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Summary record of the 3202nd meeting

Topic:
Expulsion of aliens

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3202nd MEETING

Friday, 9 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, 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. Vázquez-Bermúdez, Mr. Wisnumurti.

Expulsion of aliens (*continued*) (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the ninth report of the Special Rapporteur on the topic of expulsion of aliens (A/CN.4/670).

2. Mr. NIEHAUS said that in the comments and observations made by States during the discussion in the Sixth Committee, varied and sometimes contradictory opinions had been expressed, including that the topic was not suitable for codification and that the traditional practice through which States had full discretion to expel a foreigner from their territory without any outside interference should be retained. There seemed to be much confusion among States about the content of certain draft articles, which in his opinion was due primarily to their wording and was a problem that would have to be addressed in the Drafting Committee.

3. With regard to draft article 1, the opposition of some States to granting equal treatment to aliens both lawfully and unlawfully present in the territory of a State was contrary to the correct position, clearly enunciated by the Special Rapporteur, that no distinction should be made between individuals when it came to their fundamental human rights.

4. The text of draft article 3 was perfectly clear and should be retained absolutely unchanged. He agreed that the suggestion of one State to amend it to require that expulsion be carried out in accordance with the “international legal obligations” of a State was much too vague.⁵⁰

5. Draft articles 6 and 8, which regulated the expulsion of refugees, were problematic, and he agreed that it was better not to include such rules in draft articles. Draft article 9, on deprivation of nationality for the sole purpose of expulsion, was an important provision. In the plenary discussion, he had pointed out that, in certain Latin American countries during the Second World War, citizens of German origin had been stripped of their legitimate

nationality and German nationality imposed on them by executive decree, purely as a means of confiscating their property. That legal aberration demonstrated how deprivation of nationality could be misused. It was regrettable that the principle whereby a State could not expel its own nationals was no longer included in the draft articles. Draft article 12 on prohibition of expulsion for the purposes of confiscation of assets was closely linked to draft article 9, and thus it made sense to merge the two.

6. Although draft article 15 addressed a valid concern, the wording of paragraph 1 was ambiguous and misleading, and it should be reformulated. As it currently stood, the text appeared to indicate that some forms of discrimination were permissible under international law.

7. With regard to article 26, he did not share Mr. Forteau’s view that the right of an alien subject to expulsion to receive notice of the expulsion decision was a mere formality. On the contrary, it was an important procedure that was useful in defending the rights of individuals, as were the other procedural rights set out in the draft article.

8. Lastly, although it would be ideal for the outcome of the Commission’s work to take the form of a convention, that decision had to be taken by States at the General Assembly. For the time being, what was important was for the Commission to finish its work on the topic and approve the draft articles on second reading, taking into account those comments and observations by States that would help to improve the wording of the draft articles, to ensure that they were better understood and to enhance their acceptance.

9. Mr. MURPHY said that in 2012, of the 22 States that had made comments in the Sixth Committee on the form that the Commission’s project should take, 16 had asserted that it should not become draft articles. Of the 14 States from which the Commission had received written comments, 7 had indicated that they were against finalizing the project as draft articles. Among the reasons given for some States’ opposition to the production of draft articles was that the text advanced new principles that failed to reflect the current state of international law or State practice; that it went beyond the purview of existing multilateral treaties; that the existence of detailed regional law on the topic made it inappropriate and unhelpful to establish new uniform global rules; that, by its very nature, the topic was not appropriate for a treaty; and that the text was overly solicitous of the rights of aliens. Two States had not only rejected the idea of turning the Commission’s work into draft articles, but had called for it to terminate the project entirely. He himself was against doing so, but he was sympathetic to the concerns expressed by States, including the argument that many national laws, regional instruments and widely ratified human rights treaties governed the protection of individuals subject to expulsion, but in many instances the Commission’s text deviated from those rules.

10. All those concerns seemed to arise from a particular difficulty, namely that the Commission was attempting to codify a set of rules in an area in which States already had well-developed and long-standing regulations. Every country in the world had detailed rules on immigration and deportation, rules that touched upon sensitive national security concerns.

⁵⁰ See A/CN.4/669 and Add.1, observations on draft article 3.

