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Summary record of the 2944th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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Organization of the work of the session (*concluded*)[*]

[Agenda item 1]

108. Mr. YAMADA (Chairperson of the Drafting Committee) announced that the Drafting Committee for the topic of expulsion of aliens would be composed of the following members: Mr. Kamto (Special Rapporteur), Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Mr. Petrič (*ex officio*).

The meeting rose at 1.10 p.m.

2944th MEETING

Friday, 27 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the members of the Commission to continue and complete their consideration of the third report of the Special Rapporteur on the expulsion of aliens (A/CN.4/581).

2. Mr. KOLODKIN commended the Special Rapporteur on the quality of his report, which had given rise to an in-depth debate in the Commission. He endorsed unreservedly the right of expulsion provided for in draft article 3, paragraph 1, which stemmed directly from State sovereignty and reflected an objective reality, with the limitations imposed on its exercise by international law. The wording of paragraph 2, however, was not entirely felicitous. It probably depended on the definition of the scope of the draft articles and, in particular, the question whether the scope should cover all categories of aliens. If that was the case, it should be made clear that the right to expel aliens must be exercised in conformity with the provisions of the current draft articles. If not, the reference to the draft articles was insufficient. The words "fundamental rules of international law" should be deleted and he supported the idea of merging the two paragraphs of draft article 3.

3. He had no objection if the draft articles strengthened the rules prohibiting the State from expelling its nationals, although, strictly speaking, the draft articles related only to the expulsion of aliens. He noted that the Constitution of the Russian Federation prohibited the expulsion of nationals. The reference in draft article 4, paragraph 2, to exceptions to that principle could be retained.

4. He did, however, have serious reservations about the inclusion of refugees and stateless persons in the draft articles because the regime applicable to those categories of persons was defined in the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. By adopting provisions on refugees and stateless persons which differed from those set out in the two Conventions, the Commission might cause a fragmentation of the legal regime. Moreover, the draft articles introduced by the Special Rapporteur were different from the corresponding provisions of those two instruments, and not only in form.

5. For example, draft article 5 linked articles 32 and 33 of the 1951 Convention relating to the Status of Refugees, although they dealt with different points. Article 32 covered the expulsion of refugees who were lawfully in the territory of a State, whereas article 33 prohibited the expulsion or *refoulement* of all refugees, regardless of whether they were in a lawful or unlawful situation. Article 32, paragraphs 2 and 3, provided substantial guarantees with regard to the rights of refugees, whereas article 33 did not. He thus did not see how the two articles could be linked, as the Special Rapporteur had proposed.

6. The Commission must come to an agreement on the principles. It must decide whether refugees and stateless persons should be included in the scope of the draft articles and, if so, whether the relevant provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons should be reviewed. He was opposed to such a decision in both cases, but the adoption of a "without prejudice" clause should not be ruled out.

7. He agreed with the idea in draft article 7 of prohibiting the collective expulsion of aliens, although more details and substantive changes were needed, but the question should not be considered in the draft articles because it was a matter of humanitarian law. If the Commission decided to include it, however, it should be made clear that the draft article should apply only in the context of an international armed conflict and that the question of the expulsion of hostile or enemy aliens must be the subject of separate provisions in the draft articles. Otherwise it might be thought that the Commission was applying the general regime applicable to aliens to such persons and the impression would be given that the tendency was to apply the basic provisions of the regime applicable in time of peace to the expulsion of aliens in time of armed conflict. He was not convinced that this was justified. The prevailing opinion in the doctrine was that States had

[*] Resumed from the 2933rd meeting.

the right to expel enemy aliens collectively. That opinion was confirmed in paragraph 1020 of the study by the Secretariat,[304] which specified that this right was an exception to the prohibition of mass expulsion. Consequently, the difference between the regime applicable in time of peace and in time of armed conflict must be retained. Furthermore, the collective expulsion of enemy aliens could not be regarded as collective punishment; rather, it was a control measure applied by a State party to an armed conflict and it was in conformity with the Geneva Convention relative to the protection of civilian persons in time of war (Convention IV). It went without saying that the guarantees and rights applicable to the expulsion of enemy aliens must be respected, especially articles 35 and 36 of that Convention. He reiterated that, in his opinion, the question of the expulsion of enemy aliens in time of armed conflict must not be included in the scope of the draft articles, but, if it was, it should be considered independently of the question of the expulsion of aliens in time of peace. On another matter, he said that the definition of collective expulsion in draft article 7, paragraph 2, was unsatisfactory and the Commission should consider it again once it had decided how to define "expulsion".

8. He proposed that draft articles 3, 4 and 7 should be referred to the Drafting Committee, which should decide, however, whether draft article 4, paragraph 1, should be retained as it stood. With regard to draft article 7, the Drafting Committee should confine itself to formulating a prohibition of collective expulsion, without including the case of enemy aliens, and should also specify what it meant by "collective expulsion".

9. Mr. KAMTO (Special Rapporteur) thanked the members of the Commission for their contributions to the debate. Their positions on the five draft articles were sometimes at variance with each other and doctrinal or ideological preferences occasionally did not reflect current international practice and even current positive law in some cases.

