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**A/CN.4/2955**

**Summary record of the 2955th meeting**

Topic:  
**<multiple topics>**

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Paragraph 20

51. Mr. McRAE said that the words “and they also attended” should be replaced by “where they attended” and that the words “Disputes Settlement System” in the English version should be corrected to read “Dispute Settlement System”.

*Paragraph 20, as amended, was adopted.*

Paragraphs 21 to 27

*Paragraphs 21 to 27 were adopted.*

52. Mr. CANDIOTI said that, before chapter X was adopted, he would like to refer again to document A/CN.4/L.715. Following the amendment to paragraph 4 of document A/CN.4/L.715/Add.1, the words “on the basis of a paper prepared by Mr. Nolte” should be added at the end of paragraph 5 of A/CN.4/L.715.

*It was so decided.*

*The part of section A and sections C, D and E contained in document A/CN.4/L.715/Add.1, as amended, were adopted.*

*Chapter X of the draft report of the Commission, as a whole, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2955th MEETING

*Friday, 10 August 2007, at 10.10 a.m.*

*Chairperson: Mr. Ian BROWNLIE*

*Present: Mr. Cafilisch, Mr. Candiotti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.*

### **Draft report of the Commission on the work of its fifty-ninth session (concluded)**

**CHAPTER II. Summary of the work of the Commission at its fifty-ninth session (concluded)\* (A/CN.4/L.711)**

Paragraphs 7 to 9 (concluded)\*

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter II of its draft report (A/CN.4/L.711) and drew attention to amendments that had been made to paragraphs 7, 8 and 9 as agreed at the 2953rd meeting. The new text read:

“7. The Commission set up the Planning Group to consider its programme, procedures and working methods (chap. X, sec. A). A Working Group on the long-term programme of work was established, under the Chairpersonship of Mr. Enrique Candiotti, which will submit its final report to the Commission at the end of the current quinquennium topic (chap. X, sect. A.2). The Commission decided to include in its current programme of work two new topics, namely ‘Protection of persons in the event of disasters’ and ‘Immunity of State officials from foreign criminal jurisdiction’. In this regard, it decided to appoint Mr. Eduardo Valencia-Ospina as Special Rapporteur for the former topic and Mr. Roman A. Kolodkin as Special Rapporteur for the latter topic (chap. X, sect. A.4). The Commission also established a Working Group on the most-favoured-nation clause under the Chairpersonship of Mr. Donald McRae to examine the possibility of considering the topic ‘Most-favoured-nation clause’ (chap. X, sect. A.4).

“8. The Commission continued its traditional exchanges of information with the International Court of Justice, the Inter-American Juridical Committee, the Asian–African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe (chap. X, sect. D). The Commission also organized a meeting with United Nations and other experts in the field of human rights, which was devoted to discussions on reservations to human rights treaties (chap. X, sect. A.9). The Commission also held an informal meeting with the International Committee of the Red Cross on matters of mutual interest (chap. X, sect. D).

“9. An international law seminar was held with 25 participants of different nationalities. Members of the Commission gave lectures and were involved in other activities concerning the seminar (chap. X, sect. E).”

*Chapter II of the draft report as a whole, as amended, was adopted.*

**CHAPTER IX. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.714 and Add.1)**

2. The CHAIRPERSON drew attention to the portion of the chapter contained in document A/CN.4/L.714.

#### **A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

#### **B. Consideration of the topic at the present session**

Paragraph 3

*Paragraph 3 was adopted.*

1. INTRODUCTION BY THE SPECIAL RAPporteur

Paragraph 4

*Paragraph 4 was adopted.*

\* Resumed from the 2953rd meeting.

## Paragraph 5

3. Mr. FOMBA drew attention to the phrase “consisting of the surrender of the individual to a competent international criminal tribunal” in the first sentence and suggested that the word “individual” should be replaced by “suspect” or “alleged perpetrator”.

4. Mr. GAJA suggested that the term “alleged offender” would be more appropriate.

5. Mr. GALICKI (Special Rapporteur) endorsed that suggestion.

*Paragraph 5, as amended by Mr. Gaja, was adopted.*

## Paragraph 6

6. Mr. FOMBA said that the amendment made to paragraph 5 should also be made in the third sentence of the French version of paragraph 6. Referring to the last sentence, he questioned the accuracy of the phrase in French “*les crimes et les infractions*”, since the latter subsumed the former.

7. Mr. GALICKI (Special Rapporteur) said that all language versions should be based on his original wording “crimes and offences”.

