recommending accepted standards supported by reasonably uniform practice in keeping with human rights precepts, but it was particularly important that the commentaries accompanying the draft articles should be clear and detailed.

26. Still on the subject of the sources consulted, and by way of a second general remark, he said that the Special Rapporteur had furnished some interesting information, particularly on national legislation and case law. Although a comprehensive overview could never be provided, the

<sup>272</sup> *Ibid.*, p. 101.

legislation and practice reviewed by the Special Rapporteur seemed to present a broad and representative range of practice.

27. The report of the Special Rapporteur was voluminous. That was by no means a criticism, but merely attested to the great complexity of the subject matter: indeed, the word “complex” was used several times.

28. The sixth report (A/CN.4/625 and Add.1–2) dealt essentially with substantive issues: the prohibition of disguised expulsion and of extradition disguised as expulsion, the grounds for expulsion and cases of expulsion contrary to public international law.

29. He could endorse the content of draft articles A and 8, which provided for the prohibition of disguised expulsion and the prohibition of extradition disguised as expulsion, respectively. His sole reservation concerned the adjective “disguised” (the English term “constructive” was more appropriate). The expression “*de facto* extradition” would be preferable, but it had already been used elsewhere (para. 46).

30. He greatly appreciated the Special Rapporteur’s extensive analysis of the lawful grounds for expulsion. Those relating to public order and public security subsumed most of the others, save perhaps, for historical reasons, grounds relating to public health. Obviously it was difficult to distinguish the permissible grounds from those that were not permissible, as shown, for example, by the difficulty in defining “the higher interest” of the State, for one very quickly reached the point where specifics got lost in generalities. Other lawful grounds for expulsion included illegal entry, breach of conditions for admission, economic grounds and preventive measures or deterrents. There were also unlawful grounds for expulsion, in other words, grounds that were contrary to international law, such as expulsion as a means of reprisal or “cultural” grounds, which worked to restrict the number of foreign workers in a country (paras. 177–180).

31. Draft article 9 summed up the Special Rapporteur’s lengthy analysis of the grounds for expulsion. He endorsed the provision, subject to two comments. First, he would separate public health grounds from the grounds of public order and public security. Second, he would be a little more explicit, if possible, either in the text or in the commentary, about the grounds for expulsion that were contrary to international law.

32. Draft article B concerned respect for human rights during enforcement of the expulsion decision. He endorsed its content.

33. The second part of the report laid down the procedures for expulsion. A distinction was drawn between “legal” and “illegal” aliens and, within the latter group, between aliens residing lawfully, with a residence permit, in a foreign country, and those residing without one. The distinction drawn between long-term illegal aliens and recent ones was likewise justified. In spite of their illegal status, the former were in general integrated into the local population and had made a life for themselves. For the latter, who had arrived recently, there was less at stake and

the territorial State must exercise its full sovereignty over them. He therefore endorsed the conclusion implicit in draft article A1 that provisions relating to expulsion procedures applied only to the expulsion of aliens who were lawfully present in the territory of the country concerned, meaning that they were not applicable to aliens who were unlawfully present. To stipulate anything in the contrary would be tantamount to rewarding unlawfulness, but it went without saying that all persons continued to enjoy their human rights, in particular procedural guarantees. Furthermore, as indicated in paragraph 315 [para. 39] of the report, it was difficult to find a thread that would help to identify rules generally applicable to illegal aliens on the basis of such exceedingly diverse and complex practice. Accordingly, he thought that draft article A1 could be referred to the Drafting Committee. The question of whether to refer to aliens “legally” or “lawfully” present was of secondary importance.

34. On the whole, he was also in favour of referring draft articles B1 and C1 to the Drafting Committee. As far as the procedural rights of aliens threatened with expulsion was concerned—he preferred that wording to “procedural rights of aliens facing expulsion”—the list in draft article C1 seemed acceptable. In paragraph 1 (*b*), it would be preferable to refer to the right to challenge the expulsion decision rather than the right to challenge the expulsion itself. As to paragraph 1 (*e*), the commentary thereto would no doubt make reference to article 5 (*e*) of the 1963 Vienna Convention on Consular Relations. All the draft articles could be referred to the Drafting Committee.

**Reservations to treaties (*continued*)\* (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)**

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL  
RAPPORTEUR (*continued*)\*\*

35. The CHAIRPERSON invited the Special Rapporteur to introduce the rest of his fifteenth report (A/CN.4/624 and Add.1–2).

36. Mr. PELLET (Special Rapporteur) recalled that, during the first part of the session, the Commission had nearly completed its consideration of succession in respect of reservations (A/CN.4/626) and the effects of a valid reservation (paras. 1–95 [291–385]). The following section (paras. 96–224 [386–514]) concerned the effects of an invalid reservation—in other words, of a reservation that did not meet the conditions of form or substance defined by articles 19 to 23 of the 1969 and 1986 Vienna Conventions and spelled out in the second part of the Guide to Practice.

