

Document:-  
**A/CN.4/3153**

**Summary record of the 3153rd meeting**

Topic:  
**Draft report of the International Law Commission on the work of its sixty-fourth session**

Extract from the Yearbook of the International Law Commission:-  
**2012, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://legal.un.org/ilc/>)*

scope of the draft articles” should be retained but moved to the end of the sentence.

*It was so decided.*

104. Mr. MURPHY said that in discussions held in the Drafting Committee, members had been of the view that persons who had been displaced across borders and were therefore aliens were also covered by the draft articles. He proposed that such displaced aliens should be included in the list of persons who enjoyed special protection under international law.

105. Mr. KAMTO (Special Rapporteur) said that he did not recall that the issue of whether to include such displaced persons in that list had been raised in the Drafting Committee.

106. Mr. HMOUD (Chairperson of the Drafting Committee) said that Mr. Murphy had raised that point, but that there had been no agreement either to include it or not to include it.

107. Mr. ŠTURMA said that the current wording made it clear that the list of persons who enjoyed special protection under international law was not exhaustive.

108. Mr. MURPHY said that every year, there were hundreds of thousands, and sometimes millions, of displaced aliens living outside their countries of origin. It was important for the Commission to decide whether it intended the draft articles to cover such persons or not. His understanding was that the Commission had concluded that they were not excluded from the scope of the draft articles. If that was the case, then they should be mentioned explicitly in the categories of aliens listed in the first sentence.

109. Mr. GÓMEZ ROBLEDO said that the point raised by Mr. Murphy deserved further consideration. He therefore suggested that discussion of paragraph (5) should be deferred until the next plenary meeting in order to give members sufficient time to reflect on it.

110. Mr. KAMTO (Special Rapporteur) said that the adoption of the commentaries should not be seen as an opportunity for individual members to reiterate comments they had made in a plenary meeting or in the Drafting Committee but which had not been endorsed. The Bureau should remind members that that was not in line with the Commission’s procedures. All of the points regarding which a formal request had been made—whether in the Drafting Committee or in the plenary meeting—for inclusion in the commentaries had been reflected. He could not agree to suspend consideration of paragraphs of the commentary in order to find agreement on an opinion expressed by one Commission member that he himself had not been formally asked to include in the commentaries.

111. As to the matter at issue, he recalled that it was at Mr. Murphy’s insistence that he himself had agreed to reconsider the wording of draft article 2, after it had already been provisionally adopted by the Commission, in order to include the phrase “or the non-admission of an alien”. Aliens who crossed borders for a short period of

time in massive numbers could not be included in the scope of the draft articles. The phenomenon of displaced aliens referred to by Mr. Murphy would more appropriately fall under the law of refugees.

*The meeting rose at 1 p.m.*

### 3153rd MEETING

*Monday, 30 July 2012, at 3 p.m.*

*Chairperson:* Mr. Lucius CAFLISCH

*Present:* Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, 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.

#### **Draft report of the International Law Commission on the work of its sixty-fourth session (continued)**

##### **Chapter IV. *Expulsion of aliens (continued)* (A/CN.4/L.802 and Add.1)**

1. The CHAIRPERSON invited the Commission to continue its consideration of document A/CN.4/L.802/Add.1, which contained the text of the draft articles on expulsion of aliens and commentaries thereto adopted by the Commission on first reading at its sixty-fourth session.

##### **C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading (continued)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued) (A/CN.4/L.802/Add.1)

*Commentary to draft article 1 (Scope) (continued)*

*Paragraph (5) (continued)*

2. Mr. GÓMEZ ROBLEDO recalled that at the last meeting Mr. Murphy had raised the issue of displaced persons, whose status was regulated by no binding instrument; as far as he knew, the only relevant document was a set of texts compiled by the representative of the Secretary-General submitted pursuant to resolution 1997/39 of the Commission on Human Rights,<sup>350</sup> which had no more legal force than did that Commission’s resolutions. The categories of persons listed in paragraph (5) of the commentary (refugees, stateless persons and migrant workers and their family members) had a specific status under international law, unlike displaced persons, to whom no reference should accordingly be made in the draft articles. The displaced persons in question were understood to be persons displaced across borders, although any reference to internally displaced persons would also be inadvisable.

<sup>350</sup> Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex).

3. Mr. MURPHY said that he had recently spoken with the Special Rapporteur, who had agreed that it would be appropriate to mention displaced persons in the commentary. In response to Mr. Gómez Robledo's remarks, he cited the study by the Secretariat,<sup>351</sup> the Special Rapporteur's second report<sup>352</sup> and the resolutions in which the General Assembly had instructed UNHCR to provide humanitarian assistance to displaced persons.<sup>353</sup> While some reference should be made to displaced persons, he could agree to it being done elsewhere in the text, for example in the commentary to draft article 2, which might be preferable for Mr. Gómez Robledo.

