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Summary record of the 2924th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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80. His comments might seem indicative of substantial disagreement but, apart from those relating to the Special Rapporteur's infatuation with the word "*ressortissant*", they were only points of detail which the Drafting Committee ought to be able to solve easily. It was to be hoped that the Drafting Committee could meet in the very near future to consider the two draft articles proposed by the Special Rapporteur. He disagreed with the proposal by Mr. Vargas Carreño to defer the Drafting Committee's consideration of the draft articles and he regretted that the Special Rapporteur was apparently resigned to such a postponement. It was the task of the Drafting Committee to refine special rapporteurs' proposals and, furthermore, rapid agreement on firmer, more rigorous definitions and on a field of study was essential, since it would be impossible to draft further articles if the Commission did not know whether it was talking about "*ressortissants*" or "nationals", whether stateless persons and refugees were to be included within the scope of the topic, or whether armed conflicts should be taken into consideration. He therefore not only supported the referral of the two draft articles to the Drafting Committee, but also hoped that the Drafting Committee would examine them the following week.

81. Mr. CANDIOTI said he shared Mr. Pellet's reservations about the use of the word "*ressortissant*" in the Special Rapporteur's otherwise magnificent report. The word "*ressortissant*" had no direct equivalent in Spanish. The expression employed in the Spanish version of the second report, namely "*natural*", was incorrect, since it referred only to a person who had been born in a given place and did not cover the much wider concept of "*ressortissant*" as it was understood in French.

82. Mr. PELLET suggested that members who spoke Arabic or Chinese should indicate how the word "*ressortissant*" had been translated. If the concept existed only in French, that would be a decisive argument in favour of abandoning the term.

83. Mr. HMOUD said that the term "*ra`aya*" used in the Arabic version of the report was almost synonymous with "national", but *stricto sensu* meant persons who were protected by the State. It was an old notion dating back to the time when States which had dominions also extended their protection to the subjects of the occupied States.

84. Mr. KEMICHA confirmed that Arabic, unlike Spanish or English, had a term, namely "*ra`aya*", which was exactly synonymous with "*ressortissant*".

The meeting rose at 12.55 p.m.

2924th MEETING

Thursday, 24 May 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON welcomed Mr. Michel, Under-Secretary-General for Legal Affairs, Legal Counsel. He expressed the Commission's appreciation to the Codification Division for the assistance it provided to the Commission in its work and welcomed the frank dialogue which the Commission maintained with the Legal Counsel.

The meeting was suspended at 10.05 a.m. and resumed at 12.10 p.m.

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

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. The CHAIRPERSON invited the members of the Commission to continue their consideration of the second report on the expulsion of aliens,[137] which had been introduced the previous day by the Special Rapporteur on the topic, Mr. Kamto.

3. Mr. FOMBA welcomed the second report on the expulsion of aliens, a topic which he regarded as particularly important and interesting, given that the diaspora of his own country had often been confronted with the problem. He subscribed to the line of reasoning and conclusions of the Special Rapporteur, who had rigorously analysed a number of concepts that often gave rise to differing views insofar as their legal justification and meaning were concerned.

4. With regard to the feasibility and utility of the study, Mr. Pellet had noted during the debate at the previous meeting that the topic was more a matter of negotiation than of codification. Did that mean, then, that the Commission should elaborate a practical guide to negotiation with guiding principles, guidelines or recommendations? Personally, he would prefer formal draft articles.

5. According to Mr. Hmoud, the Commission was not competent to consider the topic if it was only going to consider the link between the individual and human rights without addressing the problem of illegality. Yet that aspect was included right in the Special Rapporteur's proposed work plan. Moreover, the Commission's competence was no longer questioned.

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* Resumed from the 2922nd meeting.

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

6. Some members had criticized the Special Rapporteur for not directly tackling the real questions of substance, but that criticism was unwarranted because he had clearly expressed his intention of elaborating a legal regime as comprehensive as possible on the topic of the expulsion of aliens. Nor was it justified to take the Special Rapporteur to task for delving immediately into the conceptual basis of the topic—it would be illogical and impossible to claim to be elaborating the legal regime of such a topic without first trying to clarify its key terms.