37. The problem did not arise, at least in practice, under the traditional system of unanimity. However, when the flexible system embodied in the Vienna Conventions had been adopted—in the light of the advisory opinion of 1951 on *Reservations to the Convention on Genocide*

\* Resumed from the 3061st meeting.

\*\* Resumed from the 3047th meeting.

and the Commission's change of heart thanks to Sir Humphrey Waldock's powers of persuasion<sup>273</sup>—it had been felt necessary to address certain reservations that were not valid *per se*, essentially because they were either prohibited by a treaty or were incompatible with its object and purpose, the situations covered by article 19 of the 1969 and 1986 Vienna Conventions.

38. The Commission had grappled for some time with the consequences of those substantive flaws, as he had shown in paragraphs 97 to 104 [387–394] of his report, only to achieve a result that was disappointing, to say the least: the question of the status of invalid reservations had been left out of the draft articles on the law of treaties of 1962 and 1966. That omission had been perpetuated at the United Nations Conference on the Law of Treaties of 1968–1969. As a result, the Vienna Conventions simply did not deal with the question of the effects (or absence of effects) of invalid reservations.

39. That was borne out by an important episode which had occurred at the Conference in 1968. Having noted the omission, the United States delegate had submitted an amendment<sup>274</sup> to what was to become article 20, paragraph 4, of the Convention, intended to preclude the acceptance of reservations that were prohibited or incompatible with the object and purpose of the treaty [the text was contained in paragraph 105 [395] of the Special Rapporteur's report]. Although the amendment had been referred to the Drafting Committee, it had not been adopted after all, without any explanation as to why in the *travaux préparatoires* of the Conference,<sup>275</sup> but with the clear result that the Convention was silent on that crucial problem—that silence being one of the main reasons why the Commission had once again taken up the question of reservations.

40. The Commission was not starting from scratch, however. First of all, practice had grown up around the silence of the Convention and it might be useful to study it, even if it was not always very revealing. Secondly, and most importantly, the Convention had an overall logic that had to be preserved and that provided a solid foundation for the general principles to be set forth while leaving room for the inevitable elements of the progressive development for which he invited his colleagues to be prepared to assume the responsibility.

41. Moreover, as disappointing as they were, the *travaux préparatoires* could be of some help in orienting

<sup>273</sup> *Yearbook ... 1962*, vol. II, first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/144 and Add.1), commentary to articles 17, 18 and 19, pp. 65–68, paras. (8)–(17), and Report of the Commission to the General Assembly (A/5209), draft articles on the law of treaties, commentary to articles 18, 19 and 20, pp. 178–181, paras. (7)–(23), and *Yearbook ... 1966*, vol. II, Report of the Commission to the General Assembly (A/6309/Rev.1), Part II, draft articles on the law of treaties, commentary to articles 16 and 17, p. 204, para. (7), and pp. 206–207, paras. (14)–(19).

<sup>274</sup> *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 21st meeting, p. 108, para. 11.

<sup>275</sup> *Official Records of the United Nations Conference on the Law of Treaties ...* (A/CONF.39/11/Add.2) (see footnote 91 above), Report of the Plenary Commission (A/CONF.39/14), pp. 137–138, para. 186.

the Commission's approach to the problem. He was thinking in particular of Sir Humphrey Waldock's firm reply, in his capacity as Expert Consultant to the Conference, to a question from the representative of Canada, who had asked him whether the United States amendment was consistent with the intention of the International Law Commission regarding incompatible reservations. Sir Humphrey had replied: "Yes, since it would in effect restate the rule already laid down"<sup>276</sup> in what would become article 19 of the 1969 Vienna Convention.

42. In other words, articles 19 and 20 functioned separately, an obvious point if they were to have any useful effects. That was the basic reason why he had taken up again in his fifteenth report a proposal that he had made in his tenth report,<sup>277</sup> namely to include in Part 3 of the Guide to Practice draft guideline 3.3.2 on the nullity of reservations that did not fulfil the conditions for permissibility laid down in draft guideline 3.1: it reproduced the text of article 19 of the Vienna Conventions. At the time, the draft guideline had been fairly well received; however, it had been pointed out that it was premature and that it related more to the effects of a reservation than to its validity, so the Commission had deferred its consideration.

43. For the reasons he had given in paragraphs 118 and 119 [408–409] of his fifteenth report, he continued to believe that, from an intellectual standpoint, the issue was one of validity, but for purely practical reasons, he had ultimately decided to deal with it in Part 4 of the Guide to Practice, which covered effects, because nullity was the consequence of failure to comply with the formal and procedural requirements described in Part 2 as well as the conditions of permissibility covered in Part 3.

