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Summary record of the 3135th meeting

Topic:
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that the alien's level of integration at various levels (social, economic, professional or family) could also be taken into account in considering the extent to which the expelling State was required to grant certain procedural rights during the expulsion process to aliens unlawfully present in its territory. However, the Drafting Committee had ultimately considered that a criterion referring to the level of integration would have been difficult to implement, and it had therefore opted for an objective time limit for the duration of the alien's presence in the territory of the expelling State. A period of six months had been deemed reasonable, not least since such a time limit was to be found in procedural rules governing the expulsion process contained in the legislation of some States.

101. Turning to draft article 27 (Suspensive effect of an appeal against an expulsion decision), he recalled that the Special Rapporteur had originally refrained from proposing a draft article on the subject, as he had felt that State practice had not sufficiently converged to warrant the formulation, if only as progressive development, of such a provision. During the plenary debate at the sixty-third session,[111] some members of the Commission had shared the Special Rapporteur's view that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. Other members, however, thought that the Commission should formulate, if only in the context of progressive development, a draft article that contemplated the suspensive effect of an appeal against an expulsion decision, unless compelling reasons of national security dictated otherwise. Some members had pointed out that an appeal against an expulsion decision that lacked suspensive effect would not be effective, since an alien who had to leave the country was likely to encounter economic obstacles to his or her return to the expelling State. According to another view, the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of being subjected to torture or ill-treatment in the State of destination.

102. In response to some of those concerns, the Special Rapporteur had submitted to the Drafting Committee, as an exercise of progressive development, a new draft article dealing with the suspensive effect of an appeal against an expulsion decision. In that text, a distinction had been made between the situation of an alien lawfully present in the territory of the expelling State and that of an alien unlawfully present. According to that proposal, the suspensive effect would be recognized in respect of an appeal lodged by an alien lawfully present in the territory of the expelling State, and possibly also by an alien unlawfully present who met certain additional requirements, such as minimum length of stay or minimum degree of social integration in the territory of the expelling State.

103. After a prolonged discussion, the Committee had opted for a draft article that recognized the suspensive effect only in respect of an appeal lodged by an alien lawfully present in the territory of the expelling State. The commentary would indicate that, even in such cases, the suspensive effect was recognized in the draft articles as a matter of progressive development, since State practice was neither consistent nor uniform in that respect. The commentary would also mention that some members of the Commission would have preferred that the draft article should provide the same guarantee for certain categories of aliens who, albeit unlawfully present in the territory of the expelling State, had been there for a certain period of time or met other conditions to be defined.

104. Draft article 28 (Procedures for individual recourse) was new. During the debate at the sixty-third session on the draft article on diplomatic protection proposed by the Special Rapporteur, several members had suggested that some reference should be made to the individual complaint mechanisms available to aliens subject to expulsion under treaties on the protection of human rights, either in a separate draft article or in a "without prejudice" clause to be inserted in the draft article proposed.[112] In response, the Special Rapporteur had submitted to the Drafting Committee the text of a "without prejudice" clause as a proposed additional paragraph to the draft article on diplomatic protection. During the discussions in the Drafting Committee, two options had emerged: a single draft article covering, in two separate paragraphs, diplomatic protection and individual recourse to a competent international body; and two separate draft articles, each dealing with one of those two questions. After careful consideration, the Drafting Committee had opted for the second option, deciding that there should be a specific draft article on the question of individual recourse to a competent international body and that it should be placed at the end of Part Four, dealing with procedural rules. Furthermore, the Drafting Committee had deemed it preferable to draft the article not as a "without prejudice" clause but as a reminder that an alien subject to expulsion should have access to any available procedure involving individual recourse to a competent international body.

105. The CHAIRPERSON said that the Commission would conclude its consideration of the report of the Drafting Committee at the next plenary meeting.

The meeting rose at 1 p.m.

3135th MEETING

Tuesday, 29 May 2012, at 3 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

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[111] *Yearbook … 2011*, vol. II (Part Two), paras. 255–257.

[112] *Ibid*., paras. 251–252; draft article J1 is reproduced at *ibid*., para. 223, footnote 570.

Expulsion of aliens (*concluded*) (A/CN.4/650 and Add.1, sect. B, A/CN.4/651, A/CN.4/L.797)

[Agenda item 2]

Report of the Drafting Committee (*concluded*)

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to resume his introduction of the report of the Drafting Committee on the topic "Expulsion of aliens" (A/CN.4/L.797).

2. Mr. HMOUD (Chairperson of the Drafting Committee) drew the Commission's attention to Part Five of the draft articles, entitled "Legal consequences of expulsion", which included draft articles 29 to 32.

3. Draft article 29 was currently entitled "Readmission to the expelling State". It should be recalled that the draft article initially proposed by the Special Rapporteur, which had been entitled "Right of return to the expelling State", had given rise to some concerns during the debate in the Commission in 2011.[113] In particular, several members had expressed the view that the draft article was too broad, in that it recognized a right of return in the event of unlawful expulsion, irrespective of the lawfulness or unlawfulness of the alien's presence in the territory of the expelling State or of the reason for which the expulsion was to be regarded as unlawful.

4. The Drafting Committee had debated the appropriateness of having the draft articles provide for a right to readmission in the event of unlawful expulsion. According to some members, the recognition of such a right would go too far and would be questionable even from the perspective of *lex ferenda*. According to others, the rules on the responsibility of States for internationally wrongful acts,[114] which were referred to in the "without prejudice" clause contained in draft article 31, and in particular the rules governing reparation—including, where appropriate, *restitutio in integrum*—already offered an adequate solution; there was thus no need to address the question of readmission in the event of unlawful expulsion from the perspective of an individual right of the expelled alien. However, the Drafting Committee had eventually decided to devote a separate draft article to that question.

5. The Drafting Committee had worked on the basis of a revised text presented by the Special Rapporteur in response to concerns raised during the plenary debate with regard to the original draft article. The Special Rapporteur had proposed that the scope of the draft article should be narrowed so as to restrict the right of return in cases of unlawful expulsion to those aliens who had been lawfully present in the territory of the expelling State. Also, in view of the fact that some States had questioned the existence of any automatic right of return to the expelling State, the Special Rapporteur had proposed to the Drafting Committee that the term "readmission" should be used instead of "return". Those proposals had been well received by the Drafting Committee, which, on the other hand, had concluded that it would have been difficult to limit the recognition of a right to readmission to those cases where the expulsion decision had violated a substantive legal rule, as opposed to a procedural one, since the two were often interconnected and difficult to distinguish from one another.