10. The members of the Commission who had taken part in the debate were unanimously in favour of referring draft articles 3 and 7 to the Drafting Committee. As to draft article 4, only Ms. Escarameia and Mr. Niehaus had clearly called for its deletion. Mr. McRae wondered whether its inclusion was warranted, Mr. Brownlie thought that it was on the boundaries of the topic, and Mr. Vasciannie and Ms. Xue endorsed it. The other members of the Commission had taken a number of different positions. Thus, with the exception of three participants in the debate, all the others were in favour of referring draft articles 3, 4 and 7 to the Drafting Committee.

11. Opinions on draft articles 5 and 6 were even more varied. Mr. Brownlie, Mr. Hmoud, Mr. Kolodkin, Mr. Nolte, Mr. Pellet and Mr. Petrič, were clearly opposed to their retention, while Mr. Fomba, Mr. Vázquez-Bermúdez and Ms. Xue supported them. On the whole, the other members of the Commission were of the view that the two draft articles should be worded to ensure that the relevant provisions of the 1951 and 1954 Conventions were not altered in any way. Those who were opposed to the retention of the provisions did not say that no reference should be made to refugees or stateless persons, but that their case could be dealt with either by a "without prejudice" clause or by a footnote. All things considered, it was clear from the debates that the five draft articles could be referred to the Drafting Committee.

12. A number of points raised during the consideration of the draft articles called for explanations. On draft article 3, two major questions had arisen. First, there was the distinction which he had drawn between the fundamental principles of the international legal system as an inter-State legal order and the principles or rules deriving from specific areas of international law, such as international human rights law, humanitarian law and refugee law. In his opinion, such a distinction existed and it was defensible from the standpoint of the theory of international law. Secondly, the question of the merger of draft article 3, paragraphs 1 and 2, of which several members of the Commission were in favour, could be considered by the Drafting Committee. Having listened to the arguments on paragraph 2 put forward by Ms. Jacobsson, Mr. McRae and Mr. Pellet, he suggested the following new wording, which would take account of the points they had made: "However, expulsion must be carried out in compliance with the relevant rules of international law, in particular fundamental human rights, and the present draft articles."

13. The debates on draft article 4 (Non-expulsion by a State of its nationals) had focused on whether it belonged in a study on the expulsion of aliens and on the content of paragraph 2. On the first point, he did not think that the category of nationals should be left out. It was common practice for an international convention to refer to a concept which, although not its main subject, was nonetheless related to it. Thus, the provision should be retained in the draft articles. As to paragraph 2, it was astonishing that some members, demonstrating a somewhat unusual approach to human rights, had refused to learn the lessons of history and had fiercely contested the relevance of the examples cited. It was incorrect to say that the Charles Taylor case was one of extradition or of judicial transfer. In actual fact, it had had to do with Charles Taylor's negotiated expulsion by the rebel authorities towards a receiving State, namely, Nigeria.

14. He acknowledged that the words "exceptional reasons" in paragraph 2 were imprecise and could give rise to abuse; the Drafting Committee should attempt to clarify their meaning.

15. He did not intend to consider the questions raised by dual nationality, multiple nationality and deprivation of nationality—the latter term being broader than "denaturalization", the word used by Mr. Caflisch, and more appropriate than "denationalization", employed by other members—and even less to propose draft articles at the current stage. Contrary to what Mr. Brownlie had said, he had not asserted that the question of nationality did not fall within the competence of international law, but that the conditions for access to the nationality of a State depended on the latter: the assessment of the link of nationality was a matter of international law, but

[304] A/CN.4/565 and Corr.1, mimeographed, available on the Commission's website.

the criteria for the granting of nationality were defined by domestic law. In his own opinion, the prohibition of expulsion was required of any State of which a person was a national. It seemed to him that his viewpoint was more protective of the rights of the persons concerned than one which, in the case of dual nationality, was tantamount to granting the right to expel to the State which could invoke a less effective link of nationality with the person concerned. In Part Three on the legal consequences of expulsion, he would draw a distinction and conclude that the State which could claim the most effective link—what was called "active" nationality—could invoke that argument to exercise diplomatic protection. Given the very large majority in favour of considering the issue, he undertook to conduct, with the Secretariat's assistance, a study on the questions of dual nationality, multiple nationality and deprivation of nationality, to be contained in an addendum to the third report, which the Commission should be able to consider at its sixtieth session.

16. The major problem raised by draft article 5 (Non-expulsion of refugees) appeared to be the merger of articles 32 and 33 of the 1951 Convention relating to the Status of Refugees. He had the impression that the provisions of that Convention were so sacrosanct that there was simply no question of touching them, even to improve them. He understood the argument put forward by Mr. Pellet and several other members, including Mr. Kolodkin, when they said that the coexistence of two conventions with non-identical provisions on the same subject might cause difficulties, but thought that international law would be able to resolve such a problem, as had been seen in the context of the Commission's work on fragmentation of international law.

17. The above comments were also valid for draft article 6. He recalled that the 1951 Convention had already been amended, in a sense, by regional legal instruments, including in respect of the definition of "refugee", as he had indicated in his second report.[305] He strongly disagreed with Mr. Kolodkin's analysis of the distinction which the authors of the Convention had supposedly tried to make between articles 32 and 33. In actual fact, article 33 merely repeated part of article 32, adding an additional criterion to justify expulsion. What distinguished the two articles was the principle of *non-refoulement* and the fact that the provision set out in article 33 could not be claimed "by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is".

