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**Summary record of the 3065th meeting**

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

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

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

*The meeting rose at 12.50 p.m.*

### 3065th MEETING

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

*Chairperson:* Mr. Nugroho WISNUMURTI

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

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

[Agenda item 6]

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

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

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

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

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

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

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

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

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

8. Draft article B1 establishing the basic procedural safeguard that an alien might be expelled only “in pursuance of a decision reached in accordance with law” should apply irrespective of whether that person was legally or illegally present in the territory. While the applicable law might differ, the principle that expulsion might take place only in accordance with the law surely held good for everyone. For that reason, that provision should not come under draft article A1.

9. As the Special Rapporteur acknowledged, draft article C1 was to some extent progressive development of the law. The Commission must consider how much detail that provision should include. Procedures and the accompanying safeguards varied greatly in different legal systems and were constantly changing within them. Although the Commission should not be overly prescriptive, it should lay down the core requirements that had to be met, without prejudice to such greater protection as might be available within particular legal systems.

10. It might be helpful if the Commission were to begin by setting out the basic objectives of expulsion procedures. Those objectives might be to ensure that expulsion decisions were reached in accordance with the law, that they were effective and that they were fair to the person subject to expulsion. If the Commission established the aims of the procedures in general terms, the list of procedural rights could be illustrative rather than comprehensive. Article 13 of the International Covenant on Civil and Political Rights was a good starting point but, for the purposes of the Commission’s exercise, it should not be the limit of its ambition. He agreed with those members who had suggested that the reference to national security contained in that article also be incorporated into the Commission’s draft text.

11. Limiting the application of draft article C1 to persons lawfully in the territory of a State might have a negative effect on the rights that other persons might enjoy under the laws of some States or under human rights treaties, for example under article 9 of the International Covenant on Civil and Political Rights, or under other texts regarding detention, which was often part of the expulsion process. Perhaps the commentary should make it clear that in draft article C1 the Commission was not seeking to imply that other persons did not enjoy similar rights.

12. A perusal of the sixth report and earlier reports indicated the extent to which State practice in the field of expulsion occurred within “special regimes”, to borrow the terminology of the Commission’s study of the fragmentation of international law.<sup>291</sup> Among those special regimes were the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, to which unfortunately not all States were parties; the legal order of the European Union; and the human rights systems of the Council of Europe. The first such regime was confined to refugees and the second to citizens

of the European Union, who therefore enjoyed free movement within the Union; the third was a regional system for the protection of human rights in the 47 member States of the Council of Europe. That situation prompted two thoughts. The first was that the Commission should be cautious about relying on the practice and case law which had developed within such special regimes. The second was that it might be advisable to include somewhere in the draft articles a saving clause to the effect that nothing in the draft articles was intended to diminish the protection offered by “special regimes” such as the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

13. Ms. JACOBSSON commended the Special Rapporteur for addressing some sensitive semantic issues in the second part of his sixth report. Delicate reasoning was required to clarify the concepts of “resident aliens” or “aliens lawfully in the territory of a State”, on the one hand, and “aliens unlawfully in the territory of a State”, on the other. Persons in the latter category were variously referred to in practice as “irregular migrants”, “unregulated migrants”, “undocumented migrants”, “clandestine migrants” or “illegal migrants”. The International Organization for Migration said that all those expressions were used, but that there was no consensus on a single term. The Special Rapporteur had circumvented these semantic difficulties by referring to aliens “legally [lawfully] in the territory of the expelling State” and to aliens unlawfully in the territory of the expelling State. While that seemed to be a wise solution, it might not be the answer to all the issues that the Commission would face when drawing up procedural rules.

14. In paragraph 316 [40] of this second part, the Special Rapporteur was proposing a specific draft article devoted to the determination of the scope of the rules of procedure relating solely to aliens lawfully in the territory of the expelling State, but he did not address the issue of aliens who had entered its territory “illegally”. Although that was a logical starting point, it raised two questions. The first was whether it was always possible to determine when a person had entered or was remaining in the territory of the expelling State illegally. The second was whether it was satisfactory to allow a State the option of applying procedural guarantees of its own choice in such situations, as was implied by the words “a State may” in draft article A1, paragraph 2. She wondered whether international law did not require, or should not require, the upholding of certain minimum standards.

15. While the answer to the first question might appear to be “yes”, since it was sufficient to look at the law of the expelling State, there could well be situations where the law was vague, or where a State had acted in a manner that had led aliens to believe that their presence was tolerated *de facto*, by not enforcing its legislation or by even encouraging the presence of aliens in its territory. With respect to the second question, she agreed with Mr. Gaja and Sir Michael that the Commission should identify fundamental procedural guarantees applicable to all persons who were facing expulsion, including those who had entered the territory of the expelling State illegally. She concurred with the examples of guarantees suggested by Sir Michael.

<sup>291</sup> “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission finalized by Martti Koskeniemi (A/CN.4/L.682 and Corr. 1 and Add.1) (available on the Commission’s website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

16. The legal grounds for such guarantees were related to the basic concept of the rule of law at both the national and international levels. That did not mean that persons who had entered the territory of the expelling State illegally had the right to stay there. The reason for addressing the issue was simply to give recognition to the principle that the basic concept of the rule of law must apply, with implications for the human rights of the individual. It was to be expected that in 2010 a sovereign State would be willing to exercise its sovereignty in full compliance with the rule of law in terms of due process and legal security. While it was correct to say that a sovereign State had a right of expulsion, as Mr. Hmoud had pointed out at the previous meeting, the expelling State did not have absolute discretion in procedural matters. The Commission had already set the standard in draft article 3 on the right of expulsion. Whether that requirement needed to be reiterated in draft article B1 was a matter to be debated.

17. Another odd aspect of draft article A1 was the wording of paragraph 2 establishing that a State “may also apply these rules to the expulsion of an alien who entered its territory illegally”, since it was clear that a State had such a right and the draft did no more than state the obvious. She also failed to understand the purpose of specifying that the rules could be applied “in particular” in the situations referred to, at the end of the draft article.

18. The Special Rapporteur’s dilemma was that he had to reconcile a State’s sovereign right to expel aliens with human rights considerations. What was really at stake, however, was the rule of law, in particular the right to due process. The Commission needed to signal more strongly that the procedural guarantees inherent in the rule of law must also be respected in the context of the expulsion of aliens not lawfully present in the territory of the expelling State. For that reason, draft article B1 should cover all aliens, whether legally or illegally present.

19. Although procedural guarantees were generally less extensive in expulsion proceedings than in criminal proceedings, there appeared to be a trend towards an acceptance of higher standards in administrative proceedings. That was only natural, since the concept of the rule of law and legal security had developed considerably since 1955 when the Secretariat had issued its first study on expulsion of immigrants.<sup>292</sup> At the same time, it must be acknowledged that the situations in which procedural guarantees were to be applied were in most cases fundamentally different in criminal and expulsion proceedings.