11. There appeared to be two possible responses to those concerns. The first was to reformulate the project as something other than draft articles, such as draft principles or draft guidelines. On three occasions, the Commission had characterized the outcome of its work as draft principles, doing so in each instance in order to influence the later development of either international law or national law without dictating a uniform set of rules.⁵¹ The Commission was in a similar situation with the topic of expulsion of aliens, in that its objective was to encourage States to develop existing national regimes in the direction of the principles set forth in the project. Since it was not the Commission's intention to alter existing treaties governing expulsion, such as conventions on the treatment of refugees or migrant workers, perhaps it should craft its rules as general principles that helped to guide States as they established and amended their own rules.

12. A second response was to continue with the project as draft articles, although he concurred with Mr. Nolte that simply ignoring the reasons behind the strong reactions by States would be a mistake. The Commission should make adjustments to the draft articles where possible in order to accommodate those concerns. Where adjustments were not made, the Commission might be able to get past some of the criticism of particular articles by agreeing that the commentaries would refer to them as progressive development. He endorsed Mr. Nolte's idea of including a statement at the beginning of the commentaries that silence with regard to whether a particular draft article constituted progressive development did not create a presumption of codification; instead, the strength of the rule as a form of codification should stand or fall on the strength of the authorities cited in the commentary.

13. With regard to draft article 1, several States remained opposed to the coverage in the draft articles of aliens unlawfully present in the territory of the State, considering them to fall into a category distinct from that of aliens lawfully present. None contested the fact that aliens unlawfully present were entitled to human rights, but the concern was that the Commission was establishing the same rights for an individual who overstayed a two-week visa as for one who had lived in a country as an alien resident for 10 years. He tended to share that concern and thought that the Commission should ask itself, as it went through the draft articles, whether all of them should apply to aliens unlawfully present in the territory of a State.

14. With regard to article 2, he supported the Special Rapporteur's proposal to include the word "intentional" before "conduct" in subparagraph (a). Such a change would help to harmonize draft article 2 with draft article 11.

15. Many States had expressed the concern that the draft articles conflicted with the 1951 Convention relating to the Status of Refugees: draft article 2, for example, declared that the non-admission of a refugee was

a form of expulsion. He tended to agree with Mr. Forteau that the Commission's efforts to address such conflicts by means of draft article 8 had merely generated confusion and criticism. The Commission should therefore consider excluding refugees from the scope of the project, since their expulsion was already covered by the Convention relating to the Status of Refugees, a long-standing and widely ratified instrument.

16. On draft article 3, the United States had pointed out that the relationship of the draft articles to other treaty regimes was unclear.⁵² Several of the rights embodied in the text were rights from which derogation was permissible under other treaty regimes. However, draft article 3 expressly stated that expulsion had to be in accordance with both the draft articles and other applicable rules of international law. That appeared to preclude derogation, yet confusingly, the commentary to draft article 3 allowed for derogation in certain cases.⁵³ Clearly, that issue would have to be addressed by the Drafting Committee.

17. Draft article 15 stipulated that States must exercise their right to expel aliens without discrimination on grounds such as property and nationality. The Special Rapporteur seemed to have misunderstood the comment by the United States,⁵⁴ in which it had simply cited certain admission practices to illustrate how expulsion might occur for property-related reasons. Poverty or dependence on Government benefits was often grounds, in and of itself, for expulsion in many States. In its memorandum on the expulsion of aliens, the Secretariat had identified some 24 States that had property-based grounds for expulsion.⁵⁵ Moreover, numerous immigration law scholars asserted that nationality-based distinctions were quite common and were generally accepted. Indeed, at its most basic level, the expulsion of aliens was, by definition, discrimination on the basis of nationality, in that it involved expelling persons who did not possess the nationality of the expelling State.

18. In the European Union, a distinction was made between persons with and without the nationality of a member State: the protections against expulsion set out in articles 27 and 28 of Directive 2004/38/EC of the European Parliament and of the Council on the right to free movement and residence⁵⁶ did not apply to citizens of non-European Union member States, who were covered solely by the protections contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) with regard to expulsion.

⁵² See A/CN.4/669 and Add.1, observations of the United States on draft article 3.

⁵³ *Yearbook ... 2012*, vol. II (Part Two), pp. 20–21, commentary to draft article 3.

⁵⁴ See A/CN.4/669 and Add.1, observations of the United States on draft article 15.

