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Summary record of the 3154th 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:-
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3154th MEETING

Tuesday, 31 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. Comissário Afonso, 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. 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.

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 resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.802/Add.1.

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 12 (Prohibition of expulsion for purposes of confiscation of assets) (*concluded*)

Paragraph (2)

2. The CHAIRPERSON said that, at the previous meeting, Mr. Murphy had proposed that the phrase "seems contrary to" should be replaced with "implicates". He wished to know if, after due consideration, the Commission had reached consensus on that amendment.

3. Mr. MURPHY said that the word "implicates" would be a useful way of bridging the different opinions within the Commission.

4. Mr. KAMTO (Special Rapporteur) said that, in the French version, the verb "*impliquer*" was not meaningful in the context of that paragraph.

5. Mr. FORTEAU proposed that the phrase "*mettre en cause*" or "*mettre en jeu*" should be used in the French version.

Paragraph (2), as amended, was adopted.

The commentary to draft article 12, as amended, was adopted.

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

Paragraph (1)

6. Mr. FORTEAU said that, in the second sentence, the words "and implemented" should be added after the phrase "a definitive decision is taken".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to draft article 13, as amended, was adopted.

Part Three. Protection of the rights of aliens subject to expulsion

Chapter I. General provisions

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

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

7. Mr. NOLTE said that in the debate on the topic, all members had agreed that human dignity was the foundation or source of inspiration for all human rights, but views had diverged as to whether it also constituted a specific human right. He therefore proposed that the first sentence should read as follows: "Divergent views were expressed by members of the Commission as to whether human dignity was the foundation or source of inspiration for human rights in general or also a specific human right."

8. Sir Michael WOOD said that he agreed with the point made by Mr. Nolte, but that the idea would be more clearly expressed if, in the original wording of the sentence, the words "or rather" were replaced with the phrase "in addition to being". The sentence would then read as follows: "Divergent views were expressed by members of the Commission as to whether human dignity was a specific human right in addition to being the foundation or source of inspiration for human rights in general." In the next sentence, "often" should be replaced with "not infrequently", to align it more closely with the French version.

Paragraph (2) was adopted with those two amendments.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft article 14, as amended, was adopted.

Commentary to draft article 15 (Obligation not to discriminate)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

9. Sir Michael WOOD proposed the deletion of the second sentence, since in some treaties the prohibition

of discrimination was an obligation of general scope, whereas in others it applied only to the rights set forth in the treaty in question. The next sentence would then begin thus: "As the prohibition of discrimination applies to the exercise of the right of expulsion …".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

10. Mr. NOLTE, supported by Sir Michael, proposed the deletion of the word "subsequently" in the first sentence, because the Commission members who had proposed the expansion of the list of grounds for discrimination had done so in the normal course of the discussions. The use of the word "subsequently" might wrongly convey the impression that members had made that proposal out of order, or in unusual circumstances.

Paragraph (4), as amended, was adopted.

Paragraph (5)

11. Mr. McRAE said that in the last sentence, the phrase "it does not seem necessary to mention sexual orientation as a distinct ground" suggested that that was the general conclusion reached by the Commission, whereas it was the view of only some members. The phrase should therefore be amended to read, "some members were of the view that it was not necessary".

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to draft article 15, as amended, was adopted.

Commentary to draft article 16 (Vulnerable persons)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

12. Sir Michael WOOD proposed the addition of the phrase "and special needs" after the word "vulnerabilities" in the second sentence.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft article 16, as amended, was adopted.

Chapter II. Protection required in the expelling State

Commentary to draft article 17 (Obligation to protect the right to life of an alien subject to expulsion)

The commentary to draft article 17 was adopted.

Commentary to draft article 18 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft article 18 was adopted.