44. In any event, it seemed that in either situation, and particularly when the reservation was incompatible with the object and purpose of the treaty, there was no doubt that it was null and void. That was the idea expressed in draft guideline 4.5.1, reproduced in paragraph 129 [419] of the report, which read: "A reservation that does not meet the conditions of permissibility and validity set out in Parts II and III of the Guide to Practice is null and void."

45. That pronouncement was consistent not only with the few references that could be found in the *travaux préparatoires* and with the logic of the text, but also with practice which, it must be emphasized, was more varied than one might have thought. Such practice, as well as the positions expressed by States in the Sixth Committee, were described in paragraphs 123 to 125 [413–415].

46. While the pronouncement on nullity did not fully resolve all the problems relating to the effects of invalid reservations, it nonetheless had an obvious consequence, linked by definition to nullity: such a reservation was devoid of any legal effect. That was the intent of draft guideline 4.5.2, the text of which was contained in paragraph 144 [434] of the report.

<sup>276</sup> *Official Records of the United Nations Conference on the Law of Treaties ...* (A/CONF.39/11) (see footnote 274 above), 25th meeting, p. 133, para. 4.

<sup>277</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 187, para. 200.

47. In actual fact, the majority view in the Commission, the Sixth Committee and human rights bodies and the practice of States and of international organizations all confirmed that position. Without dwelling on the matter (it was all explained in paragraphs 131 to 143 [421–433] of the report), he merely wished to draw attention to the fact that, according to the Human Rights Committee’s all-too-well-known General Comment No. 24,<sup>278</sup> the author of a reservation that was incompatible with the object and purpose of the International Covenant on Civil and Political Rights did not have the benefit of the reservation—a principle applied to the *Kennedy v. Trinidad and Tobago* communication [para. 6.7]—and that was one of the few conclusions reached in General Comment No. 24 that the three “critical” States (France, the United Kingdom and the United States) had not seen fit to challenge. The rulings of the European Court of Human Rights and the Inter-American Court of Human Rights went solidly along the same lines.

48. Thus an invalid reservation was null and void, and that nullity prevented it from producing the effects derived from its formulation, but the effects of that failure to produce effects still had to be determined. The key question was fairly easy to formulate and involved the following two alternatives: “Was the author of an invalid reservation bound by the treaty ‘less the reservation’, or did the invalidity exclude it from the circle of States parties?” (unless otherwise specified, when he referred to “States”, he also meant international organizations).

49. The question was simple, but the answer was not—it was perhaps the most difficult of all the questions raised in the Commission’s work on reservations. It was especially difficult since practice was so vague and fluid, and the Commission must therefore engage in progressive development in order to carry out its task. He had assumed his responsibilities by proposing a solution that represented a happy medium that he believed to be reasonable and in keeping with the spirit of the Vienna regime which, on the whole, was now being “recodified”. He expressed the dual hope that members of the Commission would likewise assume their responsibilities and not try to duck the issue, which was an open question that the Commission had to resolve, and that they would not lean towards an extreme solution even if, in their eyes, it had the attraction of abstract logic and the advantage of being in line with the political and ideological considerations they might espouse.

50. In that regard, he wished to say two things. First of all, the two alternatives were “almost” but not completely reconcilable through the principle of consent which, with a few unfortunate exceptions, had always guided the Commission. Everything depended on one’s point of view: was it the integrity of the consent of the reserving State or the will of the other parties that should be preserved? Secondly, fairly evenly balanced elements could be found in practice to support either of the two alternatives.

51. The idea of participating in a treaty without the benefit of the reservation (the more erudite term of severability could be used), described in paragraphs 146 to 156 [436–446] of the report, was primarily attributable to the Nordic

countries (recently joined by other European States, and with the implicit support of the Council of Europe), which wished to give what was called “super-maximum” effect to their objections, in other words to be associated with the reserving State *without* the reservation; and it was in line, or at least seemed to be in line, with the decisions of the human rights bodies.

52. The other approach, which could be described as “pure consensualist”, was illustrated by the practice described in paragraphs 157 to 161 [447–451] of the report and consisted in taking the view, to quote the French reaction to General Comment No. 24:

that agreements, whatever their nature, are governed by the law of treaties, that they are based on States’ consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.<sup>279</sup>

53. Nevertheless, the majority practice was not so clear-cut and, if truth were to be told, it was frankly incoherent: it amounted to stating, on the one hand, that a reservation was incompatible with the object and purpose of the treaty, and—or rather “but”—that such incompatibility did not prevent the treaty from entering into force between the author of the reservation and the author of the objection. In other words, one agreed to enter into treaty relations with a State that one deemed to have divested the treaty of its object and purpose. In addition, it could not be said that the replies received from States<sup>280</sup> to the Commission’s question on that subject in 2005<sup>281</sup> helped to clarify the matter.

54. As he had just said, the decisions of the human rights bodies *seemed* to confirm the severability theory. It was there, however, that one might find elements that would help, not to reconcile the points of view—ultimately they were not reconcilable—but to borrow components from both in order to reach the balanced solution that he earnestly hoped for.