20. Draft articles B1 and C1 should be read together, although there was merit in having two separate articles: one that set out the general rule and another that listed the procedural guarantees. She agreed with Sir Michael that to have a basic rule embodying the Commission’s aim was the best way forward. Draft article C1 was a good summary of commonly accepted procedural rights and contained a few welcome elements of progressive development. Since the draft articles did not specify who was to pay for legal counsel or an interpreter, or whether the alien in question had a right to be present at the hearing,

those aspects should be clarified in the commentary. Draft article C1 should also expressly state that expulsion should not take place until the decision had become final and should include a clear reference to national security.

21. Another question was whether all aliens should be entitled to the same level of procedural guarantees, or if asylum seekers should enjoy stronger guarantees. The Special Rapporteur seemed to take the view that, in the light of General Comment No. 15 of the Human Rights Committee,<sup>293</sup> no such discrimination should be made. In that case, the Commission should ensure that all aliens were able to avail themselves of at least the same procedural guarantees as those granted to an asylum seeker.

22. She was in favour of referring draft articles A1, B1 and C1 to the Drafting Committee, but she would also be prepared to envisage more in-depth discussion of draft article C1, either in plenary session or in a working group, as suggested by Mr. Nolte.

23. Mr. NOLTE said that the provision to which he had referred was draft article A1, paragraph 2, concerning aliens who were illegally present in the territory of the expelling State and their procedural rights. In his view, the Commission did not yet have a sufficient basis for identifying those rights. With regard to semantic issues, he had used the term “illegal aliens” merely as shorthand and agreed that more precise language was needed.

24. Mr. MELESCANU commended the Special Rapporteur on the balance that he had achieved in the second part of his sixth report between legal and political considerations and the main concern of the report, namely the protection of the human rights and fundamental freedoms of the persons covered by the draft articles he was proposing.

25. The Special Rapporteur began with a very interesting analysis of the distinction which could be drawn between “legal” and “illegal” aliens. For that purpose, he had relied on the Convention relating to the Status of Refugees which, according to the Special Rapporteur, was the only legal instrument that explicitly established such a distinction. However, he agreed with the Special Rapporteur that no distinction should be made when it came to respect for human rights, because the persons in question, regardless of the manner in which they had entered the expelling State, were human beings and, as such, entitled to the protection of all their human rights. If those rights were safeguarded, that would go some of the way towards meeting the concerns voiced by Sir Michael. The Commission should perhaps explain, either in the commentaries or in the draft articles themselves, that the law must be respected and applied even to persons who had entered a country illegally.

26. The second question of principle raised by the Special Rapporteur was whether any distinction should be made between aliens who had recently entered the territory of the expelling State illegally and those who had entered illegally but had been living there for a long time.

<sup>292</sup> *Study on Expulsion of Immigrants* (ST/SOA/22 and Corr.2, United Nations publication, Sales No. 1955.IV.6), New York, 1955.

<sup>293</sup> *Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40)*, vol. I, annex VI, para. 10.

That was a matter within the discretion of the State in question. Legally speaking, if aliens were illegally present in the territory of a State, the length of their stay was irrelevant because it did not affect the illegal nature of their presence. Even if some countries, such as Denmark or Germany, applied more favourable rules in these cases, any such difference in treatment was a matter to be decided by a State in the free exercise of its sovereignty and therefore could not form the subject of uniform international rules, but could be regulated only at the national level. For those reasons, draft article A1 was the most that could be envisaged in that respect. It could be referred to the Drafting Committee, since further debate of the question in the plenary Commission would be pointless.

27. As for the rules of procedure applicable to aliens legally in the territory of a State, while he concurred with the Special Rapporteur that expulsion was not in theory a criminal penalty but rather an administrative act, an alien subject to expulsion proceedings should have the benefit of procedural guarantees precluding arbitrary exercise of power or abuse of authority. The procedural guarantees proposed by the Special Rapporteur seemed to be judicious and based on international human rights conventions, regional instruments, national laws and international practice.

28. He supported the referral of draft article B1 (Requirement of conformity with the law) to the Drafting Committee. In that connection he endorsed Sir Michael's suggestion regarding the introduction, in the commentary to the draft article or in the body of the draft article itself, of wording to indicate that the obligation covered all aliens irrespective of whether they were legally or illegally present in the territory of the expelling State. He was also in favour of referring draft article C1 (Procedural rights of aliens facing expulsion) to the Drafting Committee. At the same time, he agreed with the Special Rapporteur's suggestion that an expression such as "in particular" or "*inter alia*" should be inserted into the first line of the draft article in order to underscore the illustrative nature of the procedural rights listed in subparagraphs (a) to (h). Like Mr. Gaja, he was of the opinion that the execution of an expulsion decision should be deferred or suspended until the completion of any appeal against it. Mr. Gaja's arguments in that connection were entirely convincing in that they rested on article 13 of the International Covenant on Civil and Political Rights, which appeared to support that idea, "except when compelling reasons of national security otherwise require".

29. Mr. SABOIA noted that the Special Rapporteur had drawn attention to the fact that few international instruments, apart from the Convention relating to the Status of Refugees, drew a distinction between aliens who were lawfully present in the territory of a State and those whose presence there was unlawful. He had, however, also referred to article 13 of the International Covenant on Civil and Political Rights, the Convention relating to the Status of Stateless Persons and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and had rightly emphasized that, regardless of the conditions under which aliens had entered the expelling State, they were entitled to the protection of their human rights.

30. After examining the meaning of the terms "resident alien" or alien "lawfully" or "unlawfully" in the territory of a State, in paragraph 291 [15] the Special Rapporteur had reached certain conclusions regarding the distinction between the two categories of aliens, a distinction with which he personally had no special difficulty.

31. The principle of *non-refoulement*, which was a cornerstone of the protection of refugees, was also of importance in the context of the topic under consideration. It was obvious that persons seeking asylum in another country because they feared persecution for various reasons in their country of origin could not fulfil the requirements for legal entry into the country where they were seeking refuge. He therefore appealed to the Special Rapporteur to include a provision that would safeguard the right of an asylum seeker not to be expelled until his or her application for asylum had been considered.

32. The Special Rapporteur had concluded from his analysis of the law and practice of several countries that procedures for the expulsion of illegal aliens varied widely, that those procedures were usually quite summary and that they were conducted by administrative authorities, usually without the possibility of review by a judge. A number of factors might influence the authorities' decision, such as the person's degree of social integration, length of stay and family situation. It was a regrettable fact that few means of appeal were available to such persons, and it was well known that society and the State might turn a blind eye to their presence depending on the economic, political and social conditions prevailing in the country.

33. The expulsion of second-generation or long-term illegal immigrants, referred to in paragraph 314 [38] of the report, was aberrant. Fortunately, there was a positive tendency within certain institutions of the Council of Europe to consider such expulsion discriminatory. The Special Rapporteur stated in paragraph 315 [39] that State practice was so varied and depended so much on specific national conditions that it appeared virtually impossible to determine uniform rules of procedure for the expulsion of aliens. That was true, but the Commission could surely go further than to simply acknowledge the situation without recognizing the legal vacuum that could result in arbitrary treatment. He agreed with other speakers about the need to incorporate in the draft articles certain minimum standards regarding the treatment of unlawful aliens, among which should be guarantees that the expulsion would be carried out in accordance with the law, that the person being expelled would be informed of the reasons for expulsion and that he or she had the right to consular protection.

