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Summary record of the 3094th meeting

Topic:
<multiple topics>

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appeals adequately. Although he acknowledged that European law did recognize the right of appeal, his conclusion in paragraph 461 [para. 59] of the report was based largely on the fact that there was no agreement as to the suspensive effect of such an appeal. He personally agreed with Mr. Vasciannie that the Commission should be guided, not by the 1892 resolution of the International Law Institute,[196] but by more recent instruments such as the European Convention on Human Rights and, possibly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In any event, the Special Rapporteur should give further consideration to the subject and perhaps formulate a provision dealing with the right of appeal and the possible suspensive effect of such an appeal against an expulsion order, since more clarity on the subject was certainly needed.

45. While he agreed completely with draft article E1, paragraph 1, he was troubled by paragraph 2, because it suggested that if the alien's State of nationality had not been identified, or if he or she was likely to be tortured there, the alien could be expelled to a number of other States. Although the Special Rapporteur's philosophy was apparently to ensure that a person was expelled to somewhere where he or she would be well treated and safe, it was uncertain that the draft article would necessarily achieve that aim: in the other States to which the person might be expelled, he or she might still be subjected to torture or inhuman and degrading treatment. It was therefore necessary to make it clear that the qualification relating to torture or inhuman and degrading treatment applied to those States as well.

46. Revised draft article 8 on the prohibition of expulsion in connection with extradition needed more careful examination. It might well be that if the Commission paid sufficient attention to the question of torture or inhuman and degrading treatment in draft article E1, paragraph 2, the bracketed phrase "or with the provisions of the present draft article" could be retained in draft article 8.

47. Draft article H1 provided that where a person had been expelled on mistaken grounds, he or she had a right of return, "save where his or her return constitutes a threat to public order or public security". That phrase needed further drafting work to ensure that the State concerned could not refuse to allow the person to return on purely arbitrary grounds.

48. He agreed with Mr. McRae that draft article J1 was unnecessary. Draft article 19 of the draft articles on diplomatic protection recommended that the State of nationality be under an obligation to grant diplomatic protection in certain circumstances, and as draft article J1 obviously disregarded that recommendation, it might be best to delete it.

49. He proposed that draft articles D1 to J1 contained in the second addendum to the sixth report should be referred to the Drafting Committee.

[196] "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892" (see footnote 183 above).

50. Mr. CANDIOTI, referring to draft article G1 on protecting the property of aliens facing expulsion, said that Mr. Wisnumurti was quite right in contending that paragraph 2 established adequate protection of property and other pecuniary interests of aliens subject to expulsion, even if the bracketed text was deleted. He could support paragraph 1 of the draft article, although it could perhaps go into greater detail. It would, however, be better placed in the section of the text dealing with the prohibition of certain types of expulsion such as collective expulsion and disguised expulsion.

The meeting rose at 11.15 a.m.

3094th MEETING

Friday, 27 May 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Later: Mr. Bernd H. NIEHAUS (Vice-Chairperson)

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

Expulsion of aliens (*continued*) (A/CN.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

Sixth report of the Special Rapporteur[197] (*concluded*)

Ms. Jacobsson (Vice-Chairperson) took the Chair.

1. The CHAIRPERSON invited the Commission to resume its consideration of the second addendum to the sixth report by the Special Rapporteur on the expulsion of aliens.

2. Ms. ESCOBAR HERNÁNDEZ said that draft article D1 (Return to the receiving State of the alien being expelled) was well balanced, as she saw it. She endorsed the idea of placing emphasis, in paragraph 1, on voluntary compliance with the expulsion decision, in order to ensure the greatest possible respect for the wishes of the alien affected. However, she shared the view of previous speakers that the use of the word "encourage" before the phrase "to comply with the expulsion decision

[197] At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook … 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2).

voluntarily" gave rise to some difficulties—first, because it could be interpreted as a call for undue pressure on the alien, and, secondly, because "encourage" was hardly a legal term. It would therefore be better to replace it with the phrase "take the necessary measures to enable".

3. In paragraph 2, the phrase "as far as possible" should be deleted because expulsion must always be carried out in an orderly manner and in accordance with the rules of international law. If the idea was to raise the possibility of adopting coercive measures towards aliens under certain circumstances in order to ensure their expulsion, then that should be stated clearly, perhaps at the end of the paragraph. The specific reference to the rules of civil aviation was not particularly objectionable, as the vast majority of expulsions occurred by air. It was for the Drafting Committee to take up that issue in greater detail.

4 Paragraph 3 was quite acceptable. Notwithstanding the need to improve the wording, the provision clearly pertained to progressive development and was fully in keeping with the overall logic of the draft articles.

5. Turning to draft article E1 (State of destination of expelled aliens), she endorsed the Special Rapporteur's reasoning about the State of destination and the preference accorded to the State of nationality. She also endorsed, in principle, the portion of paragraph 3 that said that only the State of nationality could be required to admit an expelled alien.

6. Nevertheless, further work on the draft article should take into account several factors, some of which had already been identified by other members of the Commission. First, in cases where the State of destination was not the State of nationality, the wishes of the alien being expelled with regard to the location to be chosen must be respected, in accordance with the principle set forth in draft article D1 of giving preference to voluntary compliance with expulsion decisions. Secondly, the risk that the alien facing expulsion might be subjected to torture or inhuman or degrading treatment should be taken into consideration with regard not only to the State of nationality but also to all States of destination. Further thought should be given to the situation of stateless persons who, at least as the draft articles now stood, could never be expelled, given that there was no State of nationality that could be required to accept them. The Drafting Committee might also consider that particular situation when it prepared its commentaries.

7. Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) did not raise major difficulties, except the one indicated by Mr. Vasciannie with regard to the description of the "applicable rules" as rules of international law. The Special Rapporteur had added a welcome nuance with the phrase "*mutatis mutandis*", and that phrase should be retained.

8. The general approach in draft article G1 (Protecting the property of aliens facing expulsion) was acceptable, but Mr. Wisnumurti's proposal to reverse the order of the two paragraphs should be taken into account. Further consideration should also be given to the bracketed phrase "to the extent possible" in paragraph 2. Any references to restrictions on the protection of the property of aliens must be worded in a way that could not be construed as leaving full discretion to the expelling State.

9. Draft article H1 (Right of return to the expelling State) certainly came under progressive development and should therefore be given particular attention. The term "mistaken", used to describe the grounds for expulsion, had little legal significance and was open to very subjective interpretation. The Drafting Committee should replace it with a more appropriate term.

10. As some members had already pointed out, draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) were two parts of a whole and could not be separated. She did not have a firm view as to whether they should be retained. While it was true that they introduced nothing new in the general regime of international responsibility of States and diplomatic protection, one of the main aspects of the topic under consideration was precisely the fact that the expulsion of aliens could, in some cases, constitute an internationally wrongful act. At the current stage of the Commission's work, it might be advisable to retain the draft articles.

11. Draft articles D1 to J1 could be referred to the Drafting Committee.

12. With regard to the explicit recognition of the right of appeal against an expulsion decision and the suspensive effect of such an appeal, a provision to that effect that was fully in keeping with the Commission's mandate of progressive development would certainly have its place in the draft articles. However, the Special Rapporteur had not distinguished clearly enough between appeals in the event of expulsion and appeals against expulsion decisions. There was a need to study more thoroughly whether an appeal that did not have suspensive effect could be considered an "effective remedy", within the meaning of that phrase in international human rights law.

13. She understood that in preparing draft article 8, the Special Rapporteur had been inspired by the need to differentiate clearly between expulsion and extradition and to prevent extradition disguised as expulsion. It seemed to her, however, that the current wording was much too ambiguous and, while she was not opposed to referring the article to the Drafting Committee, she would like it to be made more precise.