*Paragraph 6 was adopted.*

## Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

*Section A and B. 1 contained in document A/CN.4/L.714, as amended, was adopted.*

8. The CHAIRPERSON drew attention to the portion of chapter IX contained in document A/CN.4/714/Add.1.

## 2. SUMMARY OF THE DEBATE

## (a) General comments

## Paragraph 1

9. Mr. PELLET said that the phrase “and the so-called ‘triple alternative’ suggested by the Special Rapporteur” was rather esoteric and required some explanation. He suggested that it should be expanded to read: “and the question of surrendering an individual to an international court, the so-called ‘triple alternative’ suggested by the Special Rapporteur”.

10. Mr. GALICKI (Special Rapporteur) endorsed Mr. Pellet’s comments but suggested that the addition of the word “question” after “so-called ‘triple alternative’” would suffice.

*Paragraph 1, as amended, was adopted.*

## Paragraph 2

11. Mr. PELLET questioned the need for the adjective “rigorous” before the noun “analysis” in the first sentence and suggested its deletion. Moreover, he was not entirely

satisfied with the overall structure of the paragraph, and in particular the position of the second sentence which raised the issue of *jus cogens*. As the third sentence followed logically from the first sentence, he suggested that the second sentence should be moved to the end of the paragraph, or else be made the subject of a new paragraph.

12. Mr. GALICKI (Special Rapporteur) said that his preference was for the second sentence to be moved to the end of the paragraph.

13. Mr. McRAE said that he wished to retain the words “rigorous analysis”, since he had used those words himself during the debate. His point had been that before taking any position on such a difficult and controversial matter, the Commission must conduct a thorough analysis of the situation, and he had not been satisfied with the references provided in the second report (A/CN.4/585).

14. Mr. GALICKI (Special Rapporteur) said that he agreed with Mr. McRae on the need to retain the word “rigorous”; it was important to reflect as faithfully as possible the actual words used by speakers during the debate.

*Paragraph 2, as amended, was adopted.*

## Paragraph 3

15. Mr. PERERA suggested that the phrase “in presence of one or more treaties” in the first sentence should be amended to read “in the context of one or more treaties”.

*Paragraph 3, as amended, was adopted.*

## Paragraph 4

16. Mr. GAJA suggested that a new sentence should be added after the third sentence which would read: “Some other members pointed out that a custodian State often acquired jurisdiction only as a consequence of the fact of not extraditing the alleged offender.”

17. Mr. NOLTE suggested the insertion of the qualifier “only” in the second sentence before the word “insofar”.

18. Mr. GALICKI (Special Rapporteur) endorsed those suggestions.

*Paragraph 4, as amended, was adopted.*

## Paragraph 5

19. Ms. ESCARAMEIA suggested that, in order to ensure that the penultimate sentence tied in with the last sentence, the latter should be reworded to read: “Some members thought that to present the obligation as an alternative would tend to obscure its nature.”

20. Mr. GALICKI (Special Rapporteur) said he was agreeable to that suggestion.

*Paragraph 5, as amended, was adopted.*

## Paragraph 6

*Paragraph 6 was adopted.*

Paragraph 7

21. Ms. ESCARAMEIA suggested that the following sentence should be added in order to reflect a view expressed by several members during the debate: “Some members noted that the constituent instruments of some international criminal tribunals deal with the question of concurrent requests for extradition and for surrender to the international tribunal.”

*Paragraph 7, as amended, was adopted.*

(b) Comments on draft article 1 proposed by the Special Rapporteur

Paragraph 8

22. Mr. HMOUD said that several members had made a point relating to the term “jurisdiction” in draft article 1 that was not covered in the paragraph. He therefore proposed the addition of a new sentence along the lines of: “Several members had proposed that the word ‘jurisdiction’ at the end of draft article 1 should be replaced by ‘present in their territory or under their control’; that was to clarify that the custodian State may not have criminal jurisdiction over the individual concerned.”

23. The CHAIRPERSON said that the Secretariat would find a suitable formulation for the proposed amendment.

24. Ms. ESCARAMEIA said that the fourth sentence did not accurately reflect the point made in connection with the alternative obligation and suggested that it should be reformulated to read: “It was also considered that the adjective ‘alternative’ should be deleted, since the alternative character of the obligation was a matter which the Commission would examine at a later stage.”

*Paragraph 8, as amended, was adopted.*

(c) Comments on the future work of the Commission on the topic

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

3. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

Paragraphs 12 to 15

*Paragraphs 12 to 15 were adopted.*

Paragraph 16

25. Ms. ESCARAMEIA said that, to the best of her recollection, the Special Rapporteur had not expressed the view ascribed to him in the first sentence, although he had said that the word “alternative” should not appear in draft article 1.

