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Summary record of the 3041st meeting

Topic:
Expulsion of aliens

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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.

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.

2. Mr. PELLET said that he had read with interest the sixth report on the expulsion of aliens (A/CN.4/625 and Add.1–2), even though he still had reservations on the topic, which he thought was suitable for negotiation, not for progressive development, and still less for codification. He had a number of small queries and critical remarks to make on some aspects of the sixth report.

3. First, as noted in paragraph 13, some delegations on the Sixth Committee had raised doubts as to the existence, in the context of expulsion, of an absolute prohibition of discrimination based on nationality. He shared those doubts: by its very nature, expulsion was always based on nationality. Only non-nationals could be expelled or subjected to double punishment, a measure that raised grave issues of morality and human rights. The report highlighted that essential link between expulsion and nationality. The problem was not one of State practice, as was made clear in paragraphs 128 *et seq.* Discrimination among different groups of aliens according to their nationality was permissible if there was a basis for it in legislation. That was certainly the case with the expulsion of aliens from the European Union, but he was not always convinced by the Special Rapporteur's approach to the matter. It was true that the forcible return of European citizens from certain States was shocking, or "striking", as the Special Rapporteur put it more diplomatically in paragraph 36 of his report. Yet in paragraph 104, after having explained that, under European Community law, States were not free to define public order in accordance with their own practices, the Special Rapporteur suggested that the opposite might be true under international law. It was fairly simplistic, however, to say that because things worked one way under European Community law, they should work the opposite way under international law. The question should instead be whether the European Community system could be transposed to the international level. The solutions under European Community law for failure to fulfil administrative formalities, for example, could not be transposed to international law. It was hard to understand why the Special Rapporteur devoted so much attention to that question, merely to conclude that Europeans could not be expelled from the European Union on grounds of non-compliance with administrative formalities.

4. By and large, he supported the report's general approach, that of firmly defending human rights without falling into the trap of "human-rightism". The Special Rapporteur had not confined himself to generalities, but had provided very specific examples of ill-treatment of persons being expelled, without hesitating to name the States responsible for such acts, principally in Africa and Europe. He was not entirely sure that the Asian States were irreproachable in such matters, but he presumed it was a problem of access to sources rather than of an actual distinction in that regard. On the subject of sources, it was regrettable that certain references to cases involving France were taken from English-language sources, even when there were readily accessible French-language sources such as the European Court of Human Rights website for the judgement in the *Bozano v. France* case. In other instances, the footnotes were much too long or crammed with a bewildering web of cross-references.

5. He welcomed the statement made in paragraph 214 of the report that the cases cited with regard to the questionable or even criminal treatment of detainees had been chosen without any intention of stigmatizing a given country. Nevertheless, some members of the Commission seemed to take personally any reference to the situation in their country. He had no qualms about drawing attention to the fact that the conduct of France in matters of expulsion had been strongly criticized by the Council of Europe, but that did not mean that France had a poor human rights record.

6. While he endorsed the general tone of the report, he did not share some of the Special Rapporteur's views: sometimes he was too categorical, at other times, too lax. An example of the former was the bald assertion that the practice of extradition disguised as expulsion was inconsistent with international law (para. 70). It all depended on the circumstances, and it was not the case if two conditions were met: the rules governing expulsion were observed and the expulsion that amounted to extradition was actually a legitimate case of expulsion. It should be made clear at the end of draft article 8 (Prohibition of extradition disguised as expulsion) that extradition disguised as expulsion was prohibited only when expulsion *per se* was not justified. The opening phrase of the draft article, "Without prejudice to the standard extradition procedure", also required some clarification. The first sentence of paragraph 139 was too general and seemed to imply that being sentenced to imprisonment was always grounds for expulsion. The Commission should be wary of making a rule to that effect or of including such wording in the commentary to the draft article.

7. He agreed with the conclusions drawn by the Special Rapporteur in the section on the grounds for expulsion (paras. 73–210), particularly the reference to striking a fair balance between protecting public order and the interests of the individual (para. 118). He would go even further by asserting that, in a democratic State, respect for human rights was a constituent element of public order—the two balanced one another out. Perhaps paragraph 118 could be reworded along those lines, if it was to be included in the commentary.

8. The Special Rapporteur appeared to be splitting hairs as far as the grounds for expulsion were concerned. Having drawn on the excellent study by the Secretariat published in 2006,[74] he should have striven to provide not only an analysis, but also a synthesis, of the information available. For example, he stated in paragraph 76 of the report that the question was whether public order and public security were the only two grounds for expulsion

[74] A/CN.4/565 and Corr.1 (see footnote 42 above).

permitted under international law. Was that really the question, or was it whether the other grounds mentioned in the report were constituent parts of the grounds of public order and public security? He questioned the statement in paragraph 170 that the grounds for expulsion of begging-vagrancy and debauchery-disorderliness raised no particular problem: in fact, they raised major problems. It was difficult to know whether to be amused or appalled at some of the grounds used to justify expulsion in some States, including the presentation of "ideologically false documents" in Argentina (para. 175) and the astonishing "cultural" grounds in certain Gulf States (para. 177), not to mention the bizarre list of conditions that until fairly recently had excluded admission to the United States (para. 151).