14. Mr. NOLTE said that he generally agreed with draft article D1 (Return to the receiving State of the alien being expelled). It was not clear whether the proposal by Mr. Vasciannie and other members that the expelling State should "take measures to encourage" voluntary compliance with expulsion decisions would have the effect intended, as legitimate means of encouragement such as persuasion could hardly be described as "measures". It was therefore preferable to retain the Special Rapporteur's original proposal.

15. Paragraph 2 should not contain a specific reference to rules relating to air travel. Such rules were clearly covered by the general term "rules of international law", and it was unclear why they should be mentioned when

there was no reference, for example, to the rules relating to sea travel or simply to the rules applicable to the transport of persons. Referring only to air travel might suggest that most forcible expulsions took place through that means of transport and that this form of expulsion was particularly prone to abuse. That was not necessarily the case, however: a specific reference to human rights would be more appropriate.

16. One of the most important aspects of the topic under consideration was the review of or appeal against an expulsion decision. Like Mr. McRae, he considered that this should be the subject of a separate draft article, to be placed in the part concerning procedural rules. He concurred with the Special Rapporteur's reasoning that customary international law recognized, not the right to judicial review, but merely the right to an effective remedy. The latter derived from both State practice and human rights guarantees as interpreted by various treaty bodies. Another argument for such a right was that determining whether an expulsion was lawful under a review procedure would make it possible to apply the rules relating to State responsibility and diplomatic protection cited in draft articles I1 and J1. He therefore encouraged the Special Rapporteur to provide the Commission with a draft article on the right to an effective remedy against an expulsion decision.

17. That led to the question of suspensive effect. There, much depended on the question that was posed. If the question was whether all appeals against an expulsion decision must, *de lege lata*, have suspensive effect, then the Special Rapporteur's response—that that was not true—seemed correct. However, if the question was whether an appeal against an expulsion decision should have suspensive effect when the person concerned could plausibly claim that he or she faced the risk of torture or inhuman treatment, then the answer must be in the affirmative. That response was not based solely on a provision such as article 13 of the European Convention on Human Rights, which guaranteed the right to an effective remedy. It could also be drawn based simply on the procedural ramifications of the right not to be subjected to torture or inhuman treatment. That did not mean that there was a general right, under customary international law, to a remedy with suspensive effect in all expulsion proceedings, because in some cases fundamental rights might not be at risk of being infringed. However, the Commission could and should recognize, *de lege lata*, that appeals must have suspensive effect in cases where there was a risk of torture or inhuman treatment, as the European Court of Human Rights had done in its judgments in the *Čonka* and *Jabari v. Turkey* cases. After all, the prohibition of torture was an element of *jus cogens* and States had an obligation to ensure that this prohibition was effective.

18. While he agreed with the general thrust of draft article E1 (State of destination of expelled aliens), like Mr. McRae, he thought that it should be reformulated by the Drafting Committee. Paragraph 1 was too strict, because it was quite conceivable that a person might be expelled to a State that was not his or her State of nationality even when the State of nationality could be identified. That had implications for paragraph 2, which should be in the form of an indicative list.

19. Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) should be reworded to make it clear that the transit State was not required to restart the expulsion procedure from the very beginning.

20. The Special Rapporteur's reasoning behind draft article G1 (Protecting the property of aliens facing expulsion) was noteworthy. He had chosen two examples from German history to make his point, namely the expulsion of Jewish foreign nationals by the Bavarian authorities at the time of the Weimar Republic and the expulsion of millions of Germans and ethnic Germans by other States after the Second World War. The Special Rapporteur could obviously have cited different, terrible examples dating from the interim between those two periods of history. The examples that he had chosen were indeed appalling and worth mentioning, but broad conclusions should not be drawn from them, not only because the expulsions carried out after the Second World War raised very complex questions that the Special Rapporteur only touched upon, but also because the main motivation behind the expulsions was arguably not to confiscate property but rather to manifest various forms of hatred or to pursue political goals. That was why Ms. Escobar Hernández and Mr. Wisnumurti were right to say that draft article G1 should emphasize, not the motive for or purpose of confiscation, but rather the protection of the property of expelled persons in general. He therefore went along with Mr. Wisnumurti's proposal to make paragraph 2 the main paragraph of draft article G1 and agreed with Mr. Dugard's idea of moving the current paragraph 1 to the part of the draft articles that dealt specifically with prohibited forms of expulsion, such as mass expulsion. He wished to emphasize again, however, that he considered the inclusion of a draft article on the protection of the property of expelled persons to be very important.

21. Draft article H1 (Right of return to the expelling State) should be clarified by the Drafting Committee. First, it should speak of the right of re-entry, as the concept of the right of return seemed to be used for cases in which people had been driven from their homeland. The main point, however, was that the current wording of draft article H1 was too broad. He himself did not interpret the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families or the resolution of the Inter-American Commission on Human Rights in *Case 7378 (Guatemala)* as recognition of a general right of return, as did the Special Rapporteur in paragraph 554 [para. 152][198] of the sixth report. The Convention only indicated that an earlier expulsion decision should not be used to prevent the person expelled from re-entering the State concerned, but that did not preclude other factors that might prevent re-entry. As for the Inter-American Commission on Human Rights, it had simply made a recommendation in a particular case. He accepted the idea that a right of re-entry should be the normal consequence of a final determination that an expulsion decision had violated certain rules. That right flowed from the principles of State responsibility and was recognized in the legislation and practice of certain States.

[198] The numbers in brackets refer to the numbering used in the mimeographed version of the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), available from the Commission's website. The chapters, paragraphs and footnotes were renumbered for publication in *Yearbook … 2010*, vol. II (Part One).

However, it must be made clear that only the violation of certain rules could give rise to a right of re-entry. The Special Rapporteur admitted as much when he wrote that an annulment of an expulsion decision founded on a purely procedural error could not confer that right. He himself would like the Commission to go further and state that the right of re-entry could only ensue from the violation of a substantive rule of international law.

22. He generally agreed with draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) but wished to emphasize that States should be held responsible only for violations of the rules of international law. He therefore suggested that the words "unlawful expulsion" in draft article I1 be replaced with "internationally wrongful expulsion".

23. Draft articles D1 to J1 could be referred to the Drafting Committee.

24. Mr. GAJA said that he agreed that the draft articles proposed by the Special Rapporteur in his sixth report should be referred to the Drafting Committee, with one exception, to which he would return later. However, he had some doubts about the impact that the proposals could have if they were ultimately adopted by the Commission, mainly because of the difficulty of tackling some practical problems raised by expulsion.

25. Under draft article D1, aliens should be encouraged to comply with expulsion decisions voluntarily. However, as Mr. Dugard had noted, many aliens facing expulsion did not have the means to return voluntarily to their State of nationality or to go to any other State willing to accept them. They might also not wish to comply with a measure that they considered too harsh or think that if they refused to leave, the decision might be annulled or revised. In both cases, the alien could end up being detained. Such detention could last for some time before a State willing to accept the alien was found. It should be noted that the European Court of Human Rights had been rather lenient towards States concerning the length of such detention. The Commission might consider recommending some restrictions, not only on the length of detention but also on the very act of detaining aliens facing expulsion, at least in the absence of grounds of public policy or national security. Of course, the latter concepts should not be manipulated or rendered meaningless, but there was only so much that the Commission could do in that regard.