34. He agreed with the formulation of draft article A1, paragraph 1. In paragraph 2, however, which would have to be revisited if the Commission did decide to incorporate guarantees of minimum standards for the treatment of aliens, he queried the phrase "if the said alien has a special legal status in the country". The situation of adoptive children or adults facing expulsion deserved particular attention. The 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, which had been ratified by a great many countries worldwide, established that a child's receiving country must ensure that he or she enjoyed permanent residence status there.

That did not completely exclude the possibility of expulsion, but it did facilitate the acquisition of nationality by adopted persons. Nevertheless, cases continued to occur where a person who by reason of adoption had totally lost contact with his or her country of origin and biological family upon expulsion faced almost insurmountable obstacles in adapting to the new environment, even with the help of the country of origin and benevolent organizations. In the case of offenders, rehabilitation was nearly impossible. Such a case had occurred in Brazil with a person adopted before the United States had ratified the 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption. The difficulties caused by that case had led the Brazilian authorities to prohibit adoptions by prospective American parents until the United States had begun to comply with the Convention.

35. Subject to the comments made about the possible inclusion of procedural guarantees for unlawful aliens, he supported the procedural rules proposed in draft articles B1 and C1. He agreed with the proposal in paragraph 389 [113] that, on the basis of progressive development of international law, European Community law and the trend in State practice, a person being expelled should be accorded the right to legal aid during expulsion procedures. The right to consular protection should also be extended to any person subject to expulsion, whatever the nature of his or her presence in a country. The Special Rapporteur should consider the possibility of stating that the expelling State had an obligation to inform the person being expelled of the right to consular protection—a right of which many aliens might be unaware.

36. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee.

37. Mr. KAMTO (Special Rapporteur) said that if the Commission wished a provision or provisions providing certain procedural guarantees to unlawful aliens, the Drafting Committee and he himself needed some clarification of one question. The issue of aliens who had recently entered illegally the territory of a State was closely related to that of a State's sovereign right to grant or refuse admission into its territory. The question was when and under what conditions the State whose territory the alien had unlawfully entered could exercise that right. In his second report,<sup>294</sup> he had gone so far as to propose that the definition of frontiers between countries should be addressed. One could question whether an alien who had only just entered territory of the State illegally and was only perhaps one kilometre from the frontier should enjoy the same procedural guarantees as an alien who had been in the country for months or years, had integrated into the society and had found a job, or as an alien who had entered legally but, because his or her residence permit had expired and had not been renewed, was now in an irregular situation. The legal problem with which the Commission must grapple was whether it should be stipulated that all aliens who entered a territory illegally enjoyed procedural guarantees, or whether an exception should be made to allow a State in some instances to exercise its right to grant or refuse admission.

38. Mr. McRAE said that the second part of the sixth report contained a thorough and careful description and evaluation of practice, showing where it was inconsistent but also where broad conclusions could be drawn. Overall, the proposed draft articles dealt well with the procedural aspects of protection of the rights of aliens facing expulsion, but as others had suggested, the Commission might need to go beyond existing practice and propose the progressive development of international law in that area.

39. As the Special Rapporteur had just pointed out, it was not a simple task to make a distinction between aliens who were lawfully present in the territory of the expelling State and those who were not, but if the distinction was to be made, definitions were needed. Aliens lawfully present could be defined along the lines of paragraph 291 (c) [15 (c)], as those that had been admitted according to the laws of the State in which they were present. As for aliens not lawfully present, it would probably be necessary, as the Special Rapporteur had suggested, to distinguish between those who were just arriving and those who had been in the country for some time. Despite the difficulties involved, he agreed with others that some kind of procedural protection must be provided to the different subcategories of aliens unlawfully present in a country.

40. In that regard, draft article A1, paragraph 2, gave the State the option, if it so desired, of applying the procedural protections for aliens lawfully present to those who were not. That “opt-in” provision merely recognized the discretion of the expelling State, and it was not enough. Perhaps an “opt-out” approach should be taken: to say that the same procedural protections should be available to aliens unlawfully present unless a State, for good reasons such as national security, decided otherwise. Although that might be going a bit too far, it did open up a way of coping with the problem. One might also, for aliens not lawfully present in a country, draft a shorter list of procedural protections than those in draft article C1, distinguishing between aliens who had been in a country for a considerable period of time and those that had not. He accordingly encouraged the Special Rapporteur, in the light of the discussion, to produce a new draft article, perhaps along the lines suggested by Mr. Nolte, dealing with aliens not lawfully present in a country and making legitimate distinctions among them.

41. With respect to the obligation to expel only in accordance with the law, set out in draft article B1, the bracketed word “lawfully” should be deleted so that the provision covered all aliens. All aliens were entitled to have the law respected in the event of their expulsion, even if it provided only minimal guarantees or if the only law applicable was the international law stipulating that their human rights must be respected.

42. Each of the procedural guarantees listed in draft article C1 was supported by a considerable amount of State practice, so the list, although only indicative, was a good starting point. Like Mr. Hmoud, however, he wondered about the implications of the phrase “without discrimination” in paragraph 1 (d), with reference to the right of access to effective remedies. As Mr. Hmoud had suggested, it could not be a reference to national treatment of aliens, since aliens did not have the right to precisely

<sup>294</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, pp. 248–249, paras. 183–186.

the same remedies as nationals. In any event, the notion of non-discrimination underlay all the provisions in the draft, although not in that sense. That point should be made clear, and the phrase “without discrimination” should be deleted.

43. He also queried the unqualified reference to legal aid: not all States were in a position to provide it to their nationals, let alone to aliens being expelled. To impose an unqualified obligation on States to provide legal aid to persons subject to expulsion might place too onerous a burden on States and might be a prescription that was likely to be ignored. The issue there was actually one of national treatment: to the extent that a legal aid scheme was provided by a State, an alien subject to expulsion should be entitled to access to that aid on a non-discriminatory basis. Paragraph 1 (g) should therefore refer to the right to access to legal aid, as opposed to some guarantee of legal aid that could not always be implemented in practice. The scope of the right could be explained in the commentary.

44. He agreed with Mr. Gaja that a provision should be added to cover the deferral of expulsion until final review had been completed. Procedural protections were rendered irrelevant if the alien could be expelled before the final review of the case had been carried out.

45. Subject to those comments, including the suggestion that additional draft articles should be produced, he supported sending the draft articles to the Drafting Committee.

46. Mr. NIEHAUS said that drawing a clear distinction between aliens legally and illegally present was important but not easy. The legal or illegal nature of an alien's presence in the territory of a State was related to, though not identical with, the concept of residence, and what was meant by residence therefore had to be spelled out. On that subject, paragraph 287 [11] of the second part of the report referred to an explanation by the Steering Committee for Human Rights of the Committee of Ministers of the Council of Europe that the word “resident” included neither an alien who had arrived in a State but had not passed through the immigration control, nor a person in transit for a limited period. That conflicted with the conclusion drawn in paragraph 291 (a) [15 (a)] of the report that an alien was considered a “resident” of a State when he or she had passed through immigration controls at the entry points of that State. For the sake of clarity, the text should rather say that the alien must have completed the designated residence requirements and received the corresponding authorization for prolonged residence, in the juridical sense of the term, in accordance with the legislation of the State and the principles of customary international law. Paragraph 291 (c) [15 (c)] might be construed as saying precisely that, since it referred to fulfilment of the conditions for entry or stay established by law, but the same expressions could also apply to tourists and therefore created confusion.