9. He wondered whether it was necessary to draw a distinction between illegal entry and breach of conditions for admission, as the Special Rapporteur had gone to great trouble to do. On the other hand, he was glad that the numerous but very similar grounds listed in the report had not been incorporated in draft article 9 (Grounds for expulsion). In paragraph 2 of the draft article, he queried the words "in particular", which might cause the grounds for expulsion to be misconstrued: the text should refer exclusively to public order and public security, other grounds being acceptable only in conjunction with threats to public order and public security.

10. In general, he endorsed the rationale behind draft article B on the obligation to respect the human rights of aliens who were being expelled or were being detained pending expulsion. In that connection, he noted that the pleadings of Guinea, delivered very recently during public hearings before the ICJ, on the merits of the *Ahmadou Sadio Diallo* case, provided useful insights into conditions of expulsion and extradition disguised as expulsion.

11. It was regrettable that, for the revised text of draft article B, paragraph 1 had been deleted (see the 3038th meeting above, paras. 36–46). It should be reinstated and amended to refer to "general international law" instead of "international human rights law", since the former subsumed the latter. Paragraphs 2 (*a*) and (*b*) should not form part of the same paragraph: paragraph 2 (*b*) should be inserted between the former paragraph 1 and paragraph 2 (*a*) and should be reworded to read: "The detention of an alien who is being expelled shall not be punitive in nature."

12. He disagreed with the statement in paragraph 96 of the report that the jurisprudence of the ICJ provided little assistance in defining the notion of public security. There was ample jurisprudence from the Court, including its 2003 judgment in the *Oil Platforms* case, its 1989 judgment in the *ELSI* case and its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua*. Even if those judgments did not define the notion of public security with specific reference to expulsion, they were still useful for defining the limits within which this notion could be invoked.

13. In addition to the information provided in the report concerning HIV/AIDS (paras. 152 *et seq.*), he pointed out that the World Tourism Organization had condemned the expulsion from or the prohibition of admission to a State of persons living with HIV/AIDS.[75]

14. In paragraphs 104, 107 and 207, the Special Rapporteur referred to "discretionary power"—a concept familiar under French administrative law yet surprisingly unfamiliar to common-law practitioners, who often confused it with arbitrary power. He drew attention to Judgement No. 191 of the International Labour Organization Administrative Tribunal in the case concerning *Ballo* v. *United Nations Educational, Scientific and Cultural Organization* (UNESCO), according to which discretionary power must not be confused with arbitrary power and must be exercised lawfully and under the supervision of a court. The main difference between the two concepts was that decisions taken based on discretionary power were subject to the scrutiny of the courts only when a clear error of assessment was involved. Such decisions were mentioned in the footnote to paragraph 101 of the sixth report.

15. With those clarifications and comments, he expressed support for the sixth report and the referral of all the draft articles proposed therein to the Drafting Committee.

16. Mr. HASSOUNA said that the previous year's debate in the Sixth Committee on the Commission's report on the work of its sixty-first session[76] had shown that some States were worried about the complexity of the subject and the vagueness of certain legal principles, such as non-discrimination in the context of expulsion and the right to dignity, while others feared that difficulties would be involved in establishing general rules on the subject (A/CN.4/620 and Add.1, paras. 27, 36 and 38). Such views reflected the sensitive nature of a subject that raised substantive issues touching on national sovereignty and national security. Those concerns had become even stronger since the Commission had embarked on the formulation of rules, amounting to the progressive development of international law. The complexity and sensitivity of the subject should not, however, preclude the formulation of rules, provided the views and concerns of member States were taken into account.

17. The question posed in the sixth report with regard to chapter 3 (Prohibited expulsion practices) of the draft articles was whether "disguised expulsion" was a legal term or a mere descriptive notion used by some organizations or members of certain professions (paras. 29–42). Its essence was clear: it meant expulsion without a formal act, indirect expulsion, a measure that was increasingly being used by developed countries as a means of controlling immigration in order to combat unemployment. Legal regulation of that situation was warranted, and draft article A on the prohibition of disguised expulsion purported to do so. While he agreed with the substance of that article, he thought that paragraph 2 should

[75] See, *inter alia*, the Declaration on the facilitation of tourist travel, annex to resolution 578 (XVIII), adopted by the General Assembly of the World Tourism Organization in October 2009, and the report of the World Tourism Organization on the implementation of the Global Code of Ethics for Tourism (A/65/275).

