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Summary record of the 3098th meeting

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SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-THIRD SESSION

Held at Geneva from 4 July to 12 August 2011

3098th MEETING

Monday, 4 July 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

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

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Constantin Economides, former member of the Commission

1. The CHAIRPERSON said that the second part of the sixty-third session of the International Law Commission was opening on a sombre note, as he had been informed of the death on 14 June 2011 of Constantin Economides, who had been a very active member of the Commission from 1997 to 2001 and from 2003 to 2006 and who had made a very valuable contribution to the Commission's work. For a long time he had been the Legal Adviser to the Greek Ministry of Foreign Affairs and had taken part in many conferences whose purpose had been the codification and progressive development of international law. He said that, on behalf of the Commission, he had sent a letter of condolence to the wife of Mr. Economides.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

Tribute to the memory of Mr. Francis Mahon Hayes, former member of the Commission

2. The CHAIRPERSON said that he had also received the sad news of the death of Francis Mahon Hayes, who had made a substantial contribution to the Commission's work. He had been a member from 1987 to 1991. Francis Mahon Hayes had been the Legal Adviser to the Irish Department

of Foreign Affairs before pursuing a full diplomatic career as his country's Ambassador to Denmark, Norway and Iceland, then as his country's Permanent Representative to the United Nations in Geneva and New York. He had also represented Ireland at several diplomatic conferences. He said that, on behalf of the Commission, he had sent a letter of condolence to the family of Francis Mahon Hayes.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

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

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

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

3. The CHAIRPERSON invited Mr. Kamto, the Special Rapporteur, to present his seventh report on the expulsion of aliens (A/CN.4/642).

4. Mr. KAMTO (Special Rapporteur) said that the purpose of the seventh report, which was short, was to outline the most significant recent developments concerning the topic which had occurred since the second addendum to the sixth report had been written.²⁵⁴ In addition to national legislation which had been proposed or adopted during that period, the judgment of the ICJ of 30 November 2010 in the *Ahmadou Sadio Diallo* case was of very great relevance to the topic under consideration. The report mentioned only two national developments, namely the initiative adopted in Switzerland at the end of 2010 and the rejection by the French Parliament in February 2011 of a draft law on deprivation of nationality. A third, more recent development had been the adoption in Denmark of a law on the same subject.

5. The people's initiative of 15 February 2008 on the expulsion of foreign criminals, which sought to amend the

* Resumed from the 3094th meeting.

²⁵⁴ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1-2.

Swiss Constitution, had been accepted by the Swiss people and cantons in a referendum held on 28 November 2010. The new constitutional clause provided for the automatic revocation of the right of residence by the competent administrative authorities and the expulsion from Swiss territory of aliens who had been convicted, in a decision which had become final, of murder, rape or any other aggravated sexual assault or any other form of violence such as robbery, trafficking in persons, drug trafficking or burglary and of aliens who had obtained social security or social assistance benefits by fraud. The expulsion measure was also accompanied by a ban on entering Swiss territory for 5 to 15 years, or 20 years in the case of persistent offenders. The new constitutional provision sought to limit the discretionary power currently enjoyed by the competent administrative authorities by introducing automatic revocation of the residence permit of an alien who had been convicted of the offences in question and automatic expulsion in consequence thereof. In practice, it removed the administrative authorities' margin of manoeuvre and their power to assess the situation of the individual concerned. The constitutional amendment of 28 November 2010 was therefore a step backwards, even by comparison with former legislation which, moreover, had been criticized because it created a "double punishment" by combining the main penalty, the prison sentence, with the ancillary penalty of expulsion, which was sometimes harder to bear than the main penalty.

6. In France, the idea of the new law had been put forward by the Head of State against the emotional background of the inauguration of the new prefect of the Department of Isère in the wake of some very violent incidents in July 2010 in a working-class neighbourhood of Grenoble, in the course of which some members of the police force had sustained casualties. The proposed text did not concern expulsion as such, but since it provided for deprivation of nationality which could lead to expulsion, he considered that it was of relevance to the topic, even though the draft law had been rejected by the Senate in February 2011.

7. On 24 June 2011, Denmark had adopted a law comparable to the Swiss constitutional amendment, in that it provided for the automatic expulsion of any alien resident in Denmark who had received a prison sentence in criminal proceedings. The issue had been highly controversial, for a substantial number of Members of Parliament had voted against the draft law and many NGOs had considered that it violated international law and that Denmark might be censured by the European Court of Human Rights.

8. The judgment delivered on 30 November 2010 by the ICJ in the *Ahmadou Sadio Diallo* case transcended that national practice which evidenced a tendency towards the tightening of legislation on the expulsion of aliens. The judgment would stand out in history on account of its juridical quality which, when all was said and done, was remarkable, although one of its most important aspects, namely that concerning the protection of an alien's right of ownership, was debatable. What made that judgment so important was that it addressed no fewer than seven legal issues raised by the expulsion of aliens: the notion of conformity with the law; the obligation to inform aliens

detained pending expulsion of the reasons for their arrest; the obligation to inform aliens detained pending expulsion of the grounds for that expulsion; the prohibition of the mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to alert, without delay, the consular authorities of the State of origin to the detention of their national; the property rights of the alien subject to expulsion; and recognition of the responsibility of the expelling State and its provision of compensation. Those points constituted the nub of the topic which the Commission had been examining for more than five years. In his seventh report, the Special Rapporteur reviewed them and, in each case, reproduced the relevant passages from the judgment and showed how the Court's position matched the arguments set out in the reports presented to the Commission on the subject of the expulsion of aliens. Since the Court's judgments were significant points of reference for codification, it seemed as if the Commission was on the right track. In particular, the seventh report showed that the draft articles proposed in line with the Commission's instructions to the Special Rapporteur rested on a sound and indisputable basis. Lastly, he invited the Commission simply to take note of the seventh report, which was purely informative and to leave it up to the Drafting Committee to decide whether to draw on it when it examined the draft articles which would be referred to it.

