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Summary record of the 3236th meeting

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

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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.

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

Paragraph (2)

2. Mr. FORTEAU said that in the French version, for the sake of clarity, the phrase *le droit positif au sens du droit conventionnel*, in the second sentence, should be replaced with *le droit international en vigueur*.

That proposal was adopted.

3. Mr. TLADI proposed that the fourth sentence (“Some of the rules contained therein are established by certain treaty regimes ...”), which he deemed to be redundant, be deleted, and that the last sentence be recast to read: “Draft article 3 therefore preserves the inherent right of the State to expel aliens in accordance with international law.”

4. Sir Michael WOOD said he thought that the fourth sentence should be retained, but that the English version should be aligned with the French, to read: “Some of the rules contained therein are ... firmly established in customary international law, although some of them constitute ...”. He also proposed that the wording of the International Covenant on Civil and Political Rights be reproduced in the last half of the penultimate sentence, which would then read: “derogations are possible in certain emergency situations, for example, where there is a public emergency threatening the life of the nation”.

Those proposals were adopted.

5. Mr. FORTEAU, referring to the final sentence of paragraph (2), said it was important to retain the notion that derogations from the draft articles were possible, because the draft article itself did not contain a clause making express provision therefor.

6. Sir Michael WOOD proposed that the scope of such derogations be clarified by amending the final sentence to read: “Draft article 3 thus preserves the possibility for a State to adopt measures that derogate from certain requirements of the present draft articles insofar as that is permitted under other instruments.”

7. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. PETRIĆ and Ms. ESCOBAR HERNÁNDEZ, said that the expression “other instruments” proposed by Sir Michael was too vague and that it would be preferable to maintain the reference to the State’s other obligations arising from international law that was contained in the current wording.

8. Sir Michael WOOD said that his proposal could be amended to read “in so far as that is consistent with its other obligations under international law”.

That proposal was adopted.

Paragraph (2) was adopted, subject to the requisite corrections pursuant to the amendments just made.

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

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

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

9. Mr. NOLTE proposed the addition, in the first sentence, of the phrase “in accordance with the law” after “The requirement that an expulsion decision must be made”.

That proposal was adopted.

10. Mr. NOLTE, noting that expulsions carried out without a formal decision were not necessarily disguised expulsions within the meaning of draft article 10, because they could also stem directly from a State’s conduct, proposed that the second sentence be amended to take account of that fact.

11. Mr. FORTEAU said that such an amendment would be at odds with the purpose of the commentary, which was to explain the dual requirement of adoption of an expulsion decision, on the one hand, and of its conformity with the law, on the other. Mr. Nolte’s concern could, however, be met by deleting the adjective “formal” before “decision” in the first sentence, which would also ensure consistency with draft article 26, paragraph 1 (a), regarding the alien’s right to receive notice of the expulsion decision, and by deleting the second sentence, which would then have become meaningless.

12. Mr. MURPHY and Mr. NOLTE endorsed Mr. For-teau’s proposals.

13. Mr. KAMTO (Special Rapporteur) said that he failed to see how the deletion of the adjective “formal” in the first sentence would render the second sentence meaningless, for the latter referred to situations where expulsion stemmed from conduct and where there was therefore no decision of which an alien might need to be notified. He was, however, prepared to accept that proposal for the sake of consensus. On the other hand, the second sentence absolutely had to be retained in order to make it plain that, although draft article 4 concerned only situations where expulsion followed a decision taken in accordance with the law, the Commission realized that expulsions could occur without any formal procedure.

14. Mr. MURPHY said that the second sentence was still problematic in that it suggested that any action resulting in expulsion that had not formed the subject of a formal decision constituted disguised expulsion, whereas that was not the definition that the Commission had adopted in draft article 10. In order to avoid any risk of confusion, he proposed to retain two separate sentences, but that the second be reworded to read: “The prohibition of any form of disguised expulsion is contained in draft article 10, paragraph 1.”

That proposal was adopted.

Paragraph (2) was adopted, subject to the requisite corrections pursuant to the amendments just made.