7. With regard to the changes in the structure of the study to which the Special Rapporteur referred in paragraph 43 of his second report, Mr. Fomba said that he was not opposed to having definitions precede the scope, but the latter should go beyond mere *ratione personae*, as suggested by Mr. Candioti. It remained to be seen whether the list of categories of aliens concerned was adequate. Mr. Pellet had suggested excluding refugees and stateless persons from the list for reasons of *lex specialis*, which was perhaps appropriate, provided that their current legal status was clear. In the case of refugees, it would be necessary to choose between a restrictive definition, such as the one in the 1951 Convention relating to the Status of Refugees, or an extensive one, such as in the 1969 OAU Convention governing the specific aspects of refugee problems in Africa. As to how to define the legal situation of applicants for refugee status between the time of submission of the application and the time of receipt of a response, he shared the Special Rapporteur's view that the answer depended on national law and would be duly considered when the conditions for expulsion were studied.

8. The Special Rapporteur proposed initially to make no distinction between the various categories of aliens residing lawfully in a State. He himself wished to know whether that question would be addressed later (given that the length of stay could have implications for the consequences of expulsion) and, if so, to what extent it might be taken up in the definitions.

9. The question of expulsion in the event of armed conflict was governed by international humanitarian law, which was why some members had argued that it should be left out; however, an in-depth study of practice might be useful before a decision was taken on the matter. With regard to migrant workers, he agreed with the suggestion that legal instruments of relevance from the standpoint of the principle of prohibition of collective expulsion should be given consideration at a later time, and he endorsed the Special Rapporteur's criteria for identifying aliens whose expulsion was likely to be of relevance to the topic.

10. Turning to the two draft articles proposed by the Special Rapporteur, he said that in draft article 1 (Scope), the *ratione materiae* should be clarified before the *ratione personae*, and a new paragraph 1 should therefore be inserted in the proposed text indicating that the draft article applied to the expulsion of aliens; the two existing paragraphs would be maintained and renumbered accordingly. He also noted that in the French version, paragraph 2 referred to "*asilés*", whereas the body of paragraph 122 spoke of "*exilés*" (in both cases rendered as "asylum seekers" in the English version). Those terms should be standardized, or else the Special Rapporteur should explain what the difference was, assuming there was one.

11. In draft article 2 (Definitions), the problematic term was "*ressortissant*" (of another State), which Mr. Pellet had proposed replacing with "non-national". The basis for that proposal was that "alien" was defined as the opposite of "national", but practice showed that "national" and "*ressortissant*" were regarded as interchangeable. Moreover, the Special Rapporteur's standpoint did not necessarily contradict Mr. Pellet's, because in paragraph 148 of his report he proposed that "*ressortissant*" should apply not only to nationals but also to persons who were subject to the authority of a given State as the result of a particular legal connection, such as refugees and stateless persons. Thus, it remained to be seen whether refugees and stateless persons should be included. If they were not, the scope of the topic would be confined to "non-nationals", and that would settle the question, but it presupposed recasting the wording of the entire draft article 2, in which case the Commission would need to give the Special Rapporteur specific instructions.

12. Some members had felt that the word "conduct" was inappropriate when defining expulsion and that it alluded to the question of responsibility. That might be the case, provided that the type of conduct contemplated actually constituted an internationally wrongful act. It had also been rightly noted that paragraph 1 and paragraph 2 (*b*) duplicated each other, but it might not be a bad idea to dissect the definition of expulsion, even at the risk of repetition.

13. The triple function given to "frontier" in paragraph 2 (*c*) was useful and interesting. He welcomed the Special Rapporteur's new version of paragraph 2 (*d*), although it remained subject to the decision on "*ressortissant*".

14. In conclusion, he believed that the Commission should give the Special Rapporteur clear instructions on the scope of the key concepts to be defined, and he was in favour of referring the two draft articles to the Drafting Committee.

15. The CHAIRPERSON, speaking as a member of the Commission, reiterated the reservations that he had already expressed on the scope of the topic. The sequence in which the various aspects of the question were discussed did not sufficiently reflect the importance of one of its main aspects, namely legality and the reasons for the expulsion of aliens by States. In the work plan proposed in the preliminary report,[138] the question of the responsibility of the expelling State was addressed only in Part 3, on legal consequences of expulsion. By taking such an approach, the Special Rapporteur neglected the heart of the matter and focused chiefly on categories of aliens likely to be expelled, such as refugees or migrant workers, or on types of expulsion, such as extradition; that did not seem to be particularly useful, since those questions were already covered by international law.

[138] *Yearbook … 2005*, vol. II (Part One), document A/CN.4/554.

