

Document:-  
**A/CN.4/3155**

**Summary record of the 3155th 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/>)*

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,<sup>363</sup> 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.<sup>364</sup>

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.

<sup>363</sup> 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.

<sup>364</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 53.

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. Kitichaisaree, 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 (concluded)* (A/CN.4/L.802 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of document A/CN.4/L.802/Add.1, which contained the text of the draft articles and commentaries thereto adopted by the Commission on first reading at the current session. He suggested starting with paragraph (3) of the commentary to draft article 27 and recalled that the Commission would return to paragraph (1) later.

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

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

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

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

Paragraph (5)

2. Mr. VALENCIA-OSPINA pointed out that the last sentence of the paragraph raised the question of the reference to the progressive development of international law, to which the Commission had agreed to return later.

3. Sir Michael WOOD said that the entire paragraph should be deleted, because the resolutions of the Parliamentary Assembly of the Council of Europe were not particularly helpful in the current context.

4. Mr. KAMTO (Special Rapporteur) stressed that the idea was to take into account the evolution of law in the area under consideration and to show that at least one organization—the Council of Europe—had gone further than the others. He proposed the deletion of the last sentence, which referred to the progressive development of international law, but to retain the preceding sentence, which followed the quotation, to indicate that the Commission had set itself a limit in its work.

*That proposal was adopted.*

*Paragraph (5), as amended, was adopted.*

*Commentary to draft article 28* (Procedures for individual recourse)

*The commentary to draft article 28 was adopted.*

#### PART FIVE. LEGAL CONSEQUENCES OF EXPULSION

*Commentary to draft article 29* (Readmission to the expelling State)

Paragraphs (1) to (3)

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

Paragraph (4)

5. Mr. NOLTE suggested to add a sentence to allow for cases in which an expulsion decision that had been unlawful at the time at which it had been taken nevertheless had been cured later in accordance with the law, which

could occur, for example, if the required hearing had been insufficient or late. That might be useful to lawyers dealing with specific cases.

6. Mr. TLADI said that such an insertion might not be necessary, because if the expulsion decision had initially been unlawful but no longer was, the question of readmission no longer arose.

7. Mr. FORTEAU asked whether it might not be sufficient to say "... where the authorities of the expelling State, or an international body such as a court or a tribunal that is competent to do so, have found in a binding and final determination ...".

8. Following a discussion in which Mr. NOLTE, Mr. FORTEAU, Mr. KAMTO, Mr. ŠTURMA and the CHAIRPERSON took part, it was decided to insert, at the end of the first sentence, a footnote which read as follows:

"Such a determination is not present when an expulsion decision which was unlawful at the moment when it was taken is held by the competent authority to have been cured in accordance with the law."

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

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

*The commentary to draft article 29, as amended, was adopted.*

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

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

9. Mr. McRAE proposed that, in the quotation, the third paragraph of article 21 of the American Convention on Human Rights should be deleted, because it concerned usury, which was not relevant.

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

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

*The commentary to draft article 30, as amended, was adopted.*

*Commentary to draft article 31* (Responsibility of States in cases of unlawful expulsion)

Paragraph (1)

10. Sir Michael WOOD pointed out that that was the second reference to the articles on responsibility of States for internationally wrongful acts.<sup>365</sup> He proposed that the paragraph should be simplified, as had been done for

<sup>365</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 (3) of the commentary to draft article 2. The first sentence would remain unchanged, and the second sentence would read, “In this regard, draft article 31 is to be read in the light of Part Two of the articles on responsibility of States for internationally wrongful acts”, with a corresponding footnote reference. The following sentence would then read, “Part Two sets out the content of the international responsibility of a State, including in the context of the expulsion of aliens”, with a footnote reference to paragraph (5) of the general commentary to the 2001 articles, which stated that the articles applied to the whole field of international responsibility of States and that, being general in character, they were also for the most part residual.<sup>366</sup> That made the point that the responsibility of States as defined in the 2001 articles also applied in the context of the expulsion of aliens.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

11. Mr. McRAE suggested that the words “One should also mention a new approach taken” at the beginning of the third sentence should be replaced with “A new approach was taken”.

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

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

12. Sir Michael WOOD said that in the second paragraph the Special Rapporteur made a distinction between the principle established by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów* and the principle recalled by the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. In actual fact, those were two aspects of the same issue. Moreover, the sentence was too long, and he therefore suggested to delete it and simply to begin the second paragraph with the words “The Court further stated:”.

13. Mr. KAMTO (Special Rapporteur) said that he was opposed to that suggestion, because it was useful to show that the decision rendered by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* was part of its jurisprudence. Perhaps the second paragraph could be divided into two or three sentences.

14. Mr. FORTEAU shared Sir Michael’s concern about the second paragraph and proposed the deletion of the words “the distinction between”.

*That proposal was adopted.*

*Paragraph (6), as amended, was adopted.*

*The commentary to draft article 31, as amended, was adopted.*

<sup>366</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 32.

*Commentary to draft article 32 (Diplomatic protection)*

Paragraphs (1) and (2)

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

*The commentary to draft article 32 was adopted.*

15. The CHAIRPERSON suggested that the Commission return to paragraph (5) of the commentary to draft article 1, which had been left in abeyance at the 3153rd meeting, and to paragraph (5) of the commentary to draft article 23 and paragraph (1) of the commentary to draft article 27, the consideration of which had been left in abeyance at the preceding meeting.