6. Following a lengthy discussion, the Drafting Committee had retained a formulation that it considered to be sufficiently cautious, in that it covered only aliens lawfully present in the territory of the expelling State and recognized a right to readmission to the expelling State only if it was established by a competent authority that the expulsion had been unlawful, save where the return of the alien constituted a threat to national security or public order, or where the alien no longer fulfilled the conditions for admission under the law of the expelling State. That being said, the Committee had formulated the draft article as an exercise of progressive development rather than an attempt to codify existing rules.

7. The term "unlawful expulsion" contained in the draft article covered any expulsion in violation of a rule of international law. However, that term should also be understood in the light of the principle stated in article 13 of the International Covenant on Civil and Political Rights and reiterated in draft article 4, according to which an alien could be expelled only in pursuance of a decision reached in accordance with law—meaning, primarily, the domestic law of the expelling State. The commentary would address that point.

8. The recognition of a right of readmission under draft article 29 was limited to those situations in which the unlawful nature of the expulsion had been determined by a binding decision handed down either by the authorities of the expelling State or by a competent international body, such as a court or a tribunal. In that connection, the phrase "on the basis of the annulment of the expulsion decision", which appeared in the text of the draft article as referred to the Drafting Committee, had been considered too restrictive. The Committee had concluded that it would not have been appropriate to subordinate the alien's right to be readmitted to an annulment of an expulsion decision, which could normally be issued only by an authority of the expelling State. In addition, the formulation adopted by the Drafting Committee also covered situations in which unlawful expulsion did not result from the adoption of a formal decision (a scenario addressed in draft article 11 on the prohibition of disguised expulsion). The commentary would clarify those various aspects.

9. Draft article 29 should not be read as conferring on determinations made by international bodies effects other than those provided for in the constituent instruments of such bodies. It recognized, as a matter of progressive development, only an independent right of the alien to be readmitted as a result of a determination of the unlawfulness of his or her expulsion by a competent national or international authority.

10. As was clearly indicated in the draft article, the expelling State retained the right to deny readmission

[113] *Yearbook … 2011*, vol. II (Part Two), paras. 247–249; draft article H1 is reproduced at *ibid*., para. 222, footnote 568.

[114] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

in cases where the return of the alien would constitute a threat to national security or public order or where the alien no longer fulfilled the conditions for admission under the law of the expelling State. The Drafting Committee had considered the recognition of those exceptions as necessary in order to preserve a balance between the rights of the alien unlawfully expelled and the expelling State's discretion to control the entry of any alien into its territory in accordance with its immigration law. The last clause of paragraph 1 also took into account the fact that, in certain cases, the circumstances on the basis of which an alien had originally been granted an entry or sojourn permit might no longer exist. However, the expelling State must exercise in good faith its discretion to decide on readmission; for instance, the expelling State should not be allowed to invoke a provision of domestic legislation that would regard the mere existence of an expulsion decision as a bar to readmission. Such a limitation was clearly reflected in paragraph 2 of the draft article, which stated, "In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted". The commentary would emphasize that point and refer to article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, on which the text of draft article 29, paragraph 2, had been based.

11. Lastly, the commentary would indicate that draft article 29 was without prejudice to the legal regime of the responsibility of States for internationally wrongful acts, which was referred to in draft article 31, including the rules governing various forms of reparation.

12. Draft article 30 was currently entitled "Protection of the property of an alien subject to expulsion". As mentioned previously, the text of paragraph 1 of the draft article originally proposed by the Special Rapporteur, which set out the prohibition of expulsion for confiscatory purposes, had been moved to Part Two of the draft articles and had become draft article 12.

13. Consequently, draft article 30, as provisionally adopted by the Drafting Committee, consisted of only paragraph 2 of the initially proposed draft article. The Drafting Committee had considered a proposal, made during the plenary debate in 2011, which sought to replace the term "property" with "property rights".[115] However, after careful consideration, the Committee had deemed it preferable to retain the generic reference to "property" and to avoid the notion of "property rights", which was still controversial in human rights law. The text provisionally adopted by the Drafting Committee was largely based on the one originally proposed by the Special Rapporteur. However, the Drafting Committee had considered it appropriate to strengthen the formulation of the general obligation enunciated in the draft article by replacing the words "shall protect" with the words "shall take appropriate measures to protect". In addition, the Drafting Committee had decided to replace the phrase "to the extent possible", which appeared in square brackets in the original text, with "in accordance with the law". It had concluded that the former phrase, which had been criticized by various Commission members and several States, might have had the effect of unduly weakening the protection, whereas the phrase "in accordance with the law" satisfactorily addressed cases in which the expelling State might have a legitimate interest in limiting the disposal by the alien of his or her property. Such cases might include, for instance, restrictions placed on the disposal of illegally acquired property, including assets produced by criminal or other unlawful activities. The commentary would address that point and provide some clarifications concerning the reference to the requirement that the alien should be allowed to dispose freely of his or her property even from abroad. Furthermore, at the recommendation of the Special Rapporteur, the Drafting Committee had decided to delete the last phrase of the original text, which had referred to the obligation to return the property of an expelled alien at his or her request or that of his or her heirs or beneficiaries. It had done so in response to concerns expressed during the plenary debate in 2011 and reiterated in the Drafting Committee. The point had been made, in particular, that an obligation to return the alien's property was incompatible with the right of the expelling State to expropriate the alien's property provided the conditions of international guarantees (in particular, the payment of adequate compensation) had been met. Moreover, forms of reparation other than restitution could also be utilized in the event of the loss or destruction of an alien's property. For the time being, draft article 30 was included in Part Five of the draft articles, entitled "Legal consequences of expulsion". However, the Commission could consider whether to move it to chapter II of Part Three, placing it after draft article 20.

14. Draft article 31 was now entitled "Responsibility of States in cases of unlawful expulsion". The inclusion in the draft articles of a provision referring to the legal regime of the responsibility of States for internationally wrongful acts, which was proposed by the Special Rapporteur in the second addendum to his sixth report,[116] had found broad support in the Commission. The formulation originally proposed referred, in that context, to the "legal consequences" of an unlawful expulsion; however, the Special Rapporteur had subsequently presented the Drafting Committee with a revised version of the draft article, which referred directly to the engagement of the international responsibility of the expelling State as a result of an unlawful expulsion. The text of the draft article as provisionally adopted by the Drafting Committee indicated that the expulsion of an alien in violation of international obligations engaged the international responsibility of the expelling State. As stated in draft article 31, the obligations referred to were those deriving from the draft articles or any other rule of international law. The commentary to draft article 31 would address the obligation to provide reparation as a consequence of the international responsibility incurred by the expelling State in the event of an unlawful expulsion.

15. Lastly, draft article 32 was entitled "Diplomatic protection", as had originally been proposed. It set forth the right of the State of nationality of an alien subject to

[115] *Yearbook … 2011*, vol. II (Part Two), para. 244; draft article G1 is reproduced at *ibid*., para. 221, footnote 567.