26. Whether aliens left a country voluntarily or not, they were likely to encounter economic difficulties in returning to the country in the event that an effective remedy was available and the appeal was successful. As Mr. Melescanu and Mr. Saboia had emphasized at the previous meeting, the suspensive effect of an appeal was essential for that remedy to be effective. Regardless of whether or not aliens were lawful residents, that remedy must always have a suspensive effect, unless considerations relating to national security came into play. A draft article on that issue should therefore be included. Mr. Nolte had suggested earlier in the meeting that an exception should be envisaged in cases where there was a risk of torture or ill-treatment; it would be better if the general rule was that an appeal had a suspensive effect.

27. The length of time spent in detention pending expulsion might be attributable to the difficulty of ascertaining the nationality of the alien or the attitude of the State of nationality. In many cases, the State of nationality would be the only State willing to receive an expelled person. However, for various reasons, that State might not wish to cooperate with the State that intended to expel the alien, particularly if such cooperation went against the grain. While enhancing cooperation between States would facilitate expulsion, it would also limit the length of time the persons concerned were detained. It was therefore a matter of considerable practical importance and should be further studied. Bilateral readmission agreements could enhance cooperation but might increase the risk that expelled persons would be subjected to torture or inhuman or degrading treatment. In addition, when such agreements were entered into with third States, the persons concerned risked being detained pending yet another expulsion.

28. Dealing with issues such as detention pending expulsion, the suspensive effect of an appeal against an expulsion decision and cooperation between States could lead to texts that supplemented the existing rules of general international law or even international instruments that enjoyed near universal acceptance. Finding solutions would be difficult—but the draft articles would at least have the benefit of addressing such fundamental issues.

29. Disguised extradition, even if it accounted for a relatively limited number of cases, deserved the Commission's attention. Endorsing the comments just made by Ms. Escobar Hernández, Mr. Gaja said that he was not certain that the proposed draft article 8 dealt with the issue properly. The article provided that: "Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft articles]."[199] The fact that the expulsion constituted disguised extradition was significant, since there had to be additional safeguards for persons who were not only returned to a country but returned to be tried or to serve a sentence. However, draft article 8 seemed to suggest that only the ordinary restrictions on expulsion applied in such cases. In other words, the fact that disguised extradition was involved changed nothing: such expulsion was treated like any other. An effort should be made to determine whether there were additional guarantees that should be applied in the requesting State: for example, ensuring a fair trial in the requesting State. Such guarantees would limit the number of expulsions that were in fact disguised extraditions.

30. Members of the Commission had a habit of asking Special Rapporteurs to carry out additional work. In the present case, little further work was needed; the Special Rapporteur could perhaps make some additional proposals that would give the outcome of the Commission's work more practical significance.

31. Mr. NOLTE, referring to what Mr. Gaja had presented as an intermediate proposal regarding the suspensive

[199] *Yearbook … 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

effect of an appeal, suggested that the difference between *lex lata* and *lex ferenda* might be significant in that context. If one acknowledged that suspensive effect came under *lex lata* in cases where there was a risk of torture or inhuman treatment, it might be said that, *de lege ferenda*, the Commission wished to encourage States to give appeals against all expulsion decisions suspensive effect. That distinction might be taken into consideration for the elaboration of a future draft article.

32. Mr. GAJA said that Mr. Nolte seemed to be changing the rules of the game. His comment was not really about the suspensive effect of an appeal but about the existence of an obligation not to return persons to a country where they risked being tortured. That, however, was a basic obligation that applied in all cases, regardless of whether an appeal had been made: it was not an incidental consequence of the appeal.

33. Mr. MELESCANU said that he did not believe that encouraging voluntary repatriation could create problems. In practice, what Mr. Gaja had said was true, but for some countries, including his own, there were legal implications. Absent some arrangement for voluntary repatriation, if a person subject to an expulsion decision refused to be expelled, the cost of his or her repatriation would not be defrayed. In Romania, for example, it was a fundamental principle that all citizens were repatriated and their travel paid for provided that they freely consented to return. If they refused, Romania could simply not cover their expenses. Nevertheless, he was pleased that Mr. Gaja had brought up some very practical and real problems at the current, very important stage of finalizing the draft articles. His observations should help to make the text more specific, so that it had a direct impact, and would help to resolve some of the difficulties involved in preparing the draft articles.

34. Sir Michael WOOD said that the second addendum to the sixth report of the Special Rapporteur was, as expected, thorough, detailed and thought-provoking. If at times he himself seemed to be criticizing the report, that was because the subject matter presented real difficulties—it was no reflection on the quality of the Special Rapporteur's efforts or of his reports. Member States still seemed to harbour serious doubts as to whether the Commission should address the topic, something that was hardly surprising given the political sensitivities and practical problems inherent in the subject matter—a point that Mr. Gaja had just made in more diplomatic terms. Mr. McRae had stated at an earlier meeting that it was not certain that the Commission could produce a result that would be widely accepted by Governments, a view that he himself shared. Perhaps that was immaterial and the Commission's role was to move forward even if Governments did not accept everything that it said in some areas. Nevertheless, it would be good for the Commission to reassess the topic in order to see where it was heading before it embarked on a second reading.

35. At the previous meeting, Mr. Vasciannie had raised several important questions about sources. The issue of sources was particularly difficult in an area like the present one, which went to the heart of State sovereignty and had mostly been dealt with by States in their domestic legislation. He was not sure that he would endorse all the Special Rapporteur's conclusions on the current state of customary international law in the field: for example, he was not convinced by the conclusion arrived at in paragraph 451 [para. 49], notwithstanding the lengthy analysis of domestic legislation, practice and writings that preceded it.

36. In determining the rules of customary international law, the Commission should look first and foremost to State practice. Writings, even those emanating from venerable bodies such as the Institute of International Law, should be treated with caution, as should case law under specific regional regimes such as the European Convention on Human Rights. Even when looking for State practice, the Commission must be very careful. European Union practice with regard to European citizens was probably of rather limited relevance to the topic under consideration. Of much more interest was Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.[200] It would be particularly useful to be able to show that the European Union and its 27 member States considered that they had been adopting rules required by international law, although it was not entirely clear to what extent that had been so. National laws and their implementation could be essential to ascertaining customary law in that area, and the Special Rapporteur had paid due attention to them. However, one problem was that the laws were constantly changing under the pressure of events and politics: for years, the United Kingdom had been adopting new legislation on immigration once a year.

37. However, that was perhaps not the main point. The fundamental question for the Commission was whether to engage in the codification or the progressive development of international law, or a combination of both. The Commission must indicate clearly—more than States ever did—whether it was seeking to identify *lex lata* or aiming to propose new rules for consideration by Governments, in the form either of a convention or, as suggested by Mr. McRae, of guidelines that represented best practices to be followed in that area. If the Commission intended, as seemed to be the case, to develop new laws or guidelines—in other words, if it was engaged in a policy exercise—perhaps it did not need to be very strict about sources. He tended to share the view expressed a few days earlier that the topic did not lend itself to the elaboration of draft articles that could eventually be part of a treaty; he was not of the view that the Commission should, as a matter of principle, assume that the outcome of its work would necessarily be draft articles suitable for conversion into a convention.

38. With regard to the proposed draft articles, several questions arose, most of which had already been raised by other members. He shared the doubts expressed about draft article D1, paragraph 1, which hardly seemed appropriate as a legal rule. In its current form, at least in the English version, it carried unfortunate undertones of

[200] *Official Journal of the European Union*, No. L 348, 24 December 2008, p. 98.

pressure to return "voluntarily". One might even wonder whether it was appropriate to speak of voluntary return where there was a legally binding decision that required a person to return to his or her country. Like others before him, he questioned whether there was a need to mention air transport rules in paragraph 2 and was not sure what the reference to "rules of international law" was intended to convey in that context. Since it had been said repeatedly that the fundamental rights of persons facing expulsion must be respected, it was not clear what more there was to say about the practical arrangements for expulsion. While paragraph 3 might well reflect good practice, it was not clear that it should be made into a rule of law.

