

Document:-  
**A/CN.4/3235**

**Summary record of the 3235th meeting**

Topic:  
**Draft report of the Commission on the work of its sixty-sixth session**

Extract from the Yearbook of the International Law Commission:-  
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fulfil the obligations provided for under articles 6 and 7 in the domestic sphere, the specific consequences of the provisional application of that Treaty were primarily domestic. Other members had argued that the provisions of article 46, paragraph 1, of the 1969 Vienna Convention should not be overlooked; Mr. Kamto had stressed that the relationship between that article and article 27 of the Convention should be taken into account, and that the aspects of domestic law that had an impact at the international level should not be discarded at the outset. It was that very relationship that was addressed in paragraph 19 of the second report, and the aspects of domestic law relating to provisional application would be considered if they had an impact at the international level.

7. Lastly, with regard to future work on the topic, it was clear from the debate that it was necessary to examine the regime applicable to treaties concluded between States and international organizations and treaties concluded between international organizations, as well as the articles of the 1969 Vienna Convention of relevance to the provisional applications of treaties—not only those concerning termination of provisional application. For instance, Mr. Kamto had said that consideration should be given to the provisions of article 24, paragraph 4, which were applicable from the time of the adoption of the text and thus before any action related to provisional application. In conclusion, he said that he would endeavour to promptly prepare draft guidelines or conclusions, as recommended by some members.

#### **Programme, procedures and working methods of the Commission and its documentation (concluded)\***

[Agenda item 12]

#### REPORT OF THE PLANNING GROUP

8. Mr. MURASE (Chairperson of the Planning Group) said that the Group, which had held three meetings, had had before it section I (entitled “Other decisions and conclusions of the Commission”) of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666); General Assembly resolution 68/112 of 16 December 2013 on the report of the International Law Commission on the work of its sixty-fifth session; General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels; and the part of the proposed strategic framework for the period 2016–2017<sup>289</sup> covering “Programme 6: Legal affairs”. The Working Group on the long-term programme of work, which had been reconstituted for the current session, had recommended including the topic of *jus cogens* in the long-term programme of work on the basis of the proposal prepared by Mr. Tladi. The Planning Group had endorsed that recommendation and had also recommended that the Commission request the Secretariat to draw up a list of possible topics together with brief explanatory notes on the basis of the general scheme of topics established in 1996.<sup>290</sup> The Commission

might wish to examine the list, on the understanding that extensive syllabuses on the list of topics prepared by the Secretariat would be developed only once the Working Group on the long-term programme of work had drawn up a final list of topics, possibly in 2016. In the meantime, the Working Group would continue to consider any topics that the members might propose.

9. At the request of the General Assembly,<sup>291</sup> the Planning Group had drafted a chapter on the rule of law at the national and international levels. Lastly, he recommended that the sixty-seventh session of the Commission be held in Geneva from 4 May to 5 June and 6 July to 7 August 2015 and that the Commission examine several topics during the first part of the session, particularly the identification of customary international law and protection of the atmosphere.

10. Mr. KAMTO said that the Commission might wish to consider organizing a seminar on its work in 2017 to mark its seventieth anniversary.

11. After a discussion in which Mr. HASSOUNA, Mr. NIEHAUS, Mr. MURPHY, Mr. CANDIOTI, Mr. KAMTO, Mr. VALENCIA-OSPINA, Mr. PETRIČ, Mr. KITTICHAISAREE, Mr. AL-MARRI, Sir Michael WOOD and Ms. JACOBSSON took part, the CHAIRPERSON said he took it that the Commission wished to indicate in its annual report that some members would like part of the session to take place in New York. He also took it that the Commission wished to adopt the recommendations of the Planning Group for the inclusion of the topic of *jus cogens* in the long-term programme of work, to request the Secretariat to draw up a list of topics for consideration, and to take note of the report of the Planning Group (A/CN.4/L.849).

*It was so decided.*

*The meeting rose at 11.25 a.m.*

### **3235th MEETING**

*Monday, 4 August 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, 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. Wisnumurti, Sir Michael Wood.

\* Resumed from the 3227th meeting.

<sup>289</sup> A/69/6 (Prog. 6).