[116] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2; draft article I1 is reproduced in *Yearbook … 2011*, vol. II (Part Two), para. 223, footnote 569.

expulsion to exercise diplomatic protection in respect of that alien. Apart from minor linguistic changes, the text retained by the Drafting Committee corresponded to that originally proposed by the Special Rapporteur. Draft article 32 was to be understood as a generic reference to the legal institution of diplomatic protection, which was well established in international law. The general conditions and modalities for the exercise of diplomatic protection in accordance with international law were applicable to the protection exercised by the State of nationality in respect of an alien subject to an expulsion decision. The commentary would clarify that point, while also referring to the articles on diplomatic protection adopted by the Commission in 2006,[117] the text of which appeared as an annex to General Assembly resolution 62/67 of 6 December 2007, and to relevant case law.

16. Mr. SABOIA recalled that the Special Rapporteur, in his third report,[118] had proposed a draft article 4 entitled "Non-expulsion by a State of its own nationals". The draft article had been generally well received by the plenary Commission and had been referred to the Drafting Committee;[119] unfortunately, the Drafting Committee had not been able to reach agreement on it and had decided not to include the draft article in its report to the Commission. The argument advanced had been that the topic under consideration was the expulsion of aliens but that the proposed draft article entailed dealing with questions related to the right of States to establish rules about nationality.

17. In his own view, such a provision would not at all jeopardize the rights of States. Conversely, by excluding it, the Commission would deprive itself of the opportunity to follow the path cleared for it by important universal as well as regional human rights instruments and would deny itself the chance to contribute to the codification and the progressive development of international law in an area in which individual rights had frequently been violated. In that and other areas, the Commission must be careful to preserve the balance between the rights of the State and those of the individual. In the light of the extensive research carried out by the Special Rapporteur, which was contained primarily in paragraphs 34 to 39 of his third report, one could only conclude that the prohibition of the expulsion by a State of its own nationals should be seen as a necessary corollary to the provisions of article 12 of the International Covenant on Civil and Political Rights, article VIII of the American Declaration of the Rights and Duties of Man (Bogota, 1948)[120] and article 2 of Protocol No. 4 to the European Convention on Human Rights, among others.

18. Furthermore, as affirmed by the Special Rapporteur in paragraph 39 of his third report:

> Given the abundant national and international practice mentioned above and doctrinal opinion on the subject, which is long-standing and nearly unanimous, there is cause to be—at the very least—cautious about the statement that "[a] general rule of customary international law forbidding the expulsion of nationals does not exist".[121]

That comment left the impression that, in the Special Rapporteur's view, there were at least some grounds for considering that the prohibition of the expulsion of one's own nationals was sufficiently established in practice as to be considered a customary rule of international law.

19. He wished to draw the Commission's attention to the fact that the Drafting Committee had taken a decision on an important substantive issue, one which, in principle, should have been referred to the plenary. Without wishing to reopen the debate on the question, he nevertheless requested to have the summary record reflect his conviction that international law prohibited a State from expelling its own nationals. He wished to thank the Special Rapporteur for having proposed to the Drafting Committee what was currently draft article 9 (Deprivation of nationality for the sole purpose of expulsion), which made it possible to retain at least some elements of a general rule prohibiting the expulsion by a State of its own nationals.

20. In conclusion, he agreed with all the draft articles adopted by the Drafting Committee.

21. The CHAIRPERSON invited the Commission to adopt the text of draft articles 1 to 32, provisionally adopted by the Drafting Committee on first reading and contained in document A/CN.4/L.797.

PART ONE. GENERAL PROVISIONS

Draft article 1 (*Scope*)

22. Mr. GEVORGIAN said that he wished to reserve his position with regard to paragraph 1, since it was only in the light of the Commission's solution to a number of other questions raised in various other draft articles that he could give his opinion on the appropriateness of dealing with the question of the lawful or unlawful presence of an alien in the territory of a State.

Draft article 1 was adopted, subject to that comment by Mr. Gevorgian.

Draft article 2 (*Use of terms*)

Draft article 2 was adopted.

Draft article 3 (*Right of expulsion*)

23. Ms. ESCOBAR HERNÁNDEZ said that she planned to submit several editorial changes to the Secretariat concerning the Spanish version of the draft article.

24. Mr. GEVORGIAN said that the Russian text of the draft article did not correspond perfectly to the English and that he, too, planned to submit a number of editorial changes. That being said, the very substance of the draft article gave rise to certain doubts in his mind. With regard to the phrase "Expulsion shall be in accordance with the present draft articles and other applicable rules of

[117] The draft articles and commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), chap. IV, paras. 49–50.

[118] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/581.

[119] *Ibid*., vol. II (Part Two), paras. 188 and 226–232; draft article 4 is reproduced at *ibid*., para. 197, footnote 322.

[120] See www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm.

[121] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/581, p. 118.

international law", he wondered whether such wording was appropriate and whether the expulsion decision should not instead be in accordance with domestic law, which itself should be in accordance with international law.

25. Mr. HMOUD (Chairperson of the Drafting Committee) said that the Drafting Committee had decided, as a matter of legal principle, to refer to the rules of international law. Even if it was presumed that, as a general rule, any expulsion decision had to be in accordance with domestic law, it could nevertheless happen that the domestic law of a particular State was not in conformity with international law. It had thus been decided to specify, as a precautionary measure, that the expulsion procedure must be in accordance with international law, in order to take into account the situation in which a State's domestic law was not consistent with the rules of international law.

On that understanding, draft article 3 was adopted.

Draft article 4 (*Requirement for conformity with law*)

Draft article 4 was adopted.

Draft article 5 (*Grounds for expulsion*)

Draft article 5 was adopted.

PART TWO. CASES OF PROHIBITED EXPULSION

Draft article 6 (*Prohibition of the expulsion of refugees*)

26. Mr. MURPHY said that he wished to raise several of the concerns that he and other Commission members had expressed in plenary meetings but that the Drafting Committee had not been able to address. He had a particular concern regarding draft article 6, paragraph 2.

27. First of all, nowhere in the draft articles was there a definition of the term "refugee", and it was therefore not clear whether the text covered "refugees" as defined in the 1951 Convention relating to the Status of Refugees or as defined in the 1967 Protocol relating to the Status of Refugees, which had significantly altered the definition given in the Convention. The definition of "refugee" had been further amended by regional instruments in Africa and Latin America, basically in order to include persons who had fled war or other violence in their home country. Among such instruments was the 1969 OAU Convention governing the specific aspects of refugee problems in Africa and the 1984 Cartagena Declaration on Refugees.[122] He understood that in the commentary, the Commission would clarify that it employed the term "refugee" as it was defined in the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol thereto, and not as defined by regional instruments.