26. Mr. GALICKI (Special Rapporteur) concurred: the sentence did not reflect his original idea. He therefore proposed that the word “treated” should be replaced by the more neutral word “described”.

*Paragraph 16, as amended, was adopted.*

*Chapter IX of the report of the Commission as a whole, as amended, was adopted.*

CHAPTER III. *Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.712)*

27. The CHAIRPERSON invited the Commission to consider chapter III of the draft report, which was contained in document A/CN.4/L.712.

#### A. Reservations to treaties

Paragraph 1

*Paragraph 1 was adopted.*

Paragraph 2

28. Ms. ESCARAMEIA said that she had never before seen the suggestion that States’ replies to the Commission’s questions should be addressed to the Special Rapporteur.

29. Mr. PELLET (Special Rapporteur) said that the procedure was helpful in identifying the general direction of State practice and also in rectifying mistakes before reports came out.

30. Ms. ESCARAMEIA said that it was a welcome innovation that should be extended to the work of all the special rapporteurs.

31. The CHAIRPERSON, replying to a question by Mr. CANDIOTI, said that replies from Governments would be published in the usual way.

*Paragraph 2 was adopted.*

Paragraph 3

*Paragraph 3 was adopted.*

#### B. Shared natural resources

Paragraph 4

32. Mr. NOLTE asked why there was no reference to the questionnaire that was to be sent to Governments.

33. Mr. YAMADA (Special Rapporteur) said that the questionnaire, which had been drawn up by the Working Group on shared natural resources, was currently being sent out. The questionnaire was, of course, dealt with in a substantive chapter of the report, but it might well be an improvement to include a reference to it in the paragraph under consideration as well.

34. The CHAIRPERSON suggested that a footnote would refer the reader to the substantial chapter.

35. Ms. ESCARAMEIA said that while a footnote was better than nothing, she would have preferred a fuller reference to the questionnaire.

*Paragraph 4 was adopted with the editorial change suggested by the Chairperson.*

#### C. Expulsion of aliens

Paragraph 5

36. Mr. NOLTE said that the questions posed in subparagraphs (a) to (h) were so broad that States might be

deterred from answering them in full. Moreover, he noted that in three cases—subparagraphs (a), (c) and (h)—the questions related both to national practice and to the legality of such practice. He was aware that, in the absence of the Special Rapporteur, the Commission should be wary of tampering with the original questions; nevertheless, he wished to propose an amendment that would, while fully respecting the Special Rapporteur's intentions, give greater emphasis to the questions by deleting the questions in subparagraphs (a) and (b) and adding a subparagraph (i) requesting States' opinion on the possible basis of or limit to the practice referred to in subparagraphs (a) to (h) under international law.

37. Mr. PELLET noted that the English text of subparagraph (a) did not correspond to that of the French and Spanish texts: the first sentence ought to read: "State practice with regard to the expulsion of nationals." In addition, some of the questions might have been better phrased—for example, the question "Is it permissible under international law?" would better read "Should it be permissible ...?" However, as a matter of principle, the Commission should not rewrite the questions in the absence of the Special Rapporteur.

38. Mr. FOMBA and Mr. VASCIANNIE concurred with that view.

39. Mr. SABOIA supported Mr. Nolte's proposal. Without changing the substance of the questions, it would make States' tasks easier by grouping all the requests for their opinion in one subparagraph.

40. Mr. VARGAS CARREÑO said that, whatever wording was chosen, the Commission should specify that the question did not refer to extradition. If no such clarification was made, States would provide irrelevant information.

41. The CHAIRPERSON invited members to take an indicative vote on whether it was desirable, in the absence of the Special Rapporteur on the expulsion of aliens, to modify the questions proposed by him.

*There were 2 votes in favour and 14 against. Accordingly, the Commission decided not to modify the questions proposed by the Special Rapporteur on the expulsion of aliens.*

*Paragraph 5 (a) was adopted.*

Paragraphs 5 (b) and 5 (c)

*Paragraphs 5 (b) and 5 (c) were adopted.*

Paragraph 5 (d)

42. Mr. NOLTE said that he wondered whether subparagraph (d) properly reflected draft article 7 as proposed by the Special Rapporteur, in which a reference was made to the collective expulsion of a group of foreign nationals of a State engaged in armed conflict, who had displayed a hostile attitude.

43. The CHAIRPERSON recalled that the Commission had just decided not to modify the questions suggested by the Special Rapporteur.