<sup>290</sup> *Yearbook ... 1996*, vol. II (Part Two), annex II, pp. 133–136.

<sup>291</sup> See General Assembly resolution 68/116 of 16 December 2013, para. 17.

## Draft report of the Commission on the work of its sixty-sixth session

### Chapter IV. *Expulsion of aliens* (A/CN.4/L.837 and Add.1/Rev.1)

1. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.837.

#### A. Introduction

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

Paragraph 6

2. The CHAIRPERSON said that the number and date of the current meeting would be entered into the appropriate blanks in the first sentence.

*Paragraph 6 was adopted, subject to its completion by the Secretariat.*

Paragraph 7

*Paragraph 7 was adopted.*

*Section B was adopted.*

#### C. Recommendation of the Commission

Paragraph 8

3. Mr. KAMTO (Special Rapporteur) said that the proposed text of the recommendation had been formulated to read:

“At its 3235th meeting, on 4 August 2014, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly: (a) to take note of the draft articles on the expulsion of aliens in a resolution, and to annex these articles to the resolution; (b) to recommend to States, when expelling aliens, to take appropriate measures to ensure that the rules set out in these articles are taken into account; (c) To consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.” [“*A sa 3235<sup>e</sup> séance, le 4 août 2014, la Commission a décidé, conformément à l'article 23 de son statut, de recommander à l'Assemblée Générale : a) de prendre acte du projet d'articles sur l'expulsion des étrangers dans une résolution et d'annexer ces articles à la résolution; b) de recommander aux États de prendre des dispositions appropriées pour veiller à ce qu'il soit tenu compte des règles énoncées dans ces articles dans l'expulsion des étrangers; c) d'envisager à une date ultérieure et étant donné l'importance de la question, d'élaborer une convention sur la base du projet d'articles.*”]

4. Sir Michael WOOD proposed to leave the adoption of the recommendation until later in the session in order to afford members the necessary time to review it.

*Paragraph 8 was left in abeyance.*

#### D. Tribute to the Special Rapporteur

Paragraph 9

5. Mr. TLADI (Rapporteur) said that the proposed text of the resolution had been formulated to read:

“The International Law Commission, having adopted the draft articles on the expulsion of aliens, expresses to the Special Rapporteur, Mr. Maurice Kamto, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the expulsion of aliens.”

*The resolution was adopted by acclamation.*

*Paragraph 9 was adopted.*

*Section D was adopted.*

#### E. Text of the draft articles on the expulsion of aliens

##### 1. TEXT OF THE DRAFT ARTICLES

Paragraph 10

*Paragraph 10 was adopted, with an amendment to the Spanish version of article 15 in the text of the draft articles.*

*Section E.1 of chapter IV of the draft report of the Commission was adopted.*

6. The CHAIRPERSON invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.837/Add.1/Rev.1.

##### 2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO

*General commentary*

Paragraph (1)

7. Mr. NOLTE proposed reformulating the final sentence so that it would read: “This is why some of the present draft articles constitute codification and others progressive development of fundamental rules on the expulsion of aliens.” This would make it clear that not all draft articles constituted both the codification and the progressive development of such rules.

8. Mr. VÁZQUEZ-BERMÚDEZ said that Mr. Nolte’s proposal failed to take into account the fact that some draft articles could, at once, involve both codification and progressive development. In his view, the current wording better reflected that fact.

9. Mr. TLADI said he supported the point made by Mr. Vázquez-Bermúdez. In the fourth sentence, he proposed that the word “issue” be replaced with “topic” or “subject”, since classifying the expulsion of aliens as an “issue” could minimize its importance.

10. Mr. MURPHY endorsed Mr. Tladi's proposal to replace the word "issue" with "topic". He also endorsed the proposal made Mr. Vázquez-Bermúdez to retain the current wording of the final sentence.

11. Mr. CANDIOTI said that he shared the views of Mr. Murphy, Mr. Tladi and Mr. Vázquez-Bermúdez. The Commission was not in the habit of drawing a sharp distinction between codification and progressive development.

12. Mr. FORTEAU said that he concurred with Mr. Candiotti. In addition, he proposed to insert the words "at least" (*au moins*) between the words "since" and "the nineteenth century" in the third sentence.