47. As pointed out in paragraph 287 [11] of the second part, article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms applied not only to aliens who had entered a territory

lawfully but also to those who had entered unlawfully and whose position had been subsequently regularized. However, a person who no longer met the conditions for admission and stay as determined by the laws of the State party could not be regarded as being still lawfully present.

48. On the basis of State sovereignty, it was entirely logical and acceptable that it should be the administrative authorities that were competent to make decisions regarding the expulsion of aliens who had illegally entered the territory of a State. The same was true as to the entry of aliens into a State's territory. Refusal of entry was in many ways similar, though not identical, to expulsion. There was no doubt that the State had the sovereign right to decide whether to admit aliens to its territory, but problems and injustice might be the result of such measures. The application of the Schengen system in Europe, for example, created grave problems of human rights. The vast majority of Latin American citizens travelling to the European Union entered through Spain; the presence of large numbers of Latin American immigrants in that country was a well-known problem. Often, for purely subjective reasons, an administrative official might decide on economic, social, ethnic and even xenophobic grounds to refuse admittance into Spain to persons who in most cases were tourists or in transit to another country of the European Union. The whole issue was a delicate matter pertaining to State sovereignty, and he was not suggesting provisions that would challenge that sovereignty. However, with a view to avoiding arbitrary treatment, consideration might be given to allowing for administrative review, upon request, of decisions of that nature.

49. It was interesting to see that the legislation of some countries distinguished between aliens who had recently entered illegally and illegal aliens who had resided for a prolonged period in the expelling State. The resulting differences in expulsion procedures, which provided the latter category of aliens with some guarantees of their rights, in particular the possibility of arguing their case before a competent authority, he found reasonable and acceptable.

50. He endorsed draft article A1 on the scope of the rules of procedure, except that the phrase “for some time” at the end of paragraph 2 was quite vague; the Drafting Committee might wish to look into that problem. Draft article B1, on the requirement for conformity with the law, was very clear and accurate. Draft article C1, on the procedural rights of aliens facing expulsion, set out eight rights that were essential to defence of the interests of the individual. All three draft articles could be referred to the Drafting Committee.

51. Mr. FOMBA said that making a distinction between lawful and unlawful aliens in establishing the legal regime for expulsion was appropriate and welcome. Domestic law had a prominent place owing to the nature of the subject, but that should not be seen as sufficient cause for not seeking to place international law on a more secure and dynamic footing. In the process of identifying the legal implications of the distinction, “illegal” aliens must not be left without protection. It must be made clear that the distinction did not apply with regard to the obligation to respect the human rights of all persons being expelled, whatever their category. The clarification of terminology in paragraph 291 [15] was

useful and, as the Special Rapporteur suggested, might help to improve draft article 2, which had already been referred to the Drafting Committee.

52. It was logical that distinguishing among “illegal” aliens based on the length of their stay might give rise to some differences in expulsion procedures, in particular with respect to guarantees. In any event, the legal consequences were a matter of State sovereignty. The question was whether or to what extent international law could or should lay down minimum rules. It seemed appropriate to codify rules that were established incontrovertibly in international law or that derived from a clearly dominant trend in State practice as, on the one hand, ordinary law governing the procedure for the expulsion of aliens lawfully present and, on the other, “soft law” pertaining to aliens unlawfully present. The question remained, however, whether or to what extent it would be possible to raise the threshold of legal protection for certain specific categories of aliens unlawfully present.

53. He agreed with the arguments put forward by the Special Rapporteur in support of draft article A1. As for the wording, the square brackets around the words “the present” in the title could be removed. In paragraph 1, the word “legally” could be retained and the word “lawfully” deleted even though they were essentially interchangeable. He endorsed the aim of paragraph 2, which was to ensure a minimum of legal protection for “illegal” aliens, while leaving the matter to the discretion of the State. The wording was satisfactory, but it might be worthwhile, in the interests of progressive development, to consider whether or to what extent it was possible to posit an obligation of protection for “illegal” aliens who had a special status or had been residing in the country for some time.

54. With regard to the procedural rules applicable to aliens lawfully present, paragraph 323 [47] of the second part of the report made the useful point that one could not say that there were rules of customary law on the subject. The question was what that meant in terms of the approach to be taken. An attempt should be made, despite the inherent differences, to apply by analogy certain procedural rules that existed for criminal proceedings. He agreed with the statement in paragraph 339 [63] linking the requirement of conformity with the law to the requirement of respect for international norms and standards, and he endorsed the interpretation given to the possibility of derogating from such requirements.

55. With regard to draft article B1, it was clear that the provision it contained was well established in international treaty law and in the legislation of many States. The only change he could propose was that the word “lawfully” between square brackets should be deleted.

56. He agreed with the view expressed by the Special Rapporteur in paragraph 343 [67] of the second part of the report that the safeguards being considered within the framework of the currently developing European citizenship could serve to inspire rules of more universal application.

57. With regard to the requirements that aliens be notified of the expulsion decision and that they be notified of the

reasons for the decision, the question arose as to how the two requirements related to each other. One way of looking at it might be to consider that the requirement to provide the reasons for the expulsion decision entailed *ipso jure* and/or *ipso facto*, the requirement to notify. He supported the view set forth in paragraph 356 [80] that the fulfilment of the requirement to inform aliens subject to expulsion of the decision to expel was the condition needed for aliens to invoke the other procedural guarantees.

58. As to the right to be present, the Special Rapporteur rightly concluded that State practice was too limited for it to be possible to infer any rule on the matter. That said, it nevertheless remained a practical requirement whose exercise might, in some cases, prove necessary. As indicated in paragraph 368 [92], the right to effective review constituted an important rule that was well established in international law. With regard to the right to consular protection, he agreed with the interpretation of the scope of the relevant provisions of the Vienna Convention on Consular Relations and the Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by the General Assembly in its resolution 40/144 of 13 December 1985. On the issue of the right to legal aid, he agreed with the conclusion that, although treaty law did not explicitly provide a basis for that right, the Commission could establish it as part of the progressive development of international law.

59. With regard to draft article C1, he concurred with the conclusion reached in paragraph 402 [126] of the second part of the report. Paragraph 1 contained a number of important procedural rights that needed to be presented as logically and coherently as possible, as indeed they were. The “without prejudice” clause in paragraph 2 was useful in that it set the parameters for the debate on the question of which specific rights would eventually be included in the list. In the light of the Special Rapporteur’s cogent explanations, he himself was of the view that, if it was considered necessary to extend the scope of draft article C1, it would be wise to do it discriminately, retaining only those rights that were genuinely applicable.

