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Summary record of the 2849th meeting

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SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-SEVENTH SESSION

Held at Geneva from 11 July to 5 August 2005

2849th MEETING

Monday, 11 July 2005, at 3 p.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Tribute to the memory of Qizhi He

1. The CHAIRPERSON said that the Secretariat had been informed of the death of Mr. Qizhi He, who had been a member of the International Law Commission from 1994 to 2001. Legal Counsel of the Ministry of Foreign Affairs of China and professor of international law at the University of Beijing, Mr. Qizhi He had also been a member of several learned societies and the author of a large number of articles and works on international law, notably space law. The members of the Commission would remember him as an amiable colleague always ready to offer advice, the fruit of his long and rich experience as an eminent theoretician and practitioner of international law. His death was an immense loss for international law and for those who had known him personally.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Qizhi He.

Expulsion of aliens (A/CN.4/554)[1]

[Agenda item 7]

Preliminary report of the Special Rapporteur

2. The CHAIRPERSON invited Mr. Kamto, the Special Rapporteur, to introduce his preliminary report on the expulsion of aliens (A/CN.4/554).

3. Mr. KAMTO (Special Rapporteur) said that the Commission had been wise in deciding specifically to address the expulsion of aliens. The question was a very old one that was closely linked to the organization of human societies into States and yet was more topical than ever in that it highlighted the paradox between a world that was technically and economically globalized while also highly compartmentalized by barriers of political sovereignty that acted like a filter on immigration. It was also a topic that raised real questions of international law and, owing to the vast practice to which it had given rise on every continent, lent itself to codification. National or regional practice did not exist solely in a few regions or large States, as was often the case: the expulsion of aliens affected all regions of the world, and all countries had national legislation on the subject from which general principles of law applicable in the international legal order could be derived. As it was also a phenomenon involving human rights, a number of its aspects were dealt with in the many international conventions that existed in the field of human rights.

4. He had not wanted to start drawing up draft articles immediately as he thought that a preliminary report stage was needed to give the Commission some idea of his thinking on the subject and the methodological questions to which it gave rise, thus allowing him to receive any guidance or indications that might be forthcoming as to the best way to proceed. The preliminary report thus aimed to give an overview of the topic, pinpointing legal problems and methodological difficulties associated with their consideration. In the report, he had outlined the notion of the expulsion of aliens and reviewed the right to expel in international law: that right was an inherent right of State sovereignty that had never been called into question. The grounds for expulsion could vary, although they were not all admissible under international law, because the expulsion of an alien challenged protected rights, in particular fundamental human rights, the violation of which entailed legal consequences under international law.

[1] Reproduced in *Yearbook … 2005*, vol. II (Part One).

5. The report also contained a draft workplan in annex I, which provided an outline of his future reports on the topic. The draft was open to discussion, but if it was approved by the Commission, he intended to address in the first report, which he proposed to submit to the Commission in 2006, the general rules governing the expulsion of aliens, in particular the scope of the future draft articles. Needless to say, he was receptive to any proposals aimed at improving the workplan and would be grateful for any additional bibliographical information that members of the Commission might wish to add to the partial bibliography in annex II.

6. A question had arisen with regard to terminology: whether it was proper to speak of the "expulsion" of aliens, a term which, as a review of comparative legislation on the subject made clear, referred to a phenomenon that was much more limited than that of the "removal" of aliens. He had retained the term "expulsion", at least provisionally, but the term should be taken in its broadest sense. Similarly, a decision would have to be taken on whether to address the expulsion of categories of persons other than aliens. It would be up to the Commission to determine which term was appropriate, but it seemed to him that "aliens" covered all categories of persons concerned.

7. More fundamentally, methodological questions had also arisen on subjects on which he sought guidance from the Commission. For example, he was not sure how to deal with existing treaty rules on the issue. Should they be incorporated in the future draft articles so as to achieve as exhaustive a legal regime as possible, or should the draft articles be restricted to the formulation of basic principles to bridge any gaps in international law? He favoured the elaboration of an entire legal regime on the subject, even if treaty law might offer elements that could be incorporated in the future draft articles, given that some of the rules in question were to be found in comparative national legislation and in international case law, particularly that of regional human rights courts, but he was, of course, open to suggestions from Commission members and looked forward to any direction they might wish to give him.

