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Summary record of the 3040th meeting

Topic:
<multiple topics>

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50. The CHAIRPERSON said she took it that the Commission agreed to her suggested course of action, subject to Mr. Nolte's clarification.

It was so decided.

Organization of the work of the session (*continued*)

[Agenda item 1]

51. Mr. McRAE (Chairperson of the Study Group on the most-favoured-nation clause) announced that he would chair the Study Group, which would be composed of the same members as during the sixty-first session, as well as any other members wishing to participate, and Mr. Vasciannie, Rapporteur, *ex officio*.

The meeting rose at 11.20 a.m.

3040th MEETING

Friday, 7 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, 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*) AND DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPORTEUR[71] (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the agenda item on expulsion of aliens.

2. Mr. PETRIČ said that the draft articles on protection of the human rights of persons who had been or were being expelled, revised and restructured by the Special Rapporteur in the light of the plenary debate during the first part of the sixty-first session, had been greatly improved, and he was in favour of their referral to the Drafting Committee. He nevertheless wished to make a few comments on the text.

3. Draft article 8 was not problematic. As for draft article 9, he shared the view expressed by Mr. Nolte at the previous meeting, namely that human dignity was the source of all rights; that was why it was essential for that principle to be one of the general rules, as it now was. With regard to draft article 10, in particular the phrase "or other status" at the end of paragraph 1, he drew the Special Rapporteur's attention to the situation of European Union nationals. They enjoyed freedom of movement—a special situation that should be mentioned, if not in the draft article itself, then at least in the commentary. Concerning paragraph 2 of the draft article, it was important to bear in mind the fundamental difference between legal and illegal immigrants, since the procedures applicable to each group could be different.

4. Draft articles 11, 12 and 13 did not raise any particular problems. As for draft article 14, he did not see the need for the third paragraph, since the first paragraph expressly stated that "[n]o one may be expelled". With regard to draft article 15, he said that the wording of paragraph 2 left something to be desired and should be examined carefully by the Drafting Committee. He had no problems with draft article 16.

5. Turning to the Special Rapporteur's sixth report (A/CN.4/625 and Add.1–2), he said that the diverse and contradictory views expressed by States during the debate in the Sixth Committee were well summarized in the introduction, which showed the difficult nature of the topic. The Commission should take that into account in its work, in particular if, with some draft articles, it envisaged moving from strict codification to the progressive development of international law. Failure to balance the legal aspects of expulsion, the interests of the State carrying out expulsion and those of the person being expelled would be unacceptable for States. They still had the sovereign right to decide who, besides their nationals, could stay in the territory under their sovereignty or jurisdiction and to establish the applicable rules. The limitations placed on their decision basically related to respect for human rights as embodied in international law, their constitutions and domestic legislation.

6. That said, the Commission should also not lose sight of the realities of expulsion. In practice, and in most States, the expulsion of aliens who were legally in their territory was relatively rare and was normally dealt with in keeping with legal rules and procedures and human rights standards. Furthermore, when violations did occur, they were generally taken up by national courts, at least in countries governed by rule of law, and sometimes also by international courts, including regional courts and human rights institutions.

7. On the other hand, many States currently faced serious problems with illegal immigration. As a result, illegal immigrants were expelled frequently and in large numbers, and such expulsions were rarely supervised by the courts: the decision to expel an alien was generally taken by administrative bodies, and sometimes even by the police. The procedures intended to protect the rights of illegal immigrants were often cursory and perfunctory. He wondered whether those important and real differences between the expulsion of aliens who were legally present

[71] See footnote 19 above.

in a State and those who were not should not be dealt with in greater depth, in particular in the draft articles on the grounds for expulsion and procedural guarantees.

8. With regard to the draft articles contained in the sixth report (A/CN.4/625 and Add.1–2), he proposed that the words "[a]ny form of" be deleted from draft article A, paragraph 1, before its referral to the Drafting Committee.

9. As for draft article 8 contained in the sixth report, he wondered whether it was really necessary: it seemed to relate more to extradition.

10. The section of the report dealing with the grounds for expulsion (paras. 73–210) posed serious problems. State practice revealed that certain grounds for expulsion were sufficient in the case of illegal immigrants, but far from sufficient for the expulsion of legal residents; the two types of situations should be dealt with separately.