⁵⁵ See document A/CN.4/565 and Corr.1, mimeographed; available from the Commission's website, documents of the fifty-eighth session (2006). The final text will be reproduced in an addendum to *Yearbook ... 2006*, vol. II (Part One).

⁵⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens and the Union and their family members to move and reside freely within the territory of the Member States, *Official Journal of the European Union*, No L 158 of 30 April 2004.

⁵¹ See the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal ("Nürnberg Principles"), *Yearbook ... 1950*, vol. II, document A/1316, pp. 374 *et seq.*, paras. 95–127; the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67; and the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *ibid.*, pp. 161 *et seq.*, paras. 176–177.

19. With regard to draft article 24, in his introductory remarks the Special Rapporteur had seemed to criticize the United States for making a distinction between “torture” and “cruel, inhuman or degrading treatment or punishment”. While the Special Rapporteur contended that the Convention against torture and other cruel, inhuman or degrading treatment or punishment did not make that distinction, he himself drew attention to the *non-refoulement* provision in article 3 as proof that the distinction was indeed set out in the Convention.

20. He supported referring the set of draft articles to the Drafting Committee for further review in light of the comments that the Commission had received from States.

The meeting rose at 10.40.

3203rd MEETING

Tuesday, 13 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the Special Rapporteur’s ninth report on expulsion of aliens (A/CN.4/670).

2. Mr. TLADI said that, like Mr. Forteau, he considered that the final product of the Commission’s work should take the form of draft articles. With regard to draft article 1, he noted that the United Kingdom had objected to the fact that the draft articles applied to all aliens, whether or not they were lawfully present in the territory of a State.⁵⁷ Relevant as it was, that issue in fact related to applicable standards and was not a matter to be addressed in a draft article on scope. With regard to draft article 3, he considered that the current formulation should be retained, since the new wording proposed by the United States was less balanced. Nevertheless, the first sentence could be modified to read: “A State may only expel an alien in accordance with its obligations under international law”.

⁵⁷ See A/CN.4/669 and Add.1, observations of the United Kingdom on draft article 1.

3. With regard to draft article 15, he was not opposed to the proposal to include sexual orientation among the grounds for discrimination listed in paragraph 1. As to draft article 24, the Drafting Committee would probably need to address implementation issues and to clarify what was meant by the phrase “substantial grounds for believing”. Noting that some States had rightly observed that the draft article extended the scope of the *non-refoulement* principle set forth in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, he stressed that such progressive development was in line with the values espoused by the vast majority of States. Lastly, he had changed his mind regarding the inclusion of refugees within the scope of the draft articles, and he agreed with Mr. Forteau that it would be preferable that they should not be included because of possible conflicts with the Convention relating to the Status of Refugees.

4. Mr. PARK said that the Commission should take account of the often conflicting comments and observations received from States, while refraining from making any substantive changes to the draft articles already adopted on first reading. In that connection, it was important not to reject certain States’ reservations on the ground that they were based on domestic considerations rather than arguments derived from international law. With regard to draft article 1, he shared the view of the Special Rapporteur that the Commission should not revisit its approach of including in the scope of the draft articles both aliens lawfully present in the territory of a State and those unlawfully present. As to draft article 2, the Drafting Committee should take into account the amendments to subparagraphs (a) and (b) proposed by certain States. With respect to draft article 7, he noted that only States that had not ratified the 1954 Convention relating to the Status of Stateless Persons had considered that article unnecessary and requested its deletion. As to draft article 10, which reflected article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, it was understandable that it had not been endorsed by States that had not ratified the Convention. The Drafting Committee should take account of the fact that the prohibition of collective expulsion, which was an established principle of international law, involved procedural rules of differing legal value.

5. The Drafting Committee should also take account of the concerns of certain States regarding the criterion for attribution of individual conduct to the State, set forth in draft article 11, paragraph 2, which was indeed broader than the criterion contained in the 2001 articles on the responsibility of States for internationally wrongful acts.⁵⁸ As to draft articles 14 and 15, he considered that in view of their general character they should be included in another part of the draft articles. With regard to draft article 19, he had no objection to the proposal to insert the words “or administrative” after “judicial” in paragraph 2 (b). Regarding the observations of the European Union on the

⁵⁸ General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.