16. In defining the scope of the topic, it was important to bear in mind that expulsion was intrinsically linked to the duty of the State to control public order throughout its territory. That was why it would have been useful to include the question of non-admission, which, like expulsion, addressed the need of States to control the presence and movements of aliens for reasons of security. The topic raised not only the question of the human rights of expelled persons, but also that of the duty of a State to prevent the presence in its territory of aliens who might, for example, cause harm to its nationals. That should be the starting point of the study. It was unfortunate that the Special Rapporteur had addressed the topic from the standpoint of respect for human rights, thereby creating some confusion as to the legality of the expulsion of aliens, which was *a priori* perfectly lawful. In giving priority to human rights to the detriment of the rights and duties of States, the Commission was going about things in the wrong way. He reserved the right to return to the question at a later date.

17. Mr. McRAE said that, broadly speaking, he had no objection to the Special Rapporteur's approach, which recognized the sovereign right of States to expel aliens from their territory but also acknowledged that, in exercising that right, States must respect a number of rules, in particular the norms of international human rights law and international humanitarian law. It was unfortunate that the Special Rapporteur had not gone all the way with his logic and specified the content of those rules as well as the context in which States were usually led to order the expulsion of aliens, namely the maintenance of public order, as rightly pointed out by Mr. Brownlie. However, Mr. Brownlie's doubts about the utility of an analysis of the legal consequences of expulsion for different categories of aliens did not seem to be well founded: on the contrary, it was an inescapable aspect of the topic that had perhaps been addressed too hastily by the Special Rapporteur. It should be borne in mind that the Commission was only at the beginning of its work on the expulsion of aliens and that it must therefore remain focused on the definition of the subject. Perhaps the Commission could agree that the main question under consideration was the expulsion by a State from its territory of persons who were not its nationals. That was the Special Rapporteur's point of departure, as could be seen to a certain extent from the wording of his proposed draft article 2, paragraphs 1 and 2 (*b*). However, in defining the meaning of "alien" for the purposes of the draft article, the Special Rapporteur referred to the notion of "*ressortissant*", which seemed unnecessary; it was sufficient to say that an alien was any person who was not a national of the expelling State. The wording of paragraph 1 should be modified along those lines, and the current paragraph 2 (*a*) should be deleted.

18. The idea that the expulsion of aliens concerned the expulsion of persons "physically" present in the territory of the expelling State should also be expressed more clearly, and draft article 1, paragraph 1, should thus be modified. Although the distinction drawn in draft article 1, paragraph 2, between categories of aliens on the basis of whether or not their presence in the territory of the expelling State was legal was definitely useful in analysing the legal consequences of expulsion, it should not be made at the current stage of work, when the scope of the draft article was at issue. Physical presence in the territory of the State expelling the person who was the subject of expulsion should be the sole criterion in defining the term "alien". There should be no need to determine whether there was a link of nationality between the expelled person and a State other than the territorial or expelling State. The application of such a criterion would also settle the question of whether to include non-admission in the scope, which Mr. Brownlie favoured doing, since logically only persons seeking admission who were not physically present in the territory of the State concerned would be excluded from the scope of draft article 1. The idea that the only category of aliens of prime concern to States—and which should thus be given full attention by the Commission—was that of aliens physically present in the territory of the expelling State should also serve as the basis for a discussion on whether or not some forms of expulsion, such as extradition, or some categories of non-nationals, such as refugees, ought to be excluded from the scope of the draft article. The inclusion of those aliens might make it possible to close any existing gaps in international norms concerning them.

19. With regard to draft article 2, Mr. McRae said that he agreed with Ms. Escarameia, who had argued that the definition of the term "territory" in paragraph 2 (*e*) needed to be improved. To that end, the Special Rapporteur should rely more on the line of reasoning followed in paragraph 179 of his second report. While Mr. Brownlie's proposal to include a study of expropriation in the consideration of the impact of expulsion on the right to own property abroad could be considered, that should be done only after a thorough assessment of whether that option was of interest. The Commission would then have to exercise great caution to ensure that an examination of that important branch of law did not distract it from its main subject of study.

20. Much still needed to be done to clarify the exact scope of the topic, but the two draft articles proposed by the Special Rapporteur were a useful starting point, and he had no objection to their being referred to the Drafting Committee.