60. In conclusion, he was in favour of referring all three draft articles to the Drafting Committee.

61. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with the Special Rapporteur on the need to make a distinction between aliens residing in a State in conformity with laws on the entry and residence of foreigners and those who were present in a State in violation of those laws. Nevertheless, with regard to terminology, it was important that, in its work on the topic, the Commission should refrain from using the terms “illegal alien” or “illegal immigrant”. It should not use—much less embody in an instrument—terms that had a pejorative connotation and were legally incorrect. As Sir Michael had rightly pointed out, it was a person’s presence in the territory of a State—not the person himself—which should be considered as lawful or unlawful. In that connection, it was of interest to note that article 40 of the new Constitution of Ecuador, which had been adopted by popular referendum in 2008, provided that no individual could be identified as, or considered to be, “illegal” on the basis of his or her migration status. In draft article A1, paragraph 1, the Special



Rapporteur proposed a choice between “an alien legally in the territory of the expelling State” and “an alien lawfully in the territory of the expelling State”. His preference would be for the second of the two options proposed.

62. Beyond issues of terminology, it was important to stress that the right or power of the State to regulate the entry, stay and residence of aliens in its territory, and hence its exercise of the right of expulsion, could not be completely discretionary but must be consistent with the applicable rules and principles of international law, in particular those relating to human rights, whether substantive or procedural in nature. Consequently, in the case of aliens facing expulsion, the procedural safeguards accorded at the international level, as well as those provided by the domestic law of the State in question, must be respected.

63. In draft article A1, the Special Rapporteur distinguished between two situations in which aliens could find themselves, proposing that the draft articles—and by extension the procedural guarantees they embodied—outlined in that section of the project should apply only in the case of the expulsion of an alien lawfully in the territory of the expelling State and leaving it entirely to the discretion of the State in question as to whether to also apply them in the case of the expulsion of an alien unlawfully present.

64. Nevertheless, as had been pointed out, for example, by Mr. Hmoud, there were some procedural guarantees that also applied to aliens unlawfully present. He agreed with Mr. Gaja that to leave such aliens with no protection at all when facing expulsion proceedings was to disregard a number of guarantees that also applied to aliens unlawfully present. That was all the more true in cases in which such aliens had already been residing in the receiving State for some time, in recognition of the fact that they had already achieved some degree of integration in the host society or had significant ties to the State in question, which might tolerate their presence without formally recognizing their status as lawful.

65. Therefore, while it was generally recognized in international instruments and State practice that aliens lawfully present were entitled to additional procedural guarantees, the Commission should identify all the procedural guarantees that applied when States exercised the right of expulsion, whether the aliens in question were lawfully or unlawfully present (so as to prevent arbitrary decisions in either case). The Commission should also determine the additional procedural guarantees to which aliens lawfully present were entitled. Both sets of guarantees should be regarded as minimum indicative standards to be applied by States. The three draft articles A1, B1 and C1 should be reformulated along those lines.

66. Draft article B1 provided that an alien lawfully in the territory of a State party could be expelled therefrom only in pursuance of a decision reached in accordance with law. That was correct; however, there was no question but that the principle also applied to an alien unlawfully in the territory. The principle of legality was a fundamental principle of the rule of law, requiring full compliance with the laws of the State in question, including applicable international law. It applied as well to aliens who had just entered the territory of a State.

67. Moreover, as the Special Rapporteur stated in his preliminary report,

a logical rule holds that if a State has the right to regulate the conditions for immigration into its territory without thereby infringing any rule of international law, it also is obliged to act in conformity with the rules which it has adopted or to which it has agreed concerning the expulsion of persons whom it deems that it cannot receive or retain in its territory.<sup>295</sup>

68. In that connection, it was important to stress, as the Special Rapporteur explained in paragraph 339 [63] of the second part of his sixth report, that in terms of the expulsion of aliens, the requirement for conformity with the law was based on the implicit requirement that domestic rules of procedure for expulsion should be in conformity with relevant international rules and standards, and that a State could therefore not establish procedural rules that were inconsistent with the latter. It was clear that, in the area of human rights, States could only deviate from the international standards binding on them in the direction of greater protection of the rights of aliens facing expulsion.

69. With regard to draft article C1, several of the rights in the list of procedural guarantees for aliens facing expulsion applied even to aliens unlawfully present. Those included the right to be notified of the expulsion decision, including the reasons for the decision; the right to consular protection; and the right to interpretation and translation into a language understood by the alien. He agreed with the various arguments presented by Mr. Hmoud in that regard. As stressed in the report, article 13 of the International Covenant on Civil and Political Rights prescribed procedural guarantees only in the case of aliens lawfully in the territory of a State party. However, in its General Comment No. 15,<sup>296</sup> the Human Rights Committee held that the procedural guarantees contained in article 13 should also apply if the legality of an alien’s entry or stay was in dispute.

70. On another point, he supported Mr. Gaja’s proposal to include in the draft an additional procedural safeguard for a stay of execution of the expulsion decision in cases where an appeal for review of the expulsion decision was pending. The purpose of the safeguard would be to ensure that the exercise of the right to challenge the expulsion was able to produce its effects, in the event that the competent authority ruled in favour of the appellant.

71. As recalled in the memorandum by the Secretariat on the topic,<sup>297</sup> the principle of non-discrimination was relevant not only with regard to the adoption of a decision whether to expel the alien but also with regard to the procedural guarantees that must be respected, as had been recognized by the human rights treaty bodies.

72. He was in favour of referring the three draft articles A1, B1 and C1 to the Drafting Committee, provided that they were reformulated to include a set of procedural guarantees common to both cases: the expulsion of aliens lawfully present and that of aliens unlawfully present.

<sup>295</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554, p. 198, para. 23.

<sup>296</sup> See footnote 293 above.

<sup>297</sup> A/CN.4/565 and Corr.1 (see footnote 42 above).

73. Mr. VASCIANNIE said that, in his efforts to present three draft articles on the rules of procedure that should be applicable to persons subject to expulsion, the Special Rapporteur had undertaken a review of various sources of law, notably the domestic law of a number of countries. At least two general issues were implicit in that approach, the first of which was a problem of perspective. Although the domestic law of virtually all States provided for the possibility of expulsion, in many instances safeguards available to persons facing expulsion were not found together with provisions affirming a State's sovereign right to expel a person from its territory. Moreover, whereas the rules on expulsion were apt to be found conveniently in one place, namely the State's immigration law, rules concerning procedural and other safeguards to be enjoyed by individuals were widely scattered among human rights provisions, broad principles of constitutional and other domestic law and international instruments. Therefore, when reviewing the material, there was a risk that more attention might be given to the readily available rules that allowed expulsion from the State simply because those rules were easier to find. It was a tribute to the Special Rapporteur that he had not fallen into that trap, but rather had maintained the balance between individual rights and State prerogatives that was necessary for the project.

74. A second problem relating to sources of law was that there was, in general, a greater abundance of information pertaining to Western countries than to the rest of the world. Consequently, if the Commission was not careful, it could end up giving greater emphasis to approaches to expulsion adopted by a relatively small group of countries. To some extent, the Special Rapporteur had avoided that problem by including references to the position of a variety of States, and he should be encouraged strongly to maintain that approach. The perspective on expulsion of a small developing country with high unemployment might differ considerably from that of a developed country. In the same way, the perspective of a former colony might differ from that of a former colonial power.

