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Summary record of the 3129th meeting

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had conferred on him and paid a tribute to Mr. Kamto, Chairperson of the sixty-third session, and to the other officers of that session for their outstanding work. As it was the start of the new quinquennium, he wished to welcome back the members of the Commission who had been re-elected and expressed confidence that the new members would quickly adapt to the Commission's pace and methods of work.

Mr. Niehaus was elected first Vice-Chairperson by acclamation.

Mr. Hassouna was elected second Vice-Chairperson by acclamation.

Mr. Hmoud was elected Chairperson of the Drafting Committee by acclamation.

Mr. Šturma was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/649)

The agenda was adopted.

The meeting was suspended at 3.40 p.m. and resumed at 4.35 p.m.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew attention to the programme of work for the first week of the Commission's session. The Commission would begin by hearing the introduction of the eighth report on the expulsion of aliens by the Special Rapporteur on that topic (A/CN.4/651). The Drafting Committee would be working on the topic throughout the week, during which the Study Group on treaties over time would also be meeting. Lastly, the Bureau proposed that the next plenary meeting should be dedicated to the memory of Mr. Carlos Calero Rodrigues.

The programme of work for the first week of the session was adopted.

7. Mr. CANDIOTI pointed out that with the start of the new quinquennium, one third of the Commission's members were new to its work. The General Assembly had given the Commission a clear mandate to make progress on two topics: "The obligation to extradite or prosecute (*aut dedere aut judicare*)" and "Immunity of State officials from foreign criminal jurisdiction". In addition, new topics would have to be chosen now that work on three major topics had just been completed. For all those reasons, it might be beneficial to hold an open exchange of views on how best to organize the Commission's work for the current session and beyond, throughout the new quinquennium.

8. The CHAIRPERSON said that the Commission, owing to its new composition, needed to appoint new special rapporteurs for two topics: "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)". He invited members to hold consultations

to that end. He also suggested that members give some consideration to the overall approach to be taken to its work: he would be holding informal consultations on that subject. He would be consulting informally, with members of the Enlarged Bureau, on the new items to be included in the programme of work.

9. Mr. HASSOUNA said he hoped that the Commission would continue to improve its methods of work during the current session, in line with decisions taken at the previous session. He looked forward to a productive start to the new quinquennium.

The meeting rose at 4.50 p.m.

3129th MEETING

Tuesday, 8 May 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Adoke, Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, 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. Wako, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Carlos Calero Rodrigues, former member of the Commission (*concluded*)

1. The CHAIRPERSON said that, as had been announced at the previous meeting, the current meeting was dedicated to the memory of Mr. Carlos Calero Rodrigues, who had been a member of the Commission from 1982 to 1996. With his vast experience of diplomacy and the drafting of international legal instruments, he had made a significant contribution to the work of the Commission and, more generally, to the development of international law in such areas as the law of the sea, human rights, international humanitarian law and State immunity.

2. Mr. SABOIA commended the Commission for paying tribute to the memory of Mr. Carlos Calero Rodrigues, with whom he had worked at the Commission on Human Rights during the 1980s but also during the time when the latter had been Secretary General of the Brazilian Ministry of Foreign Affairs, during the 1990s. In addition to his contribution to the development of international law in the areas mentioned by the Chairperson, Mr. Calero Rodrigues had been a member of the Commission on Human Rights at a difficult time for Brazil and had participated in the drafting of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Even though his country had experienced problems in the area of human rights, he had believed that it was possible to take a positive approach and

move things forward. That spirit had also guided him in his work in the International Law Commission: he had been convinced that it was possible to bring opposing positions closer together and that it was necessary to find solutions in order to obtain satisfactory results, while seeking a compromise that genuinely contributed to the development of international law or to the strengthening of human rights. While he took the topics considered by the Commission very seriously, he never lost his sense of humour—he could in fact display biting sarcasm. The work of the Commission was what mattered most to him, and he made it a point of honour to work on his own, without any assistant or adviser. Having himself learned a great deal from Mr. Calero Rodrigues, he had been greatly distressed to learn of his death, and he was grateful to the Commission for having chosen to remember him.