13. Ms. ESCOBAR HERNÁNDEZ said that she was in favour of retaining the current wording of the final sentence, since in those cases in which a particular provision reflected progressive development, the Special Rapporteur had so indicated in the commentary.

14. Sir Michael WOOD said that he supported Mr. Forteau's proposal to insert the words "at least" and Mr. Tladi's proposal to replace the term "issue" with "topic". In the fourth sentence, the word "numerous" was not an adequate translation of the French *plusieurs*, which would better be rendered by "several". In the sixth sentence, he proposed deleting the word "positive", in the phrase "the relevant positive law": the resulting phrase, "the relevant law", was sufficient to convey the intended meaning. In the final sentence, he proposed bringing the English text more closely into line with the French by replacing the word "constitute" with "involve", which would perhaps allay Mr. Nolte's concern.

15. Mr. KITTICHAISAREE said that he supported Sir Michael's proposal regarding the deletion of the word "positive". In the last sentence, he proposed replacing the word "constitute" with "comprise" instead of "involve".

16. Mr. NOLTE said that he would not insist on his proposal, in light of the comments just made. The question of whether the Commission was articulating existing law or suggesting progressive development of the law was perhaps not as relevant for the present topic as for other topics, but he wanted to draw the attention of the members to the fact that the necessity of drawing the distinction was being discussed in the literature.

17. The CHAIRPERSON said he took it that the Commission wished to adopt paragraph (1) with the following amendments: in the third sentence, the words "at least" should be inserted before "the nineteenth century"; in the fourth sentence, the word "issue" should be replaced by "topic"; in the sixth sentence, the word "positive" should be deleted; and in the final sentence, the word "constitute" should be replaced with "involve".

*Paragraph (1) was adopted with those amendments.*

Paragraphs (2) and (3)

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

*The general commentary as a whole, as amended, was adopted.*

#### PART ONE. GENERAL PROVISIONS

*Commentary to draft article 1 (Scope)*

Paragraphs (1) and (2)

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

Paragraph (3)

18. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in the Spanish version of the first footnote to the paragraph, the reference to *extranjeros ilegales* be replaced with *extranjeros en situación irregular* and that the sixth sentence, which read "This is the case with illegal or clandestine migrants" (*Tal es el caso de los migrantes ilegales o "clandestinos"*) be deleted, as it contained terms with pejorative connotations. He had already obtained the Special Rapporteur's agreement on that point.

19. Mr. NOLTE proposed that, in the English version of the first sentence of this footnote, the term "illegal alien" be replaced with "alien unlawfully present", which would be analogous to the wording used in the International Covenant on Civil and Political Rights. In the eighth sentence of the same footnote, the words "illegal status" should be replaced with "irregular status".

20. Mr. SABOIA said that he supported the proposals made by Mr. Vázquez-Bermúdez and by Mr. Nolte.

*Those proposals were adopted.*

21. Mr. PETRIČ proposed that, in the penultimate sentence of paragraph (3), the word "necessary" be inserted between the words "draw" and "distinctions", and in the final sentence, the word "be", between the words "should" and "also", be deleted.

*The proposal was adopted.*

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

Paragraph (4)

22. Mr. FORTEAU said that, in the final sentence, the phrase "and exempting them from the normal expulsion procedure" (*et qui les mettent ainsi à l'abri de la procédure ordinaire d'expulsion*) should be deleted. Contrary to that statement, a diplomat who had been declared *persona non grata* and who did not leave the country as required by the rules of international law governing diplomatic relations would be subject to the normal expulsion procedure.

23. Mr. KITTICHAISAREE said that he had no objection to Mr. Forteau's proposal and drew attention to two minor editorial corrections that needed to be made in the second sentence.

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

Paragraph (5)

24. Sir Michael WOOD proposed that, in the interests of readability, the first sentence of the last footnote to the paragraph be deleted.

25. Mr. CANDIOTI said that, if that sentence were to be deleted, the French and Spanish versions of the current second sentence would have to be rephrased for the sake of clarity.