75. The point was that if the Commission was searching for an *opinio juris* or at least State attitudes towards expulsion issues, it should be prepared to look beyond the domestic legislation on expulsion of a small group of countries. Greater consideration should therefore be given to the positions of Latin American, Caribbean, African, Asian and Pacific States on safeguards relating to expulsion proceedings, as well as to those of the United States and Canada. Such a study did not need to entail a detailed review of national legislation; it might encompass statements made at multilateral forums, positions adopted in treaties concerning the deportation of convicted persons and the *travaux préparatoires* of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and State practice with regard to the expulsion of migrant workers. Such information would help to paint a broader picture and guide the Commission more reliably in terms of identifying the provisions that represented *lex lata* and those that were adopted *de lege ferenda*.

76. With respect to specific draft articles, draft article A1 maintained the distinction between aliens lawfully in the territory of an expelling State and aliens who had entered

the State's territory illegally. That distinction was plausible, but it seemed to suggest that almost no safeguards were available to aliens who had entered a State illegally (especially if they had not resided in the country for a long period of time). He shared the view of those who recommended reconsidering that approach. The Commission might wish to consider having, at a minimum, a tripartite scheme covering persons lawfully in the territory; persons not lawfully in the territory, but who had been present there for some time; and persons who had just arrived and had no lawful basis for entry. In such a scheme, some safeguards would be available to all three categories, but a higher level of protection would be afforded to persons lawfully in the territory and perhaps those unlawfully in the territory but who had been there for some time. To the extent that the above scheme appeared to be implicit in the Special Rapporteur's approach, his own remarks should be regarded as a request for an elaboration of the implications of draft article A1.

77. With regard to draft article B1, the word "lawfully" between square brackets should be deleted, so that all aliens—whether lawfully or unlawfully present in the territory—would be entitled to the safeguard envisaged by that provision. Alternatively, and out of an abundance of caution, he proposed that the provision might begin: "An alien, whether lawfully in the territory of a State Party or not, may be expelled". That would avoid *a contrario* arguments that would inevitably arise if the current formulation were retained with the square brackets removed.

78. Lastly, with regard to draft article C1, he supported the safeguards listed by the Special Rapporteur, with perhaps one exception. He agreed, in particular, with the rights listed in paragraphs 1 (a) to 1 (f) and 1 (h). His hesitation concerned the right to legal aid in 1 (g), which, as others had noted, might pose a challenge to some States owing to resource constraints, as was the case with a number of Caribbean States. On the other hand, it was desirable for persons subject to expulsion to have access to legal aid. He therefore proposed that draft article C1 should contain a provision to the effect that legal aid should be provided to the fullest extent possible having regard to resource considerations in the expelling State.

79. Although draft article C1 did not seek to distinguish between aliens lawfully in the territory of a State and other aliens, the distinction would apparently be made in draft article A1. If the Special Rapporteur decided to provide for a different level of protection for aliens lawfully present than for those unlawfully present, those distinctions might be made in draft article C1. For example, it might provide that a person lawfully residing in the State was entitled to all the procedural rights listed in paragraph 1 (a) to (f) and (h), while a person not lawfully present but present for some time was entitled to some of those rights. Ultimately, however, his preference would be for the rights listed in paragraph 1 (a) to (f) and 1 (h) of C1 to be available to all aliens, regardless of their situation.

80. Mr. NOLTE said that he was among those Commission members who proposed that the draft articles should recognize that aliens illegally present in the territory of a State had some procedural rights. He had suggested not sending the draft article addressing that situation to the

Drafting Committee on the reasoning that the provision required further elaboration. He supported Mr. McRae's proposal that the Special Rapporteur should propose a new draft article relating to aliens illegally present in the territory of the State and that it should be formulated during the Special Rapporteur's summing up of the debate, which would allow Commission members to react to it immediately and to refer it to the Drafting Committee without further delay. While the matter perhaps did not require a full new debate, it nevertheless involved an issue that should not be discussed exclusively within the Drafting Committee.

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

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

81. The CHAIRPERSON invited the members to continue their consideration of the fifteenth report on reservations to treaties, in particular the addenda thereto (A/CN.4/624/Add.1 and 2).

82. Mr. GAJA said that the Special Rapporteur's thinking had evolved over the course of the 15 years that he had been working on the topic of reservations to treaties. That had led to results that were very much in keeping with the 1969 Vienna Convention on the Law of Treaties, despite the regrettable silence of the latter on the issue of the consequences of invalid reservations. The Commission had now reached the heart of the problem of reservations to treaties.

83. One conclusion reached by the Special Rapporteur in that regard was that articles 20 and 21 of the Vienna Convention concerning acceptances of, and objections to, reservations and legal effects of reservations and objections to reservations, respectively, did not apply to invalid reservations. That conclusion was confirmed by the *chapeau* of article 21, which concerned only "a reservation established with regard to another party in accordance with articles 19, 20 and 23". An invalid reservation certainly could not be considered a reservation established in accordance with article 19, or, with regard to procedural rules, with article 23.

84. At first glance that position did not seem to be supported by State practice, which tended to treat reservations considered incompatible with the object and purpose of the treaty as if they were valid reservations. However, in analysing the practice more closely, it was possible to identify elements that confirmed the non-applicability of articles 20 and 21 to objections to, and acceptances of, invalid reservations. For example, one could refer to the numerous cases in which an objection to the invalidity of a reservation was raised after expiry of the 12-month time period following notification prescribed in article 20, paragraph 5, of the Vienna Convention. The States that had entered those objections clearly did not consider paragraph 5 also to apply also to objections to invalid reservations. They therefore made a distinction between valid and invalid reservations and did not consider paragraph 5 to

express a general rule. One particular noteworthy example was that provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in relation to which some 19 States had raised an objection to the validity of certain reservations after the end of the time period set out in article 20, paragraph 5. They represented nearly all the States that had adopted the practice of raising objections. Thus, while there were few States that entered objections, those that did so obviously thought that there was a different rule that applied to invalid reservations. The above considerations supported the Special Rapporteur's conclusion.

85. It was necessary to express more clearly in draft guidelines 2.6.13 (Time period for formulating an objection) and 2.8.0 (Forms of acceptance of reservations) that they applied only to reservations considered valid. As those two draft articles were currently worded, they seemed to be more general in scope and to apply to any type of reservation. The Commission should avoid giving the impression that the expiry of the 12-month time period after notification of a reservation could imply the acceptance of an invalid reservation.

86. A second important conclusion reached by the Special Rapporteur was that the invalidity of a reservation for whatever reason, including its impermissibility on the grounds of incompatibility with the object and purpose of the treaty, always produced the same legal effects. In draft guideline 4.5.1, the Special Rapporteur posited that such reservations were null and void, adding in draft guideline 4.5.2 that such a reservation was "devoid of legal effects". That conclusion would be justified if the question of the validity of the reservation was referred to an international tribunal competent to issue a binding decision, but, in most cases, the validity of such reservations was assessed by the contracting States. Even if they applied objective criteria, they might well draw different conclusions. It could be said that the reservation was null and void, but only for the States that deemed it invalid. As far as the other States were concerned, the reservation was not invalid and produced legal effects.