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

Paragraph (5) (concluded)

16. Mr. MURPHY said that, following consultations with the Special Rapporteur and members of the Commission who had expressed a view on the subject, he proposed to add the following sentence at the end of the paragraph: “Displaced persons, in the sense of relevant resolutions of the United Nations General Assembly, are also not excluded from the scope of the draft articles.” He also proposed the insertion of a footnote that referred to General Assembly resolution 59/170 of 20 December 2004 as well as to the Special Rapporteur’s second report on the expulsion of aliens<sup>367</sup> and the memorandum prepared by the Secretariat<sup>368</sup> on the question.

*Paragraph (5), as amended, was adopted.*

*The commentary to draft article 1, 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) (concluded)*

Paragraph (5) (concluded)

17. Mr. NOLTE said that the first sentence should be amended to read, “Consequently, paragraph 2 of draft article 23 would develop the law in at least two respects”.

18. Mr. KAMTO (Special Rapporteur) said it would be preferable for the Commission not to use the phrase “develop the law”, because it was not consistent with the wording in article 1 of its statute, which spoke of “progressive development”.

19. Mr. NOLTE said that perhaps the word “undoubtedly” could be deleted to meet the concerns expressed by certain members about the reference to progressive development in the first sentence—to which he had no objection.

20. Mr. VALENCIA-OSPINA said that it was not for the Commission to indicate in the commentaries that its draft articles constituted progressive development, and he was opposed to any proposal in that regard.

<sup>367</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

<sup>368</sup> A/CN.4/565 and Corr.1 (document available from the Commission’s website and eventually as a supplement to *Yearbook ... 2006*).

21. Mr. HASSOUNA agreed that it was not the tradition of the Commission to refer to progressive development in the commentaries to its draft articles, but he did not see any problem in the current case. However, to improve the wording of the first sentence, he suggested to delete the word “undoubtedly” and to replace “constitutes” with “would constitute”.

22. Mr. McRAE proposed that the Commission should adopt the Special Rapporteur’s initial proposal and delete the word “undoubtedly”. On the other hand, he was opposed to the insertion of the words “at least”, which would give a much broader scope to the concept of progressive development.

23. Mr. PARK said that he was in favour of the deletion of the word “undoubtedly” and the insertion of the words “at least”. He also asked whether the Commission had taken a decision on the proposal that he had made at the previous meeting to insert the words “in practice” after “do not apply it”.

24. Sir Michael WOOD said that the words “real risk” reflected the case law of the European Court of Human Rights in the *Soering v. the United Kingdom* case, which related to both the death penalty and the death row phenomenon. In the first sentence, he thought it important to include the words “at least” to avoid a contradiction between paragraph (5) and paragraph (4). However, if that was not agreeable to Mr. McRae, an alternative might be to replace “Consequently” with “In addition”, since paragraph (5) was not a consequence of paragraph (4), but was something new.

25. Mr. PETRIČ endorsed Mr. McRae’s proposal as well as Sir Michael’s suggestion to insert the word “real” before “risk” in the last line.

26. Mr. MURPHY summarized the various proposals: to delete the word “undoubtedly” in the first line, to insert the words “in practice” after “do not apply it” in the fourth line and to add the word “real” before “risk” in the last line.

*That proposal was adopted.*

*Paragraph (5), as amended, was adopted.*

*The commentary to draft article 23, as amended, was adopted.*

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

Paragraph (1)

27. Mr. MURPHY noted that the proposal was to delete the word “undoubtedly” in the first sentence and to replace the words “positive law” with “existing law”.

*Those proposals were adopted.*

*Paragraph (1), as amended, was adopted.*

*The commentary to draft article 27, as amended, was adopted.*

*Section C of chapter IV, as amended, was adopted.*

## B. Consideration of the topic at the present session (concluded)\*

28. The CHAIRPERSON said that the Commission, which had completed—with difficulty—the adoption on first reading of the draft articles on expulsion of aliens and commentaries thereto, should take a decision on the forwarding of the draft articles to Governments for comments. In line with Commission practice, that decision might read as follows:

“At its 3155th meeting, on 31 July 2012, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.”

*It was so decided.*

29. The CHAIRPERSON said that it was customary for the Commission to pay tribute in its report to the Special Rapporteur, and he proposed to do so with the following text:

“At its 3155th meeting, on 31 July 2012, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Maurice Kamto, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on expulsion of aliens.”

*It was so decided.*

*Section B of chapter IV, as a whole, was adopted.*

*Chapter IV, as amended, was adopted.*

30. Mr. KAMTO (Special Rapporteur) thanked the Chairperson most warmly for his patience in conducting the work of the Commission, thereby enabling it to adopt the draft articles and commentaries thereto. Not wishing to contradict the Chairperson’s assessment that the text had been adopted with difficulty, he recalled that the Commission had seen worse cases and that both former and current members, through their cooperation, enthusiasm, discipline and commitment, had made a valuable and positive contribution to the conclusion of the work on the topic. He also thanked the successive Chairpersons of the Drafting Committee, who had demonstrated their authority and extraordinary mastery, and he expressed gratitude to the Secretariat, which, through the colossal study that it had completed at the beginning of the consideration of the topic and its priceless assistance throughout the work and in the preparation of the commentaries, had made it possible to adopt on first reading a text that, although not perfect, was of remarkably good quality. He hoped that the Commission would be able to re-examine the draft articles at its next two sessions and thus make an eagerly awaited contribution to that very sensitive and important topic.

*The meeting rose at 4.40 p.m.*

\* Resumed from the 3152nd meeting.