Commentary to draft article 19 (Detention conditions of an alien subject to expulsion)

Paragraph (1)

13. Sir Michael WOOD said that paragraph 1 (*b*) of the draft article, which stipulated that an alien subject to expulsion must be detained separately from persons who had been sentenced, stated only one of the consequences of the principle set forth in paragraph 1 (*a*), namely that the detention of an alien must not be punitive in nature. In the second sentence of the commentary to paragraph (1), the last clause should therefore read, "whereas subparagraph (*b*) sets out one of the consequences of that principle".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

14. Sir Michael WOOD said that the length of detention was an important rather than a sensitive issue. In the first sentence of that paragraph the word "sensitive" should therefore be replaced with "important".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

15. The CHAIRPERSON said that, since it was the Commission's practice to refer to a "Special Rapporteur", irrespective of the gender of the person in question, in the French version of the paragraph, "*Rapporteuse spéciale*" should be replaced with "*Rapporteur spécial*".

Paragraph (7) was adopted with that editorial amendment to the French version.

Paragraph (8)

16. Sir Michael WOOD suggested that, for the sake of clarity, it would be advisable to add a sentence at the end of the paragraph, which would read thus: "Paragraph 3 (*b*) is without prejudice to a right of the State to continue to detain the alien on grounds unrelated to expulsion." That sentence would cover the case where an alien was detained pending expulsion, expulsion then became impossible, but there were other grounds, such as national security, on the basis of which the alien could continue to be detained. The addition he was proposing made it clear that the statement in paragraph 3 (*b*) "detention shall end" referred only to detention with a view to expulsion.

17. Mr. TLADI, supported by Mr. KAMTO (Special Rapporteur), said that he was uncomfortable with the amendment proposed by Sir Michael. He proposed instead the addition of the phrase "in connection with expulsion" after the word "detention" in the first sentence, if the Commission's intention was to ensure that a State was able to continue the detention of an alien subject to expulsion, but solely for other reasons unrelated to his or her expulsion. He would not, however, wish to include any language that seemed to detract from the essence of the article and that seemed to be a positive encouragement to the State to continue detention.

18. Mr. SABOIA asked for clarification of the phrase at the end of paragraph 3 (*b*), "except where the reasons are attributable to the alien concerned".

19. Mr. McRAE said that part of the reason for the inclusion of that apparently obscure phrase was to leave open the possibility for continuing to detain an alien if there were factors other than the reason for expulsion that necessitated his or her detention.

20. Sir Michael WOOD said that, in the light of all the constructive comments made, he could go along with Mr. Tladi's suggestion.

Paragraph (8) was adopted with that amendment.

The commentary to draft article 19, as amended, was adopted.

Commentary to draft article 20 (Obligation to respect the right to family life)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

21. Sir Michael WOOD said that the meaning of the words "*a contrario*" was somewhat obscure.

22. Mr. TLADI read out the text of article 17, paragraph 1, of the International Covenant on Civil and Political Rights, which was described in paragraph (5) as setting out a condition *a contrario*.

23. Mr. NOLTE said that the term "implicitly" would be more correct than "*a contrario*" and would better correspond to the purpose of the draft article, which was to ensure not only that interference must not violate the law, but also that it must be based on the law.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to draft article 20, as amended, was adopted.

Chapter III. Protection in relation to the State of destination

Commentary to draft article 21 (Departure to the State of destination)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

24. Sir Michael WOOD proposed the deletion of the lengthy quotation from the *Maal* case, which was extremely dated, in that it distinguished between persons who were gentlemen and others.

25. Mr. KAMTO (Special Rapporteur) said that he wished to retain the passage because it showed that as early as the nineteenth century there had been an awareness of the sacred character of the human person and the importance of the dignity of the human person.

26. Mr. NOLTE said that, while the language of the quotation might be outdated, its substance was extremely important and instructive.

Paragraph (4) was adopted.

Paragraph (5)

27. Sir Michael WOOD said that, in the passage quoted from section 5.2.1 of annex 9 to the Convention on International Civil Aviation, it was unclear what was meant by "an inadmissible passenger or", and he therefore proposed its deletion.

28. Mr. KAMTO (Special Rapporteur) said that the important point being made in that paragraph was that the conditions under which a person was deported must not infringe his or her dignity.

Paragraph (5) was adopted.

Paragraph (6)

29. Mr. FORTEAU drew attention to the fact that in the first sentence the reference should be to paragraph 3 and not paragraph 4 of the draft article.

Paragraph (6) was adopted with that correction.

The commentary to draft article 21, as amended, was adopted.