39. The chapter on appeals against the expulsion decision was in many ways the most interesting. In general, he agreed with the conclusions of the Special Rapporteur, who showed rather convincingly that the practice of States varied considerably and that there were few, if any, rules of customary law in that field. Even treaty provisions varied substantially. Indeed, the very notion of "appeal" was not clear. Since the term most commonly used seemed to be "review" and the nature of such reviews varied from one State to another, he was not sure that the phrase "right of appeal" could be employed unless one knew what was meant by that right in practice. He agreed with the Special Rapporteur's conclusion that there was no basis in international law for a general right to a suspensive appeal, especially when people repeatedly exercised the right to appeal in a manner that could become abusive. However, as Mr. Nolte had explained, a different position might be taken when the right to life and the right not to be subjected to torture were concerned, and the issue deserved further consideration. He was not convinced by Mr. Gaja's argument for a general right to a suspensive appeal, because even if there were a such a right when the right not to be subjected to torture or the right to life was threatened, that would not necessarily mean that aliens would invoke it in any appeals they made, as they would have to have some factual basis for doing so. However, he agreed with members who considered that draft article E1 (State of destination of expelled aliens) could advantageously be restructured.

40. He was perhaps misreading draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), yet he had to confess that he still did not understand it. The amended version read: "The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State."[201] But what rules for the protection of human rights should apply in the transit State under that provision? Presumably, it could only be the rules of international human rights law by which the transit State was bound. However, the draft article seemed to suggest that the rules on human rights applicable in the expelling State must apply in the transit State *mutatis mutandis*—whatever that term meant in that context. If a State party to the European Convention on Human Rights expelled an alien via a third State that was not a party to the Convention, for example the United States, would the United States be bound to apply the Convention *mutatis mutandis*? It was also unclear whether draft article F1 was intended to impose an obligation on the expelling State, the transit State or both. In other words, while the issue of the transit State must certainly be addressed, the drafting of article F1 needed careful attention.

41. He had no serious questions concerning draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) although, like other members, he was not sure that draft article J1 on diplomatic protection was necessary. He shared the view expressed by Mr. Nolte earlier concerning draft article G1 (Protecting the property of aliens facing expulsion). On the other hand, draft article H1, on the "right of return", needed careful review. He was not sure that that was the most appropriate term in the context. More substantially, like Mr. Nolte and other members, he had doubts as to how far one could generalize a right to have an expulsion decision revoked and to be allowed to return to the expelling State. It all depended on the particular circumstances. Finally, with regard to revised draft article 8 on the prohibition of extradition disguised as an expulsion, he continued to think that the provision was out of place in the draft articles. However, if it were to be included, it would have to be substantially recast to achieve what seemed to be its purpose.

Mr. Niehaus (Vice-Chairperson) took the Chair.

42. Mr. HMOUD said that the Special Rapporteur had done outstanding work in identifying issues that must be addressed in the draft articles in the light of State practice, national and international proceedings, jurisprudence and scholarly writings. It should be noted that State practice was not uniform in several of the areas tackled in the report and that national legal systems took different approaches to the proceedings in expulsion-related matters. The Special Rapporteur had been careful in trying to reach conclusions based on *lex lata* when international rules existed and in developing new rules when practice was not uniform, taking into account the need to strike a balance between the interests of the State and those of the alien. Concerning the implementation of expulsion decisions, while voluntary departure should be the option chosen by States as far as possible when they implemented an expulsion decision, the wording of draft article D1 (Return to the receiving State of the alien being expelled), paragraph 1, should be revised to indicate that it was only an option and not a binding rule. There was insufficient practice in that area to stipulate that the State must encourage voluntary compliance with expulsion decisions by the persons concerned. Concerning forcible implementation, he agreed that the expulsion decision should be carried out in accordance with the rules of international law and that the provisions already included in another draft article on respect for the human rights and dignity of the expelled person were sufficient. Perhaps paragraph 2 should further provide, however, that the measures taken to enforce the decision should be only those needed to implement it. That seemed warranted given the fact that the paragraph focused on the "orderly transportation" of the alien being expelled. Regarding appeals against expulsion decisions, he said that although the right to an effective remedy so as to challenge an expulsion decision had been provided for in draft

[201] The Special Rapporteur presented a revised version of this draft article in a meeting document with distribution limited to the members of the Commission.

article C1 (Procedural rights of aliens facing expulsion),[202] the Special Rapporteur seemed to consider that no specific rule on the right of appeal was necessary. Since the content of that right was recognized in international law, it was hard to understand why the Special Rapporteur concluded in paragraph 461 [para. 59] of his report that in general the issue "falls … within the scope of States' domestic legislation". While it could be left to national systems to determine the body responsible for reviewing expulsion decisions and the procedure for review, the draft articles should at least cover what international law already recognized as a right to review a decision. It might be specified for that purpose that access to effective remedies included the right of persons subject to expulsion to have their case reviewed by a competent authority of the expelling State, unless there were reasons of national security and public order. He agreed with the Special Rapporteur that no rule of international law provided that a suspensive effect should be the consequence of an appeal. In response to the comments made by Mr. Nolte and Sir Michael, he suggested that the problem could be resolved by defining the notion of a "safe country" elsewhere in the draft articles or by providing that no one should be sent to a State where he or she would be persecuted as an alien. The issue of the suspensive effect of an appeal would then no longer arise.

43. With respect to the relationship between the expelling State and States of transit and destination, the Special Rapporteur, understandably, had emphasized the rights of the expelling States and States of destination. It was also established under international law that the State of nationality had an obligation to receive its nationals. However, there was no convincing argument not to refer in the draft articles to the right of an expelled person to be sent to the State of his or her choice when that State agreed to admit the person into its territory. The expelling State had the right of expulsion under international law, but that should not deprive a person subject to expulsion of the possibility of choosing the country to which he or she wished to be sent, as long as the receiving State consented to it and the expelling State had no compelling reason to refuse that choice. A provision to that effect should be incorporated into draft article E1 (State of destination of expelled aliens), preceding the paragraph on the State of nationality and establishing a sequence among alternative States of destination. While the Special Rapporteur made it clear in his report that there was no international obligation for a State other than the State of nationality to admit an alien, except when that State agreed to the admission by treaty or otherwise, paragraph 2 of draft article E1 was not clear in that regard. It seemed to suggest that the State of residence, the passport-issuing State or the State of embarkation had a duty to admit expelled aliens. If that was not the case, then the paragraph, at least the English version thereof, should be more clearly worded. He agreed that the concept of "safe State" should be incorporated in the draft article to ensure that aliens were not sent to a country where they might be persecuted. Although the concept was simply a general rule under international refugee law, many States currently included it in their agreements with other States involving the return of persons, in order to ensure that the person returned would not face persecution in the receiving State.