[76] *Yearbook ... 2009*, vol. II (Part Two), chap. VI, sect. B, pp. 129 *et seq.*

be reformulated to state that disguised expulsion was an action or omission of a State that provoked the departure of an alien.

18. Treaty law and international law said little about the illegality of extradition disguised as expulsion, whereas various national courts and the European Court of Human Rights had condemned such practices, which were also inconsistent with the International Covenant on Civil and Political Rights. Hence the need for the rule embodied in draft article 8 on the prohibition of extradition disguised as expulsion. Although that article made it plain that it was "[w]ithout prejudice to the standard extradition procedure", the Commission could alleviate the concerns of some States by giving greater emphasis to the legal, authentic regime of extradition, as opposed to disguised measures.

19. The accepted rule regarding grounds for expulsion was that expulsion must be for a good reason that must be substantiated by the expelling State. While there were two principal grounds for expulsion, public order and public security, they were evolving concepts without a defined content. In many cases, governments had avoided establishing a definition of national security in order to maintain their power of discretion and freedom of action. Strong guarantees were therefore needed in order to protect the human rights of aliens in the context of expulsion. Expelling States should not have absolute power of discretion when they assessed threats to national security: a fair balance should be struck between the protection of public order and the interests and the rights of individuals. Proof of the threat must be offered and provision should be made for judicial review. Any steps taken must be based exclusively on the personal conduct of the individual, not on general preventive considerations, and must be reconciled with the fundamental principle of the free movement of persons embodied in European Community law. That principle should also apply to the movement of persons in free trade zones and common markets in Africa, Asia and Latin America. He supported the Special Rapporteur's analysis and the principles set forth in paragraph 118 of the report.

20. Turning to other grounds for expulsion, he observed that the report referred to the concern of certain Arab Gulf States with regard to an "identity threat" posed by the presence of a large number of foreign workers in their territories. Even if such a concern were real, it should not be used as grounds for expulsion, since that would violate the fundamental principle of non-discrimination enshrined in international and regional conventions, including the Arab Charter on Human Rights.[77] The calls in a number of developed Western countries for protective policies and legal measures owing to the presence of foreign immigrants with a different religious and cultural background likewise posed a threat to human rights and violated the principle of non-discrimination.

21. While the report pointed out that some grounds for expulsion, such as prostitution or ill-health, had become obsolete in contemporary international practice, it failed to mention a number of other grounds. The conclusion must be drawn that it was impossible to establish an exhaustive list of permissible grounds or to formulate a general rule encompassing all prohibited grounds. He agreed with the substance of draft article 9 but thought that the terms "good faith" and "reasonably" used in paragraph 4 were subjective elements and that the whole draft article should be reformulated to read:

> "1. A decision by a State to expel an alien must rest on legitimate grounds.
>
> "2. A State may expel an alien on the grounds of public order or public security or any other ground in accordance with international law.
>
> "3. Any ground for expulsion must be determined according to the law and by taking into account the seriousness of the person's threat, actual conduct and all other circumstances."

22. The inhumane detention conditions described in section E of the report were unfortunately to be found in a very large number of developed and developing countries (paras. 214–227). Civil society was a vital source of information about those conditions. As far as conditions of enforcement of expulsion were concerned (paras. 228–236), priority must always be given to humane treatment and preserving the dignity of individuals. While detention pending expulsion was not unlawful, the conditions of detention of aliens being expelled (paras. 237–260) should comply with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, contained in the annex to General Assembly resolution 43/173. Many of those principles, which guaranteed humane treatment and respect for the dignity of detained aliens, should be incorporated into national legislation and adopted in State practice.

23. Although Mr. Hassouna agreed with the substance of draft article B, he proposed some drafting amendments. In paragraph 2 (*a*), the phrase "in an appropriate place other than a facility" should be replaced with "in appropriate premises other than those". In paragraph 3 (*a*), the words "expulsion decision to be carried out" should be altered to read "period of time reasonably necessary for the expulsion process to be terminated" and the phrase "All detention of excessive duration" should read "Any detention of excessive duration".

24. He recommended referral of the draft articles to the Drafting Committee.

25. Mr. WISNUMURTI said that he had no problem with the general approach adopted in the draft articles, which emphasized the importance of protecting the human rights of persons who were being expelled, as long as that did not undermine the right of an expelling State to deal with a situation arising from the undesired presence of a particular alien in its territory.

26. While expulsion required a formal act of a State, "disguised expulsion" or *de facto* or indirect expulsion could be brought about through the conduct of a State, such as the non-renewal of an alien's visa or the groundless invalidation of a legal residence permit. A government

[77] See footnote 23 above.

might also adopt "incentive" measures aimed at compelling aliens to return to their country of origin without their having any choice in the matter. Those steps were inconsistent with international law. He could therefore see the validity of draft article A, paragraph 1, but he had some difficulty with the second part of paragraph 2, which took progressive development a bit too far: it would be difficult to ascertain objectively whether a State "supports" or "tolerates" the acts in question.