Commentary to draft article 22 (State of destination of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

30. Sir Michael WOOD said that the phrase at the end of the first sentence "under a rule of international law, whether a rule of general international law or a treaty rule binding that State" was too narrow in scope. For example, a regional international law or a rule of customary law might not be a rule of general international law. He considered that the emphasis was supposed to be on treaty rules. Thus, for the sake of a more comprehensive listing, he proposed that the phrase should read "under a rule of international law, including a treaty rule binding on that State".

31. The CHAIRPERSON suggested that a simpler solution would be to delete the phrase "whether a rule of general international law or a treaty rule binding that State".

32. Mr. McRAE said that the deletion of those words would mean that the commentary added nothing to the draft article. As he understood the point that the Special Rapporteur had wished to make, a rule of international law might be a customary rule or a treaty rule. He liked the proposal made by Sir Michael, which expressed the point but placed emphasis on treaty rules.

33. The CHAIRPERSON said that the question seemed to be how one interpreted the words "rule of international law".

34. Sir Michael WOOD said that his proposal would tie in with the footnote at the end of that phrase, which referred the reader to examples of treaty rules.

35. Mr. TLADI said that his recollection of the Commission's deliberations was that, while some members had wished the emphasis to be placed on treaty law, the majority in the Drafting Committee had held the view that both treaty law and general international law should be covered. He would therefore prefer to retain the text as it stood or amend it along the lines suggested by the Chairperson.

36. Mr. KAMTO (Special Rapporteur) said that he agreed with Mr. Tladi that placing the emphasis on treaty law would not accurately reflect the discussion that had taken place in the Drafting Committee. He also endorsed Mr. McRae's comment that truncating the phrase would not add anything to the draft article. He therefore proposed that the phrase should be reworded to read, "under a rule of international law, whether a treaty rule binding on that State or a rule of customary international law". The content of general international law varied according to legal writers: some authors considered that it referred to customary law only, while others considered that it covered both customary and treaty law.

37. Mr. CANDIOTI said that the corresponding footnote should then read, "For examples of the first hypothesis …".

Paragraph (2), as amended by the Special Rapporteur and with that amendment to the footnote at the end of the first sentence, was adopted.

Paragraph (3)

38. Mr. HMOUD, referring to the phrase in the last sentence "the view was also expressed that the State of embarkation would have no legal obligation to receive the expelled alien", proposed that the words "would have" should be replaced with the word "had".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

39. Mr. FORTEAU proposed that, in addition to the mention of draft articles 23 and 24, reference should also be made to draft article 6, paragraph 3.

Paragraph (5), as amended, was adopted.

The commentary to draft article 22, as amended, was adopted.

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

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

40. Mr. McRAE said that an essential part of the compromise agreement reached by the Commission had been the inclusion of a reference in draft article 15 to any other ground impermissible under international law. As currently worded, paragraph (3) of the commentary seemed to suggest that the issue of whether sexual orientation was a prohibited ground for discrimination had been dropped, which was not the case. He therefore proposed that the paragraph should end with the phrase "and the matter is any event covered by the words 'any other ground impermissible under international law'".

41. Mr. KAMTO (Special Rapporteur) said that Mr. McRae's proposal would not reflect the outcome of the discussion in the Drafting Committee—that had been the position of some members, but not the Drafting Committee as a whole. He proposed that the text should be left as it stood, since, in any case, there was a footnote referring to paragraph (5) of the commentary to draft article 15, which explained the various viewpoints expressed. Alternatively, a new sentence could be added to the end of the paragraph to the effect that some members had considered that sexual orientation should not, under any circumstances, be included among the prohibited grounds of discrimination.

42. Mr. McRAE, acknowledging the point made by the Special Rapporteur, proposed that a sentence along the lines of the first sentence of paragraph (7) of the commentary to draft article 15 should be added.

43. Mr. WISNUMURTI said that he would prefer to retain the text of paragraph (3) as it stood.

44. Mr. NOLTE said that, as currently drafted, paragraph (3) did not accurately reflect the balance of the discussion and might give rise to misunderstandings.