8. Mr. GAJA commended the Special Rapporteur for producing a readable and useful report. The main question raised by the Special Rapporteur concerned the scope of the study on expulsion. That was problematic because of the connections between the expulsion and the admission of aliens. It was not clear whether the Commission could usefully contribute to the regulation of such a politically sensitive matter as immigration control. It therefore seemed preferable to limit the scope to those measures that concerned resident aliens, although aliens who had stayed irregularly for a certain length of time might also be included in the study.

9. He agreed with the Special Rapporteur when he advocated a wide definition of expulsion. The definition given in paragraph 13 could, however, be taken as implying that expulsion consisted solely in a formal measure aimed at turning an individual out of a territory. It would be useful for the definition to take into account situations in which aliens were forced to leave the territory without being officially ordered to do so, and he drew attention in that connection to the definition of expulsion given by the Iran–United States Claims Tribunal in 1985 (*International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, p. 18).

10. The Special Rapporteur proposed that the Commission should focus on admissible grounds for expulsion. For example, the Convention relating to the Status of Refugees set as a precondition that "national security or public order" should be endangered (art. 32). However, since the expelling State had broad discretionary powers, it would be difficult for a supervising body to come to a conclusion that was different from that of the State concerned.

11. Further questions concerning the lawfulness of an expulsion should be considered. They could be grouped into four categories. Firstly, a decision on expulsion must be in accordance with the law, as expressly stipulated in a number of international instruments. One question that arose in that context was whether the expulsion could be used as a disguised form of extradition. Secondly, a decision on expulsion must be consistent with the principle of non-discrimination. Thirdly, the State's interest in expelling must be weighed against the individual's right to private and family life. Fourthly, there was the question of the risk to which the expulsion decision exposed the expelled person. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided that a State must not expel a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture. Procedural guarantees, especially remedies that could prevent expulsion, needed to be specifically considered. Respect for human rights was particularly at risk in cases of collective expulsion.

12. Mr. PAMBOU-TCHIVOUNDA thanked the Special Rapporteur for his lucid report and commended him for having accurately identified the questions raised by the topic. He was grateful to Mr. Gaja for having endeavoured to bring together all the questions relating to grounds for expulsion. Other questions remained, such as whether the form to be taken by the draft articles should be a regime or a set of basic principles. Since the report was a preliminary report, some aspects had not yet fallen into place, and the Special Rapporteur had been wise to leave it to the Commission to help in reorganizing the study of the topic.

13. He himself had concluded that expulsion could be analysed as a juridical event but also as a unilateral act, since the State decided it at its own discretion. His second question related to the status of an expellable alien. Aliens did not all have the same standing; their situation differed according to whether their status was recognized by the receiving State or enshrined by customs and mores, or even by conventions. Accordingly, all aliens were not "expellable" to the same degree.

14. As to grounds for expulsion, it was obvious that competence to expel was a matter of national sovereignty, but the lawfulness of such a decision had also to be considered. The decision could be viewed from the standpoint of both national law and international law. That raised the question of whether the right to expel was enforceable,

and the Commission ought to consider whether expulsion measures were enforceable under international law. Lastly, he wondered about the relationship between the two States involved or, in some cases, between a State and an international organization. That relationship naturally brought into play the institution of diplomatic protection, which might be seen as a component of the expulsion regime or, more appropriately, as an obstacle to the capacity to expel.

15. Mr. DUGARD requested clarification of the delimitation of the project. He had the impression that the Special Rapporteur intended to deal with cases of aliens expelled by unfair procedures, and not with large-scale population expulsions. He was thinking in particular of Palestinians expelled from Palestine at the birth of the State of Israel and then again after the 1967 war, the expulsion of Greek Cypriots from Turkish-occupied Northern Cyprus and the large-scale population removals that had followed the dissolution of Yugoslavia. It was sometimes difficult to define the status of the individual, but the persons who had been expelled in all those cases had not had the nationality of the State that had expelled them and might accordingly be classified as aliens. He had no fixed views on the scope of the project but thought that the question of large-scale expulsions warranted inclusion, despite the difficulties that might raise.