*Paragraph 5 (d) was adopted.*

*Paragraph 5 as a whole was adopted with minor editorial amendments.*

Paragraph 6

*Paragraph 6 was adopted.*

#### **D. Responsibility of international organizations**

Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

#### **E. The obligation to extradite or prosecute (*aut dedere aut judicare*)**

Paragraph 9

*Paragraph 9 was adopted.*

Paragraph 10

44. Mr. PELLET, supported by Mr. CAFLISCH, said that the questions in paragraph 10 should be reworded in the third person, so that, for example, the phrase "Do you have authority under your domestic law ..." would read: "Is the State authorized under its domestic law ...".

45. Mr. GALICKI (Special Rapporteur) said that his aim had been to elicit frank responses from States; however, if it was not the Commission's tradition to put direct questions to States, he requested the Secretariat to reword the questions appropriately.

46. Mr. KOLODKIN said that States should be asked specifically whether they deemed the obligation *aut dedere aut judicare* to be an obligation under customary international law.

47. Mr. CAFLISCH supported Mr. Koldokin's proposal and suggested that, in order to make the question more sharply focused, States should be asked to what extent they deemed the obligation *aut dedere aut judicare* to be an obligation under customary international law.

48. Mr. GAJA said that, if it was necessary to find out whether there was any State practice which pointed to the existence of a customary rule of *aut dedere aut judicare*, one could not rely on statistics based on the replies to that question.

49. Mr. KOLODKIN said that his question was not intended to produce a straw poll but to elicit information about practice and an *opinio juris*.

50. Ms. JACOBSSON said that she favoured Mr. Kolodkin's proposal without the additional wording suggested by Mr. Caflisch. She was afraid that the answer to the questions regarding the existence of State practice might be a laconic "no" and so, without the proposed new question, no *opinio juris* would be forthcoming, despite the fact that many States did have an *opinio juris* even when they had no State practice.

51. The CHAIRPERSON, speaking as a member of the Commission, said that while past experience had shown that obtaining even “yes” or “no” responses from States was often a matter of good fortune, such short replies were not necessarily a bad thing. If Governments were asked to supply too much detailed information about State practice, they might not bother to answer at all. For that reason, a simple question should be asked in order to elicit at least a brief opinion from States.

52. Mr. CAFLISCH, supported by Mr. GALICKI (Special Rapporteur) and Ms. ESCARAMEIA, said that his additional wording would make the question more pointed and was therefore more likely to produce answers that would show whether practice existed in certain areas and whether an *opinio juris* existed. He therefore insisted on its maintenance.

53. Mr. CANDIOTI said that he was also in favour of adding Mr. Caflich’s additional query, as it would be interesting to know if States considered that there was a customary obligation to extradite or prosecute in respect of certain crimes or categories of crimes.

*Paragraph 10 (f), as amended, was adopted.*

*Paragraph 10 as a whole, as amended, was adopted.*

Paragraph 11

54. Mr. CANDIOTI, supported by Mr. KOLODKIN and Mr. VARGAS-CARREÑO, asked if it would be possible to seek the Special Rapporteur’s agreement to include the words “and any other further views” after the word “information”, because the crucial question was whether Governments or States regarded the obligation as a customary obligation, as a principle of general international law, or only as a treaty-based obligation. To date, only one Government had expressed an opinion on that subject, and it would be helpful for the Commission’s future work on the topic to ascertain the views of other Governments.

*Paragraph 11, as amended, was adopted.*

*Chapter III of the draft report of the Commission as a whole, as amended, was adopted.*

55. Mr. WISNUMURTI, speaking on a point of clarification, said that at the 2954th meeting, when the Commission had discussed chapter VI on the expulsion of aliens (A/CN.4/L.707/Rev.1), he had proposed the insertion of the term “archipelagic waters” in paragraph 38 of that chapter. Another colleague had expressed the view that the report should reflect members’ statements in the plenary. He therefore wished to draw attention to his statement to the plenary at the 2925th meeting.

56. The CHAIRPERSON drew attention to chapter VII of the report, on the effects of armed conflicts on treaties, and suggested that, to ensure consistency with the reports of other bodies, the Secretariat should be requested, when editing the final version of the report, to move the Special Rapporteur’s concluding remarks, which currently appeared after each draft article, to the end of the chapter and to place them in a separate section entitled “Special Rapporteur’s concluding remarks”.

57. Mr. CANDIOTI supported the Chairperson’s suggestion, which would help the reader to gain a more focused view of a topic. In the future, that modification should be applied to each chapter.

58. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to adopt his suggestion.