18. As he had indicated in his report, the principle of non-expulsion in article 32 of the 1951 Convention was worded in a negative way: it did not state that a refugee could not be expelled, but that he could be expelled only in certain circumstances. Thus, the first element of his proposal was the idea that the principle was expulsion, not non-expulsion, but that it could be derogated from in certain circumstances. The second element was based on an attempt at a clarification with regard to articles 32 and 33: the idea was that the former could serve to regulate the question of refugees in a lawful situation and the latter that of refugees in an unlawful situation, in the context of draft article 5, paragraph 2, and that conclusions could be drawn later, when the procedure for expulsion and the limits *ratione materiae* of those rules were discussed. Responding to the concerns expressed by Ms. Escarameia and Ms. Jacobsson, he said that he would consider the question of *non-refoulement* at that time, by focusing on refugees in an unlawful situation; the others could not be *refoulés*, since their status protected them.

19. Noting that views were divided in the Commission on a number of questions, such as the reference to terrorism, he asked the plenary for clearer instructions. He would not make draft articles 4 and 5 a question of principle. He had merely wanted to improve on the provisions of the 1951 Convention, primarily by guaranteeing greater protection for the rights of refugees, but, if the Commission wished to preserve this Convention's "monument", he could agree to the proposal for a "without prejudice" clause. In his fourth report, he would nevertheless attempt to explain what he had intended to do, in particular by addressing the questions of the temporary protection of persons who had requested the status of refugees and the residual rights of persons whose request had been denied.

20. There had been virtual unanimity among the members of the Commission that the reference to terrorism was inappropriate. Several members had proposed that the words "including terrorism" should be added after "national security", but it would be better to place any such clarification in the commentary.

21. With regard to draft article 7 (Prohibition of collective expulsion), he did not see why there should be a separate provision for migrant workers. Moreover, the argument put forward seemed insufficient because the principle of the collective expulsion of migrant workers was stated in a treaty provision and was thus not a matter of customary law. He was unhappy with the definition of collective expulsion in paragraph 2, no doubt because he was unhappy with the definition of expulsion itself.

22. Paragraph 3 was the paragraph of draft article 7 that gave rise to the most problems, a number of members having called for its deletion because it was a question of international humanitarian law. He did not understand that argument, especially since, in the context of the expulsion of aliens, the Commission had, for example, considered questions relating to human rights: should it leave everything that had to do with human rights in the field of human rights? Why was international humanitarian law so special that it could not be referred to anywhere other than in the 1949 Geneva Conventions for the protection of war victims? He could agree with the idea that a separate provision was needed because the proposal was purely formal, but no one had put forward a convincing argument for not addressing the question. Moreover, as confirmed in his discussions with ICRC officials, international humanitarian law did not settle the matter at all. What he had wanted to show with the provision was that the individual expulsion of a national of an enemy State was governed by the ordinary law on the expulsion of aliens and that there was no reason to

[305] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

set up a special regime. On the other hand, the collective expulsion—or "mass expulsion", which amounted to the same thing, notwithstanding the point Mr. Kolodkin had tried to make—was prohibited in time of peace by all the international instruments which he had examined, hence his recapitulation of the principle. However, he had also studied the doctrine, case law since the eighteenth century and State practice, and he had found that practice had fluctuated: it was not that States considered that the collective expulsion of nationals of an enemy State was prohibited, but that they sometimes tolerated their presence, provided that such nationals did not have a hostile attitude towards the receiving State. The doctrine, and British doctrine in particular, which was reflected in *Oppenheim's International Law*[306] and which had been cited by the Eritrea–Ethiopia Claims Commission, had tended to support the collective expulsion of alien nationals in time of war [see paragraph 81 of the decision of 17 December 2004]. He was thus departing somewhat from what might appear to be jurisprudence and doctrine when he proposed that the expulsion of the nationals of an alien State should be prohibited, provided that those aliens, collectively, as a group—and the concept of group was unrelated in the current context to nationality, enemy or ethnic criteria—had not engaged in activities hostile to the receiving State.

23. As a result of the debates, Mr. Pellet had proposed specifying instead that such aliens could be expelled if their security was in danger, i.e. in their own interest. He had no objection to that, but the opposite could be retained because there was a balance to be struck between the protection of alien nationals of an enemy State and the interests of the expelling State in cases in which those nationals constituted a threat to the expelling State's peace and security. In order to take account of Mr. Pellet's proposal, he suggested that the end of draft article 7, paragraph 3, should be amended to read: "unless, taken together or collectively, they have been the victims of hostile acts or have engaged in hostile activities against the receiving State".