3. Sir Michael WOOD said that the Chairperson and Mr. Saboia had already said all that he had wished to say about Mr. Carlos Calero Rodrigues, which showed that the latter was the same to all who knew him. He had been one of the great international lawyers of his time and an accomplished master of diplomacy, a field that drew upon all the qualities and experience that the work of the Commission called for. In the Sixth Committee his contributions to the debates, particularly those relating to the report of the Commission, were listened to with the utmost attention, not only because he was always the first speaker to take the floor, but also because what he said was extremely pertinent and set the tone for the discussions that followed. He, too, had learned a great deal from Mr. Calero Rodrigues, who, in addition to possessing extensive skills, was a model of courtesy and diplomacy in the best sense of those terms: he displayed a keen interest in everyone, and while he could be sarcastic, he was never cruel. Above all, he would be remembered for his contribution to the progressive development and codification of international law, in particular his skilful chairing of the Sixth Committee during the consultations on jurisdictional immunities of States. The reports that he had drafted in the early 1990s had contributed greatly to the adoption in 2004 of the United Nations Convention on Jurisdictional Immunities of States and Their Property: when the Commission had taken up that topic, it had based itself on the issues on which Mr. Calero Rodrigues had worked and for which he had found solutions that had proved valid. That Convention was one of the Commission's greatest achievements, and he himself, who had also been very saddened by Carlos Calero Rodrigues's death, was pleased to give him much of the credit for it.

4. Mr. COMISSÁRIO AFONSO said that he had known Mr. Carlos Calero Rodrigues personally, having worked with him on many occasions, and that their relationship had left a deep and lasting impression on him. An outstanding personality, Mr. Calero Rodrigues had always acted in a respectful and friendly manner. He had been an excellent jurist who had served his country, the Commission, the United Nations and the entire international community with honour and distinction. He had had the privilege of meeting Mr. Calero Rodrigues several times during sessions of the Commission on Human Rights, to which the latter had been entirely devoted. He had also encountered him during meetings of Portuguese-speaking countries that had been organized in order to establish,

through a harmonization of positions, the Portuguese text of the United Nations Convention on the Law of the Sea, which was to be submitted to the Governments and parliaments concerned for approval. He had also met him in New York in the Sixth Committee, which he himself had chaired in 1991. Together with other representatives, including Sir Michael Wood, Mr. Calero Rodrigues had worked tirelessly to ensure that the work of the Sixth Committee led to a positive outcome. And indeed, that was one of the rare occasions on which a resolution on terrorism had been adopted by consensus, something that had not occurred in previous years or in subsequent ones. Mr. Calero Rodrigues had been a powerful but wise voice in the Sixth Committee, and he had developed his legal arguments in a convincing and forceful manner. He himself had consulted Mr. Calero Rodrigues time and again, given the latter's extensive experience as a negotiator, until they could find a solution to the thorny problems that faced them. Carlos Calero Rodrigues had been a major legal scholar who happily embraced great causes that embodied universal human values. He was staunchly opposed to human rights violations, in particular the death penalty, and had taken part in the drafting of numerous human rights instruments. He had also chaired the Third Committee of the United Nations Conference on the Human Environment, held in Stockholm in 1972, the fortieth anniversary of which had recently been observed in that city. He therefore wished to commend the Commission for its initiative to pay homage to the memory of an eminent jurist who had devoted his entire life to the ideals of peace, justice and human rights as well as to the progressive development and codification of international law.

5. Mr. GEVORGIAN said that he, too, had known Mr. Carlos Calero Rodrigues personally and that he had always had the impression, notwithstanding the difference in their ages and status, that Mr. Calero Rodrigues had been well disposed towards him. He agreed that Mr. Calero Rodrigues had been a veritable institution within the Sixth Committee whenever the Commission's report was considered, for his statements were as precise and detailed as they were unrestrained. Accordingly, he endorsed everything that had been said by previous speakers and wished to express his profound respect for Mr. Calero Rodrigues and to convey his deepest condolences to his family and to his fellow citizens.

6. Mr. VALENCIA-OSPINA said that he wished to associate himself with the tribute to the memory of Mr. Carlos Calero Rodrigues because he was the only member of the Commission to have had the honour of working with him in that body, where both had been members in 1982 and 1983, and he could therefore testify to the contribution that that eminent jurist had made to the Commission's work. Apart from Mr. Calero Rodrigues's contribution to the progressive development and codification of international law, he wished to stress another aspect, already mentioned by Mr. Saboia, namely the fundamental role played by Mr. Calero Rodrigues in the harmonization of divergent views expressed within the Commission: in fact, he had always endeavoured to find solutions that made it possible to rally divergent points of view in a constructive manner so as to move the process of codification forward. The very active role he had played

in the Commission and in the Sixth Committee had also made it possible to forge a link between those two bodies, which had been a key factor in the General Assembly's acceptance of a number of projects formulated by the Commission. Mr. Calero Rodrigues was in a sense part of a family tradition, since he was the brother-in-law of José Sette Câmara, who had preceded him in the Commission before serving on the International Court of Justice. Lastly, as everyone had noted, he had had a great sense of humour, but also—and that was perhaps less well known—a genuine passion for classical music.

7. The CHAIRPERSON said that he had also been very fond of Mr. Carlos Calero Rodrigues, an outstanding individual with whom he had had the privilege of working in the context of the United Nations Conference on the Law of the Sea and, later, in the Sixth Committee, on the question of jurisdictional immunities of States, and that he had been greatly affected and saddened by his death.