9. Mr. CANDIOTI drew attention to the fact that the seventh report also contained a chapter entitled "Restructured summary of the draft articles", which was very important because in it the Special Rapporteur had amended the titles and numbering of the draft articles.

10. Mr. KAMTO (Special Rapporteur) said that he had endeavoured to arrange all the draft articles in a more orderly fashion and to make them clearer and more coherent. The members of the Commission meeting in plenary session might wish to propose amendments to or to comment on the proposed plan for the draft articles which he had submitted to the Commission.

11. Mr. CANDIOTI said that the summary proposed by the Special Rapporteur should be sent to the Drafting Committee.

12. Sir Michael WOOD endorsed that proposal and thanked the Special Rapporteur for bringing the Commission up to date on recent developments. That information was very helpful. In taking note of the report, the Commission should not be deemed to have agreed or disagreed with the criticism contained therein, to which he did not fully subscribe.

13. Mr. McRAE said that the fact of taking note of the report was likely to have more implications than might be apparent, for it was tantamount to giving a mandate to the Special Rapporteur, who would probably include some of the passages from it in his commentary. In that connection, he wished to know precisely which provisions of the draft articles would, in the Special Rapporteur's opinion, conflict with the text of the Swiss people's initiative.

14. Mr. KAMTO (Special Rapporteur) said that the Swiss legislation did not conflict with any specific draft

article. During the debate on the sixth report, when the Commission had studied the grounds for expulsion and the practice of inflicting a “double punishment”, it had considered that that practice was open to criticism, because the fact of giving a person a prison sentence and then expelling him or her was the equivalent of imposing a double penalty, even if expulsion was not a criminal sentence, because it was not necessarily handed down by a court after a breach of the law, but could be ordered by an administrative authority. The commentary should therefore indicate that it was essential to avoid an expellee having to undergo “double punishment”. That was where a reference to recent Swiss practice could be relevant when drafting the commentary to the grounds for the expulsion of aliens.

15. The CHAIRPERSON said that she took it that the Commission wished to refer the restructured summary contained in the Special Rapporteur’s seventh report on the expulsion of aliens to the Drafting Committee.

It was so decided.

The meeting rose at 3.45 p.m.

3099th MEETING

Wednesday, 6 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, 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. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his seventeenth report on reservations to treaties (A/CN.4/647 and Add.1).

2. Mr. PELLET (Special Rapporteur) said first of all that he deeply regretted the passing of two former members of the Commission. Constantin Economides had been a man of deep convictions and an excellent jurist, and Francis Mahon Hayes had been an elegant thinker and a distinguished diplomat.

3. Turning to the introduction of his seventeenth—and final—report, he expressed gratitude to the translation services for their great efficiency and hard work in translating it, as well as all the draft commentaries in the Guide to Practice. In the seventeenth report, he had dispensed with the traditional introductory remarks in which he outlined new developments with regard to reservations to treaties and took stock of reactions to previous reports and to the Commission’s latest work. Instead, he had gone straight to the heart of the matter by devoting the first section of the report to the reservations dialogue. He owed a debt of gratitude to Daniel Müller for his help in drafting that section.

4. The phrase “reservations dialogue” was not a term of art but an expression that he had coined in his eighth report,²⁵⁵ although he had outlined the underlying notion in his third report.²⁵⁶ The term “reservations dialogue” simply meant that, irrespective of the substantive and procedural rules applicable to reservations in the absence of specific provisions in a given treaty, contracting States or contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope and meaning of another party’s reservations or objections to a reservation.

5. While those were informal practices that it would be difficult to transpose to a legal context, they had many advantages that deserved to be highlighted. The Guide to Practice was a suitable context in which to do so because it was an informal “soft law” tool that combined *de lege lata* and *de lege ferenda* provisions with actual recommendations.

6. As the reservations dialogue was intended to take place outside the normal channels, he had preferred not to include guidelines on it in the body of the Guide to Practice but rather to touch on it in an annex, which could take the form of a recommendation, a resolution, conclusions or some other instrument linked to the Guide, but separate from it.

7. An important general point was that the reservations dialogue between States and international organizations was conducted in many different forms, using a wide variety of methods. It could take place well before reservations were formulated, when a treaty was still being negotiated. At that stage, a State or an international organization was at liberty to draw attention to any language that it found problematic and to indicate that it might enter a reservation. Its partners were also free to react to those concerns by expressing any reservations they might have to the reservation being contemplated. The dialogue could also take place, at a later stage, once the State in question had formulated its reservations, either on signing the treaty or when expressing its consent to be bound by it, if those steps occurred at different times. At that juncture, the other contracting States could react by formally accepting or objecting to the reservation, but they could also react informally by expressing their concerns, seeking

²⁵⁵ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, pp. 42–50, paras. 70–106.

²⁵⁶ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6.

* Resumed from the 3090th meeting.