27. Turning to extradition disguised as expulsion, he said that since the notion of "disguised extradition" had a long history stretching back to the mid-nineteenth century, there was no point in disputing its use in the Commission's work or in dwelling too much on the perceived distinction between "disguised expulsion" and "*de facto* extradition". The usual motive behind "disguised extradition" was to circumvent formal procedures under municipal law which might be protracted and result in a court decision that did not satisfy the requesting State's interests in achieving the rapid surrender of an alien, or the requested State's interests in having an undesirable alien removed from its territory.

28. Despite the Special Rapporteur's statement that international case law was in "short supply", he had managed to cite some important cases, notably *Bozano* v. *France*, where the European Court of Human Rights had found that extradition disguised as expulsion was not lawful. On the other hand, in *Öcalan* v. *Turkey*, the same Court had expressed the view that disguised extradition did not run counter to the European Convention on Human Rights if it was the result of cooperation between the States involved and if the transfer was based on an arrest warrant issued by the authorities of the country of origin of the person concerned. The Special Rapporteur speculated that, had the latter case not been related to terrorism, the Court would have had no difficulty in confirming the case law set forth in *Bozano v. France*; nevertheless, he personally would have expected to see the principles embodied in the Court's decision on *Öcalan* v. *Turkey* reflected in draft article 8. Allowing flexibility through cooperation between the States involved, if the higher interests of those States were imperative, would certainly facilitate the process of surrendering an alien, which would otherwise be hampered by the procedural wrangling that normally preceded a formal decision on extradition.

29. Instead, the Special Rapporteur had chosen to rely heavily on the *Bozano v. France* decision and had proposed a draft article 8 that constituted progressive development of international law. He could agree to the draft article's referral to the Drafting Committee, insofar as the prohibition of extradition disguised as expulsion purported to protect aliens from prosecution by the requesting State or a third State without proper extradition procedures.

30. Requiring the expelling State to give the grounds for expulsion helped to preclude arbitrary decisions by such States and was an obligation established in international law. Nevertheless, a balance must be achieved between the interests of the alien and the need of the expelling State to protect its national interests. Drawing up a list of grounds for expulsion would unduly limit the discretionary power of an expelling State. Draft article 9 managed to some extent to strike the right balance.

31. Its paragraph 1 reflected the obligation under international law that he had just mentioned. The wording of paragraph 2 was reasonable in that it attached particular importance to two grounds for expulsion, namely public order and public security, while allowing the possibility of relying on others. The references to the law and to international law in paragraphs 2 and 3 set the parameters for the discretionary power of the expelling State in dealing with the alien concerned. Paragraph 4 laid down some additional conditions which an expulsion decision had to meet. Draft article 9 could therefore be sent to the Drafting Committee.

32. Draft article B, as revised (see the 3038th meeting above, paras. 36–46), was important in that it sought to protect the human rights of an alien pending expulsion but, as Mr. McRae had said, its sweeping yet detailed provisions came close to micromanagement. He shared Mr. Petrič's opinion that it was not ripe for referral to the Drafting Committee.

33. Mr. PERERA said that in paragraph 48 of his sixth report, the Special Rapporteur noted the lack of any explicit statement in treaty law that extradition disguised as expulsion was illegal and pointed out that international case law was somewhat limited, although national courts offered precedents. Considerable attention was devoted to the very different conclusions reached by the European Court of Human Rights in the *Bozano v. France* and *Öcalan v. Turkey* cases. Against that background, rather than endeavouring to codify a customary rule prohibiting the practice of expulsion for extradition purposes, the Special Rapporteur had sought to establish a rule that would be part of the progressive development of international law.

34. Several important developments in the extradition regime should be borne in mind in respect of possible abuse of the extradition process through recourse to disguised extradition.

35. First, the value of inter-State cooperation in bringing to justice the perpetrators of serious international crimes must be recognized, as the European Court of Human Rights had done in *Öcalan v. Turkey*, while also underlining due process requirements.

36. Secondly, it was necessary to give some consideration to the growing use, particularly among States sharing common legal systems, traditions and values, of simplified extradition procedures which departed from well-established substantive requirements under the traditional extradition regime. The simplification of extradition procedures was illustrated by the following new developments: the requirement that an extradition request must be supported by sufficient evidence to establish a *prima facie* case in the requesting State had been removed, and instead, extradition was effected on the basis of a warrant issued by a foreign court; the requirement of treaty-based extradition had been relaxed in favour of *ad hoc* extradition; multilateral conventions could be used as the basis of extradition in the absence of an extradition treaty; extradition could be requested

for all serious crimes incurring certain penalties, and not solely when they were on a list of extraditable offences; and specific serious offences could be treated as non-political for extradition purposes. The purpose of the move towards simplified extradition procedures was to enhance State-to-State cooperation against serious international crime.