4. Mr. HASSOUNA said that he also thought reference should be made to displaced persons, who in today's world needed protection and a special status, as the General Assembly seemed to have recognized.

5. Mr. TLADI said that he had no objection to mentioning "displaced persons" in the commentary, depending on what was meant by that term. If it was non-nationals, in other words persons who had crossed an international border, then clearly they should also be covered by the draft articles.

6. Mr. KAMTO (Special Rapporteur) said that, as there were General Assembly resolutions that referred to displaced persons, they should be mentioned in the commentary, as Mr. Murphy was proposing, provided it was made clear that it was displaced persons in the sense of a specific General Assembly resolution that was meant.

7. Mr. MURPHY explained that he was proposing to insert the words "displaced persons" after "stateless persons" in paragraph (5), perhaps with a footnote citing the resolutions in which the General Assembly had requested UNHCR to provide humanitarian assistance to displaced persons.

8. Mr. GÓMEZ ROBLEDÓ said that he was not opposed to Mr. Murphy's proposal, provided that the reference to displaced persons was made in a separate sentence, since their situation was not regulated by international law.

Paragraph (3) (concluded)

9. The CHAIRPERSON invited the Commission to return to paragraph (3), which had been left in abeyance at the previous meeting. He asked Mr. Murphy if he wished to propose an additional sentence.

10. Mr. MURPHY explained that he had consulted the Special Rapporteur and other members of the Commission in the intervening period. He proposed the addition, at the end of paragraph (3), of this sentence: "Some Commission members, however, favoured only addressing in these draft articles aliens lawfully present in the expelling State, given that the restrictions on expulsion contained in relevant global and regional treaties are limited to such aliens." That new sentence would be accompanied by a footnote citing the relevant treaties.

<sup>351</sup> A/CN.4/565 and Corr.1 (document available from the Commission's website and eventually as a supplement to *Yearbook ... 2006*, paras. 160–162.

<sup>352</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

<sup>353</sup> See, among others, resolution 67/149 of 20 December 2012.

11. Mr. KAMTO (Special Rapporteur), supported by Sir Michael, said that it was impossible to speak of "some Commission members" when only one member was concerned. It would be more accurate to say "the view was expressed ...".

*Mr. Murphy's proposal was adopted subject to that drafting amendment.*

*Paragraph (3), as amended, was adopted.*

12. Mr. TLADI requested clarification about the role played by minority opinions in the Commission's work and the way they were reflected in the commentaries.

13. Mr. CANDIOTI explained that diverging opinions voiced on first reading were not included in texts considered on second reading.

*Commentary to draft article 2 (Use of terms)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

14. Sir Michael WOOD proposed that the final part of the first sentence, after the words "the criteria of attribution to be found", should be amended to read "in chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts", and that a footnote should be inserted with a reference to the General Assembly resolution and *Yearbook ... 2001*, where the provisions in question were to be found.<sup>354</sup>

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

15. Sir Michael WOOD said that the reference to the footnote at the end of paragraph (4) should be to paragraphs (3) to (7) of the commentary, not to paragraphs (3) and (4) thereof.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

16. Mr. NOLTE, supported by Mr. TLADI, said that a sentence should be inserted to indicate that the Commission had discussed the possibility of using a different term than "alien" in the English version. While that was not strictly necessary from a legal standpoint, the Commission's awareness of the potentially negative connotations of the term in some English-speaking countries should be indicated: over the years, the use of the term had evolved significantly.

<sup>354</sup> General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

17. Mr. FORTEAU said that the term “alien” appeared often, and with no negative connotations, in legal writings in the English language: for example, in *Oppenheim’s International Law*.<sup>355</sup> In 1966, it had been included in the International Covenant on Civil and Political Rights and had never caused any difficulties in the practice of the Human Rights Committee, which was responsible for monitoring the Covenant’s implementation. The danger was of raising a non-issue that might cause unsuspected difficulties for the Commission.

18. Mr. KAMTO (Special Rapporteur), supported by Mr. CANDIOTI and Mr. SABOIA, pointed out the fact that the term “alien” was used in the title of the topic, which had been chosen more than 15 years earlier. Altering the title, which had after all been proposed by an English-speaking member of the Commission, Mr. Addo, was out of the question. The proposed addition had no place in the commentary, since it concerned only one language. At best it might be explained in a footnote that “alien” was to be understood in the strictly legal sense, as Sir Michael had suggested. His own opinion as Special Rapporteur, however, was that there were good legal reasons for not taking up the proposal.