28. Paragraph 2 was not in conformity with the 1951 Convention, article 32 of which provided that the Contracting States must not "expel a refugee lawfully in their territory save on grounds of national security or public order". Refugees who were unlawfully in the territory of a Contracting State fell outside the scope of article 32, although they were protected by other articles of the Convention, in particular articles 31 (Refugees unlawfully in the country of refuge) and 33 (Prohibition of expulsion or return ("refoulement")). The *travaux préparatoires* confirmed that the authors of what became article 32 had intended to confine the limitation on expulsion solely to those refugees who had been lawfully admitted. Draft article 6, paragraph 2, took no account of the express language of article 32 of the Convention, nor of the intention of its drafters.

29. Draft article 6, paragraph 2, did not reflect *lex lata*, and there was nothing in the Special Rapporteur's report to suggest that there was sufficient State practice in support of its contents. At best, it could be considered as an attempt to engage in the progressive development of the law, although it was regressive rather than progressive, in that it undermined the meaning of the phrase "a refugee lawfully in their territory". That phrase had been chosen deliberately by the drafters of the 1951 Convention in order to avoid implying a requirement of residence or domicile. Indeed, the drafters had set aside the phrase commonly used in the French legal tradition ("*résidant régulièrement*"), which was thought to be too restrictive. The expression "lawfully in their territory" was meant to be much broader, since it potentially covered someone whose presence in the territory had lasted for only a few hours.

30. The Commission seemed to assume in draft article 6, paragraph 2, that the phrase "lawfully in their territory" was too narrow and that paragraph 2 could fix it. Yet that phrase was not narrow, and the apparent assertion to the contrary did nothing to improve matters. In particular, if the Commission indicated in the commentary that the phrase covered only persons who had been granted refugee status by the State in question, then it would be departing radically from the meaning given to that phrase in the 1951 Convention. Even if other Commission members disagreed with him on that point and insisted that paragraph 2 constituted progressive development, there could be no disagreement that, by putting forward paragraph 2, the Commission was saying that the 1951 Convention was wrong, or at least inadequate, and that article 32 of that Convention was improperly drafted and needed fixing. Furthermore, it was saying so, even though there was no evidence either in State practice or in the academic literature that there was a problem with the operation of that article. In addition, the Commission was saying that article 32 needed to be fixed in a way that was not consistent with the approach taken by States when they enacted national laws that were in line with draft article 6, paragraph 2. In paragraphs 73 and 74 of his third report,[123] the Special Rapporteur noted that some States had adopted national laws that provided for rights like the one that appeared in paragraph 2, but also that there were restrictions on that right. In France, for example, the right was not recognized when the sole purpose of an alien's application for refugee status was to thwart a deportation order. Ultimately, to claim that the 1951 Convention needed to be fixed or was inadequate would be a rather

[122] Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in OEA/Ser.L/V/II.66 doc. 10, rev. 1. OAS General Assembly, fifteenth regular session (1985), resolution approved by the General Commission at its fifth session on 7 December 1985.

[123] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/581.

striking statement on the part of the Commission, since the Convention established a multilateral treaty regime to which 145 States had become parties. Far from being a dormant instrument out of touch with contemporary developments, its implementation was closely monitored by the Office of the United Nations High Commissioner for Refugees (UNHCR), and more States were becoming parties to it every year: 12 had acceded since 2000, the most recent being Nauru in 2011. As far as he knew, none of those States had indicated a problem with the language of article 32, nor had the terms of that article been altered by the regional instruments that sought to complement and implement the 1951 Convention. The comments made by representatives of States in New York in the autumn of 2011 suggested that they were troubled that the Commission might alter the terms of major human rights treaties such as the 1951 Convention. For example, the Netherlands had cautioned that deviations from regimes such as the 1951 Convention "could cause uncertainty as to which international legal regime applied in a specific situation".[124] He himself had gone through prior instruments drafted by the Commission to try to identify an instance in which the Commission had sought to rewrite a key provision of a major multilateral treaty to which the vast majority of States were parties, but he could find no such example. For those reasons, draft article 6, paragraph 2, should be deleted, and he hoped that it would be possible to do so on second reading.

31. A related but broader problem with the draft articles was that the Commission was deviating in other ways from the terms agreed upon in the major human rights instruments: not just the 1951 Convention relating to the Status of Refugees, but also the International Covenant on Civil and Political Rights, the 1954 Convention relating to the Status of Stateless Persons and some regional human rights instruments. It was unlikely, given those divergences, that States would welcome or implement the outcome of the Commission's efforts. The most glaring example was perhaps the Commission's failure to recognize the ability of States to derogate from their human rights obligations in times of public emergency. Many of the obligations embodied in the draft articles—including the obligation not to expel aliens except in certain circumstances and obligations concerning detention and relating to family life—were drawn from treaties that allowed for derogation from those obligations in the event of public emergency. It was well known that article 4 of the International Covenant on Civil and Political Rights provided as follows:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation …

Among the articles from which it was possible for States to derogate was article 13 of the Covenant, which related to the expulsion of aliens. Article 15 of the European Convention on Human Rights and article 27 of the American Convention on Human Rights contained comparable provisions.

32. That was just one example of the broader problem. It was regrettable that nowhere in the draft articles did the Commission indicate that they were without prejudice to the provisions set forth in the major multilateral human rights treaties, which carefully balanced the rights of individuals with those of States. It was possible that the Commission regarded the provisions of draft article 3 as leaving intact the rights and obligations set forth in existing treaties; if so, perhaps that could be reflected in the commentary. Furthermore, it was possible that the language of draft article 8 left intact the rights and obligations set forth in existing treaties that concerned refugees and stateless persons. Again, if that was the Commission's intention, perhaps it could be reflected in the commentary. However, if that was not the Commission's intention in draft articles 3 and 8, it would rightly be criticized for attempting to alter core instruments of international human rights law to which the vast majority of States had acceded. He hoped that those concerns would be reflected in the commentary and that the problems identified would be remedied on second reading.

33. The CHAIRPERSON, recalling that members' comments must relate exclusively to draft article 6, pointed out that the issue appeared to be a matter of interpretation and that the provisions of draft article 8 might allay Mr. Murphy's concerns. He wished to know whether the issue had been discussed in the Drafting Committee and whether the Chairperson of the Drafting Committee and the Special Rapporteur had any comments to make in that regard.