55. He would start from the premise that was most favourable to the principle of consent: a State that had consented to be bound while accompanying the expression of its consent with a reservation could not be considered to be purely and simply bound without its reservation, even if the reservation was not valid. However, most of the time when the problem of whether a State was bound arose, it was too late to seek the State’s opinion and such a solution, which was not unthinkable *de lege ferenda*, did not have even the beginnings of a reflection in practice. On the other hand, apart from in other rare cases, it was

<sup>279</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, annex VI, p. 119, para. 7.

<sup>280</sup> Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560), sect. G, paras. 213–225 (mimeographed; available on the Commission’s website, documents of the fifty-eighth session) and Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat (A/CN.4/577 and Add.1–2), sect. C, paras. 45–63 (mimeographed; available on the Commission’s website, documents of the fifty-ninth session).

<sup>281</sup> *Yearbook ... 2005*, vol. II (Part Two), p. 14, para. 29.

<sup>278</sup> See footnote 83 above.

difficult to determine what the real position of the State had been when it had bound itself: had it been most interested in the adoption of the treaty and less interested in the reservation, or did it consider the latter to be of crucial importance?

56. Sometimes the matter of whether a State was bound could be determined more or less artificially, as the European Court of Human Rights had attempted to do in *Belilos v. Switzerland*, or, in an even more contrived manner, in *Loizidou v. Turkey*. In general, however, nothing could be inferred from the *travaux préparatoires* concerning the expression of consent to be bound, and it was necessary to rely on a presumption. Which presumption? That the State was bound by the whole treaty without its reservation or that it was not bound at all by the treaty?

57. He had hesitated for 15 years before proposing the first solution, as set forth in the first paragraph of draft guideline 4.5.3, reproduced in paragraph 191 [481] of the report:

When an invalid reservation has been formulated in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole, the treaty applies to the reserving State or to the reserving international organization, notwithstanding the reservation, unless a contrary intention of the said State or organization is established.

58. The presumption was thus in favour of severability, but it was a rebuttable presumption that would be set aside if the author of the reservation expressed a contrary intention.

59. The reasons why he had finally come down in favour of the solution were manifold and complex: they were summarized in paragraphs 177 to 182 [467–472] of the report. It seemed to him above all that, while reservations were indeed important, the will to be bound by a treaty was also important and it was normal to presume that when the State expressed its position, it did not wish to divest the treaty of its object and purpose. The reverse presumption would pose serious problems of legal stability and call for some juggling to fill in the time lag between the expression of consent to be bound and the determination of the nullity of the reservation. Lastly, the solution would facilitate the reservations dialogue which everyone fervently desired.

60. In a far more subjective vein, as he had said a few weeks earlier, the time had come for the Commission to “bury the hatchet” with the human rights treaty bodies without going back on the basic position it had adopted in 1997 in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.<sup>282</sup> It seemed to him that the solution he was proposing should make that possible.

61. It was all the more feasible and appropriate since such bodies had moved on, too. Apart from the case law of the European Court of Human Rights, which was much less categorical than people often thought, he had in mind recent statements by the human rights treaty bodies, including the Human Rights Committee, set forth in paragraphs 171 to 174 [461–464] of his report. During a

meeting with the Commission, the Committee’s members had stated that “there was no automatic conclusion of severability for inadmissible reservations but only a presumption”,<sup>283</sup> a view expressed again during a meeting of the working group on reservations of the inter-committee meeting of the human rights treaty bodies. In 2006, the working group had acknowledged that the “consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation”,<sup>284</sup> and that principle had been incorporated in recommendation No. 7, adopted at the sixth inter-committee meeting of the human rights treaty bodies.<sup>285</sup> Nevertheless, he knew that it was not easy to determine “the intention of the State at the time it enters its reservation”. In paragraphs 184 to 188 [474–478] of the report, he explained the role that he thought a number of elements should play in determining the intention of the author of the reservation. They were, “including, *inter alia*”, as stated in the second paragraph of draft guideline 4.5.3, the wording of the reservation, the provision or provisions to which the reservation related and the object and purpose of the treaty, the declarations made by the author of the reservation when negotiating, signing or ratifying the treaty, the reactions of other contracting States and contracting organizations and the subsequent attitude of the author of the reservation. It was reasonable to believe that, on the basis of that group of indicators, the intention of the author of the reservation could be reconstructed and, if an honest quest for the intention of the author of the reservation did not yield conclusive results, the presumption reflected in the first paragraph of draft guideline 4.5.3 could come into play.

62. It remained to be seen what effects the acceptance of impermissible reservations and objections to them produced, or did not produce. Objections were dealt with in paragraphs 211 to 224 [501–514] of the report and in the draft guideline, which should perhaps be broken into two separate texts; the Drafting Committee could see to that. The first paragraph of draft guideline 4.5.4 read: “The effects of the nullity of an impermissible reservation do not depend on the reaction of a contracting State or of a contracting international organization.”