44. The pertinent rule with regard to protection of the property rights of expelled aliens was article 17 of the Universal Declaration of Human Rights, which stated:

> 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property.[203]

There had been considerable differences of opinion within the international community on the existence of the right to property and the content of the right beyond what was provided for in article 17, which could be considered a general rule of international law. What was relevant to the issue at hand was that the expelling State could not arbitrarily deprive persons subject to expulsion of their property. Conversely, there was no rule of international law that prohibited a State from expropriating the property of an alien, as long as it did not do so arbitrarily, and a large body of jurisprudence on the matter asserted that the State had that right. While the concept of arbitrariness had been subject to various interpretations, the expropriating State must at least compensate the owner for the property that it had seized. There was no single standard of compensation for expropriation. In accordance with General Assembly resolution 1803 (XVII), dated 14 December 1962 and entitled "Permanent sovereignty over natural resources", compensation must be "appropriate", while under the standard applied in the *Chorzów Factory* case, it must be "fair" and, according to the formula used by United States Secretary of State Cordell Hull in his Note of 3 April 1940 to the Ambassador of Mexico,[204] it must be "adequate, effective and prompt". However, draft article G1 as currently worded imposed an obligation on the expelling State to return property to aliens at their request, which clearly contravened the right of the State under international law to expropriate the property of aliens as long as certain international guarantees were met, including the payment of compensation according to the standards just mentioned. While he supported the introduction in draft article G1 of the idea of prohibiting the expulsion of aliens for the purpose of confiscating their property, he pointed out that the concept came under *lex ferenda*.

45. Turning to the return to the expelling State of aliens expelled illegally, he said that he agreed that the draft articles should include the principle of return to the expelling State as a consequence of wrongful expulsion, despite the apparent lack of State practice in that regard. Like Mr. Nolte, he did not see how return could be a consequence of the violation of the rules of national law if the same national law prohibited return. If a State had the right under international law to control the entry, stay and exit of an alien, it should not be forced to admit an alien except under conditions specified by international law or when there was a violation of international law and the appropriate reparation of the violation was the readmission of the alien. He would therefore support confining draft article H1 (Right of return to the expelling State) to situations of expulsion that violated international law—including the rules of the current draft articles when they became international law—and to cases where return would not be an appropriate consequence, such as

[202] *Yearbook … 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

[203] General Assembly resolution 217 A (III) of 10 December 1948.

[204] See M. M. Whiteman, *Digest of International Law*, vol. 8 (1967), p. 1020.

when readmission would threaten public order or public safety. In that case, of course, return would not create any acquired right of stay or residency.

46. Regarding the responsibility of the expelling State as a result of an unlawful expulsion, he noted that article 33, paragraph 2, of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission in 2001 seemed pertinent to the consequences of an internationally wrongful act. The paragraph provided that the part of the draft articles on the content of responsibility was without prejudice to any right arising from the international responsibility of the State that might accrue directly to any person or entity other than a State.[205] Paragraph 1 stated that "[t]he obligations of the responsible State set out in this Part [the Part on the content of the responsibility, with particular reference to reparation] may be owed to another State, to several States or to the international community as a whole".[206] The provisions on reparation in the draft articles on State responsibility were thus addressed to injured States.

47. He agreed with the content of draft article J1 on diplomatic protection, although the right of the State in which an alien who was stateless or had refugee status resided to exercise diplomatic protection should also be mentioned, in line with article 8 of the draft articles on diplomatic protection adopted by the Commission in 2006.[207] In conclusion, he recommended that draft articles D1 to J1 contained in the sixth report of the Special Rapporteur be referred to the Drafting Committee and said he hoped that the changes that he had proposed would be taken into consideration.

48. Mr. VÁZQUEZ-BERMÚDEZ, noting that some members of the Commission had again stressed not only the urgency of the topic but also its sensitivity and complexity, said that given the progress made so far, including the preliminary adoption of a large number of draft articles, he was convinced that the Commission would rise to the occasion and submit to the General Assembly, in a timely manner, draft articles that had been adopted on first reading and were sufficiently well structured and balanced to meet with general approval. It was therefore encouraging that the Special Rapporteur had introduced seven new draft articles, which he generally endorsed, with a few exceptions.

49. Section D of chapter IV [chap. III] of the sixth report dealt with the enforcement of expulsion decisions. The Special Rapporteur provided several examples of serious violations of the human rights of aliens during their expulsion, including cases of death. Draft articles 8 and 11, which had been provisionally adopted by the Drafting Committee, afforded the necessary protection in that regard. Draft article 8 provided that any person who was being expelled should be treated with humanity and respect for the inherent dignity of the human person throughout the expulsion proceedings. In addition, he or she was entitled to respect for his or her human rights, in particular those cited in the draft articles.[208] Draft article 11[209] related to the expelling State's obligation to protect the lives of aliens. It therefore seemed unnecessary to make another reference in draft article D1, on the conditions of return of expelled persons, to the obligation to respect the human rights of aliens. However, it was important to do so in the commentary to the draft article because, as the Special Rapporteur had shown, it was often during the enforcement of an expulsion decision that acts of violence against the persons affected occurred. In addition to the draft articles relating to respect for human rights, the Special Rapporteur was proposing draft article D1, which was based on State practice and international instruments relating mainly to air travel, including the Convention on International Civil Aviation and the relevant IATA guidelines. He agreed with the approach taken in paragraph 1, since by encouraging the voluntary return of the alien, difficulties in the enforcement of expulsion decisions could be prevented and avoided. He endorsed Mr. Vasciannie's comments to the effect that the State was required not only to "encourage" voluntary compliance with expulsion decisions but also to "take measures to promote voluntary return", as stated in one of the Twenty Guidelines on Forced Return adopted by the Committee of Ministers of the Council of Europe in May 2005:[210] the phrase clarified the content of the obligation. The word "facilitate" could even be added, so that the phrase read: "take measures to promote and facilitate voluntary return".

50. Paragraph 2 of draft article D1 was useful, since in cases of forcible implementation of an expulsion decision, the expelling State must take the necessary measures to ensure that the alien being expelled was transported to the receiving State in accordance with the rules of international law. It did not seem necessary to make a specific reference in the paragraph to the rules relating to air travel: they could instead be mentioned in the commentary. The sentence could thus end after the words "international law".

51. It also seemed useful, in the context of the progressive development of international law, to retain paragraph 3, which provided that the expelling State must give the alien being expelled appropriate notice to prepare for his or her departure, in order to protect the rights of the alien, who was clearly in a vulnerable position.

52. Turning to the detailed analysis made by the Special Rapporteur of appeals against expulsion decisions, he noted that at the previous session, in the first addendum to the sixth report, the Special Rapporteur had proposed draft article C1[211] on the procedural rights of aliens facing expulsion, which included the right to challenge the expulsion, the right to a hearing and the right of access to effective remedies to challenge the expulsion decision without discrimination. The Special Rapporteur had

[205] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 28, and pp. 94–95 for the commentary thereto.

[206] *Ibid.*

[207] *Yearbook … 2006*, vol. II (Part Two), p. 25, para. 49.

[208] *Yearbook … 2010*, vol. II (Part Two), p. 158, para. 117, footnote 1272.

[209] *Ibid.*, p. 158, para. 120, footnote 1275.

[210] Document CM(2005)40 final, of 9 May 2005. See also the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Comments on the Twenty Guidelines on Forced Return (925th meeting), document CM(2005)40-Add.

[211] *Yearbook … 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

argued for the inclusion of those provisions on the basis of State practice and case law, particularly that of the Court of Justice of the European Communities. He himself had expressed support for the Special Rapporteur's proposal in his statement at the time. He had also endorsed Mr. Gaja's proposal to include an additional procedural guarantee in the draft article[212] concerning the stay of execution of expulsion decisions while the decision was being appealed in order to ensure that this could be an effective remedy in the event that the competent authority decided in favour of the applicant. The Special Rapporteur's thorough analysis of the relevant international and regional multilateral human rights instruments, State practice and case law only confirmed the need to include such a procedural guarantee, namely of "the right of access to effective remedies to challenge the expulsion decision without discrimination", once such a decision had been made. As the Special Rapporteur had pointed out in paragraph 451 [para. 49], "[t]he submission of an individual appeal against an expulsion order is therefore clearly established under international law, particularly since the end of the Second World War and the subsequent creation of various institutions for the protection of human rights. We believe it now has the force of customary law".