45. Mr. CANDIOTI said, in the light of Mr. McRae's earlier comments, that the footnote at the end of the paragraph should refer not only to paragraph (5), but also to paragraph (7) of the commentary to draft article 15, and that that should be taken into account when redrafting the text.

46. Following consultations, Mr. McRAE proposed that the second sentence of paragraph (3) should be amended

to read as follows: "Since divergent views were expressed by members of the Commission on this point, the approach taken in draft article 15 and explained in the commentary to that draft article was adopted here as well." Such an amendment would obviate the need for a footnote to that sentence.

Paragraph (3), as amended and with the deletion of the corresponding footnote, was adopted.

Paragraph (4)

47. Sir Michael WOOD proposed that in the last sentence, the expressions "positive international law" and "positive law" should be replaced with the expressions "existing rule of international law" and "existing law", respectively, as those terms seemed more appropriate in the context.

48. Mr. MURPHY said he believed that the Special Rapporteur had used the term "positive" because, in his fifth report,[358] he had drawn a distinction between the obligations set forth in the International Covenant on Civil and Political Rights and the European Convention on Human Rights, on the one hand, and non-treaty obligations, on the other hand. He proposed that the word "positive" should be replaced with the word "treaty" in both cases.

49. Mr. KAMTO (Special Rapporteur) proposed the deletion of the word "positive" altogether.

50. Mr. MURPHY said that without the word "positive", the sentence would seem to refer to a rule of customary international law, which was not what was said in the Special Rapporteur's fifth report or the commentary to the draft articles. It might be preferable to delete the sentence.

51. Mr. CANDIOTI said that his preference was to opt for the word "treaty", for the reasons given by Mr. Murphy. If the word "positive" was simply omitted, the expression would embrace every rule of international law, which was not the intention.

52. Mr. KAMTO (Special Rapporteur) said that the deliberations had not focused on whether reference should be made to treaty law or any other source of law, but on how far the law went on the issue of the prohibition of the death penalty. He thus proposed that the last part of the sentence should read, "while … this prohibition now corresponds to a rule of international law, it would be difficult to state that international law, as it stands, goes any further in this area". He recalled that during the discussion in the Drafting Committee, some members had referred to the General Assembly's efforts to achieve the abolition of the death penalty and, failing that, to impose a moratorium. The ensuing General Assembly resolution was not treaty law, but it could perhaps be considered as evidence of a trend not to apply the death penalty.

53. Mr. NOLTE, supported by Mr. TLADI, said it was arguable that the issue went beyond treaty law and thus he was not in favour of Mr. Murphy's proposal to replace "positive" with "treaty". He expressed support for the Special Rapporteur's proposal.

54. Mr. MURPHY said that both the memorandum by the Secretariat[359] and the fifth report approached the issue solely in the context of specific treaty regimes containing certain kinds of obligations. Paragraph (4) of the commentary alluded to the International Covenant on Civil and Political Rights, which did not express the rule in question, although the Human Rights Committee had adopted a view that such a rule existed in that particular treaty regime. However, nowhere in any of the Commission's prior documentation had the Special Rapporteur or anyone else established that the rule went beyond treaty law. The Special Rapporteur had even stated in his fifth report that it would not be appropriate to generalize the rule since it was not a customary norm. While he did not wish to enter into a substantive debate at the current juncture, at the same time he did not wish the Commission to draw a conclusion that expanded the scope of the prohibition to include general customary international law without carrying out the necessary research.

55. Mr. TLADI said that, ultimately, the commentary was the product of the Commission's debate. During the debate, he had expressed the view that the obligation for a State that did not apply the death penalty not to expel an alien to a State where the person was threatened with the death penalty or the execution of a death sentence was a general rule of international law. In the Drafting Committee, several other members had shared that view, while others had even gone further by saying that there was a general rule of international law against the death penalty. The sentence in question referred to the narrower issue and was not as conclusive as Mr. Murphy suggested, since it opened with the phrase "it may be considered" and continued with the qualifying expression "within these precise limits". What was important, however, was that it should reflect the discussions held in plenary Commission and the Drafting Committee. He would prefer to retain the original text of the sentence, but rather than to see an emphasis on treaty law, he would prefer to delete it.