21. Mr. CAFLISCH commended the Special Rapporteur for the quality of his second report, which prepared the ground for the Commission's consideration of the particularly complex topic of the expulsion of aliens. Although he endorsed the thrust of the report, the concept of "*ressortissant*", which at first glance did not pose any special problem, was defined in such general terms in draft article 2, paragraph 2 (*d*), that categories of persons other than "nationals" in the strict sense might be regarded as "aliens" within the meaning of the draft article. The scope of the definition of "*ressortissant*" should be restricted in order to avoid that trap. Perhaps the safest way of dealing with the problem would be simply to abandon the notion in favour of "nationality". He drew attention to paragraph 174 of the report and said that it was perhaps inappropriate to employ the word "transfer", which was also used to mean the surrender to their State of nationality of persons already sentenced abroad to have them serve all or part of their sentence. Draft articles 1 and 2 were a useful starting point for the Commission's future work on the topic, but the question of the various

regimes governing expulsion should probably be considered in greater depth before a decision was taken on the definition of the terms "alien" and "expulsion". Although he did not have a clear-cut opinion on the matter, he was not at all certain that he agreed with Mr. Pellet that the question of the expulsion of foreign nationals in situations of armed conflict should not be included.

The meeting rose at 1 p.m.

2925th MEETING

Friday, 25 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, 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. Vázquez-Bermúdez, Mr. Wako, 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]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON, responding in his capacity as a member of the Commission to the opinion expressed at the previous meeting by Mr. McRae that it would not necessarily be appropriate to take up the subject of expropriation even in passing, explained that his earlier reference to expropriation had been made within the context of his more general point that, if the Commission were going to discuss the illegality of expulsion in certain circumstances, it would have to identify the causes of action, or the basis of claim, to enable it to discuss State responsibility issues not in the abstract, but in relation to particular categories of illegality.

2. In that connection, he had mentioned violations of friendship, commerce and navigation treaties, other bilateral treaties, and possibly human rights treaties; and, alongside those categories, one would also have to include international crimes including genocide, and the minimum international standard for the treatment of aliens. In fact, the overall point he had wished to convey was that the rubric "expulsion of aliens" was inadequate in that it amounted to no more than a convenient label and, for that reason, the Commission would have to take great care when defining the scope of the topic. He had alluded to expropriation only because, in real life, cases of expulsion were often part of a situation imposed on aliens and their property. Expropriation frequently accompanied expulsion of the individual concerned and, as the case of *Loizidou v. Turkey* had shown, individuals were sometimes not permitted to repossess property even when there had been no expropriation. He was not, however, proposing that the Commission should take up the subject of expropriation; he had merely been attempting to illustrate the fact that various legal categories and causes of action were relevant to the issue of legality.

3. One of his objections to adhering to a narrow conception of expulsion was that, if it were to be accepted that the Commission was examining control over the presence of aliens in the territory of a State, and that such control was *prima facie* part of statehood, *prima facie* part of title to territory and *prima facie* lawful, premises which seemed to him quite acceptable, the question of controlling the presence of aliens would not be confined to the mechanics of expulsion, but would be further complicated by the wide variety of factors involved: first, illegal presence; secondly, informal migrants, e.g. unlicensed foreign traders; and thirdly, changes in domestic law relating to the licensing of individuals and their activities which meant that lawful visitors were reclassified as unlawful visitors. If the Commission was dealing with the question of the control of presence, it should logically also include refusal of entry among the situations it examined.

4. Mr. GAJA said that the Special Rapporteur's very useful second report[139] constituted a further step in the right direction. Given that the topic referred, not to expulsion in general, but to expulsion of aliens, it was understandable that the Special Rapporteur should endeavour to provide a definition of "aliens" when determining the scope of the topic; draft articles 1 and 2 were thus plainly linked. A difficulty inherent in that approach, however, was that, if the status of a person were to be considered in terms of that person's relation with a State other than the expelling State, as was done in draft article 2, paragraph (1), no weight would be given to his or her possible ties with the expelling State. If he or she were a dual national with the nationality of the expelling State, expulsion would not be lawful, if one agreed, as he did, with the opinion expressed in paragraph 47 of the report, to the effect that the expulsion of nationals was prohibited. Since the scope of that prohibition might be uncertain in the case of dual nationals, that question should be addressed in order to ascertain to what extent the rules on expulsion of aliens were intended to apply to those persons, even though, strictly speaking, the prohibition of the expulsion of nationals did not form part of the topic.

5. Although draft article 1, paragraph (1), would seem to exclude dual nationals, draft article 2, paragraph (1), gave the contrary impression. Draft article 2 should mention not only persons with dual nationality, but also stateless persons, since they were definitely not encompassed by the concept of "*ressortissants* of another State".

6. In practice, expulsion was closely bound up with the often difficult question of establishing the nationality of the person to be expelled, as the State of nationality was the only State obliged to admit him or her to its territory. While the statement in paragraph 152 of the second report to the effect that it was the responsibility of national

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