37. The dividing line between lawful expulsion and extradition had become much narrower, at least when it came to combating serious international crime or denying safe haven to fugitive offenders charged with such crimes. In the light of those developments, the problem with draft article 8 was that it was drafted in very broad language and those nuances might be blurred. Mr. McRae had, however, raised a more fundamental issue by querying the appropriateness of including in draft articles on expulsion of aliens a provision designed to preserve the integrity of the extradition regime—a question that deserved close examination. The deletion of draft article 8 would not affect the coherence and integrity of the text as a whole.

38. Turning to the section of the report on grounds for expulsion (paras. 73–210), Mr. Perera observed that the logical starting point for considering the grounds for expulsion was that that matter fell into the domain of State sovereignty and that they retained a substantial degree of latitude, subject to due process and respect for the rights and interests of the affected individual. He concurred with Mr. Petrič that another aspect to which attention must be paid when determining grounds for expulsion was the distinction between persons lawfully present and persons unlawfully present.

39. The Special Rapporteur had rightly concluded from his examination of international conventions and case law that there were very few established grounds for the expulsion of aliens apart from public order and public security. Any study of the exact content of those grounds was fraught with considerable difficulty because, in the final analysis, the question of what constituted a threat to public order and public security was eminently within the domain of State sovereignty and had to be decided by the State concerned in the light of all the circumstances of each individual case. As pertinently noted in paragraph 80 of the report, none of the key conventions on human rights or related fields which used the terms "public order" and "public security", or similar terms, attempted to define the precise content of those concepts.

40. Particular sensitivities were involved in the invocation of the grounds of public security. A State would determine the existence of a threat to public security by reference to its overriding national interest and the particular circumstances surrounding each case. The reference in paragraph 96 to the findings of the Court of Justice of the European Union that " '[p]ublic security' must be defined in a flexible way in order to meet changing circumstances" and that the "concept of public security does not have a single and specific meaning" underlined those sensitivities (*Svenska Journalistförbundet* case).

41. Although the report raised the question whether public order and public security were the only grounds for expulsion permitted under international law, to the exclusion of all the other grounds that might be invoked by States, that was not an issue into which the Commission should delve. Since each of the grounds invoked must be justified by objective criteria and comply with international law, he subscribed to the view expressed by earlier speakers that, for the purposes of the draft articles, the only permissible grounds for expulsion should be those established by international law, namely those of public order and public security.

42. The section of the report on the conditions in which persons being expelled were detained (paras. 211–276) moved into uncertain terrain essentially governed by a variety of national laws, practices and circumstances. That again was an area where the sovereign discretion of States needed to be taken into account. While the broad obligation to respect the human rights of aliens who were being expelled or were detained pending expulsion could be reflected in the proposed draft article, any tendency to be excessively prescriptive must be avoided. The proposed provisions in draft article B, paragraph 3 (*a*) and (*b*), on duration of detention and the extension thereof did tend in that direction.

43. In conclusion, he said that the critical challenge when formulating draft articles on expulsion of aliens was to achieve the delicate balance between regarding the expulsion of aliens as an integral attribute of the sovereign prerogative of States and ensuring respect for the human rights of the aliens to be expelled. Preserving that balance became even more difficult in the context of grounds for expulsion and detention conditions.

44. Draft articles 9 and B therefore required close scrutiny in the Drafting Committee, to which they should be referred.

45. Mr. HMOUD said that Mr. Perera had just raised an important policy matter of relevance to counter-terrorism efforts. There was currently no established procedure for cooperation between States on the extradition of suspected terrorists, and the European Court of Human Rights was not consistent in its rulings on such matters. The guarantees set out in the international conventions on combating terrorism were quite elaborate and were binding upon States that were parties to them. In addition, there was a voluminous body of national legislation and multilateral treaties dealing with extradition. In draft article 8, which needed to be reworded, the main point was that the established extradition procedures had to be respected and States must not attempt to circumvent them, for that would undermine the existing legal regime.

46. Mr. VASCIANNIE said that in his analysis of the report, he was guided by the general view that customary international law allowed each State the right to determine the circumstances in which it might expel aliens from its territory. However, that right could be limited by treaty relations into which the State had entered, for example within the European scheme, or by restrictions derived from generally accepted human rights rules.

47. In the section on collective expulsion (paras. 19–28), the Special Rapporteur had given careful consideration to whether paragraph 3 of draft article 7 (Prohibition of

collective expulsion)[78] was consistent with the rules of international humanitarian law, and had concluded that it was. He himself concurred with that conclusion.