Expulsion of aliens (A/CN.4/650 and Add.1, sect. B,⁴ A/CN.4/651,⁵ A/CN.4/L.797)⁶

[Agenda item 2]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

8. The CHAIRPERSON invited the Special Rapporteur to introduce his eighth report on the expulsion of aliens (A/CN.4/651).

9. Mr. KAMTO (Special Rapporteur) said that when he had introduced his seventh report on expulsion of aliens⁷ at the sixty-third session, he had said that it would be the last report before the set of draft articles on the topic was submitted to the Drafting Committee and, he had hoped, adopted by the Commission. The debates in the Sixth Committee of the General Assembly at its sixty-sixth session had revealed a need for him to draft an eighth report to address the concerns expressed by certain States (see paras. 5–31 of the eighth report) and the European Union (*ibid.*, paras. 32–48).

10. He would not burden his colleagues by setting out in detail the concerns expressed and the responses he had made in an effort to address them, convinced that members had been able to take in the eighth report, which was fairly brief. Most of those observations had to do, in his view, with the discrepancies between the progress made by the Commission in considering the topic of expulsion of aliens and the information on that progress that had been submitted to the Sixth Committee in the context of its consideration of the Commission's annual report on its work.

11. In his eighth report, then, he had tried to dispel the misunderstandings created by that discrepancy while taking into account, where necessary, certain suggestions or proposing certain adjustments to the wording of certain draft articles. The draft articles had in fact been sent to

the Drafting Committee by the plenary Commission, and so it was in that context that those suggestions, largely of a drafting nature, would be considered. In essence, the report was mainly intended to show that the Special Rapporteur and the Commission were quite mindful of the observations of States, and groups of States like the European Union, and sought to make an adequate response to them. The Commission might therefore limit itself to taking note of them, but members were entitled to make observations, and he was open to all comments and suggestions.

12. He wished to conclude by raising a question that had come up during the debates in both the Commission and the Sixth Committee, namely the final form that the Commission's work on the topic would take. As he had already noted, few topics lent themselves to codification as well as the present one did. The arguments in support of that contention had been set out at length in the Commission at its sixty-third session⁸ and in the Sixth Committee in November 2011;⁹ he wished simply to reaffirm his conviction that once the drafting of the draft articles was completed, the coherence and solidity of the Commission's work would become more apparent, and the hesitation to which the codification exercise had given rise would be dispelled. He strongly hoped that when the time came, the Commission would decide to send the results of its work on the topic of expulsion of aliens to the General Assembly in the form of draft articles and entrust the Assembly with deciding what form it ultimately wished them to take.

13. Mr. MURPHY commended the Special Rapporteur for his eighth report on the expulsion of aliens, in which he considered and addressed many of the comments made by States and the observer for the European Union in the Sixth Committee. Those observations seemed to suggest mixed support for the draft articles, although there was certainly general agreement that a State's right to expel aliens must be exercised in accordance with international law, including rules on the protection of human rights. He wished to draw the Commission's attention to four main areas of concern that the Drafting Committee needed to consider.

14. First, several States had stressed that there already existed numerous global, regional and national regimes that addressed the expulsion of aliens in different contexts. According to those States, such regimes operated reasonably well and, given that they were complex, it was pointless to codify them further by means of a set of relatively simple rules. The Nordic countries, for example, had expressed "their scepticism concerning the usefulness of the Commission's efforts to identify general rules of international law with respect to the topic of expulsion of aliens".¹⁰ They had felt that "a significant body of detailed regional rules was already in place"¹¹ and that trying to codify those rules was not time well spent. Similarly, Germany had maintained that

⁴ Available from the Commission's website.

⁵ Reproduced in *Yearbook ... 2012*, vol. II (Part One).

⁶ Available from the Commission's website.

⁷ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/642.

⁸ *Ibid.*, vol. II (Part Two), para. 258.

⁹ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 25th meeting (A/C.6/66/SR.25), paras. 46–54.

¹⁰ *Ibid.*, 21st meeting (A/C.6/66/SR.21), para. 59.