63. It was the logical and inescapable consequence of the very principle of the nullity of impermissible reservations: they were null and void, hence they were devoid of any effect. Accepting or rejecting them changed nothing, despite the vacillation of the ICJ described in paragraphs 212 to 214 [502–504] of the report. In its 2006 judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court had said two things that might seem contradictory but which, all things considered, complemented more than contradicted each other. It had stated, first, that the reservation by Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide was not incompatible with the instrument; and only later, “that, when Rwanda acceded to the Genocide Convention

<sup>283</sup> “The practice of human rights treaty bodies with respect to reservations to international human rights treaties” (HRI/MC/2005/5 and Add.1), para. 37.

<sup>284</sup> Report of the meeting of the working group on reservations (HRI/MC/2006/5/Rev.1), para. 16, recommendation 7, pp. 4–5.

<sup>285</sup> Report of the meeting of the working group on reservations (HRI/MC/2007/5 and Add.1), p. 7.

<sup>282</sup> See footnote 108 above.

and made the reservation in question, the [Democratic Republic of the Congo] made no objection to it” (para. 68 of the judgment). In other words, the reservation was not null and void *per se*—a position which accorded with the first paragraph of draft guideline 4.5.4—and in fact, the Democratic Republic of the Congo had made no objection to it. That was why, even if neither an acceptance, even an express one, nor an objection could render impermissible a reservation that was not permissible or establish the impermissibility of a reservation that was permissible—for example, because it was not “objectively” contrary to the object and purpose of the treaty—the fact remained that, as indicated in the second paragraph of the draft guideline, a “State or international organization which, having examined the permissibility of a reservation in accordance with the present Guide to Practice, considers that the reservation is impermissible, should nonetheless formulate a reasoned objection to that effect as soon as possible”. As he had tried to explain in paragraphs 212 to 223 [502–513] of his report, that was in the interests both of the author of the reservation, which was thus alerted to the problems the reservation raised, and of the objecting State, whose declaration had the same value as any “heteronormative unilateral act” (*acte unilatéral hétéronormateur*). It also provided important guidance that could be taken into consideration by third parties invited to rule on the permissibility of the reservation, as the European Court of Human Rights had done in the *Loizidou v. Turkey* case.

64. He wished quickly to revert to the issue of acceptance of impermissible reservations, which meant going back to the part of the report that dealt with the matter, starting with paragraph 195 [485]. It also meant going back in time, because he wished the Commission to reconsider draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), which he had proposed for adoption in his tenth report on the permissibility of reservations in 2005, and which read: “Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.”<sup>286</sup>

65. He saw no need to rehearse the rationale behind the draft guideline, which was chiefly justified by the point made in draft guideline 4.5.1, namely that a reservation that did not meet the conditions of formal validity and permissibility set out in the Guide to Practice was “null and void”. If that had been the only problem, then there would be no need for a separate draft guideline and the same approach as for objections could be applied. However, it seemed to him that acceptance posed an additional problem that needed to be tackled in a separate guideline. An objection was the manifestation of disagreement, whereas acceptance, which in all cases was explicit, signified agreement. To go from there to assuming that there was a collateral agreement between the reserving State and the objecting State, an agreement which changed the treaty relations between the two, was only one step. That step could not be taken, however, for the basic reason that article 41, paragraph 1 (b) (ii), of the Vienna Conventions excluded any partial agreement that was “incompatible with the effective execution of the object and purpose

of the treaty as a whole”. That might hypothetically be the case if the agreement related to an impermissible reservation, but would probably not be the case if the reservation was merely formally invalid, a point to which he would revert later. One could imagine a situation, not inconceivable in the case of treaties with limited participation, in which all the contracting States, having been duly consulted by the depositary, expressed their acceptance of the reservation. There, as Sir Humphrey Waldock had observed,<sup>287</sup> the parties always had the right to derogate from the treaty by agreement *inter se*, and it was no longer article 41 of the Vienna Conventions that came into play, but article 39. However, for that purpose, a “real” agreement was still required, an agreement whose existence could not be lightly presumed. That explained the rather heavy wording of draft guideline 3.3.4, likewise drawn from his tenth report, the slightly amended text of which was contained in paragraph 205 [495] of the current report. Without wishing to dwell too much on the matter, he pointed out that the position of the two draft guidelines posed a problem. When the Commission had first considered them in 2006, it had left them in abeyance pending future decisions on the effects of reservations.<sup>288</sup> He had accordingly waited, but as explained in paragraphs 199 to 201 [489–491] of the report, he continued to think that those draft guidelines had a place in Part 3 of the Guide to Practice, which dealt with the permissibility of reservations, not their effects. They answered the question that had arisen earlier as to whether an acceptance could “validate” an impermissible reservation. Since the answer was in the negative, the question of effects did not arise and the reason put forward for including draft guideline 4.5.1 in Part 4 of the Guide to Practice was not valid, because draft guidelines 3.3.3 and 3.3.4 related exclusively to the impermissibility of reservations, not to formal defects.