56. Sir Michael WOOD, apologizing for having sparked such a lengthy debate, said that the simplest solution would be to delete the sentence. If it was retained, however, he proposed that the phrase "it may be considered" should be replaced with "some members of the Commission considered" in order to more accurately reflect the discussion.

57. Mr. KAMTO (Special Rapporteur) said that, although the proposal by Sir Michael would be the simpler solution, since it was the first reading of the draft articles, he would like to see how Member States reacted. He endorsed Mr. Tladi's clarifications. On careful reading, the sentence did not establish a general rule. Mr. Murphy was correct about his views on the death penalty as set forth in the fifth report; he was firmly convinced that there was currently no general rule of international law prohibiting the death penalty. However, the expression "within these precise limits" referred to the situation of a State that

[358] *Yearbook … 2009*, vol. II (Part One), document A/CN.4/611.

[359] A/CN.4/565 and Corr.1 (document available from the Commission's website and eventually as a supplement to *Yearbook … 2006*).

had abolished the death penalty; having done so, it had adopted a position under international law whereby it would not expel an alien to another State where there was the threat of execution without obtaining an assurance that a death penalty would not be carried out. He proposed that the sentence should be retained, but amended slightly to read, "While it may be considered that, within these precise limits, this prohibition now corresponds to a firm trend in international law, it would be difficult to state that the law goes any further in this area".

58. The CHAIRPERSON said he would take it that the Commission was in favour of the Special Rapporteur's proposal.

It was so decided.

59. Mr. MURPHY, referring to the penultimate sentence of paragraph (4), said that the reference to the views of the Human Rights Committee should be reformulated to make it consistent with the style used elsewhere in the commentaries. He therefore proposed the insertion of a new sentence, to read as follows:

> "The Human Rights Committee has taken the position that, under article 6 of the Covenant, States that have abolished the death penalty may not expel a person to another State in which he or she has been sentenced to death, unless they have previously obtained an assurance that the penalty will not be carried out."

Paragraph (4), as amended, was adopted.

Paragraph (5)

60. Mr. VALENCIA-OSPINA said that, in the first sentence, the word "undoubtedly" conveyed significantly greater emphasis than what had been agreed by the Commission with respect to a similar paragraph of the commentaries discussed at a previous meeting. Moreover, the explicit statement that draft article 23, paragraph 2, constituted progressive development added nothing to the understanding of the text—which was, after all, the purpose of the commentaries—and instead sent a political message to States. He was concerned that, if it was retained, the Commission would be working at cross purposes with itself, giving with one hand and taking away with the other.

61. Sir Michael WOOD said that the reference to progressive development to which Mr. Valencia-Ospina objected was an essential aspect of the compromise that had emerged from the Commission's work on draft article 23, paragraph 2; personally, he was in favour of retaining it. Although it did not happen frequently, the Commission did sometimes refer to the rules it drafted as constituting progressive development. Examples could be found in the commentaries to the articles on responsibility of States for internationally wrongful acts,[360] as well as in other texts the Commission had produced. The sensitivity and importance of the issue referred to in paragraph 2 made it appropriate to classify it as progressive development. That said, he would have no problem deleting the word "undoubtedly", which added unnecessary emphasis.

62. Furthermore, in view of the debate that the Commission had had on paragraph (4), in which opinions had differed as to whether the basic principle described constituted positive law, he proposed, in the first sentence, to insert the words "at least" so that the phrase would read, "constitutes progressive development in at least two respects". He also proposed that in the last sentence, the qualifier "real" should be inserted before "risk" in keeping with the case law of international human rights courts, which, in that context, tended to use the expressions "real risk" or "substantive risk".

63. Mr. PARK said that, in referring to "States that retain the penalty in their legislation but do not apply it", an expression such as "for quite some time" or "for some time" should be added in order to be more precise about the length of time during which the State had refrained from applying the death penalty.

64. Mr. PETER said that he agreed that the rule set forth in draft article 23, paragraph 2, constituted progressive development, since it took into account the fact that there might be States that still had the death penalty on their statute books but no longer implemented it. Reiterating a request he had made during the plenary debate on draft article 23, he proposed the insertion of a footnote to paragraph (5) that would read as follows:

> "However, it was noted that, by specifically addressing only States that do not apply the death penalty, it limits the security of the alien subject to expulsion, in the sense that States applying the death penalty are at liberty to send the alien where they please."