11. Moreover, the concept of public security was very poorly defined. Legal residents could, through their conduct, endanger the security of others—but was that sufficient grounds for their expulsion? In Slovenia, for example, in order for such persons to be expelled, their activities had to endanger the security of the State or society: in other words, they must be involved in terrorist or organized criminal activities. By contrast, the very fact that immigrants were illegally present in a State, had not submitted their application for asylum or refugee status in time or had provided false identity documents, etc., was enough to justify their expulsion.

12. All things considered, it seemed that the grounds for expulsion set forth in draft article 8 were fairly far-reaching in the case of persons who were legally resident and yet, where illegal residents were concerned, they were far too restrictive for the State. In the latter case, it should be left to States themselves to establish the grounds for expulsion, on the understanding that any expulsion decision must always be based on criteria established beforehand and on legal rules, not arbitrary or discretionary grounds. The dignity of the human person and the fundamental rights of persons expelled must be respected in both cases. For all those reasons, he was not in favour of referring draft article 8 to the Drafting Committee.

13. Concerning the conditions of expulsion and detention (paras. 211–276) and the new version of draft article B contained in the document distributed in the meeting,[72] he said he endorsed the idea that persons awaiting expulsion should not be detained in facilities where convicted prisoners were serving their sentences. He was also of the opinion that detention must neither be punitive nor excessively long. However, in the case of illegal immigrants, placement in detention was necessary in order to establish the facts and should also guarantee the protection of the immigrants concerned. He considered therefore that draft article B required additional discussion before being referred to the Drafting Committee.

14. Ms. JACOBSSON thanked the Special Rapporteur for having restructured the draft articles on protection of the human rights of persons who had been or were being expelled. The new text showed that the Special Rapporteur had taken into account the comments made during the debate at the previous session. The draft articles could be referred to the Drafting Committee; however, she would like to make a few points.

15. She welcomed the fact that in draft article 8 contained in the restructured draft articles, the expression "fundamental rights" had been replaced by the broader term "human rights".

16. Concerning draft article 9 in the same document, she recalled that she had expressed doubts at the previous session about the need for a separate article on the obligation to protect human dignity. Without repeating the reasons she had given at that time, she would simply like to recall that since the inviolability of a person's human dignity underlay the very notion of human rights, it might give the wrong impression to include a reference to the basis for all human rights, namely "human dignity", in the operative portion of the text, which concerned specific human rights obligations. It was true that draft article 9 was now in a section dealing with general rules, but if a reference was to be made to human dignity, it should be placed in an introductory section.

17. She shared Mr. Nolte's view that the references to "territory" and "jurisdiction" in new draft article 11 must be clarified by the Drafting Committee.

18. As far as new draft article 14 was concerned, the Special Rapporteur had tried to accommodate some of the views expressed on the death penalty issue in connection with former draft article 9. It was a step in the right direction but, like Mr. Saboia, she would like to see the text of the draft article strengthened.

19. The CHAIRPERSON said she took it that the Commission wished to refer the revised and restructured draft articles 8 to 15 to the Drafting Committee.

It was so decided.

20. Mr. FOMBA commended the Special Rapporteur on the excellent quality of his sixth report (A/CN.4/625 and Add.1–2), which was dense, like his previous reports, and was based on systematic research and analysis of the literature, case law, practice and domestic legislation.

21. In paragraph 3 of the introduction to the sixth report, the Special Rapporteur pointed out that the Sixth Committee had suggested that the Commission should discuss the attitude to be adopted to the topic under consideration, including the structure of the text that was being drafted and the final outcome of its work. Mr. Gaja had made a suggestion concerning the structure of the draft articles that warranted consideration in due course. As far as the approach to the topic was concerned, Mr. Gaja had underlined the need to place emphasis on the principles of international law applicable to the subject—a view which did not seem fundamentally to contradict that of the Special Rapporteur. As to the final outcome of the Commission's work, it was premature to decide on the matter at that juncture.

[72] See the 3038th meeting above, paras. 36–46.

22. With respect to the comments and concerns of the Sixth Committee, he shared the views expressed by the Special Rapporteur in paragraphs 15 and 16 of his sixth report.