24. Turning to more "peripheral" considerations, he noted that Mr. Pellet had called for a provision or a draft article on the concept of banishment, but he did not really see the need for it, since banishment was part of his proposed definition. Ms. Escarameia, Ms. Jacobsson and Mr. Saboia had asked for a provision on *non-refoulement*, but he had already indicated that he wanted to deal with that question not at the current stage, when he was addressing the categories of persons whom it was prohibited to expel, but, rather, in the context of the substantive normative limitations on the principle of the non-expulsion of refugees, in particular those who had not yet obtained official refugee status. Mr. Al-Marri's concern about the expulsion of an alien to a country in which he or she was in danger of torture or ill-treatment and Mr. Brownlie's concern about the risk of discrimination would be considered in his fourth report because those questions were also related to substantive limitations on the right to expel.

25. Mr. Fomba and Mr. Nolte had asked why the distinction between "national" and "*ressortissant*" had been used in paragraph 43. The reason was very simple: when the Commission had decided to use the two terms as synonyms, the third report had already been completed and he had just had time to insert a sentence in the introduction referring to the Commission's decision.

26. Mr. Niehaus had suggested introducing the requirement of a judicial decision for the expulsion of a national. Although such an expulsion was possible, the requirement did not seem necessary, since the reasons for such an expulsion usually did not leave open the possibility of a trial.

27. He hoped that he had answered most of the members' questions and he proposed that the Commission should refer draft articles 3 to 7 to the Drafting Committee.

28. After a procedural discussion in which the Chairperson, Ms. Escarameia and Mr. Pellet took part, the CHAIRPERSON noted that a majority of the members were in favour of referring draft articles 3 to 7 to the Drafting Committee.

It was so decided.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/577 and Add.1–2, sect. G, A/CN.4/L.716,[307] A/CN.4/L.719[308])

[Agenda item 8]

LONG-TERM PROGRAMME OF WORK OF THE COMMISSION: REPORT OF THE WORKING GROUP ON THE MOST-FAVOURED-NATION CLAUSE

29. The CHAIRPERSON invited the Chairperson of the Working Group on the most-favoured-nation clause to introduce the report of the Working Group (A/CN.4/L.719).

30. Mr. McRAE (Chairperson of the Working Group on the most-favoured-nation clause), introducing the report of the Working Group, said that the Working Group had been established by the plenary to examine the possibility of the inclusion of the topic of the most-favoured-nation clause in the long-term programme of work of the Commission.[309] In 2006, at the fifty-eighth session, the Working Group on the long-term programme of work had considered the topic, but the Commission had not taken any decision on it. The Commission had then asked Governments for their views and the Sixth Committee of the General Assembly had subsequently received three comments.[310]

31. The Working Group had had before it a discussion paper prepared by Mr. Perera and himself which set out the past work of the Commission on the topic, new issues that had arisen as a result of the application

[306] R. Y. Jennings and A. D. Watts (eds.), *Oppenheim's International Law*, 9th edition, vol. I, *Peace*, Harlow, Longman, 1992.

[307] Mimeographed, available on the Commission's website.

[308] *Idem.*

[309] See the 2929th meeting above, para. 2.

[310] *Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 259.

of the most-favoured-nation clause, the work which the Commission might undertake and the arguments for and against making a contribution in that area (A/CN.4/L.719, Annex). The Working Group had concluded that the Commission could play a useful role in providing clarification of the meaning and effect of the most-favoured-nation clause in the field of investment agreements. Such work could be useful to Governments which were negotiating investment agreements, including regional free-trade agreements and economic integration agreements, as well as to courts in interpreting the clause. Consequently, the Working Group had recommended that the topic of the most-favoured-nation clause should be included in the Commission's long-term programme of work. In reaching its conclusion, the Working Group had borne several considerations in mind. First, although circumstances had changed perceptibly since it had examined the clause in the final draft articles of 1978,[311] the Commission must ensure that it did not give the impression that doubts were being cast on its past work on the topic and it should take that work into account. Secondly, the Commission should proceed cautiously through a step-by-step approach to the topic and establish a working group to prepare for the consideration of the topic by undertaking a comprehensive review of State practice and jurisprudence since the conclusion of the Commission's work on the topic in 1978, articulating all the issues arising out of the inclusion of a most-favoured-nation clause in investment agreements, establishing a dialogue with other bodies concerned with the issue, including the Organisation for Economic Cooperation and Development, UNCTAD and WTO, and preparing commentaries—rather than draft articles—on model most-favoured-nation clauses, including those developed from State practice and jurisprudence in the area. Lastly, the Working Group had suggested that the Commission should annex the discussion paper contained in document A/CN.4/L.719 to its annual report to the General Assembly to give Governments the opportunity to comment on the topic.

32. The CHAIRPERSON thanked Mr. McRae for his introduction and asked the members of the Commission for their comments.

33. Mr. CANDIOTI said that the useful report prepared by the open-ended Working Group established to examine the possibility of including the topic of the most-favoured-nation clause in the Commission's long-term programme of work should not have been introduced in plenary because that was contrary to the usual procedure. The document (A/CN.4/L.719) should be submitted to the Working Group on the long-term programme of work so that it could examine it and report to the Planning Group, which was responsible for drafting a final recommendation on the question and referring it to the plenary. The failure to abide by that procedure might create an unfortunate precedent and leave the door open to new topics being included "out of the blue" in the long-term programme of work of the Commission.