65. Ms. JACOBSSON said that she fully shared Mr. Valencia-Ospina's views. To say that the paragraph "undoubtedly constitutes progressive development" was tantamount to freezing the *status quo* of the abolition by States of the death penalty when, in reality, the course and pace of change relating to such abolition could not be foreseen. She therefore proposed that, in the first sentence, the expression "undoubtedly constitutes progressive development in two respects" should be replaced with "makes it clear that", with appropriate editorial adjustments. She would reserve her opinion on Sir Michael's proposal to insert the word "real" before "risk" until she had seen examples of the case law to which he had alluded, although her first inclination was to think that it was unnecessary.

66. Mr. NOLTE said that, since paragraph (5) was addressed not only to States but also to national courts, it should make very clear the authority on which paragraph 2 of the draft article was based. The particular circumstances covered by paragraph 2 made it legitimate for the Commission to clarify that it constituted progressive development. In the event, not only did he prefer to retain the reference to progressive development, but he also believed that it would be positively misleading not to include it. He supported Sir Michael's proposed amendments to paragraph (5).

[360] 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.

67. Mr. CANDIOTI said that he endorsed the views expressed by Mr. Valencia-Ospina and Ms. Jacobsson in favour of omitting the reference to "progressive development". Its inclusion was inconsistent with the Commission's tradition of not drawing a clear distinction between codification and progressive development in the rules that it enunciated, but rather of following a mixed approach. Moreover, for the Commission to engage in the progressive development of international law was not an exceptional or daring act, but rather was an integral part of the Commission's mandate, as set forth in its statute and in the Charter of the United Nations. Perhaps a different formulation could be used in paragraph (5) to indicate that, to a certain extent, paragraph 2 of draft article 23 reflected an innovation or the introduction of a new standard, but the Commission should not feel compelled to notify the international community each time it engaged in progressive development. As a matter of fact, the Commission would increasingly be called on in the twenty-first century to engage in such development and actually had an important role to play in doing so, since nearly everything that could be codified as international law had already been codified.

68. Mr. KAMTO (Special Rapporteur) said that perhaps a more neutral formulation—but one that nevertheless reflected the emerging nature of the rule in paragraph 2 of draft article 23—might serve as a compromise between the views expressed by Mr. Valencia-Ospina, Ms. Jacobsson and Mr. Candioti, which he shared, and the opposing viewpoints expressed by others. He therefore proposed that the word "consequently" should be replaced with "in short" and that the phrase "undoubtedly constitutes progressive development in two respects" should be replaced with "reflects a trend that reveals", together with the resulting editorial adjustments made necessary by those amendments.

69. Mr. PETRIČ said that he fully agreed with Mr. Valencia-Ospina. All of the Commission's work, including every draft convention it had produced, was a combination of codification and progressive development. Unlike Mr. Nolte, he would prefer not to characterize the provisions drafted by the Commission as constituting "progressive development", since a statement to that effect by the Commission sent a message to the national courts that the rule concerned was of a lesser order than a rule resulting from codification. There had been many references to the distinction between *lex lata* and *lex ferenda* at the current session; it nonetheless bore repeating that *lex ferenda* referred to that which would become law in the future but was not law yet. Consequently, the Commission was most definitely not producing draft articles of *lex ferenda*, it was producing draft articles of law. He supported Sir Michael's proposal to insert the word "real" before "risk" in the last sentence.

70. Mr. MURPHY said that he had seen no evidence to support the trend mentioned by the Special Rapporteur in his proposal. The point of the paragraph, and the reason why there were no footnotes containing any references, was that no body or person had stated that the two developments in question were part of an existing treaty regime. They were not part of the law and not part of the trends in the law. Therefore, in his view, the proposal did not work.