*Paragraph (6) was adopted without amendment.*

Paragraph (7)

19. Sir Michael WOOD suggested the use of the phrase “special rights” rather than “special protection”, since the latter expression was used in other draft articles with reference to refugees, stateless persons and migrant workers.

*Paragraph (7), as thus amended, was adopted.*

*The commentary to draft article 2, as amended, was adopted.*

*Commentary to draft article 3 (Right of expulsion)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

20. Mr. MURPHY said that the main multilateral instruments for human rights protection had to remain applicable independently of the draft articles. That was made clear in the text of draft article 3, but the commentary could be interpreted otherwise. He proposed to delete the second sentence in paragraph 2 and to amend the first to read, “The second sentence of draft article 3 is a reminder that the exercise of this right of expulsion is regulated by the present draft articles and by other applicable rules of international law”. A sentence to read “Other applicable rules also include rules in human rights instruments concerning derogations in times of emergency” should be appended at the end of the paragraph.

21. Sir Michael WOOD commented, with reference to what was currently the final sentence, that the prohibition against denial of justice was one of the principle rules

governing the treatment of aliens: the two could not be dissociated from one another.

22. Mr. TLADI endorsed that comment and proposed that the final sentence should be recast to read, “It is worth mentioning in particular some of the ‘traditional’ limitations that derive from the rules governing the treatment of aliens, including the prohibitions against arbitrariness, abuse of rights and denial of justice”.

*The proposals by Mr. Murphy and Mr. Tladi were adopted.*

*Paragraph (2), as amended, was adopted.*

*The commentary to draft article 3, as amended, was adopted.*

*Commentary to draft article 4 (Requirement for conformity with law)*

Paragraph (1)

23. Mr. PARK suggested that it might be explained what was meant by “conformity with law”.

24. Mr. KAMTO (Special Rapporteur) said that the reference was to the domestic law of the expelling State, as defined by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. When the word “law” covered both domestic law and international law, as it did elsewhere in the draft articles, that was made clear. In the context of expulsion, the requirement of conformity with the law necessarily referred to domestic law, as was explained in the next paragraphs, in particular paragraph (6).

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

25. Mr. VALENCIA-OSPINA said that the phrase “under the of law” in the first sentence of the English text was meaningless. The words “*sous l’empire du*” in the French text had apparently not been translated correctly.

26. Mr. KAMTO (Special Rapporteur) proposed that the phrase “*sous l’empire du droit*” should be translated by “in the framework of law”.

*Paragraph (3) was adopted with that amendment to the English text.*

Paragraph (4)

27. Mr. FORTEAU said that the ample practice cited in paragraph (3) of the commentary showed that the requirement of conformity with law applied, irrespective of whether a refugee or alien was lawfully present in the territory of the State concerned. Paragraph (4) was thus, to some extent, an exercise in progressive development; to emphasize that point, the verb “applies” could be replaced with “shall apply” in the first sentence.

*Paragraph (4), as amended, was adopted.*

<sup>355</sup> R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edition (Harlow, Longman, 1992).

Paragraph (5)

28. Mr. NOLTE proposed, for the sake of clarity, that in the first sentence of the English text, the word “formal” should be replaced with “procedural”.

*Paragraph (5) was adopted with that amendment to the English text.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

29. Mr. FORTEAU noted that, in paragraph 70 of its judgment in the case concerning *Ahmadou Sadio Diallo*, the International Court of Justice stated that it substituted its own interpretation for that of the national authorities only when they made a manifestly incorrect interpretation of domestic law. That was likewise the position of the European Court of Human Rights. To take account of that fact, the phrase “the International Court of Justice and” could be inserted in the sixth sentence, before “European Court of Human Rights”, and the final two sentences could be deleted. Paragraph 70 of the judgment just mentioned should be cited in the footnote at the end of the paragraph.

*Paragraph (7), as amended, was adopted.*

*The commentary to draft article 4, as amended, was adopted.*

*Commentary to draft article 5 (Grounds for expulsion)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*The commentary to draft article 5 was adopted.*

PART TWO. CASES OF PROHIBITED EXPULSION

*Commentary to draft article 6 (Prohibition of the expulsion of refugees)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

30. Sir Michael WOOD proposed that the first two footnotes in the paragraph should simply refer to article 1 of the Convention relating to the Status of Refugees and article 1 of the Protocol relating to the Status of Refugees, respectively, without reproducing the contents of those articles, the texts of which were readily available.