34. Mr. SABOIA said that he agreed with Mr. Candioti; the Commission should follow its usual procedure.

35. Mr. PELLET recalled that, at the preceding session, the Working Group on the long-term programme of work, which he had chaired, had not succeeded in taking a position on the question of a study on the topic of the most-favoured-nation clause and, already departing from the usual procedure, had decided that Governments should be asked for their views. Although he had been shocked that a task which was incumbent upon the Planning Group should be entrusted to a working group, he had not objected to that decision because an equivalent procedure had been chosen and because that was not the most important point. As a comparable result had been achieved, Mr. Candioti's call for procedural orthodoxy was surprising and seemed to be based on the pure pleasure of involving a large number of bodies, something that would result in a pointless detour as far as practice was concerned.

36. Mr. McRAE said that the Working Group which he had chaired had discussed the question and had concluded that, as it had received its mandate from the plenary, it should report back to it.

37. Mr. YAMADA said that he agreed with Mr. Candioti's proposal that the Commission's usual procedure should be followed.

38. Following an indicative vote requested by the CHAIRPERSON, it was decided, by 16 votes in favour and 9 abstentions, that the report prepared by the Working Group established to examine the possibility of the inclusion of the topic of the most-favoured-nation clause in the long-term programme of work of the Commission should be submitted to the Planning Group.

Cooperation with other bodies (*continued*)

[Agenda item 10]

Statement by the Representative of the Asian–African Legal Consultative Organization

39. Mr. KAMIL (Secretary-General of the Asian–African Legal Consultative Organization (AALCO)) said that he would briefly describe some interesting observations on questions of international law made by representatives to the forty-sixth annual session of the member States of AALCO. Most of them had stressed that they generally appreciated the work of the Commission on the topic of diplomatic protection, as well as the adoption on second reading of the relevant draft articles.[312] One representative had noted that the draft articles dealt only with the rules governing the circumstances in which diplomatic protection could be exercised and the conditions which must be met for it to be exercised, and not with ways of acquiring nationality. He had also stressed that, in draft article 4 (State of nationality of a natural person), the Commission had rightly specified that States had the right to determine who their nationals were and had pointed out that States should avoid adopting laws that increased the risk of dual nationality, multiple nationality or statelessness.

[311] *Yearbook ... 1978*, vol. II (Part Two), pp. 16–73, para. 74.

[312] *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50, pp. 24 *et seq*.

40. The same representative had also noted that, in the context of draft article 7 (Multiple nationality and claim against a State of nationality), the nationality of a person was determined as a function of his "predominant" nationality and that the criterion of preponderant nationality was somewhat subjective, as confirmed in paragraph (5) of the commentary to draft article 7, which stressed that none of the factors to be taken into account in deciding which nationality was predominant was decisive. The representative had pointed out that draft article 7 was not based on customary international law and that it was premature in the context of an exercise of progressive development of international law, since customary international law recognized the rule of the non-opposability of diplomatic protection against a State in respect of its own nationals. In paragraph (3) of its commentary to draft article 7, the Commission could thus not reasonably consider that the awards of the Iran–United States Claims Tribunal reflected the development of the international law of diplomatic protection. Moreover, most disputes before that Tribunal, including all those brought by claimants having dual nationality, had involved a private party on one side and a Government or Government-controlled entity on the other, and many of those disputes came under the rules of domestic law and general principles of law. The inclusion of such a controversial article in the final text might deter States from adopting the final instrument.

41. It had also been stressed that extending diplomatic protection to corporations (chapter III of the draft articles) was in most cases not necessary because the circumstances in which corporations performed their activities and the procedures for the settlement of disputes were largely regulated by the bilateral and multilateral treaties which had been signed between and among States and which were binding on them. With regard to undue delay in the remedial process, as referred to in draft article 15 (*b*), the representative had considered that sluggish judicial proceedings could not be considered *ipso facto* to justify an exception to the rule of the exhaustion of local remedies. Judicial proceedings in some countries were more time-consuming, for unavoidable reasons. Equality before the law and non-discrimination being generally accepted principles, the judicial authorities of a State could not and should not treat their own citizens and foreign nationals differently.

42. Another representative had welcomed the adoption of the 19 draft articles on diplomatic protection and stressed that they summarized and further developed the rules of international law applicable to diplomatic protection. For other representatives, certain elements of the draft articles had not been corroborated by State practice and the time was thus not ripe to adopt a legally binding instrument based on the draft articles. One representative had welcomed the Special Rapporteur's decision not to include the "clean hands" doctrine in the draft articles and another had said that the scope of draft article 19 (Recommended practice) gave rise to great difficulties. While noting that the draft article corresponded to his country's practice of responding to legitimate requests for diplomatic protection from its nationals abroad, he had nevertheless expressed the hope that it would be withdrawn from the set of articles adopted.

43. On the topic of reservations to treaties, one representative had noted that the draft guidelines adopted so far by the Commission were a significant contribution to the codification and progressive development of international law. His delegation had held the view that sovereign States had the right to make reservations, as provided in the 1969 Vienna Convention. The prohibition of reservations was only an exception to the general rule. The practice in certain regions of restricting reservations could not be universally applied. There should be a balance between the legal security of treaty relations and the freedom to conclude treaties. For another representative, who had also supported the work of the Commission, it was preferable to maintain the position taken in the 1969 Vienna Convention, namely, that it was the prerogative of the signatory States to accept or reject a reservation and that, if they had doubts about the validity of a reservation, they could raise them through diplomatic channels.