71. It was not clear to him whether some members were saying that the Commission should never speak of "progressive development", which would not be in keeping with the Commission's practice over the past 50 years. The phrase was used in situations where the Commission had little or no support for a proposal, in order to indicate its considered view as to where the law was going, or should be going. Rather than stating that the developments reflected a trend, a compromise solution could be to say "Consequently, paragraph 2 of draft article 23 would develop the law in at least two respects", and continue with the remainder of the paragraph as it stood. He supported the amendments suggested by Sir Michael. However, rather than inserting the temporal language suggested by Mr. Park, he would prefer to insert the words "in practice" immediately after "do not apply it".

Following a suggestion by the Chairperson, the Commission deferred its decision on paragraph (5) of the commentary to draft article 23.

Commentary to 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)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

72. Mr. MURPHY said that the italics in the last two sentences of the text should be removed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft article 24, as amended, was adopted.

Chapter IV. Protection in the transit State

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

The commentary to draft article 25 was adopted.

Part Four. Specific procedural rules

Commentary to draft article 26 (Procedural rights of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

73. Mr. McRAE said that, at the beginning of the fourth sentence, the words "in legal writings" were unnecessary and should be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

74. Sir Michael WOOD said that, in the second sentence, the words "may violate" should be changed to "may raise questions under", in order to ensure consistency with the subsequent quotation.

75. The CHAIRPERSON said that an indication should be given, in the French version, that the quotation by Manfred Nowak at the end of the paragraph was in fact a translation.

Paragraph (4), as amended, was adopted.

Paragraph (5)

76. Mr. FORTEAU said that, at the end of the footnote to the second quotation, the following text should be inserted: "See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, I.C.J. Reports 2010*, para. 74."

77. Sir Michael WOOD said that, in the footnote to the paragraph below on article 13 of the European Convention on Human Rights, the text of article 6 of the Convention should be deleted, since it was readily available.

Paragraph (5), with those amendments to the footnotes mentioned, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

78. Mr. NOLTE said that, in the penultimate sentence, the expression "may not be construed" should be replaced by "must not necessarily be construed", in order to avoid any ambiguity. In the same sentence, the qualifying phrase relating to the right to interpretation took away the very essence of that right. He would be in favour of replacing it with more abstract language.

79. Mr. PETRIČ said that he was in favour of retaining the original wording, bearing in mind the considerable problems of translation and interpretation faced by countries such as his.

80. The CHAIRPERSON said that, in the French version, the words "*ne saurait être*" corresponded to Mr. Nolte's first proposal.

81. Mr. PETER said that he supported Mr. Nolte's proposal, bearing in mind the importance of adequate and effective interpretation for defendants and aliens.

82. Mr. KAMTO (Special Rapporteur) said that the wording of paragraph (7) was an attempt to reflect the discussion in the Drafting Committee, bearing in mind the practical problems certain countries faced in the area of translation and interpretation. States should not be expected to provide translation and interpretation in all languages, including ones not commonly used. The idea was that aliens should either speak one of the languages spoken in the region, in which case an interpreter from a neighbouring country could be used; if not, they should speak a commonly used international language.

83. Sir Michael WOOD suggested, with regard to Mr. Nolte's first proposal, that the words "may not be construed" should be replaced with "should not be construed". With regard to Mr. Nolte's second proposal, he suggested that, in order to meet the concerns of the various speakers, the phrase "provided that this can be done without impeding the fairness of the hearing" should be inserted after the words "at the international level". It should be borne in mind that the context was one of expulsion hearings, not criminal trials.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

84. Sir Michael WOOD said that, in the second sentence of the footnote at the end of paragraph 9, the words "the arguments in" should be deleted. Generally speaking, while it had been helpful to include the references to the memorandum by the Secretariat[361] and the Special Rapporteur's report, in this instance his sixth report,[362] that did not mean that the Commission endorsed all the arguments they contained. On second reading, the Commission should try to include all the necessary information within the commentaries themselves.

Paragraph (9) was adopted with that amendment to the footnote mentioned above.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

The commentary to draft article 26, as amended, was adopted.

Commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision)

Paragraph (1)

85. Sir Michael WOOD said that, in the second sentence, "in positive law" should be replaced with "in existing law".

86. Mr. KAMTO (Special Rapporteur) said that the Commission might wish to harmonize the reference to "progressive development" in paragraph (1) of the commentary to draft article 27 with the wording he had suggested for paragraph (5) of the commentary to draft article 23. It could be stated that the paragraph reflected current trends in international law.