26. Ms. ESCOBAR HERNÁNDEZ proposed that the beginning of the footnote in question read “If a displaced person is by force of circumstances in a foreign territory, outside his or her State of origin or nationality, he or she would be in a situation comparable to that of a refugee.” [“*Si una persona desplazada se encuentra por la fuerza de las circunstancias, en territorio extranjero fuera de un Estado de origen o de nacionalidad, esa persona se halla en una situación comparable a la del refugiado.*”]

*Paragraph (5), as amended and with an amendment made to the above-mentioned footnote by Ms. Escobar Hernández, was adopted.*

*The commentary to draft article 1 as a whole, as amended, was adopted.*

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

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

27. Mr. MURPHY, supported by Mr. FORTEAU, said that the description of disguised expulsion provided in paragraph (2) did not quite capture the definition thereof given in draft article 10 and the commentary thereto. In particular, the idea of the intentionality behind disguised expulsion contained in draft article 10 was not reflected in paragraph (2). In his view, the text would be made clearer if a cross reference to draft article 10 were included and any unnecessary duplication removed. He therefore proposed deleting the final sentence of paragraph (2) and the final two sentences of the footnote to the paragraph. He further proposed that the third sentence of the footnote be reworded to read: “One should also consider that expulsion occurs even in the absence of a formal legal act, as discussed in the commentary to draft article 10.”

28. He pointed out the need for an editorial correction in the English text of draft article 2 (a).

29. Mr. VÁZQUEZ-BERMÚDEZ said that the use of the word “unilateral” in the first sentence of the footnote did not reflect the wording of the definition set forth in the draft article itself and might cause confusion. He therefore proposed reformulating that sentence to read: “In the domestic law of most States, expulsion is a formal act by the State, taking the form of an administrative act, since it is a decision of the administrative authorities.”

30. Sir Michael WOOD supported the proposals made by Mr. Murphy and Mr. Vázquez-Bermúdez. The assertion contained in the second sentence of this footnote to the effect that each stage of the expulsion process could be contested was inaccurate. Accordingly, in that sentence, the phrase “each stage of which can be contested” should be deleted.

31. Mr. NOLTE said that it should be borne in mind that in many legal systems, a distinction was made between the

formal act of expulsion, which was an administrative act subject to review, and direct action by a representative of a State, such as when a police officer physically forced an alien to leave the country. It might be argued that the use of force by a police officer was necessarily and always a formal act, but that would be to confuse the concept of formal act with the concept of official act, which was much wider. He therefore proposed that the fifth sentence of paragraph (2) be split in two, to read: “Means of expulsion that do not take the form of a formal act are also included in the definition of expulsion within the meaning of the draft articles. They may fall under the regime of prohibition of ‘disguised expulsion’ set out in draft article 10.” The amendment would ensure that paragraph (2) was not read as articulating only two alternatives—the formal act and the indirect disguised expulsion—but as leaving room for a third alternative, namely simple and direct force without pretence of formality. He further proposed that the beginning of the second sentence of paragraph (2) be reformulated to read: “The definition reflects the distinction between, on the one hand, a formal act by which a State orders and thereby compels an alien to leave its territory ...”.

32. Mr. MURPHY endorsed Mr. Nolte’s proposals.

*Paragraph (2), as amended by Mr. Murphy and Mr. Nolte, was adopted, with the amendments to the above-mentioned footnote by Mr. Murphy, Mr. Vázquez-Bermúdez and Sir Michael Wood.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

33. Sir Michael WOOD said that the fourth and fifth sentences of the English version did not appear in the French text and should be deleted.

34. Mr. NOLTE said it was his understanding that the Commission had agreed that the duty to protect an alien in the situations envisaged in the paragraph was an obligation of conduct and not an obligation of result. He therefore proposed that, for the sake of clarity, the word “appropriately” be added after the word “protect” in the second sentence.

35. Mr. MURPHY supported the proposals made by Sir Michael and Mr. Nolte. With regard to the second footnote to the paragraph, he said that the final sentence did not seem to fit in with the rest of the footnote and was somewhat confusing. He therefore proposed its deletion.