44. One representative had supported the codification of the topic of unilateral acts of States, which would provide the international community with guidelines concerning the extent to which States could be considered to be bound by their voluntary commitments. For efficiency's sake, the Commission might have to consider limiting the scope of the study to certain categories of acts rather than proceeding with the codification of unilateral acts of States in general.

45. With regard to responsibility of international organizations, one representative had commented on the draft articles in Chapter V (arts. 17–24) on circumstances precluding wrongfulness, adopted by the Commission at its fifty-eighth session.[313] The representative noted that, although the Special Rapporteur had pointed out in paragraph 5 of his fourth report that the analysis had followed the general pattern adopted in the draft articles on responsibility of States for internationally wrongful acts under the heading "Circumstances precluding wrongfulness",[314] in general, the position and functions of international organizations should be differentiated from those of States. Circumstances precluding wrongfulness were thus different in the two cases.

46. On draft article 17, the same representative had raised a question on the elements constituting "valid consent". The validity of the consent of a State or international organization should be based on their will, without any pressure or violation of their sovereignty or independence. Every instance of consent should in principle be taken as valid and it was also important to determine the limits of consent in an objective manner. The same representative had referred to considerable inconsistencies in the section on self-defence, which should be corrected. For example, draft article 18 did not completely reflect the content of paragraphs 15 to 17 of the report. For that representative, a clear distinction must be made between "self-defence" and "lawful use of force" in the framework of the reasonable implementation of the objectives of a given mission. Moreover, draft article 18 appeared to be limited to self-defence as used in Article 51 of the Charter

[313] *Ibid.*, pp. 121 *et seq*., para. 91.

[314] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 27–28 and pp. 71–86.

of the United Nations. Yet that provision related exclusively to States and did not concern international organizations. In other words, the draft article on self-defence seemed to contain elements of progressive development, since no one had ever suggested that customary law took account of the activities of international organizations. It was therefore unnecessary to refer, even indirectly, to Article 51. As to state of necessity, draft article 22 provided that necessity could not be invoked by international organizations as a ground for precluding wrongfulness. The representative had argued that the words "essential interest" and "international community" were ambiguous and the Special Rapporteur's arguments in paragraphs 35 to 42 had not provided any objective definition of or decisive factors for a determination of those concepts. The same representative had agreed with draft article 23 on compliance with peremptory norms of international law.

47. With regard to the question posed in paragraph 28 (*a*) of the report of the Commission on the work of its fifty-eighth session,[315] the representative had said that, when an international organization was not in a position to provide compensation to the injured party for its internationally wrongful act, its States parties, to the extent that they had participated in the decision resulting in the wrongful act, should try to offer compensation, taking due account of the rules of the organization.

48. Another representative had expressed strong support for the work of the Commission on the responsibility of international organizations and had noted that this responsibility and responsibility of States were the two pillars of international responsibility for internationally wrongful acts. Both should be included in a basically uniform system analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. Hence, it was necessary to adhere to the same structure of common headings and provisions, paralleled by revisions and additions reflecting the distinctive qualities of each international organization. The Commission must ensure that there was no departure from that structure. Another representative had welcomed the draft articles on circumstances precluding wrongfulness adopted by the Commission at the fifty-eighth session and had observed that member States which had exercised a key influence on the international organization in its commission of a wrongful act should be held accountable; member States should not be able to shift their responsibility to the international organization and necessity was not a circumstance precluding wrongfulness for international organizations.

49. In respect of shared natural resources, one representative had stated that his Government had welcomed the timely completion on first reading of the set of 19 draft articles on the law of transboundary aquifers[316] and that it generally supported the principles embodied therein. Another representative had stressed that it would be preferable not to prejudge the final form that the work would take and that the Commission should be cautious with regard to the study of oil and natural gas.

50. One delegation had commented on the second report[317] and the seven draft articles introduced by the Special Rapporteur on the topic of the effects of armed conflicts on treaties, noting that there were several conventions and legal instruments which were related to the topic and that the Commission's mandate was to supplement the existing international instruments. It had also agreed with the view expressed by the Special Rapporteur in paragraph 4 of his second report, for which general support was expressed by States, that the topic was not part of the law relating to the use of force, but was closely related to other areas of international law, such as the law of treaties, international humanitarian law, State responsibility and self-defence. The delegation had also argued that non-international armed conflicts might adversely affect the ability of the States concerned to fulfil their treaty obligations, but the inclusion of such conflicts in draft article 2 (*b*) would broaden the scope of the term "armed conflict". The intention of the parties at the time the treaty was concluded was a fundamentally important factor in determining the validity of a treaty in the event of armed conflict. The intention of the parties at the time of the treaty's conclusion might be deduced from the text of the treaty, including its preamble and annexes, as well as the *travaux préparatoires* and the circumstances of the treaty's conclusion. The indicia of susceptibility to termination or suspension of treaties in the event of an armed conflict did not make any distinction between the State resorting to the unlawful use of force in violation of the Charter of the United Nations and the State which exercised its inherent right of self-defence; the two could not be placed on an equal footing. As the Institute of International Law had rightly put it in article 7 of its resolution adopted on 28 August 1985 on the effects of armed conflicts on treaties,[318] States should be entitled to suspend in whole or in part the operation of a treaty which was incompatible with their inherent right of self-defence. Such a distinction should be reflected throughout the draft articles. For the same delegation, the integrity and continuity of international treaties were two basic principles of the law of treaties and they should be taken into account. Thus, draft article 6 should be retained, either as such, or as part of draft article 4.