Paragraph (3)

15. Sir Michael WOOD proposed that the first sentence be amended to read: “The requirement of conformity with the law follows logically from the fact that expulsion is to be exercised within the framework of law.”

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

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

Commentary to draft article 5 (Grounds for expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

16. Mr. TLADI proposed replacing “appears to be” with “is” in the second sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

17. Sir Michael WOOD said that the last sentence should be modified, because there were many valid grounds for expulsion. National security and public order should not therefore be singled out as if they were the only two grounds for expulsion established expressly in positive international law.

Paragraph (3), as amended and with two drafting changes in the English version, was adopted.

Paragraph (4)

18. Mr. NOLTE proposed the insertion of the words “where relevant” between “taken into consideration” and “by the expelling State” in the penultimate sentence.

Paragraph (4), as amended, was adopted.

Paragraph (5)

19. Mr. KITTICHAISAREE proposed that, for the sake of clarity, the end of the first sentence in the English version be amended to read: “contrary to the expelling State’s obligations under international law”.

Paragraph (5), as amended, was adopted.

The commentary to draft article 5, as amended, was adopted.

PART TWO. CASES OF PROHIBITED EXPULSION

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

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. FORTEAU drew attention to the fact that the first and last footnotes to the paragraph referred to different definitions of the notion of “refugee” and proposed, for the sake of consistency, to delete from the last footnote the long definition of the term “refugee” taken from article 1 of the OAU [Organization of African Unity] Convention governing the specific aspects of refugee problems in Africa.

That proposal was adopted.

21. Mr. KITTICHAISAREE said that in the English version, the words “Office of the” should be inserted before “United Nations High Commission for Refugees”, because one could not speak of the practice of a person, only of that of an institution.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

22. Mr. MURPHY proposed replacing the verb “extends” with “may extend” in the first sentence and deleting the sixth sentence, which was confusing.

23. Mr. KAMTO said that he was sceptical of the merits of that proposal. The replacement of “extends” with “may extend” would be tantamount to turning a rule deriving from practice into a mere option open to States.

24. Mr. FORTEAU welcomed Mr. Murphy’s proposal. Since draft article 6 set forth a “without prejudice” clause, it was vital not to be overly prescriptive in the commentary. He suggested that “likewise extends” be replaced by the more neutral “has also been extended”.

That proposal was adopted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

25. Mr. MURPHY proposed that in the second sentence, the phrase “does cover that situation as well” be replaced with “provides that these draft articles are without prejudice to that situation as well”. In the third sentence, he also proposed replacing “provided for” with “mentioned in”.

Paragraph (7), as amended, was adopted.

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

Commentary to draft article 7 (Rules relating to the expulsion of stateless persons)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 7 was adopted.

Commentary to draft article 8 (Deprivation of nationality for the purpose of expulsion)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 8 was adopted.

Commentary to draft article 9 (Prohibition of collective expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

26. Sir Michael WOOD proposed that the second sentence, which referred to the special case of migrant workers, be either deleted or moved to the end of the paragraph.

27. Mr. KITTICHAISAREE said that it would be preferable to delete the second sentence, because the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was only one of several treaties prohibiting collective expulsion.

That proposal was adopted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

28. Mr. MURPHY proposed the insertion of “rights and” between “the” and “obligations” in the second sentence.

Paragraph (5), thus amended, was adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Prohibition of disguised expulsion)

Paragraph (1)

29. Mr. FORTEAU, advancing the same reasons as those given with regard to draft article 2, proposed the deletion of the adjective “formal” in the first and second sentences.

That proposal was adopted.

30. Following a discussion in which Mr. FORTEAU, Mr. KITTICHAISAREE and Mr. KAMTO (Special Rapporteur) took part, Mr. VÁZQUEZ-BERMÚDEZ proposed the deletion of the phrase “as the term might carry an undesirable positive connotation”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor drafting change in the English version.

Paragraph (7)

Paragraph (7) was adopted.