66. Paragraphs 235 and 236 [525–526] proposed two alternative texts for draft guideline 4.6 on the absence of effect of a reservation on relations between contracting States and contracting organizations other than the author of the reservation. The first simply reproduced the text of article 21, paragraph 2, of the Vienna Conventions. In accordance with the Commission’s tradition, he believed that it did not pose a problem, particularly since the rule of the relativity of treaty relations laid down in that paragraph was the inevitable result of the flexible reservations regime introduced by the 1969 and 1986 Vienna Conventions and was in line with a practice firmly established since that regime had been introduced. The only question that might arise was whether there was a need explicitly to contemplate the case of an agreement between all the parties to adapt the application of the treaty to the reservation—a rare case, of which the footnote to paragraph 236 [526] gave an example. He did not think that was necessary, but the Commission might think differently, and he would like to hear its views on the subject.

67. The last section of the fifteenth report, on the effects of interpretative declarations, approvals, oppositions, silence and reclassifications (paras. 237–283 [527–573])

<sup>286</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188.

<sup>287</sup> See the first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 65, para. (9), and p. 60, art. 17, para. 1 (b).

<sup>288</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 138, para. 157.

comprised five draft guidelines. As everyone was aware, the Vienna Conventions were silent on interpretative declarations, despite a few fruitless attempts to address them during the *travaux préparatoires*, described in paragraphs 238 to 240 [528–530]. However, the Conventions were not silent on the interpretation of treaties, and articles 31 and 32 provided useful indications about the effects of interpretative declarations. One thing was certain: they had no binding effect on other contracting States or bodies tasked with settling disputes among the parties with regard to the interpretation or application of the treaty, and such declarations could not modify the treaty, as indicated in paragraphs 244 to 246 [paras. 534–536] of the report. That did not mean, however, that they were devoid of meaning: as the French Constitutional Council had observed, they could contribute, in the case of a dispute, to a treaty's interpretation. That was the general principle expressed in draft guideline 4.7 (Effects of an interpretative declaration), which read:

“An interpretative declaration may not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to some of its provisions and, accordingly, may constitute an element to be taken into account as an aid to interpreting the treaty.”

68. There was still the case of conditional interpretative declarations, which were covered in draft guideline 4.7.4, contained in paragraph 248 [538] of the report. He had included it only “for the record”, because although such declarations were different from reservations, they had been shown to behave in all respects like them. As the Commission had agreed previously, it was not necessary to repeat that systematically in each part of the Guide to Practice. In conclusion, he requested the Commission to refer draft guidelines 3.3.3, 3.3.4, 4.5.1 to 4.5.4, 4.6 and 4.7 to 4.7.3 to the Drafting Committee.

*The meeting was suspended at 11.45 a.m. and resumed at 12.05 p.m.*

### Cooperation with other bodies (*continued*)\*

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE  
ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

69. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian-African Legal Consultative Organization (AALCO), and invited him to address the Commission.

70. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that the Commission and AALCO had enjoyed a mutually beneficial relationship for more than 50 years; AALCO continued to attach great importance to that relationship. It was a statutory obligation for AALCO to consider the topics dealt with by the Commission and to forward the views of its member States to the Commission. Over the years, that had helped to foster closer ties between the two bodies, which were also customarily represented at each other's annual sessions. He invited all the members of the Commission

to participate as observers in the work of the forty-ninth annual session of AALCO, to be held in Dar es Salaam, United Republic of Tanzania, from 5 to 8 August 2010. During the session, a thematic debate, entitled “Making AALCO's participation in the work of the International Law Commission (ILC) More Effective and Meaningful”, would be held on 6 August 2010. He hoped that members of the Commission would participate in order to enrich the debate. The initiative for the debate had emerged after concerns had been expressed by AALCO member States that the current procedure for the consideration of the topics on the Commission's agenda was not the best means of consolidating and, where possible, presenting the views of member States as one voice to the United Nations and the Commission. Some member States had also proposed constituting a body akin to the Commission under the auspices of AALCO to consider the topics the Commission was dealing with, in depth at intersessional meetings of experts, prior to and after the Commission's annual sessions, and to assist AALCO member States in responding to the questionnaire prepared by the Commission on the topics under its consideration.

71. At its forty-eighth annual session, held at Putrajaya, Malaysia, from 17 to 20 August 2009, AALCO had adopted the Putrajaya Declaration on Revitalizing and Strengthening the Asian–African Legal Consultative Organization,<sup>289</sup> in which it had recognized the significant contribution of AALCO towards strengthening Afro–Asian solidarity, particularly in the progressive development and codification of international law, and the important role played by international law as an indispensable instrument for shaping a just and equitable world order.