51. The categories of treaties referred to in draft article 7 might be re-examined to identify criteria for determining which treaties should remain in force during an armed conflict. *Erga omnes* obligations constituted one such criterion, and treaties which encompassed such obligations could not be suspended or terminated in such a case. That should be made clear in draft article 7.

52. For another delegation, the question of the effects of armed conflicts on treaties was a grey zone of international law. Article 73 of the 1969 Vienna Convention made it clear that the question should not be prejudged. The issue was extremely complex and the doctrines and practices of States before the Second World War were no longer very relevant. Today, armed conflicts took the form of police actions, self-defence or humanitarian

[315] *Yearbook ... 2006*, vol. II (Part Two). p. 21.

[316] *Ibid.*, pp. 94 *et seq.*, para. 76.

[317] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

[318] Institute of International Law, *Yearbook*, vol. 61, Part II, session of Helsinki (1985), p. 278.

intervention. New legal regimes, such as in the areas of human rights and the environment, must also be operative during armed conflicts. Another delegation had expressed opposition to the Special Rapporteur's proposal that "*ipso facto*" should be replaced by "necessarily", which was less incisive, and had also argued that the draft articles should not rule out the possibility of automatic suspension or termination. With regard to the relation of the topic to other areas of international law, that delegation's position was in conformity with the principles stated by the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, namely, that although certain human rights and environmental principles did not cease to be applicable in time of armed conflict, their application was determined by *lex specialis*, i.e. the law applicable to armed conflicts which was deemed to govern the conduct of hostilities [see paragraph 25 of the advisory opinion]. *Lex specialis* should also be applicable during situations of armed conflict as long as it included not only treaties of international humanitarian law, but also bilateral treaties concluded between the parties to the conflict.

53. For another delegation, armed conflicts should be limited to international armed conflicts. Treaties should include those concluded between States and international organizations. When judging whether a treaty had been suspended or terminated because of an armed conflict, it was important to take into consideration the intention of the signatory States at the time of conclusion of the treaty, the implementation of the treaty, the situation that prevailed upon the outbreak of the conflict and the nature, objective and purpose of the treaty. In the view of that delegation, the legitimacy of the use of force affected treaty relations and the issue should be given further study.

54. Another delegation had commented on three provisions of the draft articles introduced by the Special Rapporteur, namely, draft article 2 (*b*), draft article 3 and draft article 4. With regard to draft article 2 (*b*), the delegation had thought that it might be preferable to have a broader provision and to leave to whoever was applying the draft article the task of deciding case by case. One solution might be to adopt a simpler formulation, indicating that the articles were applicable to armed conflicts, with or without a declaration of war. As to draft article 3, a conflict usually resulted in a suspension of treaties between the States concerned, which clearly were unable to apply the provisions of a treaty concluded with what had become an enemy State. It seemed unrealistic to postulate a general principle of continuity in such cases. In draft article 4, the Special Rapporteur had made the intention of the parties the main criterion for deciding on the suspension or termination of treaties. That question must be considered in greater depth, at the same time as other possible criteria, which might stem, for example, from articles 31 and 32 of the 1969 Vienna Convention, as well as from the nature of the armed conflict.

55. On the question of the obligation to extradite or prosecute (*aut dedere aut judicare*), one representative had referred to the need to be cautious and to recognize the treaty basis of the obligation. It was important to establish an international network to ensure that perpetrators of serious international crimes did not find a safe haven, but the cardinal principles of criminal justice must also be borne in mind. Those principles were relevant, for instance, to constraints on extradition based on the sovereign criminal jurisdiction of the requested State, the human rights of the accused and the need to ensure due process and the independence of prosecution; a more guarded formulation was required, which could read, "to submit the case to the competent authorities for the purpose of prosecution", as opposed to an outright "obligation to prosecute".

56. For another delegation, a major obstacle to the implementation of the obligation in question was the protracted nature of extradition procedures in some countries. That might lead to prescription of the prosecution of the suspect, which would subsequently prevent the requesting State from instituting its own criminal proceedings or referring the case to the requested State for prosecution. The international community should therefore attempt to establish rules governing extradition procedures in order to speed them up. The human rights of persons subject to extradition must also be protected.

57. On the topic of the expulsion of aliens, one delegation had stressed the need for a balance to be maintained between the right of the State to expel and the protection of the rights of aliens. The draft articles should also cover illegal immigrants. Another representative had noted that the topic was particularly relevant at a time in which globalization had led to an enormous increase in migrations. The right of the State to expel aliens was inherent in the State's sovereignty, but it was not absolute. The Commission should be encouraged to undertake a detailed study of customary international law, treaty law and jurisprudence at the global, regional and national levels.