53. In 2010, he himself had supported a proposal to add a provision on the suspensive effect of an appeal against an expulsion decision, and he maintained that position today. He noted with satisfaction that Mr. Gaja also maintained his position, and he endorsed the arguments that Mr. Gaja had put forward earlier, in particular on the need to ensure that the suspensive effect was not limited to cases where there was a risk of torture or cruel, inhuman or degrading treatment in the country of destination. He endorsed the Special Rapporteur's arguments in paragraph 456 [para. 54] of his report but disagreed with those in the following paragraph, which appeared to be based more on policy considerations. Decisions like the *Mamatkulov and Askarov v. Turkey* judgment of the European Court of Human Rights supported the notion that the effectiveness of remedies against expulsion decisions could be ensured only if appeals had a suspensive effect on such decisions.

54. Draft article E1 (State of destination of expelled aliens) was useful for States. Paragraph 1, which provided that an alien subject to expulsion must be expelled to his or her State of nationality, set out a basic and logical rule that was also consistent with human rights instruments.

55. Other options would be considered in cases where such expulsion was not feasible, for example if the nationality of the person concerned had not been identified. It should be clearly established that the potential States of destination listed in paragraph 2 of draft article E1 were options, provided that the State in question agreed to receive the expelled person.

56. In paragraph 3 of the draft article, he did not see the practical difference between the references to "a State that has not consented to admit him or her into its territory" and to a State "that refuses to do so".

57. It did not seem necessary to make an explicit reference in the draft article to the risk of torture or inhuman or degrading treatment faced by the alien subject to expulsion, especially if only the State of nationality was mentioned in that respect. It should be recalled that the Drafting Committee had already adopted draft article 14,[213] which prohibited the expulsion of a person to a State where his or her right to life or personal liberty was in danger of being violated, and draft article 15,[214] which prohibited the expulsion of a person to a country where there was a real risk of being subjected to torture or to inhuman or degrading treatment. Draft articles 14 and 15 would clearly be applied in conjunction with draft article E1, something on which explanations could be provided in the commentary.

58. It was important to develop a draft article explicitly stating that in the event of transit through a third State during the return of an alien to the country of destination, that State must protect the alien's basic rights. On the other hand, it did not seem necessary to make a specific reference to the rules of international human rights law. He thought that the wording of the draft article could usefully be improved, as Sir Michael had suggested.

59. Part Three of the report concerned the legal consequences of expulsion. While draft article G1 was entitled "Protecting the property of aliens facing expulsion", to be more precise it would be better to refer to protecting the property rights of aliens. He endorsed paragraph 1 of the draft article, which prohibited the expulsion of an alien for the purpose of confiscating his or her property. It was an important provision because, as the Special Rapporteur had shown, such cases actually came up in practice. It was clear that expulsions should be carried out in accordance with the rules of international law on the right to property and the other economic assets of aliens, and that aliens must not be deprived of such rights as the right to make use of and to enjoy the benefits of their property. Universal and regional instruments were quite explicit on that point: one had only to refer to article 17, paragraph 2, of the Universal Declaration of Human Rights: "No one shall be arbitrarily deprived of his property."[215]

60. To make it clear that the expelling State must protect, not the alien's property, but his or her right to own property, the beginning of draft article G1, paragraph 2, could read: "The expelling State shall protect the property rights of any alien facing expulsion and shall allow the alien to dispose freely of the said property, even from abroad". In addition, the phrase "to the extent possible" in square brackets should be deleted.

61. It might be helpful for the Special Rapporteur to explain what was meant, with reference to the property of aliens facing expulsion, by the wording to the effect that the expelling State "shall return it to the alien at his or her request or that of his or her heirs or beneficiaries". If that phrase was meant to refer to restitution, that meant that the State had expropriated the property of the person in question. Restitution was also one of the ways in which

[212] *Ibid*., vol. I, 3065th meeting, para. 70.

[213] *Ibid*., vol. II (Part Two), p. 157, para. 114, and p. 159, para. 124, footnote 1278, for the draft article as revised.

[214] *Ibid*., p. 157, para. 114, and p. 159, para. 126, footnote 1279, for the draft article as revised.

[215] See footnote 203 above.

a State might remedy a wrongful act that incurred its international responsibility. It was therefore necessary to clarify the meaning of that provision with a view to potential editorial changes.

62. Turning to the right of return in the case of expulsion characterized as unlawful by a competent authority of the expelling State or by an international court (draft article H1), he shared the view of the Special Rapporteur that not to permit the alien to return would be to legitimize the unlawful nature of the expulsion. In the draft article, the Special Rapporteur had struck a good balance between the interests of the expelling State and those of the alien by allowing for a derogation from that right in the event of a threat to public order or public security. He supported members of the Commission who had pointed out that the reference should be to re-entry rather than to return, a term that was usually used in other contexts. In that connection, he noted that the Inter-American Commission on Human Rights had recognized that right [*Case 7378 (Guatemala)*]. That said, the wording of draft article H1 could be improved: instead of the words "[a]n alien expelled on mistaken grounds", it would be better to say, for example, "[a]n alien expelled on grounds invoked in error or without justification", in other words, when the grounds were baseless.

63. With regard to the international responsibility of the expelling State, it should be noted that under the regime of the responsibility of States for internationally wrongful acts, a State that expelled an alien in breach of the rules of international law incurred international responsibility. He endorsed the Special Rapporteur's use of a general formulation in draft article I1, which referred to the general regime of the responsibility of States for internationally wrongful acts. However, it must be borne in mind that the expelling State incurred responsibility only if it had violated an international obligation. That would not be the case if, for example, it had violated a rule of domestic law that did not reflect a rule of international law.

64. Moreover, an expulsion decision might be lawful in itself, but the expelling State could incur international responsibility if, for example, an alien was subjected to acts of torture or to cruel, inhuman or degrading treatment by agents of the expelling State when they escorted the alien back to the country of destination.

65. It was indeed useful to remind States, as was done in draft article J1, that they could exercise diplomatic protection, and for references to be included in the commentary in order to encourage States to exercise diplomatic protection. Furthermore, it should be made clear that persons whose rights had been violated were entitled to institute proceedings in a personal capacity, independently of any action that might be taken by the State of nationality. On that point, he cited the work of Mr. Dugard, Special Rapporteur on diplomatic protection.[216]

66. With regard to draft article 8 on the prohibition of extradition disguised as expulsion, he had already stated in 2010 that the Special Rapporteur's revised version[217] could be referred to the Drafting Committee, as it was a better basis for the Commission's work.

67. In conclusion, he was in favour of referring the proposed draft articles to the Drafting Committee.

68. Mr. PETRIČ said that he wished to commend the Special Rapporteur on his excellent report and agreed to the referral of all the proposed draft articles to the Drafting Committee. The Commission's objective should be to establish rules of international law for codifying the topic of the expulsion of aliens as part of the progressive development of international law. As expulsion was a contemporary problem, the Commission must base itself on the contemporary practice of States, even if the problem had also presented itself in the past. The practice of States during the period leading up to the Second World War was of only limited relevance, as were the judicial decisions and writings of that period, when the idea of State sovereignty had been unquestioned and the principles of human rights had not yet been fully formed. During the Second World War and immediately thereafter, Europe in particular had witnessed significant population movements. Millions of people had been deported or expelled from the homes where they had lived for generations, even though they had been neither aliens nor illegal immigrants. That special and in some respects cataclysmic historical situation, preceding the drafting of the Charter of the United Nations and the Universal Declaration of Human Rights, had led to the development of the Convention relating to the Status of Refugees and the ensuing implementation of national and international rules concerning the treatment of refugees and asylum seekers.