72. At the forty-seventh annual session of AALCO, some of the items on the agenda of the sixtieth session of the Commission had been discussed, and delegates, while appreciating the meticulous work of the special rapporteurs, had made comments and suggestions on the future work of the Commission. Concerning the protection of persons in the event of disasters, one delegate had emphasized that there was a need to put in place a detailed legal framework to provide expeditious relief to victims. Only a rights-based approach could guarantee the physical security and basic necessities of persons affected by disasters. As to reservations to treaties, it had been pointed out that the Commission should be cautious when discussing the competence of the treaty monitoring bodies to assess the validity of reservations and the consequences of such assessment, as the recommendations of those bodies did not have any binding force on States. On the topic of the immunity of State officials from foreign criminal jurisdiction, one delegate had observed that while applying the “act of State” and “non-justiciability” doctrines, the Commission might also consider dealing with the question of limitations on immunity. In addition, since all the immunities enjoyed by State officials were derived from the immunity of the State, it was necessary to approach the question of recognition with prudence, stressing the criteria that State

\* Resumed from the 3062nd meeting.

<sup>289</sup> AALCO, Report of the Secretary-General on the work of the Asian–African Legal Consultative Organization (AALCO/48/PUTRAJAYA/2009/ORG 1), annex.

officials must meet in order to be eligible for immunity. As far as the expulsion of aliens was concerned, it had been underlined that the main problem was to reconcile the right to expel with the rules of international law, in particular international human rights law. It was also necessary to define clearly the term “alien” and to draw a distinction between loss of nationality and denationalization. With regard to shared natural resources, one delegate considered that it was premature to envisage the adoption of a convention in that area, since the draft articles dealt with a mechanism for international cooperation for the joint protection and utilization of transboundary aquifers, something that was not based on international practice. As to the responsibility of international organizations, one delegate had observed that the countermeasures taken by international organizations might run counter to the functions for which the international community had constituted the organizations in question. In relation to the effects of armed conflicts on treaties, it had been stated that the Commission’s mandate was to supplement and not to modify existing law relating to the effects of armed conflicts. Since such instruments created *erga omnes* obligations, on its second reading of the draft articles, the Commission should take into consideration the principle of the inviolability of treaties establishing boundaries and thereby contributing to international peace and security.

73. In his opening remarks during a meeting held on 28 October 2009 at United Nations Headquarters on the theme of how AALCO could contribute to the work of the International Court of Justice and the Sixth Committee, the Secretary-General of AALCO had laid emphasis on the importance that AALCO attached to the work of the International Law Commission and other United Nations bodies. Speaking on that occasion, Mr. Valencia-Ospina, member of the Commission and Special Rapporteur on the topic “Protection of persons in the event of disasters,” had addressed the relationship between AALCO and the ICJ in the context of the draft articles that he had submitted to the General Assembly. He had remarked that AALCO should consider preparing a study on strengthening the compulsory jurisdiction of the ICJ which, in his opinion, would be extremely helpful in dealing with the peaceful settlement of disputes clauses in the articles.

74. The participation of the Asian and African States in the development and codification of international law must be strengthened, and he called upon the Commission to take note of the mechanisms, practices and principles applied by those States in implementing the work programme. It was encouraging to note that of the 34 elected members of the Commission, 12 were from AALCO member States. Praise was also due for the work done by the special rapporteurs of the Commission.

75. In 2011, AALCO would hold its fiftieth annual session, most likely in an Asian State. It would be an historic opportunity to rekindle the Bandung spirit of Afro-Asian solidarity, particularly in the progressive development and codification of international law. The essence of the Bandung spirit lay in understanding that it was incumbent not only on developing countries, but also on peoples and social movements across the world, to establish a just and equitable world order.

76. Mr. HASSOUNA noted that important events had taken place in Africa and Asia in the field of international law in recent years, including the establishment of bodies such as the African Union Commission on International Law. He asked how AALCO envisaged its relations with such bodies. He also wished to know what topics AALCO member States would like the Commission to consider.

77. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that AALCO kept abreast of the legal activities of the African Union, which was invited to its annual session, but that it had not yet envisaged the modalities of future cooperation between the two organizations.

78. Mr. PERERA asked whether it would be possible to organize AALCO intersessional meetings on topics considered by the Commission. The time at which AALCO held its annual session did not always allow for the full participation of African and Asian States. Perhaps it should be held after the Commission’s annual session and before the United Nations General Assembly.

79. Mr. NOLTE enquired whether any views had been expressed in AALCO on whether the draft articles on the responsibility of States for internationally wrongful acts<sup>290</sup> should take the form of a draft convention or whether they should be retained in their current form and continue to exercise their influence through international, arbitral and judicial case law.