48. Mr. Dugard had suggested that what the Special Rapporteur described as "disguised expulsion" might be more properly called "constructive" or "indirect" expulsion. A reading of the case law showed that some courts used the term "constructive" expulsion, an example being the United States District Court decision in the *Xuncax* et al. v. *Gramajo* case, which had addressed the question of whether such expulsion amounted to inhuman or degrading treatment. However, the term "disguised" expulsion highlighted efforts by States to hide their wish to expel certain individuals, and had a slight connotation of criticism. It might, therefore, be appropriate to retain that term, as opposed to the more neutral "constructive" expulsion.

49. Draft article A, on the prohibition of disguised expulsion, stated that "[a]ny form of disguised expulsion of an alien shall be prohibited." Why should disguised expulsion be in all instances unlawful? Perhaps because, by definition, it failed to meet the procedural and substantive requirements that had to be fulfilled before expulsion could lawfully take place—namely, an appearance before a judicial or administrative tribunal. It would be preferable, however, to include in the draft articles a provision setting out such requirements, rather than one on disguised expulsion. As the Special Rapporteur acknowledged in paragraph 43 of his report, draft article A represented the progressive development of international law and might therefore not necessarily be acceptable to States. All the more reason for a draft article like the one he himself had just described, which was more likely to be accepted as a statement of *lex lata*, based on State practice.

50. On extradition disguised as expulsion, the Special Rapporteur proposed a rule derived from the *Bozano* v. *France* decision as a "trend indicator". However, that decision was based on the specific arrangements contemplated in article 5 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, and as such was but one approach that could be taken. If the rule was to be accepted, as progressive development of the law, its value on policy grounds had to be demonstrated, and he was not sure that this argument had been convincingly made.

51. For example, in the absence of an extradition request, State A might expel an alien to State B, as long as the relevant preconditions were met. But if an extradition request was made and the relevant preconditions were still met, why should State A be barred from expelling the individual? One response might be that the extradition request changed the situation, in that the potential expellee would be vulnerable to trial or sentencing in State B. However, that should not be a bar to expulsion, for three reasons.

52. First, expulsion in those circumstances facilitated international cooperation in dealing with criminal activities, as shown in the *Öcalan* v. *Turkey* case; secondly, it existed as an independent basis for removing the individual from the jurisdiction of the expelling State; and thirdly, there was a trend towards relaxation of extradition requirements, as Mr. Perera had pointed out.

53. He would therefore prefer to turn the rule in draft article 8 around, so that an alien might be expelled when the prerequisites for expulsion were met, even if he or she was the subject of an extradition request. Notably, the International Covenant on Civil and Political Rights did not prohibit expulsion when it amounted to extradition.

54. He agreed with the proposal in draft article 9, paragraph 1, that grounds should be given for any expulsion decision, and with the idea in paragraph 2 that a State could expel an alien on grounds of public order and public security. However, the Special Rapporteur should clarify whether the grounds of public order and public security were to be those defined by the expelling State or those stipulated in international law. State practice, as reviewed by the Special Rapporteur, suggested that it was the former that now prevailed. Paragraph 2 also failed to indicate whether grounds for expulsion other than public order and public security were to be permitted. Other grounds listed by the Special Rapporteur might be included, for example, conviction of a serious crime, illegal entry, failure to fulfil important administrative requirements and public health considerations. The grounds of morality and culture should be excluded as part of an effort to help States gradually to develop their national laws in a progressive direction. He generally supported the formulation in paragraph 4, especially the criteria of seriousness of the facts and contemporary nature of the threat.

55. He endorsed the points made by the Special Rapporteur on the revised version of draft article B, which was helpful as a means of setting out minimum conditions of treatment to be met by States if they were to be in conformity with international law. The draft article was not unduly intrusive; rather, it was in line with the fairly detailed approach to minimum conditions of human rights protection set out in articles 9 and 10 of the International Covenant on Civil and Political Rights. Technical changes would need to be introduced in the draft article, but he supported its referral to the Drafting Committee.

56. Ms. JACOBSSON said she welcomed the fact that the Special Rapporteur had returned to the subject of collective expulsion under international humanitarian law, or the laws of warfare, so as to address the concerns laid out by the Drafting Committee in relation to draft article 7.

57. She had no problem with the term "disguised" expulsion but thought its definition must be distinguished from the definition of expulsion in article 2 (*a*),[79] provisionally adopted in 2007: the two seemed to overlap. On draft article A, she agreed with Mr. Petrič that the phrase "Any form of " was redundant.

58. The question arose in connection with draft article 8 as to whether a separate article addressing one of the possible situations of disguised expulsion was needed,

[78] See *Yearbook ... 2007*, vol. II (Part Two), p. 63, para. 199; for the discussion of this draft article by the Commission, *ibid.*, pp. 66–67, paras. 238–243.