69. Today, in addition to the refugees who were victims of international and national conflicts or natural disasters, there were millions of "refugees" from poverty endeavouring to gain a better life by crossing State borders illegally. Most were seeking asylum for economic reasons and had not been persecuted in their countries.

70. While States had the right to expel aliens, especially those who were unlawfully in their territory, the imperatives of respect for human rights, human dignity and non-discrimination placed limits on that sovereign right. The Commission should seek a balance between those two poles, sovereignty and human rights—a balanced approach like the one suggested by the Special Rapporteur—and it should develop minimum standards that States must respect when expelling aliens. However, it must be recalled that expulsion occurred in a number of very different contexts: for example, the situation of the European Union member States was different from that of other countries. The problem of the expulsion of illegal

[216] Preliminary report: *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1 (draft articles 1–9); second report: *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514 (draft articles 10–13); third report: *Yearbook … 2002*, vol. II (Part One), document A/CN.4/523 and Add.1 (draft articles 14–16); fourth report: *Yearbook … 2003*, vol. II (Part One), document A/CN.4/530 and Add.1 (draft articles 17–22); fifth report: *Yearbook … 2004*, vol. II (Part One), document A/CN.4/538 (draft articles 23–27); sixth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/546; and seventh report: *Yearbook … 2006*, vol. II (Part One), document A/CN.4/567. The draft articles on diplomatic protection and the commentary thereto adopted by the Commission are reproduced in *ibid*., vol. II (Part Two), pp. 24 *et seq*., paras. 49–50.

[217] *Yearbook … 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

aliens could sometimes reach extraordinary dimensions, as had been the case in Malta a few years previously and was currently the case in Lampedusa, Italy.

71. Concerning the treatment of aliens, those both lawfully and unlawfully present in its territory, a State must take into account the fundamental differences that existed between States that had been built through immigration, like the United States of America, and States that tried to protect their identity, especially in the current period of globalization. Various types of integration policies and ways of treating aliens were accordingly needed.

72. The Commission must take into account those realities in order to produce an effective instrument. It should limit itself to developing firmly established minimum standards and procedural guarantees and leave it to States to regulate the treatment of aliens in their territory. In short, the draft articles must leave scope for national policies but nevertheless ensure that respect for human rights, human dignity and non-discrimination were guaranteed when States took expulsion measures.

73. As the Special Rapporteur had suggested, and in order not to create conflicts of law, the Commission should keep in mind the fact that the draft articles excluded certain categories of aliens, particularly those whose status was regulated by other instruments, such as those on refugees and on asylum.

74. He agreed with the Special Rapporteur on the need to be careful with regard to the suspensive effect of judicial review of expulsion decisions (para. 452 [para. 50]). Another facet of the suspensive effect must also be borne in mind, namely the legal uncertainty of applicants who often had to wait years before a constitutional court or the European Court of Human Rights reached a decision.

75. Turning to draft article D1 (Return to the receiving State of the alien being expelled), he noted that paragraph 1, which stated that the expelling State should "encourage" the voluntary departure of the alien being expelled, had been the subject of numerous comments. As he saw it, the issue should be left to States to decide, particularly with respect to the means of implementation. If the purpose of the paragraph was to set out a guiding principle, that would be of little benefit if the Commission chose to adopt a legally binding instrument. As far as paragraph 2 was concerned, he would delete the reference to rules of international law relating to air transport and perhaps refer instead to the protection of human rights. In the same paragraph, the phrase "as far as possible" should be deleted, as it could open the way to endless discussions. In paragraph 3, the words "unless there is reason to believe that the alien in question could abscond during such a period" should also be deleted. In a codification exercise, such practical matters should not be raised.

76. Paragraph 1 of draft article E1 (State of destination of expelled aliens) posed no particular problem. In paragraph 2, however, there was a need to delete the words "where appropriate", which left extensive room for manoeuvre that was hardly compatible with an international instrument. Regarding paragraph 3, it should be stressed that the State of nationality was often misidentified and that aliens who had fled their country were unlikely to wish to return. In addition, he failed to understand why the notion of State of residence was mentioned in paragraph 2 but not in paragraph 3. In practice, aliens were most often expelled to the State of embarkation. While thanking the Special Rapporteur for his important work on the issue, he thought that the Drafting Committee should look into the provisions of the draft article, which required further consideration in the light of State practice.

77. Regarding the new version of draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), he said that he shared the concerns expressed by Sir Michael and considered that the Drafting Committee should make the text more precise. Regarding draft article G1 (Protecting the property of aliens facing expulsion), he endorsed paragraph 1 but thought that the words in square brackets in paragraph 2 and the words following the phrase "to dispose freely of the said property" should be deleted. In addition, it might be appropriate to specify in a draft article of that kind whether the expelled alien had been lawfully or unlawfully present in a State's territory. There was no doubt that, under international law, lawfully resident aliens retained title to the property that they had acquired, but the fact that some aliens resided in States unlawfully must not overshadow the plight of the thousands of aliens who turned up at borders impoverished and without documentation. In that regard, it should perhaps be indicated in the draft article that even if the State of destination had not yet decided whether to grant a visa, it must afford the applicants decent living conditions.

78. Draft article H1 (Right of return to the expelling State) was the article that had probably raised the most difficulties. Aliens expelled on mistaken or unlawful grounds, even though they had been residing in the expelling State lawfully, should be granted the right of return. Whereas illegal aliens expelled unlawfully were entitled to compensation, according to the case law of the European Court of Human Rights, in practice, they did not have the right of return. Thus, to grant illegal aliens who had been expelled unlawfully the right of return to the expelling State would be to go too far: even generally accommodating States would have difficulty in accepting such a right. Lastly, draft article I1 (The responsibility of States in cases of unlawful expulsion) and draft article J1 (Diplomatic protection) posed no particular problems. Commending the Special Rapporteur on his excellent work, he invited the Commission to press forward, with an eye towards the future, by focusing on the contemporary problems posed by the expulsion of aliens and on the practice of States.

79. Mr. HASSOUNA said that he would first like to thank the Special Rapporteur for his detailed and thorough report. He agreed with most of the positions advanced by members of the Commission and would simply like to make a few general comments. Draft article D1 (Return to the receiving State of the alien being expelled) raised the issue of the criteria to be used for forcible implementation of an expulsion decision. Proposals had been made on that score by European organizations and institutions. For example, the European Committee for the Prevention

of Torture and Inhuman or Degrading Treatment or Punishment considered that no more force than was reasonably warranted by the alien's own conduct should be the rule.[218] Because that notion was so broad, questions arose about its scope in practice. For example, did escape attempts during expulsion by air travel or cases of self-injury permit the use of restraints from the outset of the expulsion? If an alien escaped or caused harm while being escorted from a country on a commercial flight, what were the expelling State's obligations to the passengers? Was any liability incurred by the escorting officials?