87. From the standpoint of States which considered a given reservation to be invalid, the reservation produced no effect, in the sense that it did not produce its intended effect, namely that of enabling the reserving State to become a party to the treaty with the benefit of the reservation. However, the question remained whether the reservation should therefore be considered as unwritten or whether it prevented the reserving State from becoming a party to the treaty—the alternatives set forth in paragraphs 145 [435] *et seq.* of the report. The first alternative (severability of the reservation) had been upheld by the European Court of Human Rights in its judgement in the *Belilos* case on the grounds that the intention of the State to be a party to the treaty prevailed over its desire to maintain a reservation that would prevent it from being a party. In other decisions by the same Court (*Weber v. Switzerland*) and by other bodies, such as the Inter-American Court of Human Rights (*Hilaire v. Trinidad and Tobago*), and the Human Rights Committee (*Kennedy v. Trinidad and Tobago*), the tendency had been to ignore the intention of the reserving State and simply to rule out the effect of a reservation deemed invalid as if it had never existed.

He agreed with the Special Rapporteur that only the existence of the intention to be a party to a treaty without the benefit of the reservation considered invalid could be reconciled with the principle of consent to be bound, which was the basis of any obligation under a treaty.

88. As noted in paragraph 173 [463] of the report, the human rights bodies had come to recognize the need to determine the real intention of the reserving State; however, as indicated in paragraph 174 [464], they maintained that there was a strong presumption that the author of the reservation would prefer to remain or become a party to the treaty, even without the benefit of the reservation. In paragraph 191 [481], the Special Rapporteur set forth a similar but more qualified presumption, whereas the presumption posited by the human rights bodies could hardly be rebutted.

89. One could well understand the attitude of the human rights bodies, whose objective was to provide the broadest possible protection of the rights guaranteed under a given treaty. Nevertheless, the consequence of the presumption they advocated was not to give any effect to a specific declaration made by the reserving State at the time of ratification purporting to limit its scope. Moreover, with regard to the States parties which considered the reservation to be valid, the reservation produced its effects; thus, the reserving State could be a party to the treaty with the benefit of the reservation. He wondered why it should be presumed that the State in question would accept the obligations under the treaty in a more comprehensive manner in its relations to States that had objected to the validity of the reservation. There seemed to be valid reasons for reversing the presumption. It would suffice to state that a reservation was to be considered as not having been formulated, or in other words could be disregarded, if that was the intention of the reserving State, without establishing any presumption whatsoever.

90. In conclusion, the section on invalid reservations raised crucial issues that warranted further, detailed debate in the Commission so as to ensure that generally accepted solutions were found. Since it had taken more than 15 years for the Commission to reach the current stage in its work on the topic, it did not seem unreasonable to request that more time be allocated for that purpose. His main point of disagreement with the Special Rapporteur was the idea that a reservation could be treated as null and void once it had been deemed invalid by one or more States or by bodies that were not competent to take a decision that would be binding on all States parties to the treaty.

91. Sir Michael WOOD said that the section under consideration addressed what was perhaps the most difficult issue of the whole project—the effects of an invalid reservation. The Commission must try to resolve the issue, lest there be something missing at the heart of the Guide to Practice, and decide whether the Special Rapporteur's proposal was the right one, or rather the least bad one, or whether the Commission should adopt a different approach.

92. In this section, the Special Rapporteur described in detail both the theory and practice relating to the effects of invalid reservations in a masterly way, which, in itself,

was a major contribution to thinking in the difficult field. He then proposed a pragmatic solution that sought to reconcile the theory with the often unclear and inconsistent State practice. Steering clear of the extreme positions taken by some States, he proposed a rebuttable presumption, namely that the reserving State intended to become a party to the treaty, and that if its reservation was impermissible, or otherwise invalid, and thus null and void, the reserving State could be presumed to have intended to become a party without the reservation.

93. His main concern was the practical application of the Special Rapporteur's proposal. As Mr. Gaja had observed, in the absence of compulsory third-party decision-making procedures, it was difficult to establish whether a reservation was impermissible. An objecting State might well claim that it was impermissible, but that did not necessarily mean that it was so.

94. If the Commission members agreed with the Special Rapporteur's analysis, as he did, there were three options. The first was the Special Rapporteur's proposal (the positive presumption); the second was the opposite presumption (the negative presumption); the third was to have no presumption at all. Nevertheless, while there could be no doubt that an impermissible reservation was null and void, it did not inevitably follow that because a reservation was null and void it could be severed, and the reserving State could be bound by the treaty without the benefit of the reservation. There were important objections, both theoretical and practical, to that proposition.

95. As far as the theory was concerned, the proposition might run counter to the cardinal principle of the law of treaties to which the Commission had always attached great importance—the requirement of consent; there could also be implications at the level of constitutional law. For example, a State that had submitted the proposed reservation to its legislature as part of the domestic ratification process would wish to be guaranteed that it would not become a party to the treaty in question without the reservation and without its consent. He welcomed the Special Rapporteur's efforts to avoid that objection by developing a rule based on a presumption that had the intention of the reserving State as its central point. Likewise, he welcomed the onus that would be placed on the reserving State to make its position clear.

96. The question, however, was whether the Special Rapporteur's presumption was the right one, for it seemed to contradict the basic thrust of the arguments he had put forward in paragraphs 177 to 182 [467–472] in favour of the positive presumption. For instance, he was not certain that the positive presumption would facilitate the “reservations dialogue”. He also queried the assertion in paragraph 179 [469] that the importance of a reservation must not be overestimated—for some States the reservation might be crucial. Moreover, while he endorsed the Special Rapporteur's point in paragraph 181 [471] that the presumption of entry into force provided legal certainty by helping to fill the legal vacuum between the formulation of the reservation and the declaration of its nullity, it should be noted that the declaration of nullity might never be made; thus, the legal vacuum could last indefinitely. In brief, the arguments put forward by the Special

Rapporteur in those paragraphs could lead equally well to the positive presumption or to the negative one.

97. On a practical level, unless the question of permissibility could be tested in court, the positive presumption would seem to have the effect of privileging the unilateral viewpoint of some contracting States and imposing it on the reserving State. He feared that it would prove very difficult in practice to hold a reserving State to a treaty obligation in the absence of third-party mechanisms. The State that had entered the reservation might not accept that the reservation had vanished; the *Belilos* case was an exception.

98. For all those reasons, he suggested that the Commission should consider whether the correct presumption—again a rebuttable one—might not instead be that the reserving State did not intend to become a party to the treaty without the benefit of the reservation, in other words, the negative presumption. The practical result might not be any different in most cases, but the principle of consent would be preserved, which was important not only for the topic under consideration, but in the wider context of the law of treaties and international law.

99. It was easier to state the options than to choose between them. The Special Rapporteur had made his recommendation, which, despite certain problems, had many points in its favour. He had made it clear that the proposal did not reflect existing treaty law, so if the Commission adopted it the question of its retroactive application would arise. At the present juncture, however, what was important was that the Commission should adopt a clear and workable proposal and await the reactions of Member States. He would welcome the views of other Commission members on the matter too. His preference was for the negative presumption. Having said that, he would be ready to join a consensus based on the proposal for a positive presumption, although in that case the Commission should consider what it could do, in addition to what the Special Rapporteur had attempted in draft guideline 4.5.4 (Reactions to an impermissible reservation), to ensure that the proposal was workable in practice.