*That amendment was adopted.*

31. Sir Michael WOOD proposed that, in the first sentence of the English text of paragraph (2), the words “in the light of” should be replaced with “having regard to”, in order to better reflect the French text.

*That amendment to the English text was adopted.*

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

32. Mr. MURPHY said that it should be made clear that the protection provided for in draft article 6, paragraph 2, constituted progressive development of the law. He therefore proposed that the phrase “progressive development of the law in the form of” should be inserted in the third sentence, after the word “constitutes”.

33. Mr. VALENCIA-OSPINA pointed out that the Commission had always avoided specifying which parts of its commentaries constituted codification and which amounted to the progressive development of law.

34. Mr. MURPHY said that that was not quite true. Paragraph (1) of the commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision) stated that the text was “undoubtedly progressive development of international law”. Reference was also made to the progressive development of law in paragraph (1) of the commentary to draft article 29 (Readmission to the expelling State).

35. Sir Michael WOOD said that the Commission had also mentioned progressive development of the law in its articles on responsibility of States for internationally wrongful acts<sup>356</sup> and on the responsibility of international organizations.<sup>357</sup> Nevertheless, it was perhaps not necessary to spell out the fact that draft article 6, paragraph 2, was an exercise in progressive development, as it was already indicated that the protection provided for therein reflected a trend in the legal literature and found support in the practice of some States. In order to meet Mr. Murphy’s concerns, the verb “constitutes” in the third sentence of the commentary could simply be replaced with “would constitute”.

36. Mr. VALENCIA-OSPINA said he found the fact that the commentaries to draft articles 27 and 29 did indeed refer to progressive development of the law to be problematic, because the Commission had already said on several occasions that no such distinction should be drawn. It was a question of legal policy that needed to be resolved.

37. Mr. KAMTO (Special Rapporteur) said that while the Commission did not usually indicate that a particular provision constituted progressive development of the law, he had included that information at the express request of the majority of the members of the Working Group on expulsion of aliens.

38. Mr. NOLTE endorsed Sir Michael’s proposal and suggested that, in the third sentence, the word “derogation”, which was a technical term used only in specific contexts, should be replaced with “departure”.

<sup>356</sup> General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77, paragraph (1) of the general commentary.

<sup>357</sup> General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, paragraphs (1)–(5) of the general commentary.

39. The CHAIRPERSON said that he took it that the Commission wished to adopt the proposals by Sir Michael and Mr. Nolte.

*It was so decided.*

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

*The commentary to draft article 6, as amended, was adopted.*

*Commentary to draft article 7 (Prohibition of the expulsion of stateless persons)*

Paragraph (1)

40. Sir Michael WOOD proposed that in the English text the adjective "strict", which he found superfluous, should be deleted.

*Paragraph (1) was adopted with that amendment to the English text.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

41. Mr. MURPHY proposed that the word "accordingly" should be replaced with "however" in the second sentence of the English text.

42. The CHAIRPERSON pointed out that the expression "*de ce point de vue*", used in the French text, meant neither "accordingly" nor "however", and that it might be better to translate it literally, using the phrase "from this point of view".

43. Sir Michael WOOD suggested that the expression, which seemed to be difficult to translate into English, should simply be deleted.

44. Mr. KAMTO (Special Rapporteur) recalled that the Commission aligned the various language versions on the original text drafted in the working language of the Special Rapporteur, and not vice versa. In the case in point, English should not be the Procrustean bed of French, because each language had its own specific rhythms, logic and way of presenting an argument.

45. Sir Michael WOOD said that there was no logical connection between the two sentences: the first was simply a statement of fact, expressing no particular viewpoint. It would therefore be preferable to delete the phrase "*de ce point de vue*" from all the language versions.

*That proposal was adopted.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

*The commentary to draft article 7, as amended, was adopted.*

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

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

*The commentary to draft article 8 was adopted.*

*Commentary to draft article 9 (Deprivation of nationality for the sole purpose of expulsion)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to draft article 9 was adopted.*

*Commentary to draft article 10 (Prohibition of collective expulsion)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

46. Mr. NOLTE said that in the second sentence, the phrase "after and on the basis of which the decision to expel the group of aliens would be taken" should be deleted. It was confusing, for it suggested that the decision was on the collective expulsion of a group of aliens, rather than on the concomitant expulsion of several aliens.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to draft article 10, as amended, was adopted.*

*Commentary to draft article 11 (Prohibition of disguised expulsion)*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to draft article 11 was adopted.*

*Commentary to draft article 12 (Prohibition of expulsion for purposes of confiscation of assets)*

Paragraph (1)

*Paragraph (1) was adopted.*

*The meeting rose at 6.05 p.m.*