34. Mr. HMOUD (Chairperson of the Drafting Committee) said that, at its fifty-ninth session, the Commission meeting in plenary had decided to refer draft article 6 to the Drafting Committee and, as a matter of progressive development, to include paragraph 2[125] relating to refugees unlawfully present in the territory of the State and the protection to be afforded them. Mr. Murphy had raised a number of substantive points and had partially answered them himself by referring to draft articles 3 and 8, the very purpose of the latter being to state that the rules laid down in the draft articles were without prejudice to the provisions of conventions relating to refugees and did not undermine the protections and guarantees provided for in human rights instruments, particularly those enjoyed by States. It was important to submit paragraph 2 for comment to the international community precisely because it pertained to progressive development: if the Commission confined its work to the codification of existing international law, half of that work would be mere duplication of effort, not to mention the fact that its mandate would have to be adjusted.

35. Mr. KAMTO (Special Rapporteur) said that he was always open to comments from other Commission members that helped to advance his work, but he disputed Mr. Murphy's arguments, which were inaccurate. Draft article 6, paragraph 2, in no way ran counter to either article 32 of the 1951 Convention relating to the Status of Refugees, which dealt with refugees lawfully present in a State, or article 31, which dealt with the expulsion of refugees who were unlawfully present. It attempted to take into consideration international practice as it had evolved since 1951 by integrating the relevant regional legal instruments, including those of Africa and Latin America that had been

[124] *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 23rd meeting (A/C.6/66/SR.23), para. 47.

[125] *Yearbook … 2007*, vol. II (Part Two), paras. 235–237.

adopted in 1969 and 1985. Most of the instruments dated back some 40 or 50 years, during which some practice had emerged. He had sent his work to UNHCR and had spoken with the staff of that organization, who believed that codification should take into account the reality on the ground. Draft article 6, paragraph 2, merely stated that a refugee who was unlawfully present in the territory of a State and had applied for refugee status could not be expelled so long as his or her application was pending—something that concorded with actual practice. Of course, that could not be said to be a customary rule, but it should at least be possible to agree that it involved progressive development. There was no question of dismantling the 1951 Convention, and it was not true that States that wished to accede to the Convention might perceive the draft articles as putting up an obstacle to their accession. Mr. Murphy perhaps lacked the necessary detachment from the work carried out to date; he had extracted from the reports on the topic only the parts that supported his argument, whereas it was the reports as a whole as well as aspects of practice that needed to be taken into account. The plenary Commission had discussed the issues at great length: Mr. Murphy would find in the summary records on the work of the five previous sessions all the elements needed to justify the existence of draft article 6, paragraph 2, which corresponded to the actual practice of those who dealt with refugees.

36. Mr. KITTICHAISAREE said that he had certain reservations regarding the expression "refugee unlawfully present in the territory of the State", which appeared in draft article 6, paragraph 2, and proposed to replace the word "refugee" with "alien". The reason was that, once an alien had obtained refugee status, he or she was lawfully present in the territory of the State. If an alien did not obtain refugee status, he or she was not a "refugee" in the strict sense of the word.

37. Sir Michael WOOD said that Mr. Murphy had raised an important point about draft article 6, paragraph 2. He agreed that the wording of the paragraph did give rise to some difficulties, and he endorsed the points made by Mr. Kittichaisaree. He, too, found it curious that an alien should be considered a refugee before having obtained refugee status, but those were issues that could be settled on second reading and in the light of comments to be made in the Sixth Committee in 2012 or thereafter.

38. Mr. KAMTO (Special Rapporteur) said that he could not allow the Commission to say that it was not possible for a refugee to be present unlawfully in the territory of a State. Contrary to what Mr. Kittichaisaree and Sir Michael Wood had affirmed, article 31 of the 1951 Convention relating to the Status of Refugees, entitled "Refugees unlawfully in the country of refuge", dealt precisely with that situation. There was thus nothing new about that notion.

39. The CHAIRPERSON suggested that the Commission should adopt draft article 6, and in so doing, indicate that it had given rise to differences of opinion that would be spelled out in the summary record of the meeting.

It was so decided.

Draft article 6 was adopted.

Draft article 7 (*Prohibition of the expulsion of stateless persons*)

Draft article 7 was adopted.

Draft article 8 (*Other rules specific to the expulsion of refugees and stateless persons*)

40. Mr. PARK, pointing out that the English expression "by law" had been translated into French as "*par le droit*" or "*par la loi*", said that he knew from having attended the meetings of the Drafting Committee that the choice of those terms had been weighed very carefully. It was his understanding that one of the terms designated international and domestic law, whereas the other referred solely to domestic law. He wished to know if it would be possible, on second reading, to dispel any uncertainties that those terms might create.

41. Mr. HMOUD (Chairperson of the Drafting Committee) said that the commentary would clarify the meaning of the phrases but that the words "*par la loi*" in French did not refer exclusively to domestic legislation.

Draft article 8 was adopted.

Draft article 9 (*Deprivation of nationality for the sole purpose of expulsion*)

Draft article 9 was adopted.

Draft article 10 (*Prohibition of collective expulsion*)

Draft article 10 was adopted.

Draft article 11 (*Prohibition of disguised expulsion*)

Draft article 11 was adopted.

Draft article 12 (*Prohibition of expulsion for purposes of confiscation of assets*)

Draft article 12 was adopted.

Draft article 13 (*Prohibition of the resort to expulsion in order to circumvent an extradition procedure*)

Draft article 13 was adopted.

PART THREE. PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

CHAPTER I. GENERAL PROVISIONS

Draft article 14 (*Obligation to respect the human dignity and human rights of aliens subject to expulsion*)

Draft article 14 was adopted.

Draft article 15 (*Obligation not to discriminate*)

Draft article 15 was adopted.

Draft article 16 (*Vulnerable persons*)

Draft article 16 was adopted.

CHAPTER II. PROTECTION REQUIRED IN THE EXPELLING STATE

Draft article 17 (*Obligation to protect the right to life of an alien subject to expulsion*)

Draft article 17 was adopted.

Draft article 18 (*Prohibition of torture or cruel, inhuman or degrading treatment or punishment*)

42. Mr. McRAE, noting that, in the English version, the adjective "inhuman" was misspelled—the final letter "e" was missing—asked whether the Commission was doomed to repeat an error made years previously in the title of a convention, or whether it could correct it.

43. Sir Michael WOOD said that he was not convinced that it was an error and that he would prefer the matter to be decided on second reading.

It was so decided.

Draft article 18 was adopted.

Draft article 19 (*Detention conditions of an alien subject to expulsion*)

44. Mr. FORTEAU said it was rather surprising that draft article 19 did not contain any rule on the right to place in detention a person subject to an expulsion procedure. He recalled that in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice had made two fundamental contributions: First of all, in paragraph 77 of its judgment, it had stated that the prohibition of arbitrary arrest and detention applied not only to measures that deprived individuals of their liberty in the context of criminal proceedings, but also, in principle, to such measures in the context of an administrative procedure and, specifically, of an expulsion procedure. In paragraph 82 of the judgment, the Court had further stated that arrest and detention aimed at allowing an expulsion measure, without any defensible basis, must be characterized as "arbitrary" within the meaning of international law. When it came to the second reading, the Commission should consider incorporating such a provision in draft article 19 or as a draft article 18 *bis* that would cover prohibition of arbitrary arrest or detention for the purpose of carrying out an expulsion procedure.