16. Ms. ESCARAMEIA said that the preliminary report by the Special Rapporteur raised questions of fundamental importance, in particular how to reconcile the sovereign right of a State to expel with the requirements of international law, primarily human rights law.

17. The scope of the topic should be very broad and include situations in which armed conflict led to the forced exit of populations as well as the expulsion of illegal workers or illegal aliens. On the other hand, the non-admission of or refusal to admit aliens should not be part of the topic. It would be preferable to use the term "expulsion", which was a technical term, rather than "removal", which was more ambiguous.

18. The definition in paragraph 13 seemed too narrow: expulsion was described there as a legal act, but it might be merely an administrative act. She thought expulsion should be defined as any act by which a State compelled an individual or group of individuals of a different nationality to leave its territory. Great care should be taken in dealing with collective expulsions, since, contrary to what was often said, such expulsions were not accepted in international law. Any decision to expel should be taken in respect of an individual and not of a group. The issue certainly merited consideration, but the practice must not be considered to be authorized.

19. On the question of methodology, she agreed with the Special Rapporteur that the Commission should produce draft articles forming a complete regime, not just a subsidiary regime.

20. With regard to the draft workplan, it would be better to reverse the order of sections A ("Expulsion and related concepts") and B ("Definitions"), or even to merge the two, as the issues were closely linked. Under "General principles" the Commission should not study a right inherent in State sovereignty only as a customary rule: doctrine, international case law and treaties must also be scrutinized. She would in fact like to know if there were any examples of "higher interests of the State" other than public order and State security. Lastly, with regard to "collective expulsion" or the "right to return to the territory of the expelling State", she thought it would be better to speak of a possible collective expulsion or right to return, since the question was highly debatable.

21. Mr. KOSKENNIEMI said that the approach followed by the Special Rapporteur in drafting a workplan reflected a more general problem which the Commission had been dealing with for a long time: determining what ought to be done first when taking up a new topic. Following the Commission's tradition, the Special Rapporteur had started by defining the scope of the topic and the basic concepts and before bringing in existing customary and treaty rules on the matter. Far from suggesting that those issues were unimportant, he thought that some issues should be considered before the Commission took up the conceptual aspects of scope and definition. They concerned the interests involved and the values affected by the expulsion of aliens. It would seem useful to have a general overview on the problem in the contemporary world. It would in fact be very difficult to foresee the significance of legislative intervention in that field without figuring out in advance what the problems were and who the people, groups, entities and States were whose interests were at stake. As currently drafted, the workplan was too far removed from real problems. The Commission's task was not to write a textbook on the issue, but rather to draft rules.

22. In paragraph 5 of the report the Special Rapporteur stated that "[t]he key problem in this area is how to reconcile the right to expel, which seems inherent in State sovereignty, with the demands of international law and, in particular, the fundamental rules of human rights law". To some extent that was a natural way to address the issue, but he was concerned by the tendency to try to balance opposing values as being equally important and *a priori* valid. Some of the problems the Commission had encountered in considering other topics lay in that conceptual approach, which had the disadvantage of leading to excessive generalities.

23. Paragraphs 14–16 of the report seemed to presume that there was an absolute right to expel. That seemed questionable, both in legal terms and on a practical level. In some situations a State might be justified in expelling aliens, but that was no reason to affirm the existence of such a right categorically. Naturally, the same could be said of the rights of the individual: there was no reason to say that every individual had the right to reside in a given territory. He therefore called on the Special Rapporteur to move quickly from generalities to practical suggestions as to the procedures to apply to expulsion.