[79] *Ibid.*, p. 68, para. 258, footnote 327.

or whether draft article A sufficed to regulate such expulsion. Another question was whether there was a clear and identifiable trend in the cases cited by the Special Rapporteur. Probably not: hence the Special Rapporteur's suggestion in paragraph 72 of his report that the rule could be established as part of progressive development. Not entirely sure what the purpose of such progressive development was, she was reluctant to support the draft article's referral to the Drafting Committee. The comments by Mr. Hmoud and Mr. Perera on extradition regimes underscored the problem of having a separate article on disguised expulsion in relation to extradition.

59. On draft article 9, she welcomed the intention to set out the grounds for expulsion and clarify their scope in a separate article, and she agreed with others that a distinction must be made between persons lawfully and unlawfully in the territory of a country. The formulation of the draft article needed further discussion in the Drafting Committee.

60. As to draft article B, she welcomed the attempt to set out detailed regulations on the obligation to respect the human rights of aliens detained pending expulsion.

61. With the possible exception of draft article 8, she supported the referral of the new draft articles to the Drafting Committee.

62. Sir Michael WOOD recalled that during the Sixth Committee's debate in 2009, some delegations had expressed reservations about whether it was appropriate to codify the expulsion of aliens. Attention had been drawn to the difficulties inherent in establishing general rules on that subject (A/CN.4/620 and Add.1, para. 27). Some delegations considered that the proposed draft articles were too general or were not supported by sufficient practice in customary law. The need to distinguish between the situations of legal and illegal aliens had been mentioned. Those points should be taken into account as the Commission moved forward with its work.

63. In his latest report, the Special Rapporteur proposed four new articles, for the most part *de lege ferenda*. As Mr. Petrič had pointed out, the expulsion of aliens was a very sensitive field, raising grave practical and political problems for States, and proposals for progressive development in that area should be made with caution.

64. The Special Rapporteur seemed to accept that much of the relevant practice, case law and doctrine was far from conclusive in terms of identifying rules of positive international law. That was especially true of virtually all of the European Union legislation and case law cited. Pronouncements dating back to the nineteenth and early twentieth century were of limited value: in that historical period, issues relating to aliens and the relevant laws and practices had been very different.

65. In addition to extensive citations from case law and national legislation, the Special Rapporteur referred, especially for facts, to numerous reports from newspapers, non-governmental organizations (NGOs) and parliamentarians, and he relied extensively on articles by individual authors. Many of those writings were quite outdated and might be of dubious fairness or accuracy. For example, in the section on disguised extradition based on incentives, the reaction of the Governments concerned to the criticisms addressed to them was not recounted. Serious abuses had undoubtedly occurred in many cases, but newspaper reports or views expressed by particular politicians, NGOs or authors should not always be taken at face value. In short, he was not convinced that the materials relied upon in the sixth report, thought-provoking though they were, necessarily justified all the conclusions reached by the Special Rapporteur, by way either of *lex lata* or *lex ferenda*.

66. With regard to draft article A, he agreed with those who had questioned the term and even the concept of disguised expulsion and who had suggested that the provision belonged, if anywhere, in the definitions section. What was really being addressed was the scope of the term "expulsion" for the purposes of the draft articles. The Commission should be seeking, not to lay down a prohibitory rule for some new and separate class of State act known as "disguised expulsion", but rather to ensure that the scope of the draft articles covered some of the factual situations described by that term.

67. He also agreed with other speakers that draft article 8 more properly belonged to extradition law and practice rather than to the expulsion of aliens. Important differences persisted in case law between different countries, and it seemed doubtful whether national courts or States regarded the issue primarily as one governed by international law. The reasons given in case law were essentially domestic and constitutional. The Special Rapporteur placed great emphasis on the *Bozano v. France* judgement of the European Court of Human Rights, but as Mr. Gaja had explained, that decision had very limited significance for the Commission's purposes: it dealt with the application of article 5 of the European Convention on Human Rights, which concerned grounds for detention, and not with extradition or expulsion. On the other hand, the *Öcalan* v. *Turkey* case of the same Court had specifically involved disguised extradition.

68. Turning to draft article 9, he said that, unlike Mr. Pellet, he was not at all certain that, as a matter of general international law, the main grounds for expulsion were public order and public security, however broadly those terms were interpreted. Mr. Vasciannie had made a good point about the need to clarify whether those grounds were as defined under international or national law. If it was the latter, were they to be interpreted by the judiciary, or principally by the executive? The implication in paragraph 3 was that any grounds were allowed, provided that they were not contrary to international law. The provision on grounds needed to be read in conjunction with draft article 3, according to which a State had the right to expel an alien from its territory. He did not see the need to draw up a list, whether exhaustive or illustrative, intended to limit the grounds on which a State could expel an alien. Guidance could hardly be derived from European Union law, which was based on the principle of free movement of European Union citizens, something unknown in general international law; nor could it be found in the grounds on which a State could expel a refugee who was lawfully in its territory. He shared the concerns about draft article 9 expressed by other speakers and wondered whether it was necessary.