45. Mr. McRAE proposed the deletion of the reference to paragraph 2 (*a*) in paragraph 3 (*b*), since that seemed to exclude paragraph 2 (*b*), although it was also applicable. Paragraph 3 (*b*) would then read, "Subject to paragraph 2, detention shall end …".

46. Mr. HMOUD (Chairperson of the Drafting Committee) said that although the matter had not been considered during the current session, he saw no problem with the deletion of the reference to paragraph 2 (*a*).

47. Mr. KAMTO (Special Rapporteur) said that he would go along with whatever the Commission decided.

Draft article 19, as thus amended and with a minor editorial correction in the French text, was adopted.

Draft article 20 (*Obligation to respect the right to family life*)

Draft article 20 was adopted.

Chapter III. Protection in relation to the State of destination

Draft article 21 (*Departure to the State of destination*)

Draft article 21 was adopted.

Draft article 22 (*State of destination of aliens subject to expulsion*)

48. Mr. TLADI proposed the deletion, in paragraph 1, of the expression "where appropriate", which seemed superfluous insofar as the will of the State prevailed in all cases over that of the alien subject to expulsion.

49. Mr. HMOUD (Chairperson of the Drafting Committee) said that the purpose of the expression was precisely to indicate that there was a hierarchy and that the will of the alien was subject to that of the receiving State and the expelling State.

Draft article 22 was adopted.

Draft article 23 (*Obligation not to expel an alien to a State where his or her life or freedom would be threatened*)

50. Mr. PETER, after thanking the Chairperson of the Drafting Committee for his clear introductory statement and the Special Rapporteur for his willingness to accommodate the diverse views expressed, said that he wished to discuss paragraph 2, in which the words "that does not apply the death penalty" posed a problem owing to the indirect message they sent to States. Did the phrase mean that a State whose legislation still provided for capital punishment was free to expel an alien to another State where the legislation also prescribed such punishment? Was it even desirable to draw a distinction between States where the death penalty was applied and those where it was not, if such a distinction gave the impression that one group was not obliged to behave in the same way as the other group? As a body of independent experts, the Commission must certainly be aware of the efforts being carried out within the United Nations to achieve the abolition of the death penalty, including the resolutions adopted by the General Assembly calling for a moratorium on executions.[126] Paragraph 2, which as currently drafted implied that States wishing to continue to apply the death penalty could do so, should therefore be amended, and he proposed that at the start of the paragraph, the words "that does not apply the death penalty" should be deleted.

51. Mr. HMOUD (Chairperson of the Drafting Committee) said that paragraph 2, according to which an alien could not be expelled to a State that applied the death penalty, was generally consistent with the provisions of the legislation in force in States that had abolished the death penalty or had applied a moratorium. A more general provision would most probably give rise to reservations by States that continued to apply the death penalty. In any event, it was a question of legal policy and the Commission had to make a decision on it.

52. Mr. KAMTO (Special Rapporteur) said that the provision did more than simply pose a problem of legal policy or of the message to be sent to the international community; it raised legal issues. While Mr. Peter's concern was legitimate in terms of human rights, the Commission's job was to survey the state of contemporary international law. Neither customary international law nor treaty law established any rule prohibiting the death penalty, however:

[126] General Assembly resolutions 62/149 of 18 December 2007, 63/168 of 18 December 2008 and 65/206 of 21 December 2010, entitled "Moratorium on the use of the death penalty".

that was why campaigns for its abolition were conducted, as Mr. Peter himself had pointed out. As for the General Assembly resolution calling for a global moratorium on executions, also mentioned by Mr. Peter, it did not call on States to prohibit the punishment. The Commission was a body of independent experts responsible for explicating the state of existing law, and the issues it addressed were primarily legal as opposed to political.

53. Sir Michael WOOD said that the Special Rapporteur was right to recall that the issues before the Commission were above all legal ones. Nonetheless, Mr. Peter had raised a very important point by questioning the indirect message sent to States in paragraph 2. Perhaps his concerns could be met by drawing on the solution adopted by the drafters of the International Covenant on Civil and Political Rights. Faced with the same problem, in that article 6 of the Covenant presupposed that some States continued to apply the death penalty, the drafters had considered it useful to specify, in paragraph 6 of the article, that nothing in the article should be invoked to delay or to prevent the abolition of capital punishment by a State party to the Covenant.

54. The CHAIRPERSON said that he was in favour of paragraph 2 because it encouraged States which did not apply the death penalty to consider its abolition. He therefore proposed that the paragraph should be retained and that the points just made by the Special Rapporteur should be explained in a commentary to the paragraphs of the draft article.

It was so decided.

Draft article 23 was adopted.

Draft article 24 (*Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment*)

Draft article 24 was adopted.

Chapter IV. Protection in the transit State

Draft article 25 (*Protection in the transit State of the human rights of an alien subject to expulsion*)

Draft article 25 was adopted.

Part Four. Specific procedural rules

Draft article 26 (*Procedural rights of aliens subject to expulsion*)

55. Mr. FORTEAU said that it seemed to him that paragraphs 1 (*b*) and 1 (*d*) might be too restrictive. The draft articles defined expulsion as a formal act or conduct whose effect was to compel an alien to leave the territory. As currently drafted, paragraphs 1 (*a*) and 1 (*b*) limited the right to effective remedies solely to the right to challenge an expulsion decision, not the expulsion itself in more general terms. Perhaps the word "decision" could be deleted from both paragraphs in order to align them with the broader formulation used in article 13 of the International Covenant on Civil and Political Rights, which allowed the alien to submit reasons against his or her expulsion.

56. Mr. KAMTO (Special Rapporteur) said that while Mr. Forteau's comment seemed justified, draft article 26 and the rights it guaranteed were based on various international conventions, General Assembly resolutions and European Union directives. The commentary could provide some clarifications to take into account Mr. Forteau's concern.

57. Mr. PETRIČ drew attention to paragraph 1 (*f*), which established the right of the alien to have the free assistance of an interpreter if he or she could not understand or speak the language used by the competent authority. If the Commission wished the draft articles to become treaties ratified by a sufficient number of States, it must keep in mind that it might be difficult, even impossible, for small States to comply with that type of provision. Instead of recasting the entire paragraph, he suggested that the words "as appropriate" could simply be inserted.

58. Mr. HASSOUNA said that several of the draft articles mentioned procedural rights or guarantees "provided by law", without further explanation, and it was not clear whether that meant national or international law. It would be useful to clarify that point in the commentaries to the draft articles in question.