23. Regarding collective expulsion and the compatibility of draft article 7, paragraph 3, with international humanitarian law, he noted that the Special Rapporteur had given assurances based, on the one hand, on the final version adopted by the Drafting Committee,[73] and on the other, on the pertinent conclusion derived from an analysis of the provisions of the Geneva Convention relative to the protection of civilian persons in time of war (Convention IV) .

24. He believed he understood what the Special Rapporteur meant by the terms "disguised" or "indirect" expulsion. The fact that they were used in the literature meant that the terms did exist—but that did not necessarily mean that they were correct. Mr. Dugard thought that the adjective "disguised" was incorrect and that "informal" would be more appropriate. However, he himself felt that the Special Rapporteur was perhaps stretching the meaning of the word "indirect": in paragraph 31 of his report, he underlined the difficulty of distinguishing between disguised expulsion and expulsion in violation of the procedural rules. The practical examples given in paragraphs 32 to 40 seemed relatively clear and satisfactory. He endorsed the Special Rapporteur's conclusion that disguised expulsion was by its nature contrary to international law, for the reasons given in paragraph 41.

25. Concerning draft article A (Prohibition of disguised expulsion), he thought that the final phrase in paragraph 2, which read "or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory", duplicated to some degree the preceding phrase that read "resulting from the actions or omissions of the State". It could be held that if the State supported something, it was an act, and if it tolerated something, it was a voluntary omission, or passive conduct, unless it was a specific factor that needed to be mentioned in that context.

26. He agreed that extradition disguised as expulsion was a practice that was inconsistent with positive international law, as stated in paragraph 70.

27. He was quite willing to follow the Special Rapporteur's approach to draft article 8 (Prohibition of extradition disguised as expulsion) as being not for codification, but for the progressive development of international law. His initial impression was that the wording of the draft article went in the right direction.

28. While public order and public security were relatively well established, apart from the problem of their specific content under international law, it must be recognized that, in practice, there were far more grounds for expulsion. In paragraphs 73 to 210 of the sixth report, the Special Rapporteur provided the Commission with extensive and very enlightening information on the subject, and in paragraph 84, he quite rightly stressed the need to develop some criteria for assessing the invocation of those grounds in the light of international law.

29. He agreed with the Special Rapporteur's conclusion regarding the criteria for assessing public order and public security grounds, as set forth in paragraph 118 (*a*) and (*b*). As far as the other grounds for expulsion were concerned, he endorsed the comment made in paragraph 119 and shared the view expressed in paragraph 178 that the "cultural" ground was contrary to international law.

30. With regard to draft article 9 (Grounds for expulsion), he noted that paragraph 1 laid down a strict obligation, and that was a good thing. In paragraph 2, the words "in particular" and "in accordance with the law" were especially important: the Special Rapporteur had demonstrated the relationship between international law and domestic legislation clearly enough. Paragraph 3 was also important. Regarding paragraph 4, he said that the attempt to define the criteria for determining the ground for expulsion seemed to be on the right track, insofar as the essential relevant factors were taken into account.

31. On the subject of conditions of detention of a person being expelled, he endorsed the comments on the use of the French terms "*détention*" and "*rétention*". Although the numerous examples cited in paragraphs 214 to 227 of the sixth report were quite appalling, he supported the point made in paragraph 237. The verbatim quotation of the 19 principles considered relevant among the 39 principles for the protection of all persons under any form of detention or imprisonment listed in General Assembly resolution 43/173 of 9 December 1988 was extremely helpful.

32. He noted with interest the quotation in paragraph 246 referring to recent antiterrorist legislation allowing for the detention of migrants on the basis of vague, unspecified allegations of threats to national security. Also extremely useful was the reference, in paragraph 251, to Recommendation 1547 (2002) of the Parliamentary Assembly of the Council of Europe entitled "Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity".

33. The legal bases for draft article B (Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion) were abundantly and firmly established, as indicated in paragraph 276 of the report. As currently worded, all the paragraphs contained in the provision seemed appropriate, in that they attempted to reflect the general trends emerging on the subject.

34. In conclusion, he said he was in favour of referring all the draft articles proposed in the sixth report to the Drafting Committee.