80. Sir Michael WOOD asked whether AALCO documentation on topics considered by the Commission was available in one form or another. Like Mr. Hassouna, he wondered what topics AALCO would like to see the Commission consider. As to the time at which the AALCO annual session was held, he said that the corresponding committee in the Council of Europe always held its sessions during the first or second week of September, before the United Nations General Assembly, something that had many advantages. While the establishment of regional legal organizations was welcome, it was nonetheless important to preserve the unity of international law.

81. Mr. MOHAMAD, replying to Mr. Perera, said that he had taken note of his two comments and that he intended to discuss with AALCO member States the possibility of holding intersessional meetings. The timing of the annual session was indeed a problem for many members.

82. Turning to Mr. Nolte’s question, he said that it was for member States and not the secretariat to decide on such matters. He informed Sir Michael Wood that AALCO documentation could be downloaded from its website.

83. Mr. VASCIANNIE, referring to the establishment of the African Union Commission on International Law, asked the Secretary-General of AALCO whether he believed that it could serve as a model for the establishment of a similar body by Asian countries, or whether the establishment of such a regional commission might undermine the unity of international law.

<sup>290</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

84. Mr. MOHAMAD said that it was for the Asian States to decide whether to establish such a body.

85. Mr. HMOUD asked whether there were any specific questions that AALCO wished the Commission to address and what AALCO would like its member States to do to assist it.

86. Mr. MOHAMAD replied that he intended to request AALCO member States to come up with priority topics and questions that it would like the Commission to consider.

*The meeting rose at 12.50 p.m.*

### 3065th MEETING

*Thursday, 15 July 2010, at 10 a.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasциannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

#### **Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)**

[Agenda item 6]

##### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the sixth report on expulsion of aliens and in particular the section on expulsion proceedings.

2. Sir Michael WOOD said that he was in favour of referring the three draft articles A1, B1 and C1 contained in the second part of the sixth report on expulsion of aliens to the Drafting Committee. This part was based on a wide range of sources and it set out proposals for the progressive development of international law, which was an important part of the Commission's mandate.

3. The expulsion of aliens was a depressing feature of the modern world. Some of the worst human rights abuses occurred during the expulsion process. Persons who were illegally present in the territory of a State had often experienced unbearable conditions in the places from which they had come; they were often victims of exploitation, were socially excluded and lived on the margins of society. Some of them abused their presence and that situation must be dealt with, but any action in that respect had to be in full conformity with internal law

and international human rights law. All persons within the jurisdiction of a State, whether their presence was lawful or unlawful, were entitled to full respect for their human rights. Anything that the Commission could do to draw attention to the abuses that took place in the context of the expulsion of aliens was to be welcomed, especially if the Commission could make reasonable proposals leading to the progressive development of international law in that field. Even if those proposals were not immediately accepted by States, they might point the way to a better future. That was the spirit in which the Special Rapporteur was working and the Commission should do likewise.

4. The report drew an important distinction between aliens lawfully in the territory of a State and those whose presence was unlawful. Many international instruments were based on that distinction and therefore applied only to the expulsion of persons who were legally present. It was perhaps a little misleading to suggest, as the Special Rapporteur did in paragraph 279 [3] of the second part of his report, that the 1951 Convention relating to the Status of Refugees was the only international instrument that explicitly drew such a distinction. Differentiating between the two categories of aliens would be important in the draft articles, because some forms of protection would be appropriate only for persons lawfully in the territory of a State. As Mr. Gaja had suggested, however, the Commission might need to consider to what extent persons who had been residing in a country for some time, even on an irregular basis, deserved some special consideration. He also supported Mr. Hmoud's suggestion concerning change of status.

5. Terminology was important, and the Commission should try to avoid expressions such as "illegal alien", which might be convenient shorthand, but which were unfortunate and even emotive. It was not the person who was illegal—he or she was not some kind of outlaw. It was the presence in the territory of a State that was in some way irregular.

6. The Special Rapporteur had endeavoured to describe the legal provisions in force in some countries. That was, of course, a difficult exercise, since legal systems differed widely and changed rapidly in the face of new circumstances. Unless the information was up to date and provided by a government or a local immigration expert, it was likely to be somewhat inaccurate. That was true, for example, of the description of the position in the United Kingdom contained in paragraphs 303 to 305 [27–29] of the second part of the report. The Commission should nevertheless take full account of the wealth of comments and information from Governments set out in document A/CN.4/628 and Add.1.

7. Turning to the three draft articles A1, B1 and C1, he said that draft article A1, paragraph 1, constituted a satisfactory introduction to the section. What mattered was the identification of the procedural safeguards that would be applicable to persons legally present in the territory of the expelling State. Like Mr. Gaja, he was doubtful about the usefulness of paragraph 2, although it did introduce the notion of persons who had been residing in the country for some time.