59. The CHAIRPERSON said that he took it that the Commission wished to adopt draft article 26.

It was so decided.

Draft article 26 was adopted.

Draft article 27 (*Suspensive effect of an appeal against an expulsion decision*)

Draft article 27 was adopted.

Draft article 28 (*Procedures for individual recourse*)

Draft article 28 was adopted.

Part Five. Legal consequences of expulsion

Draft article 29 (*Readmission to the expelling State*)

Draft article 29 was adopted.

Draft article 30 (*Protection of the property of an alien subject to expulsion*)

Draft article 30 was adopted.

Draft article 31 (*Responsibility of States in cases of unlawful expulsion*)

60. Sir Michael WOOD proposed that, in the English version, the verb "engages" should be replaced with the word "entails", in order to align the text with that of the articles on State responsibility.

It was so decided.

Draft article 31 was adopted, subject to that editorial amendment to the English text.

Draft article 32 (*Diplomatic protection*)

Draft article 32 was adopted.

Draft articles 1 to 32 contained in document A/CN.4/L.797, as amended, were adopted.

61. Mr. KAMTO (Special Rapporteur) said that he wished to extend his warm thanks to the current Chairperson of the Drafting Committee and to his predecessors, Mr. Vázquez-Bermúdez and Mr. Melescanu, for their remarkable work and the patience and skilfulness with which they had conducted the proceedings resulting in the document before the plenary Commission. He also wished to thank all those who had contributed to the work of the Drafting Committee and had helped to improve and enrich the draft articles. Even though the outcome was not perfect, the Commission now had a firm grounding, a guide, for what was not an easy topic. Lastly, he thanked the Secretariat for its outstanding work and the assistance provided to the different Chairpersons of the Drafting Committee and to himself; the quality of the Drafting Committee's report to the plenary Commission was also largely attributable to the Secretariat. Some minor adjustments might need to be made to the first part of the report so as to reflect, in a more balanced fashion, all the efforts that had contributed to the current outcome. That could easily be done by the Secretariat, in liaison with the Special Rapporteur and under the benevolent eye of the Chairperson of the Drafting Committee.

Treaties over time[127] (A/CN.4/650 and Add.1, sect. E)

[Agenda item 8]

Report of the Study Group

62. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that during the first part of the current session, the Study Group had begun its consideration of the third report by its Chairperson, entitled "Subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings".[128] The Study Group had also addressed the format of future work on the topic and the possible outcome of such work. Some members had noted that although the report was based on a wealth of material and many States had expressed interest in the topic, only a limited number had provided examples of their practice, as the Commission had requested.[129] Members had also noted that the first three reports[130] by the Chairperson of the Study Group were interrelated and that the legal analysis and discussion would benefit from their being treated together. Several members had said that in view of the preparatory work that had been accomplished and of the need to focus the work on a specific outcome, the time had come for the Commission to change the format of its work on the topic and to appoint a special rapporteur.

63. He, like some members, considered that States might have commented more substantively on the topic if the reports and summaries of the debates, which had not been published in accordance with the procedure used for study groups, had been available to them. That was why he would welcome a change, at the current stage, in the format for the work on the topic that would allow the Commission to focus on the outcome of such work. It had first been necessary to identify, use, arrange and analyse the main sources of information on the topic, something that had been done in the first three reports and the discussion on them. Those reports could now be merged into a single document that could be made available to States and considered in plenary session.

64. A change in the format of the work would enable the Commission to more sharply define the scope of the topic. One of the main reasons why the Commission had decided to pursue its consideration of the topic within the format of a study group had been so as to determine whether the topic should be approached with a broad focus—which would entail an in-depth analysis of the termination and the formal amendment of treaties—or whether the topic should have a narrower focus on specific aspects relating to subsequent agreements and practice. Now that the Study Group had concluded that it would be preferable to limit the topic to the narrower issue of the legal significance of subsequent agreements and practice, one of the main reasons for the Study Group to exist was gone.

65. Assuming that the format for work on the topic would be changed as he recommended, he proposed that a report bringing together the three first reports should be prepared for the next session. The report should take into account the discussions in the Study Group and should also contain specific conclusions or guidelines. Once the document had been considered by the Commission at its sixty-fifth session in 2013, and after the discussion in the Sixth Committee on the Commission's report on its work, one or two further reports should be drafted on the practice of international organizations and the jurisprudence of national courts, as originally envisaged. Those reports would contain additional conclusions or guidelines, together with commentaries, that would supplement or modify, as appropriate, the work done based on the first reports. The Commission would thus be able to complete its work on the topic during the current quinquennium, on the understanding that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for the interpretation of treaties (art. 31 of the 1969 Vienna Convention on the law of treaties).

66. The members of the Study Group, who had endorsed his proposals, recommended that the plenary Commission should change the current format for consideration of the topic and appoint a special rapporteur. They had also agreed that the question of the exact title of the topic should be discussed and resolved before the close of the current session and that in the meantime the Study Group should continue its work.

67. The CHAIRPERSON thanked Mr. Nolte for his report, in which the Study Group on treaties over time recommended that the format for consideration of the topic

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[127] The study plan on the subject is reproduced in *Yearbook ... 2008*, vol. II (Part Two), annex I, p. 152, and the text of the preliminary conclusions of the Chairperson of the Study Group revised in the light of the debates held in the Study Group is in *Yearbook … 2011*, vol. II (Part Two), para. 344.

[128] Document ILC(LXIV)/SG/TOT/INFORMAL/1/Rev.1; available only in English with distribution limited to members of the Commission.

[129] *Yearbook … 2010*, vol. II (Part Two), paras. 26–28.

[130] See consideration of the preliminary report of the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction in *Yearbook … 2010*, vol. II (Part Two), paras. 348–352, and *Yearbook … 2011*, vol. II (Part Two), paras. 337–338; for consideration of the second report on jurisprudence under certain international economic regimes, international human rights regimes and other regimes, see *Yearbook … 2011*, vol. II (Part Two), paras. 339–341.

should be changed and that a special rapporteur should be appointed. It was his understanding that the Study Group had made that recommendation with Mr. Nolte, its current Chairperson, in mind. He therefore asked whether the Commission wished to adopt the Study Group's recommendation to consider the topic as a "regular" topic and to appoint Mr. Nolte as Special Rapporteur.

68. Sir Michael WOOD said, first of all, that the members of the Study Group had been careful to avoid the word "regular", which implied that there were some topics that were irregular. Secondly, the Study Group had proposed that the title of the topic should be amended. That was a matter that would need to be dealt with at a later stage, unless Mr. Nolte had a proposal to make.