36. Mr. KAMTO (Special Rapporteur) said he had no problem with Sir Michael’s proposal to align the English text with the French. As to the final sentence of the footnote in question, he did not quite understand Mr. Murphy’s concern, since, in his view, that sentence was useful in describing the element of constraint that existed during the execution of expulsion orders.

37. Mr. FORTEAU, supported by Mr. SABOIA, supported the deletion of the final sentence in the above-mentioned footnote and proposed the insertion of a

third sentence, which would read: “The formal measure ordering the expulsion is an injunction, and hence a legal constraint, while the act of expulsion itself is actual or physical constraint, experienced as such.” [“*La mesure formelle ordonnant l’expulsion est une injonction, donc une contrainte légale tandis que l’exécution de l’opération d’expulsion est une contrainte de fait ou physique ressentie comme telle.*”]

38. Mr. PETRIČ said that he could accept the amendments proposed by Mr. Murphy, Mr. Nolte and Sir Michael.

39. Mr. MURPHY said that he was attracted by the wording proposed by Mr. Forteau, if the idea was that the execution or implementation of an expulsion order was preceded by a formal measure ordering expulsion, which was an injunction.

40. Mr. KAMTO (Special Rapporteur) expressed his agreement with the amendments to the text of the commentary and to the footnote in question thereto.

*Paragraph (4), as amended by Mr. Nolte and Sir Michael Wood and with the amendments to the second footnote to the paragraph proposed by Mr. Murphy and Mr. Forteau, was adopted.*

Paragraph (5)

41. Mr. MURPHY proposed that, in the first sentence, the word “transfer” be replaced with the word “surrender”. He suggested that the penultimate sentence read: “Moreover, the exclusion of matters relating to non-admission from the scope of the draft articles is without prejudice to the rules relating to refugees.” In the final sentence, the words “sets forth” should be replaced with “references”. Those changes reflected an attempt to bring the commentary into line with draft article 6.

42. Mr. NOLTE proposed the replacement of the word “other” in the second sentence with “some”, because the use of “other” gave the impression that a different legal system had been described previously, which was not the case.

43. Mr. TLADI suggested that the phrase “in cases where an alien is refused entry” be added at the end of the second sentence, in order to highlight the fact that, in some circumstances, “non-admission” was used in preference to *refoulement* in the draft articles.

44. Mr. KAMTO (Special Rapporteur) agreed to the amendments proposed by Mr. Murphy, Mr. Nolte and Mr. Tladi, subject to the insertion of the words “of international law” after the phrase “without prejudice to the rules” in the penultimate sentence.

*Paragraph (5), as amended by Mr. Kamto, Mr. Murphy, Mr. Nolte and Mr. Tladi, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

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

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

Paragraph (1)

45. Mr. FORTEAU proposed the deletion of the word “natural” in the third sentence.

46. Ms. ESCOBAR HERNÁNDEZ suggested that the adjective “natural” instead be replaced with “inherent”.

47. Sir Michael WOOD supported the latter proposal and suggested that in order to render the sentence less emphatic, the phrase should read: “an inherent right of the State flowing from its sovereignty”. He further suggested the deletion of the words “the legal” at the end of the second sentence.

48. Mr. VÁZQUEZ-BERMÚDEZ and Mr. NOLTE endorsed the amendments proposed by Ms. Escobar Hernández and Sir Michael.

49. Mr. PETRIČ said that he was in favour of the amendment proposed by Ms. Escobar Hernández.

50. Mr. KAMTO (Special Rapporteur) said that every author had his own style. He did not, however, intend to do battle over stylistic questions.

*Paragraph (1), as amended by Ms. Escobar Hernández and Sir Michael Wood, was adopted.*

*The meeting rose at 1 p.m.*

### 3236th MEETING

*Monday, 4 August 2014, at 3.05 p.m.*

*Chairperson: Mr. Kirill GEVORGIAN*

*Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, 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. Wisnumurti, Sir Michael Wood.*

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

**CHAPTER IV. Expulsion of aliens (continued) (A/CN.4/L.837 and Add.1/Rev.1)**

**E. Text of the draft articles on the expulsion of aliens (continued)**

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO (continued)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration, paragraph by paragraph, of document A/CN.4/L.837/Add.1/Rev.1.