35. Mr. McRAE, referring to disguised expulsion, said that he had no objection regarding the substance, although he agreed with Mr. Dugard that the adjective "disguised" might not be appropriate. The reason for prohibiting disguised expulsion was to ensure that a State was not able to do indirectly what it could not do directly. If what was meant by "disguised expulsion" was defined clearly, then perhaps the name would not be so important; however, the definition of disguised expulsion currently contained in

[73] See the Commission's discussion of draft articles 1 to 7 in *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

paragraph 2 of draft article A was not sufficiently clear. The forcible departure of an alien resulting from the actions of a State could equally well be a properly regulated expulsion. The reference to acts or omissions should be qualified to make it quite clear that it did not include direct expulsion.

36. As far as disguised extradition was concerned, while he understood the merit in preventing States from circumventing their extradition laws, the practice mentioned by the Special Rapporteur made it very difficult to argue that there was any customary international law to that effect. As other members had pointed out, and as the Special Rapporteur had recognized, it was clearly an area for the progressive development of international law. He had no objection to that, in principle, but he wondered whether the purpose of prohibiting disguised extradition was to protect the integrity of the extradition regime or to protect individuals who risked being expelled. In the former case, was the issue really relevant to the topic? In the latter case, what was the extent of the protection in question?

37. As currently worded, draft article 8 (Prohibition of extradition disguised as expulsion) contained in the sixth report was too broad. An alien could not be expelled to a State requesting extradition, but if a person could be legitimately expelled—in other words, expelled without any rules on the expulsion of aliens being violated—then why should that person not be sent to a country that might extradite him or her? In order to provide some protection, it was necessary to ensure that a State whose extradition laws did not allow for extradition could not use expulsion as an indirect means of surrendering a person to the State requesting extradition or to a State that intended to extradite that person. The scope of draft article 8 should therefore be made more precise and narrowed.

38. Regarding the grounds for expulsion set forth by the Special Rapporteur, he said that public order and public security were recognized grounds, but apparently there could be others, since draft article 9, paragraph 2, contained the words "in particular", and paragraph 3 suggested that any ground recognized by international law would be accepted.

39. That raised questions about the nature of the codification exercise under way. One approach would be to indicate all prohibitions of expulsion and to establish procedural guarantees, without framing draft articles on the grounds for expulsion, and leave it to States to decide on the matter themselves within the confines set by the prohibitions. The other approach would be to draw up a definitive list and prohibit all expulsions not covered by the list. The Special Rapporteur had stopped halfway between the two.

40. In his detailed analysis of practice, the Special Rapporteur pointed out that many of the grounds that States had used for expulsion in the past could be subsumed under the category of public order and public security. Given the broad ambit of those terms, it did not seem necessary to specify other grounds. The ground of "suspicion of terrorism" mentioned by Mr. Dugard could certainly fit in under the protection of public order and public security. Furthermore, the Special Rapporteur had not shown that any customary rule of international law had developed to support such other possible grounds.

41. He therefore considered that, in view of the appropriate safeguards set forth in the draft articles relating to the protection of the human rights of persons who had been or were being expelled and the procedural guarantees of due process to which such persons were entitled, limiting the grounds for expulsion to public order and public security would strike a fair balance between the legitimate interests of States and the proper protection of individuals. However, the concepts of public order and public security needed to be better defined, as shown by paragraph 118 of the sixth report. For that reason, and taking into account Mr. Petrič's comment on the distinction between legal and illegal aliens, he believed that draft article 9 required further consideration before it could be referred to the Drafting Committee.

42. Concerning conditions of detention, while he recognized that it was appropriate to provide general protection, he wondered whether the detail of the draft articles did not go beyond the scope of the topic. It seemed excessive, for example, to go as far as to stipulate a separate place of detention. It was one thing to place an obligation on States to recognize that a person subject to expulsion was not a person convicted of an offence resulting in deprivation of liberty, but it was another thing to want to decide for States how they should fulfil that obligation.

43. In conclusion, he suggested that some amendments be made to the draft articles to make them less restrictive before their referral to the Drafting Committee.

Organization of the work of the session (*continued*)

[Agenda item 1]

44. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of expulsion of aliens would be composed of the following members: Mr. Caflisch, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Mr. Vasciannie (Rapporteur), *ex officio*.

The meeting rose at 11.05 a.m.

3041st MEETING

Monday, 10 May 2010, at 3 p.m.

Chairperson: Ms. Hanqin XUE

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