58. At its forty-sixth session, AALCO had adopted a resolution in which it had expressed its appreciation for the fruitful exchange of views on the items discussed during the joint AALCO–International Law Commission meeting held in New York in 2006 in conjunction with the meeting of legal advisers of the United Nations. He looked forward with interest to the views and suggestions of the members of the Commission on topics that might be taken up at the next joint meeting. The AALCO Secretariat would continue to prepare notes and comments on the items considered by the Commission so as to assist representatives of AALCO member States to the Sixth Committee during the consideration of the report on the work of the Commission at its fifty-ninth session. An item entitled "Report on matters relating to the work of the International Law Commission at its fifty-ninth session" would be considered by AALCO at its forty-seventh session.

59. Mr. HASSOUNA asked how cooperation between AALCO and the Commission could be further developed. It would also be useful if the Commission could have information on the activities of the five regional centres for arbitration set up by AALCO.

60. Mr. DUGARD noted that few States in Africa or Asia made comments on the Commission's draft articles and that international law thus inevitably tended to be developed in a Eurocentric manner. He asked whether AALCO could encourage its members to comment on the draft texts prepared by the Commission.

61. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization) said that seminars and study days, as well as the annual joint meeting in New York, were useful tools for improving cooperation between AALCO and the Commission. In reply to a comment by Mr. Hassouna, he said that detailed information on the AALCO centres for arbitration could be found at its website, www.aalco.int. The sixth such centre had been established in Nairobi following a decision taken at the organization's session held in Cape Town. As to the comment by Mr. Dugard, he said that the records of AALCO sessions contained all the comments of member States on the work of the Commission; he promised to send a copy of those records to every member of the Commission.

62. Mr. SINGH, joined by Mr. CANDIOTI, Mr. PERERA and Mr. WISNUMURTI, described the genesis of AALCO and drew attention to the importance and usefulness of its activities for the International Law Commission.

The meeting rose at 1.10 p.m.

2945th MEETING

Tuesday, 31 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*)[319] (A/CN.4/577 and Add.1–2, sect. F, A/CN.4/579 and Add.1–4,[320] A/CN.4/585[321])

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. GALICKI (Special Rapporteur), introducing his second report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585), said that the report drew heavily on his preliminary report;[322] in places, the two were almost identical. There were three main reasons for such an approach. The first was that around half the members of the Commission had been replaced as a result of the election at the end of 2006. It therefore seemed worth recapitulating, for the benefit of new members, the main ideas set out in the preliminary report, together with a summary of the discussion in the Commission and later in the Sixth Committee. Secondly, it would be necessary to ascertain the views of the new members on the most controversial issues covered in the preliminary report before the Commission could proceed to a substantive elaboration of draft rules or articles. Lastly, there was undoubtedly a need for a wider response from States to the questions posed in paragraph 30 of the Commission's report to the General Assembly on the work of its fifty-eighth session.[323] At the time when the report had been finalized, only seven States had responded. That number had since risen to 21, but it still seemed necessary to repeat the request to States in order to obtain the fullest possible picture of States' internal regulations and international commitments concerning the obligation to extradite or prosecute.

2. The second report began with a preface and an introduction which briefly outlined the history of the Commission's work on the topic. Chapter I (paras. 9–72) dealt with a number of old and new aspects of the topic for the benefit of new members. Paragraphs 9 to 19 addressed some of the principal questions discussed during the fifty-eighth session. The first had been whether the obligation *aut dedere aut judicare* derived exclusively from international treaties specifically relating to it or whether it could be considered to be based also on existing, or emerging, principles of customary international law. The preliminary report had posed much the same question.

3. The second question had been whether there existed a sufficient customary basis for applying the obligation to extradite or prosecute to at least some categories of crime, for instance to the most serious crimes recognized under customary international law, such as war crimes, piracy, genocide and crimes against humanity. Thirdly, it had been asked whether it was generally acceptable to draw a distinction between the concept of the obligation to extradite or prosecute and the concept of universal criminal jurisdiction, and whether the Commission should embark on a consideration of the latter concept, and, if so, to what extent. The fourth question had been whether one of the alternative obligations—to extradite or to prosecute—should be given priority over the other, or whether both carried equal weight, and also to what extent the fulfilment of the one obligation released States from the other.

4. Another question had been whether there should be a third possibility, or "triple alternative", involving the jurisdiction of international tribunals, since State practice was increasingly evolving in that direction. In Argentina, for example, Law 26.200 implementing the Rome Statute of the International Criminal Court included a provision under which Argentina was obliged to extradite or surrender persons suspected of crimes falling within the jurisdiction of the International Criminal Court or, failing that, to take all such measures as might be necessary to exercise its jurisdiction over that offence. Legislation recently enacted in Panama, Peru and Uruguay to implement the Rome Statute of the International Criminal Court also provided for the *aut dedere aut judicare* obligation.

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[319] For the history of the Commission's work on the topic, see *Yearbook ... 2006*, vol. II (Part Two), chapter XI.

[320] Reproduced in *Yearbook … 2007*, vol. II (Part One).

[321] *Idem*.

[322] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

[323] *Yearbook ... 2006*, vol. II (Part Two). p. 21.