80. The issue of remedies against an expulsion decision required clarification and it should be addressed in the draft articles. The Special Rapporteur stated in paragraph 461 [para. 59] that there was no basis in international law for establishing any rule regarding remedies against an expulsion decision. Thus, apart from invoking diplomatic protection before the ICJ, persons whose international rights had been violated had no option other than to initiate civil proceedings in the domestic courts of the expelling State, where immunity might come into play, or before the relevant regional human rights organizations. In other words, even if the State of destination agreed to the return of the expelled person, it might be difficult under international law to enforce the right to a remedy or compensation for unlawful expulsion. Therefore, it would be useful to study the issue further. It should also be noted that many international instruments suspended the right of appeal against an expulsion decision for compelling reasons of national security. Although there was always a risk of abuse in the application of those instruments, States, fortunately, were still cautious about claiming a national security exception, given the precedents that might be set as a result and the potential for reprisals by armed States. As the Institute of International Law had pointed out, expulsion decisions taken in wartime against aliens whose conduct was a threat to the security of a State arguably fell under the national security exception. The modern notion of the war on terror, however, could blur the issue.

81. Refusal by States to admit former nationals who had been expelled was a very problematic issue. Such refusal might prevent another State from exercising its right to expel an alien and lead to prolonged detention until the expelling State was able to find a State of destination other than the alien's former State of nationality. While the report addressed the question of whether the former State of nationality could refuse to admit the alien and noted that the expulsion could be suspended if that State refused to admit the alien, it did not go into the consequences for the expelling State. Nothing was said about the procedures and conditions for the alien's care and detention or available remedies, even though those were important issues. With regard to the "safe country" concept, it might be useful to consider how often the list of such countries should be updated, given that characterizing a country as "safe" was intended to speed up the expulsion process but did not replace a review of applications on a case-by-case basis. Criteria should be set for designating countries as "safe".

82. Concerning the expulsion of an alien for the purpose of confiscating his or her property, draft article G1 (Protecting the property of aliens facing expulsion) reflected the current state of international law, but it should perhaps provide for an exception when, in accordance with the right to due process, a court ruled that certain property had been acquired illegally under international law or domestic law. As currently worded, paragraph 2 of draft article G1 could be used to prohibit the State from deriving benefits from illegally obtained property if the offender had been expelled.

83. Draft article H1 (Right of return to the expelling State) said nothing about the status of aliens who enjoyed the right of return. While States could be required to accept the return of aliens, they were not obliged to grant them the same status as in the past, even if the expulsion had been contrary to international law. That gap should be filled so that a State that agreed to the return of an expelled person would not be able merely to grant a tourist visa or other document that prevented the alien from owning property, working or gaining access to the justice system to initiate new proceedings. In draft article I1 (The responsibility of States in cases of unlawful expulsion), it should be made clear that responsibility existed only in the event of unlawful expulsion under international law. While the regime of the responsibility of States ultimately permitted reparation to be obtained only for internationally wrongful acts, it might be appropriate to clarify that point. In the context of draft article J1 (Diplomatic protection), it was important to indicate that the expelled alien's State of nationality could exercise diplomatic protection on behalf of the alien. However, certain problems arose when the alien was a refugee who had been rendered stateless yet whose entry into its territory had been authorized by a State in order to grant nationality. The question then was whether the new State of nationality could make a claim for diplomatic protection on behalf of the new national or whether that would be precluded by the fact that the harm had been sustained before the person concerned had obtained his or her new nationality. Those specific issues did not need to be addressed in the draft article itself, but it would be useful to do so in the commentary. In conclusion, he expressed support for referring all the draft articles to the Drafting Committee.

84. Mr. KAMTO (Special Rapporteur) said that he wished warmly to thank all the members of the Commission who had taken part in the debate on the second addendum to his sixth report on expulsion of aliens, which seemed to have been generally well received. He was pleased that all members had agreed to refer to the Drafting Committee all the proposed draft articles, together with commentaries, observations and some proposals for amendments. In their general comments, several members had queried the approach to the topic, asking whether the Commission was drawing up guidelines, draft articles or general principles. He was puzzled as to why the question had been raised now—such questions usually came up at a later stage. Given that the draft articles dealt with a complex topic and national practices varied greatly, it was more a matter of progressive development than of codification. The issue of sources had also been raised: he wished particularly to thank Mr. Vasciannie for his excellent remarks.

[218] *CPT standards* (CPT/Inf/E (2002) 1 - Rev. 2010), p. 57, para. 36 (available from www.cpt.coe.int/en/documents/eng-standards.pdf).

85. The question of whether the Commission was engaging in codification had continually been coming up ever since the item had been placed on the agenda—a rather surprising state of affairs. What should be done? Were the Special Rapporteur on the expulsion of aliens and all the Commission's other special rapporteurs to be told how to recognize a customary rule for the purposes of codification? Should the topic proposed by Sir Michael, the formation of customary rules of international law, be taken up and the issue resolved before anything else was done? Except for the responsibility of States and to some degree diplomatic protection, no topic brought together as large a body of legal instruments, practice and international and domestic case law as did the expulsion of aliens. Under those circumstances, it was surprising to hear that the topic could not be codified, still more, that the Commission wished to develop guidelines. In any case, it would be for the Commission to decide on the form to be taken by the text that would be submitted to the General Assembly. He had no personal stake in the matter. However, it should be recalled that the topic had contributed material to the codification of State responsibility: most of the cases cited in the articles on State responsibility for internationally wrongful acts[219] related to the expulsion of aliens, from the conclusions of the arbitral proceedings of the late nineteenth century to those of the present day, not to mention the decisions of treaty bodies and regional human rights courts.

86. He welcomed the fact that the Commission had decided to refer all the draft articles to the Drafting Committee. He had taken note of all the drafting proposals, which would be considered in due course by the Committee that had been set up for that very purpose. Regarding the proposal to draw up a draft article on the suspensive effect of appeals against an expulsion decision, he continued to maintain that he had not found sufficient material, and still less, sufficiently convergent State practice, to enable him to put forward a draft article. However, the Commission might choose—as a matter of policy rather than of progressive development, as practice varied so widely—to propose a draft article on the subject. There was no reason not to do so, but it should be borne in mind that the foundation was not sufficiently solid.

87. Regarding the proposal to draft an article on international cooperation, he wished to recall that such cooperation was a general principle underlying all the relations between States in peacetime, according to General Assembly resolution 2625 (XXV) of 24 October 1970, entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". If the Commission decided to include such a provision in the draft articles, something that did not seem particularly useful, it would have to do the same for all the other texts it had produced.

88. A member of the Commission had questioned the usefulness of draft article 8 (Expulsion in connection with extradition). All the topics were interrelated, however, and it was not because one was not specifically on extradition that a provision on that subject could not be developed. Draft article 8 was all the more useful precisely because it did not go into the subject matter of extradition. As to the retention of article J1 on diplomatic protection, he would have liked to have had more time to demonstrate its advantages. In the *Ahmadou Sadio Diallo* case, the ICJ had held that the application of the Republic of Guinea was admissible on grounds of the protection of Mr. Diallo's human rights, although diplomatic protection had previously been deemed to cover only certain personal rights. It would be regrettable not to reflect in a draft article the latest developments in the law. In conclusion, he thanked the members of the Commission for their support for referring all the draft articles on the expulsion of aliens to the Drafting Committee.

89. The CHAIRPERSON said that he took it that the Commission wished to refer to the Drafting Committee draft articles D1, E1, F1, as revised, H1, I1 and J1, as contained in the second addendum to the sixth report on expulsion of aliens, and revised draft article 8, as reproduced in a footnote to the report of the Commission on the work of the previous session.[220]

It was so decided.

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

[Agenda item 1]

90. Mr. HASSOUNA (Chairperson of the Working Group on methods of work) said that the Working Group on methods of work was composed of the following members: Mr. Caflisch, Mr. Candioti, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

The meeting rose at 1.05 p.m.

3095th MEETING

Tuesday, 31 May 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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[219] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 30 *et seq.*, para. 77.

[220] See footnote 217 above.

[*] Resumed from the 3092nd meeting.