24. The CHAIRPERSON, speaking as a member of the Commission, said that he was wondering about the scope of the topic and, in particular, whether the Special Rapporteur intended to look into the question of the deportation of persons living in occupied territories in times of

armed conflict. He recalled that when the Security Council had raised that issue, it had spoken of deportation, not expulsion.

The meeting rose at 4.35 p.m.

2850th MEETING

Wednesday, 13 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

1. The CHAIRPERSON said members would recall that on 27 May 2005 the Commission had held a joint meeting with the European Society of International Law (ESIL) as part of the Research Forum on International Law which ESIL had held in Geneva. He had just received a letter from Judge Bruno Simma, President of ESIL, thanking the members of the Commission for agreeing to hold the joint meeting, and in particular expressing appreciation to Mr. Gaja, the Special Rapporteur on the responsibility of international organizations, for addressing the Forum on the subject. According to Judge Simma, the participants had considered the meeting to be a highlight of the Forum, and he had been particularly pleased at the reaction of the young students of international law to Mr. Gaja's remarks.

Expulsion of aliens (*continued*) (A/CN.4/554)

[Agenda item 7]

Preliminary report of the Special Rapporteur (*continued*)

2. Mr. BROWNLIE said that the topic of expulsion of aliens was proving much more difficult than had been expected, but was also one of considerable importance. He commended the qualities of the Special Rapporteur's well-researched and comprehensive preliminary report. One difficulty was that the accepted term "expulsion" was merely descriptive. The complexity of the topic became apparent when the question of the causes of action arose. If a person was the victim of an unlawful expulsion, what bases of claim were recognized in international law? One version might be breaches of the normal principles of State responsibility, and in particular what was still referred to in arbitrations as the international minimum standard, which included denial of justice, a concept which, at least in United States sources, was often quite broad. Thus, first there were causes of action in terms of general international law. Secondly, there were numerous bilateral treaties setting what appeared to be rigorous standards for the treatment of aliens and their investments, such as treaties of friendship, commerce and navigation and bilateral investment treaties. Thirdly, claims would probably be available under specific human rights treaties. Fourthly, in extreme cases, expulsions would involve international crimes and perhaps even genocide or crimes against humanity. Lastly, there could be breaches of what was almost certainly a general principle of non-discrimination in international law, a principle which went beyond treaties.

3. The main difficulties, to which the Special Rapporteur had himself referred, concerned the scope of the topic. In paragraph 30 of the report, Mr. Kamto sought members' views on whether the study should include existing treaty restrictions on expulsion. His own view was that it should, for practical reasons: at least in certain, possibly special circumstances, a pattern of treaty provisions might provide evidence of principles of general international law.

4. The Special Rapporteur seemed to favour including a study of cases of lawful expulsion. That would entail a lengthy catalogue of institutions, including extradition and deportation as part of a punishment. While a catalogue of cases of lawful expulsion might be useful, he did not think it was central to the Commission's concerns.

5. Another problem, to which other speakers had already alluded, was what might be called collateral breaches of general international law. If groups of people, including vulnerable persons such as pregnant women or the elderly, were left at remote frontier posts without any assistance available on the other side, then the modalities of the expulsion would themselves constitute breaches of international law even if the expulsion as such was not contrary to international law. The same applied to the principle of discrimination; an expulsion might be lawful on its face, but in fact involve discrimination. There were analogous examples in the law of expropriation, where a legal expropriation was deemed to be illegal if there was proof of discrimination, for example on racial grounds. However, those were secondary questions, and he was not sure that they added much to the subject under consideration.

6. In his view, the real centre of gravity of the subject was not expulsion and refusal of entry, but the control which a State had over its territory. He was very positivist about the importance of States and, while he was aware that it was politically incorrect to say so, maintained that the human rights system still did not provide primary care and attention. Many of the worst patterns of inhumanity stemmed from the collapse of States. A functioning State with boundaries which were properly supervised was thus, in his conservative view, one of the more simple foundations for the protection of human rights. It was when States collapsed that trouble started. Therefore, the basis of any study should be the concept that the State had not only the right but also the duty to control its territory and to maintain law and order. That had to be borne in

* Resumed from the 2847th meeting.