69. In the revised version of draft article B (see the 3038th meeting above, paras. 36–46), the first paragraph had been deleted, and rightly so, since it dealt with the general obligation to respect human rights, which was covered elsewhere. The new text focused on persons detained pending expulsion and on three specific matters: place of detention, duration of detention and review of detention. Concerning the new paragraph 1, he said that to stipulate that detention must be carried out in a place other than a facility in which sentenced persons were detained, was to be unduly prescriptive. What mattered, surely, was that the human rights of all detained persons were respected and that conditions of detention were humane. Circumstances varied greatly from State to State, both in the number of illegal aliens who arrived at their borders and in the resources available to them at any particular place or time. The need for all persons undergoing expulsion to be treated at all stages of the process in accordance with international human rights law should be stated clearly.

70. Mr. Pellet seemed to have misunderstood his common-law colleagues, who were perfectly familiar with the notion of discretionary powers. Common-law systems had judicial review, which sounded very similar to the French system.

71. He could agree to the referral of draft article A to the Drafting Committee, on the understanding that it would be examined as part of the provisions on definitions. Draft article 8 should not be sent to the Drafting Committee, since its subject matter was extradition, which did not fit in with the current topic. He had no objection to sending draft article 9, paragraph 1, to the Drafting Committee, because it dealt with an important procedural matter, namely the need to give the reasons for which a person was being expelled, but he had doubts about other parts of the text. In draft article B, paragraph 1 was unnecessary, but paragraphs 2 and 3 might have a place in the draft articles.

72. Mr. KAMTO (Special Rapporteur) said that the plenary had now come to the end of its debate on the topic, but unfortunately, there had been little discussion of certain substantive issues on which he would have liked to have had guidance. Whether to refer a particular draft article to the Drafting Committee was a substantive matter that should be decided on in plenary, not in the Drafting Committee.

73. The CHAIRPERSON said it seemed to her that most speakers had agreed to refer the draft articles to the Drafting Committee, provided their views were taken into account during the drafting exercise. She had heard very few strong objections to such a course of action.

74. Mr. PELLET said that he had had the same impression. He shared the Special Rapporteur's concern, however, about not knowing what was a fundamental issue for the Commission and what was a drafting problem: as a Special Rapporteur himself, he was against the referral of texts to the Drafting Committee until he had a general idea of what direction its work should take. However, it was up to the Special Rapporteur to decide that members of the Commission had taken divergent positions on a particular point and that the plenary must give the Drafting Committee instructions. He should indicate which points he believed had not been sufficiently clarified.

75. Mr. KAMTO (Special Rapporteur) said that several speakers had questioned whether draft article 8 was appropriate. It was predicated on the assumption that respect for the rules and procedures of extradition ensured the best possible protection of the rights of the person who was to be expelled, particularly when the expulsion would be to a State that did not have an extradition treaty with the State in which the person was located. He agreed with those who had argued that the current wording was too general and that there was no reason, when the criteria and conditions for expulsion were met, for a State to decide not to expel someone simply because it did not want the person to be extradited. If there was agreement on that matter, it might be addressed as a drafting issue. Mr. Wisnumurti had been right to observe that while draft article 8 had been derived from an analysis of the *Öcalan v. Turkey* case, it did not adequately reflect the principles embodied in that case. It might, indeed, be construed as introducing a categorical prohibition of expulsion, which was not at all the intention.

76. The Commission might adopt the view that draft article 8 merely posed drafting problems that could be overcome by making the language more restrictive so as not to suggest a categorical prohibition of expulsion in the context of extradition, if the conditions for expulsion were met. On the other hand, if it had only general doubts about draft article 8, it would be difficult to make progress in the Drafting Committee.

77. The CHAIRPERSON said that as she saw it, extradition was the link between two separate regimes—the regime on expulsion of aliens and the regime on mutual judicial assistance. Draft article 8 should be further examined in the light of all the arguments: it could be referred to the Drafting Committee for further consideration.

78. Sir Michael WOOD said that he had fundamental difficulties with draft article 8, because he did not see it as reflecting a rule of international law.

79. Mr. GAJA said that, in order to take into account some of the criticism voiced, the Special Rapporteur could perhaps draft a revised version of draft article 8, which could then be referred to the Drafting Committee.

80. Mr. PELLET endorsed that course of action but pointed out that much of the work had already been done by Mr. Vasciannie in his proposal, which he urged the Special Rapporteur to follow closely in recasting draft article 8.

81. Mr. KAMTO (Special Rapporteur) said that he would attempt to produce new wording, taking into account the comments that the current text was too general and included a prohibition that was too broad and was inconsistent with reality and the rules of international law. Lastly, he pointed out that the Commission had expressly instructed him not to take up the issue of terrorism, which had been invoked earlier in the meeting.

The meeting rose at 6 p.m.