69. The CHAIRPERSON said that Mr. Nolte had proposed that the matter should be taken up at a later stage.

70. Mr. GEVORGIAN said that he was not certain that he had understood correctly: it seemed to him that Mr. Nolte had made a somewhat different proposal at the end of his report. He himself thought it would be difficult to appoint a special rapporteur without knowing the title or the precise scope of the topic.

71. Mr. NOLTE (Chairperson of the Study Group on treaties over time) explained that the document distributed to the members of the Commission was the same as the one discussed by the Study Group. Any changes made were in response to comments by members of the Study Group. As far as the title was concerned, it had been agreed that it would not be entirely new or completely different. The Study Group had agreed that the expression "subsequent agreements and subsequent practice" should appear in the title but had not taken any decision as to whether an element of the original title, namely "Treaties over time", should be retained. His impression was that such matters were not urgent and that the Commission could resolve them at a later date.

72. The CHAIRPERSON asked whether Mr. Nolte agreed that the topic should be retained and would be willing to become Special Rapporteur.

73. Sir Michael WOOD pointed out that the last two paragraphs of the document read out by Mr. Nolte reflected the position of the Study Group: a new title should be adopted and a special rapporteur appointed at the same time. He proposed that the Commission should decide on the matter on Friday, 1 June 2012.

74. The CHAIRPERSON, after reading out the relevant passage in the document, said that he would prefer the Commission to take a decision there and then.

75. Mr. NIEHAUS said that the Study Group's recommendation was clear and that the Commission should go along with it.

76. Mr. HMOUD proposed that the Commission should start by appointing Mr. Nolte as Special Rapporteur, which would give the Study Group time to continue its work and to take a decision on the title.

77. Mr. ŠTURMA asked whether it would be unusual for the Commission to agree on a provisional title, to be amended subsequently. If such a solution was possible, he shared Mr. Hmoud's view and proposed that the new title should appear in brackets.

78. Mr. KITTICHAISAREE said that the question must be put in context. For example, what procedures would be used for future meetings of the Study Group if a special rapporteur was appointed now?

79. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that the appointment of a special rapporteur would in no way change the working methods of the Study Group.

80. Mr. PETRIČ said that the Commission should go along with the position of the Chairperson of the Study Group. As for the title, the Commission could deal with that on Friday, 1 June or during the second part of the session.

81. Mr. WISNUMURTI urged the Commission to be pragmatic. The original title was too poetic and it should be changed; Mr. Nolte should then be appointed Special Rapporteur. The problem could thus be resolved without delay.

82. Ms. JACOBSSON, endorsing the remarks of the previous speaker, said that she saw no reason to defer the decision.

83. Mr. NOLTE (Chairperson of the Study Group on treaties over time), responding to a request from the Chairperson to repeat the proposed title, said that he had not in fact made such a proposal, out of respect for the Study Group. As he had indicated, the title should contain the notion of "subsequent agreements and practice". Some members of the Study Group would prefer the title to make it clear that the study focused on the interpretation of treaties, but in his own view, it was important not to limit the scope of the topic. He therefore proposed the following title: "Subsequent agreements and subsequent practice in respect of treaties".

84. Mr. HMOUD said that he had no objection to the Commission's appointing Mr. Nolte as Special Rapporteur straight away. It was with regard to the title of the topic that he would prefer to wait.

85. The CHAIRPERSON said that he found it rather strange to appoint a special rapporteur when the topic did not yet have a title. The Commission should first agree on the topic and then appoint a special rapporteur.

86. Sir Michael WOOD said that the Commission should appoint the special rapporteur and ensure that the title reflected what should be the main focus of the topic, namely the interpretation of treaties. He was not in favour of the title just proposed, because it would encompass amendments to treaties, which was not the desired objective.

87. Mr. KAMTO said that he had participated in the work of the Study Group and that what were now being discussed were merely procedural matters. It was clear to him that the Study Group wished Mr. Nolte to be appointed Special Rapporteur, and the Commission did

not seem to have any objections to that, but he failed to see why the Commission needed to take urgent action. A proposal to amend the title of the topic had been made, without any explanation as to when the change would be made or in what context. He endorsed the comments by Mr. Hmoud and the Chairperson and said he would be uncomfortable with appointing a special rapporteur when the topic had not yet been defined.

88. The CHAIRPERSON said that, regrettably, the Commission was not able to take a decision now on the matters at hand, but it was out of the question that it should do so the following Friday. It would accordingly need to take up those matters during the second part of the session.

89. Mr. NIEHAUS said that he did not understand where the problem lay: as far as the title was concerned, it would suffice to follow the Study Group's recommendation. In his view, the Commission should accept the title proposed by Mr. Nolte, on the understanding that it could amend it subsequently, and it should appoint a special rapporteur.

90. The CHAIRPERSON said that the only solution was to schedule another plenary meeting so that the Commission could settle the matter.

91. Sir Michael WOOD proposed that a plenary meeting should be held on Thursday, 31 May 2012.

92. The CHAIRPERSON urged the members of the Commission to come to an agreement so that a decision could be taken on Thursday, 31 May 2012.

The meeting rose at 6 p.m.

3136th MEETING

Thursday, 31 May 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Treaties over time (*continued*) (A/CN.4/650 and Add.1, sect. E)

[Agenda item 8]

1. The CHAIRPERSON recalled that at the 3135th meeting, the Chairperson of the Study Group on treaties over time had presented an oral report on the work of the Study Group during the first part of the current session. In particular, he had reported that the Study Group had adopted a recommendation that the Commission should change the format of its work on the topic and appoint a special rapporteur. According to the Study Group, it would be understood that the main focus of the topic would be on the legal significance of subsequent agreements and subsequent practice for the interpretation of treaties (1969 Vienna Convention on the law of treaties, art. 31) and related matters, as had been explained in the original proposal for the topic.[131]

2. During the debate in the Commission, the recommendation of the Study Group had received general support, and it had been proposed that Mr. Nolte should be appointed Special Rapporteur. At the same meeting, there had also been a debate as to whether it would be appropriate, should the recommendation of the Study Group be followed, to decide at the same time on the title under which consideration of the topic would continue.

3. He had been informed that, following informal consultations conducted by the Chairperson with members of the Study Group, general agreement had been reached that the title of the topic should be "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

4. Accordingly, if he heard no objection, he would take it that the Commission wished (*a*) to change, with effect as from the sixty-fifth session, the format of the work on that topic as suggested by the Study Group; and (*b*) to appoint Mr. Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

It was so decided.

The meeting rose at 10.20 a.m.

3137th MEETING

Friday, 1 June 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON recalled that the provisional programme of work for the second part of the session,

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[131] *Yearbook ... 2008*, vol. II (Part Two), annex I, para. 11.

* Resumed from the 3133rd meeting.