87. Sir Michael WOOD said that he did not agree that draft article 27 reflected trends in international law. He would be in favour of retaining the reference to "progressive development" in paragraph (1) of the commentary to that draft article, but without the word "undoubtedly".

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[361] See footnote 359 above.

[362] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

88. Mr. MURPHY recalled that no agreement had yet been reached regarding the use of the word "trend" in paragraph (5) of the commentary to draft article 23. The reason that the reference to "progressive development of international law" had been included in paragraph (1) of the commentary to draft article 27 was that, during the discussion in the Sixth Committee, most States had said that they did not have such a provision in their national law, at least not in the wide range of respects covered by the draft articles. The reference to progressive development involved the credibility of the Commission; there was no basis for asserting that the draft article was already law. He had no objection to deleting the word "undoubtedly", and would even be willing to discuss the use of a term other than "progressive development". The repeated effort to purge the phrase "progressive development" from the commentaries was, however, unfortunate.

89. Mr. TLADI said that the term "progressive development" should not be treated as if it were a bad term, for its use did not imply that there were no rules of law. There was a distinction between those rules or principles that were not law and the progressive development of law. That distinction had been made clear, for example in the commentary to the articles on diplomatic protection,[363] specifically in paragraph (1) of the commentary to draft article 19, which read as follows:

> There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of the law.[364]

90. Mr. NOLTE said that nobody was suggesting that "progressive development" was a bad term. As Mr. Murphy had said, it was a question of the authority that the Commission assumed and asserted. The use of the term "progressive development" was shorthand for saying that the rule in question, or variant of the rule, was not sufficiently established in practice for the Commission to be able to state that it constituted codification of customary international law. The distinction between codification and progressive development existed in the Commission's statute for a good reason and should not be obliterated.

91. Mr. VALENCIA-OSPINA said that, if he had understood correctly, the Commission was working towards a consensus formula for paragraph (5) of the commentary to draft article 23 that could serve as a model for paragraph (1) of the commentary to draft article 27. However, in paragraph (1) of the commentary to draft article 27, the phrase "undoubtedly progressive development of international law" had been used, while in paragraph (5) of the commentary to draft article 27, the phrase "exercise in the progressive development of international law" continued: "having regard to current trends in international law and to some national laws". He wondered whether it might be useful to draw on the latter formula, which was in line with the proposal of the Special Rapporteur, in order to come up with wording that would be acceptable to all.

92. Mr. KAMTO (Special Rapporteur) said that, regardless of what was finally decided on that point, no one should have the impression that rules were the product of the fertile imagination of the Special Rapporteur. While a trend might be insufficiently established, it was always based on some amount of practice. That was true of the rule on suspensive effect, which had been established formally in the legislation of a certain number of States; it was inaccurate to say that the discussions in the Sixth Committee had shown that no legislative provisions existed. He invited members to check the reports of the Special Rapporteur and the memorandum by the Secretariat, which revealed that a thorough study carried out on national legislation had shown that a certain number of States clearly established the suspensive effect of appeals. Other States had not taken a position either way. However, the fact that they had chosen not to do so did not mean that suspensive effect was not established, or that they were opposed to it. If the Commission did not want to say that a rule was based on a trend of international law, it could say that it was based on a trend resulting from the practice of certain States.

93. The CHAIRPERSON suggested that consultations should be held to achieve consensus on the wording of paragraph (5) of the commentary to draft article 1, paragraph (5) of the commentary to draft article 23, and paragraph (1) of the commentary to draft article 27.

It was so decided.

Paragraph (2)

94. Sir Michael WOOD said that, in the middle of the second sentence, regarding the potential obstacles to return, the words "especially those" should be changed to "including those", since there were many other potential obstacles besides economic ones.

Paragraph (2), as amended, was adopted.

The meeting rose at 1 p.m.

3155th MEETING

Tuesday, 31 July 2012, at 3.05 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. 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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[363] General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50.

[364] *Yearbook ... 2006*, vol. II (Part Two), p. 53.