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

Commentary to draft article 11 (Prohibition of expulsion for purposes of confiscation of assets)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

31. Following a discussion concerning the scope of the French term *sanction*, the Spanish term *sanción* and the English term “penalty” in which Mr. FORTEAU, Mr. KAMTO (Special Rapporteur), Ms. ESCOBAR HERNÁNDEZ, Mr. PETRIĆ, Mr. NOLTE and Sir Michael WOOD took part, Mr. FORTEAU proposed the addition of the phrase “consistent with law” (*conformément à la loi*), after “as a penalty”, in the last sentence of the paragraph.

Paragraph (2), as amended, was adopted.

The commentary to draft article 11, as amended, was adopted.

Commentary to draft article 12 (Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

32. Mr. MURPHY, supported by Mr. VÁZQUEZ-BERMÚDEZ and Mr. FORTEAU, proposed that “In any event” at the beginning of the last sentence be replaced with “Where the sole purpose is not to circumvent an extradition procedure”.

Paragraph (2), as amended and with a minor drafting change in the English version, was adopted.

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

PART THREE. PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

CHAPTER I. *General provisions*

Commentary to draft article 13 (Obligation to respect the human dignity and human rights of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

33. Mr. SABOIA, supported by Mr. FORTEAU, said that the notion of dignity was subjective and raised a thorny issue. He therefore proposed the deletion of the last part of the last sentence, after “inherent in every human being”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

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

Commentary to draft article 14 (Prohibition of discrimination)

Paragraph (1)

34. Mr. MURPHY proposed the replacement, in the first sentence, of the phrase “the obligation not to discriminate” with the words “the obligation to respect rights without discrimination”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

35. Mr. NOLTE said that the verbs should be in the present tense in the English version.

36. Mr. VÁZQUEZ-BERMÚDEZ, Mr. SABOIA and Sir Michael WOOD were of the opinion that it was necessary to simplify paragraph (4), as it was too long and complicated.

37. The CHAIRPERSON asked Mr. Vázquez-Bermúdez to draft a proposal for the following meeting.

Paragraph (4) was left in abeyance.

The meeting rose at 6 p.m.

3237th MEETING

Tuesday, 5 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.

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 Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.837/Add.1/Rev.1.

Commentary to draft article 14 (Prohibition of discrimination) (continued)

Paragraphs (5) and (6)

2. Mr. NOLTE said that, in the context of possible exceptions to the obligation not to discriminate based on nationality, reference was made, in the second sentence of paragraph (5), to “associations of States such as the European Union”. That raised the question of the compatibility of the regime of freedom of movement established by the European Union with the principle of non-discrimination. The second sentence of paragraph (6) was clearer in that regard, since it stated that, under the draft article, States retained the possibility to establish special legal regimes based on the principle of freedom of movement of citizens. Therefore, and in order to avoid unnecessary repetition, he proposed that the second sentence of paragraph (5) be deleted and that paragraph (5) be merged with paragraph (6).

3. Mr. FORTEAU supported Mr. Nolte’s proposal. If that proposal were accepted, the words *Dès lors*, in the first sentence of the French text of paragraph (6), should be deleted.

4. Sir Michael WOOD agreed with the suggestions just made. In order to give authority to the proposition, it might be useful to add a footnote referring to the ruling of the European Court of Human Rights in *Moustaquim v. Belgium*.

5. Mr. SABOIA said that, if the first sentence of paragraph (5) were simply merged with paragraph (6), the Commission might appear to be singling out nationality as a permissible basis for discrimination, which would be incompatible with the general prohibition of discrimination on grounds of nationality. It would be helpful if a different formulation could be found.

6. Mr. FORTEAU proposed that paragraph (5) be deleted and that the beginning of the second sentence of paragraph (6) read: “On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on nationality and, in particular, the possibility for States to establish amongst themselves special regimes ...” [*“D’autre part, elle préserve les possibles exceptions à l’obligation de non-discrimination qui seraient fondées sur la nationalité et, en particulier, la possibilité pour des États d’établir entre eux des régimes juridiques spéciaux ...”*].

7. Sir Michael WOOD suggested replacing the word “nationality” with the expression “national origin”, which was used in all the human rights instruments.

8. Mr. MURPHY agreed with that proposal. He suggested that the sentence proposed by Mr. Forteau be amended accordingly and, for sake of readability, be split in two, so that it would read: “On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on national origin. In particular, it preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.”