100. The following section of the the fifteenth report, on the effects of interpretative declarations, approvals, oppositions, silence and reclassifications, provided a very good account of the nature and effects of interpretative declarations to treaties. He had no comment on draft guideline 4.7.4 (Effects of a conditional interpretative declaration). Draft guidelines 4.7 (Effects of an interpretative declaration), 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration) and 4.7.3 (Effects of an interpretative declaration approved by all the contracting States and contracting organizations), which dealt with treaty interpretation, were acceptable. Perhaps draft guideline 4.7 alone would be sufficient, but if the Commission considered that the three draft guidelines were useful, he would have no objection. However, he considered that draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author) should not be included in the Guide to Practice. The analysis leading to the proposal was brief and unconvincing. If the draft guideline was adopted, it would mean that a State which made an interpretative declaration would not be able to

invoke an interpretation contrary to that contained in its declaration. It would therefore be precluded from making an alternative interpretation to the one in its interpretative declaration, even where the alternative interpretation was correct. There could be cases where an interpretative declaration gave rise to an estoppel or form of preclusion, but such cases were unlikely to be frequent.

101. In conclusion, he was in favour of referring all the draft guidelines proposed in the last two sections of the fifteenth report to the Drafting Committee, with the exception of draft guideline 4.7.2. The Drafting Committee might need to examine more carefully draft guidelines 4.5.3 ([Application of the treaty in the case of an impermissible reservation] [Effects of the nullity of a reservation on consent to be bound by the treaty]) and 4.5.4, either to reverse the positive presumption or to seek to clarify how the Special Rapporteur's proposal would work in practice.

102. Mr. McRAE said that, in general, he had no substantive problems with the Special Rapporteur's treatment of invalid reservations. Mr. Gaja had raised the difficult issue of the point at which a reservation could be considered null and void. Long before the matter was decided by an independent tribunal, the parties to the treaty might be making their own determination. He was not certain that further reflection would necessarily provide an easy solution. Perhaps the best to be hoped for was that the Guide to Practice would provide guidance to individual States in assessing whether a reservation was null and void; if objections were raised, the matter might then come before an independent body for decision.

103. He questioned the need for both draft guideline 4.5.1 (Nullity of an invalid reservation) and draft guideline 4.5.2 (Absence of legal effect of an impermissible reservation), since to say that a reservation was null and void seemed synonymous with saying that it was devoid of legal effects. The matter should be followed up by the Drafting Committee.

104. On the more substantive matter of draft guideline 4.5.3, he considered that the Special Rapporteur's proposal for a positive presumption, namely severance of an invalid reservation unless the reserving party expressed an intention to the contrary, was in principle better than the other alternatives. Sir Michael had drawn attention to the practical problems posed by such a proposal and had stated his preference for the negative presumption. However, he suspected that it might give rise to exactly the same problems as the positive presumption and that further debate would merely highlight the advantages and disadvantages only to obtain the same result. The advantage of the positive presumption was that it focused on the intention of the reserving State. The assumption that it intended to be a party to the treaty seemed a better starting point than the assumption that it did not wish to be a party, since it furthered treaty participation.

105. Turning to the section on the effects of interpretative declarations, approvals, oppositions, silence and reclassifications, he welcomed the fact that the Special Rapporteur treated conditional interpretative declarations as having the same effects as reservations, although that

view had not been supported by all Commission members in the past. He expressed support for all the draft articles proposed by the Special Rapporteur with the exception of draft guideline 4.7.2, regarding which he shared the concerns expressed by Sir Michael. The draft guideline purported to prevent the author of an interpretative declaration from asserting an interpretation contrary to the one set forth in the declaration. Although it was not explicitly stated in the draft guideline, it was implicit in the report that the author could withdraw or modify the interpretative declaration at any time. He failed to understand why the author was unable to retract the declaration without formally withdrawing or modifying it, and he did not follow the Special Rapporteur's reasoning in that regard.

106. In paragraph 255 [545], the Special Rapporteur justified the approach "as a corollary of the principle of good faith", claiming that it was not necessarily based on estoppel; yet in paragraph 257 [547], he asserted that the author had created an expectation in the other contracting parties who, acting in good faith, might take cognizance of and place confidence in it, and that sounded very much like estoppel. The draft guideline was too broad in scope. There might well be circumstances in which parties to a treaty had relied on an interpretative declaration by a State and, without expressly accepting it, adapted their behaviour in accordance with that declaration. In such circumstances, the author should not be able to express a contrary view and might in fact be bound by it, although probably as a result of subsequent practice under the treaty and not because of the binding nature of the declaration itself. The author of the interpretative declaration could always withdraw it, but it could still be bound as a result of the behaviour it had generated among the treaty partners.

107. However, where a State made an interpretative declaration and there was no evidence of reliance on it, and indeed subsequent events, such as a judicial decision, made the interpretation proposed in the declaration less plausible, he wondered why that State, which many years later might have forgotten about its original interpretative declaration, should be prevented from adopting a contrary position. The approach adopted in draft guideline 4.7.2 had a somewhat perverse outcome in the sense that an act which had no legal effect for other States had a boomerang-like legal effect for its author. Although in paragraph 256 [546] the Special Rapporteur denied that the author of an interpretative declaration was bound by the interpretation it put forward, implicitly that was what happened.

108. Notwithstanding the title of the draft guideline, in paragraph 258 [548] the Special Rapporteur explained that the limitation applied not only to the author, but also to any State or organization that approved the interpretation put forward in the interpretative declaration, which must also refrain from invoking a different interpretation. The provision went too far in the absence of a case of estoppel, and, even if there was estoppel, it might apply only between the author and the approving State, not even to third States. He did not agree with Sir Michael that the draft guideline should be deleted, but would suggest that its scope should be limited by adding the following phrase at the end of the provision: "where other contracting parties have relied on that interpretation and acted accordingly".

109. Mr. PELLET (Special Rapporteur) said that, in order to forestall any further debate on draft guideline 4.7.2, he declared himself convinced that the current version of the provision was too broad in scope and should be amended. He would not, however, be in favour of its deletion.

*The meeting rose at 1 p.m.*

### 3066th MEETING

*Friday, 16 July 2010, at 10 a.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*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. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, 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 (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to resume the debate on his sixth report on expulsion of aliens (A/CN.4/625 and Add.1–2).
2. Mr. KAMTO (Special Rapporteur) said that before summarizing the debate itself, he would first touch on several comments of a general nature made by members of the Commission, then respond to methodological and substantive questions raised by certain States and referred to by several members of the Commission, and lastly address the proposal to restructure the draft articles.
3. Two members of the Commission had reiterated their well-known view that the Commission should not consider the topic of expulsion of aliens: one had argued that there were no general rules of international law in the area and that therefore the subject was a matter for the domestic law of States, and not for international law, and the other had contended that the subject was dealt with in diplomatic negotiations and thus was unrelated to the technical work expected of the Commission. Those two members echoed the position expressed in that regard by two or three delegations in the Sixth Committee.
4. In response to the persistence of that opinion, he pointed out, first, that all topics considered by the Commission were, without exception, subject to negotiation. He was not aware of a sole case in which draft articles elaborated by the Commission, however admirable they