*It was so decided.*

*The draft report of the International Law Commission on the work of its fifty-ninth session as a whole, as amended, was adopted.*

### Closing remarks

59. The CHAIRPERSON said that the session had been a successful one. The level of participation had been impressive and thorough debates had been held. While half the members were new, they had obviously settled in well, as the old guard continued to keep the Commission’s institutional memory alive. He thanked all members for their spirit of cooperation and good temper and commended in particular the members of the Bureau and the Chairperson of the Drafting Committee, who had a demanding role to play.

60. As the session drew to a close, he wished to indulge in a bit of introspection. The Commission was a body for which there was no paradigm: it was somewhat similar to the treaty monitoring bodies, although they were not primarily deliberative, as it was; it was also similar in some respects to the Inter-American Juridical Committee, although that body was not, as the Commission was, subject to the discipline of the General Assembly and its Sixth Committee.

61. The first point he wished to make about the Commission was that its professional composition was significant: several vocations and forms of experience were represented. It currently counted among its members 14 ambassadors, 3 legal advisers to foreign ministries, 1 foreign minister and 10 professors. Two of the professors were also judges *ad hoc* at the International Court of Justice, and one had been both a legal adviser and a judge at the European Court of Human Rights.

62. A second distinguishing feature of the Commission was its overall structure and the role of regional and language groups. In anthropological terms, it might be characterized as an acephalous confederation of regional clans. That formation was conducive to transparency and guaranteed that the main forms of civilization and the principal legal systems of the world were represented, as stipulated in article 8 of the Commission’s Statute.

63. The third feature was the Commission’s political status, its deliberative and consultative function as a subsidiary organ of the General Assembly. Lastly, there was the Commission’s parliamentary aspect, by which he meant that its end product must be a collegiate, institutional effort that reflected the different regions and legal groups involved in its work.

64. The Commission's current programme of work included some of the most important topics in current international affairs. At the current session, the Commission's methods of work had not encountered any new problems. Still, when the object of a particular exercise was the progressive development of international law, he believed that the situation should be more openly acknowledged. It was not always easy or necessary to classify projects as belonging to either the progressive development or the codification of international law, but doing so would make it easier to determine, for example, the precise role of State practice.

65. The Commission should also give further thought to the procedure for referring draft articles to the Drafting Committee. That procedure sometimes involved the intermediate stage of consideration in a working group, and he had become convinced of the value of that step. It was often difficult, although not impossible, to arrive at a collegiate, considered view within the plenary, and in such cases consideration in a working group was justified and perhaps even unavoidable. In the case of expulsion of aliens, however, the draft text had had to be referred directly to the Drafting Committee, albeit with guidance from the plenary. Some members of the Commission were concerned that the debate on the formulation of guidance could reopen the entire subject. Accordingly, the use of the intermediate stage of the working group deserved further consideration.

66. There had been fewer "mini-debates" in the current session than in the past. Such debates were sometimes useful, since they seemed to result in shorter substantive statements. With regard to sources, he noted that Commission members seemed to like to refer to treaty law, yet in fact there was no such thing. One could say that a concordance of treaty obligations constituted evidence of the formation of customary international law, but to speak of treaty law was to ignore problems of *opinio juris* and a number of other issues. In addition, he had the impression that the Commission was not very interested in State practice. It was true that waiting for States to send evidence of their practice on certain subjects might prevent the Commission from moving forward on certain topics.

States were often busy or reluctant to commit themselves on certain questions in documents that were to be made available for general distribution.

67. Lastly, there was a tendency to allow fashionable elements in thinking about the law to stand in the way of effective analysis of problems. Expulsion of aliens, for example, was often treated as a question of human rights, which of course it was, but was it helpful to describe it exclusively as such? Article 1 of the European Convention on Human Rights said that the High Contracting Parties had the duty to secure within their jurisdiction the rights and freedoms defined in the Convention. Thus, there was no dichotomy between the maintenance of human rights and the control which a State had over its territory: the State had a duty, not just a prerogative, to control its territory. To speak about sovereignty was to miss that point completely. If one group threatened another group, such as foreign visitors or a minority, for example, within the territory of a State, that State had a duty to use its jurisdiction to prevent breaches of human rights standards. A State also had the duty to make sure its territory did not play host to the operations of armed bands—an issue central to the recent ICJ case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. There was thus a symbiosis, and not a polarity, between the control of territory and human rights.

68. In conclusion, he said that his long career in international law carried a number of drawbacks, among which were cynicism and pessimism. Yet even against that backdrop, he could say that the Commission was doing very well, and he wished to commend all its members.

#### Closure of the session

69. After the customary exchange of courtesies, the CHAIRPERSON declared the fifty-ninth session of the International Law Commission closed.

*The meeting rose at 12.35 p.m.*

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