¹¹ *Ibid.*

many national rules and regulations governed the question of expulsion, which was also addressed by human rights instruments and guarantees for protecting individuals. There was no need for further codification.¹²

Likewise, the United Kingdom had reiterated that it was “of the view that [the topic] was not suitable for codification or consolidation at the present time”.¹³ Greece, meanwhile, had stated that “many of the issues relating to the topic had not been settled in international law and did not lend themselves to codification or progressive development”.¹⁴ The Government of Japan had asked the Commission to “respond to the criticism that the topic was not ripe for codification”.¹⁵

15. Most of those States had pointed out that several widely adopted and detailed international treaties already addressed various aspects of the issue of expulsion: the Convention relating to the Status of Refugees, with 145 States parties; the Protocol relating to the Status of Refugees, with 146 States parties; the International Covenant on Civil and Political Rights, with 167 States parties; the Convention against torture and other cruel, inhuman or degrading treatment or punishment, with 150 States parties; and the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, with 194 States parties. Likewise, regional conventions and instruments adopted in Europe and elsewhere also dealt with expulsion, albeit in different ways according to different systems. Thus, when States like Germany, the Netherlands, the Islamic Republic of Iran and Canada had urged that “draft guidelines or principles could be drawn up, enunciating best practices such as those already contained in the current draft articles”,¹⁶ he understood them to mean that the Commission should not try to codify a single set of rules on the subject if the effect would be to blur the distinctions among the various treaty regimes. Rather, it should use its work to provide guidance to States that wished to develop national legislation and to encourage them, as appropriate, to enter into new or existing treaty regimes.

16. Second, several States also appeared to be concerned at the fact that the draft articles sought not to codify existing law but to impose new obligations on States that would modify or go beyond what they had accepted in their practice. The Czech Republic, for example, had stated that “some provisions ... exceeded the framework of codified rules of international law, and their wider acceptance could be problematic”,¹⁷ the Netherlands had asserted that the topic “represented progressive development of the law rather than State practice”¹⁸ and had protested that “[t]he Commission should not be involved in designing new human rights instruments”, while Hungary had maintained that

[t]he elaboration of a convention on the basis of the draft articles ... remained a controversial question, and concerns persisted over the need to balance the mere repetition of State practice with the introduction of a new regime with high human rights standards.¹⁹

17. Part of the problem was simply the use of wording in the draft articles that differed from that used in the major treaty regimes. That was why France,²⁰ for example, had objected to the language of draft article E1 (State of destination of expelled aliens),²¹ which he believed was to become article 17 under the Special Rapporteur’s proposed new numbering. Paragraph 2 of that draft article said that a State could not expel an alien to his or her State of nationality if the alien was “at risk of torture or inhuman and degrading treatment in that State”. France had correctly noted that that was not the standard used in the Convention against torture and other cruel, inhuman or degrading treatment or punishment, article 3 of which stipulated that no person could be expelled to a State “where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

18. Yet perhaps a bigger problem was that some States viewed the draft articles as inappropriately blending different concepts that existed in specific national, regional and international regimes, even though those concepts had been agreed only in the context of those particular regimes. Given that the draft articles were based on the premise that a State had the basic right to expel aliens from its territory (draft article 3), the imposition of restrictions on that right must be clearly established in State practice. State practice, which was associated with specific treaty regimes, demonstrated that some restrictions were accepted in some contexts, but it was problematic to then extrapolate from those regimes a broad right that would be applicable in all contexts, at least in the absence of widespread practice that supported the broader norm. Thus the United States of America was concerned that several provisions of the draft articles contained a *non-refoulement*²² obligation for which no comparable obligation existed in any of the widely ratified international human rights conventions.

19. Returning to paragraph 2 of draft article E1, he noted that the *non-refoulement* provision spoke of “inhuman and degrading treatment”. Yet article 7 of the 1966 International Covenant on Civil and Political Rights, which prohibited torture and cruel, inhuman or degrading treatment or punishment, did not prohibit *refoulement* to countries where the individual might be at risk of such treatment. Likewise, the *non-refoulement* obligation set out in article 3 of the later Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted in 1984, which had been viewed as an important development in international law, applied only in cases where there was a risk of torture but not of “inhuman or degrading treatment or punishment”, a situation that was contemplated in article 16 of the Convention. When the major treaties that had been widely ratified by States had been drafted, the issue of whether to extend the *non-refoulement* obligation to situations in which there was a risk of “inhuman or degrading treatment” had been rejected. That choice was obviously not meant to condone such treatment but constituted recognition that such conduct was different from torture.

¹² *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 26.

¹³ *Ibid.*, para. 46.

¹⁴ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 16.

¹⁵ *Ibid.*, 25th meeting (A/C.6/66/SR.25), para. 23.

¹⁶ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 26 (Germany).

¹⁷ *Ibid.*, para. 18.

¹⁸ *Ibid.*, para. 47.

¹⁹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 54.

²⁰ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 37.

²¹ *Yearbook ... 2011*, vol. II (Part Two), para. 218, footnote 564.

²² *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 21st meeting (A/C.6/66/SR.21), para. 66.

While there might be jurisprudence within the European human rights system that extended the *non-refoulement* provision to such treatment, the European system could not automatically be applied to the rest of the world, as the observer for the European Union himself had recognized in autumn 2011.²³

20. Third, some States had feared that the draft articles might undermine existing protections. France,²⁴ as well as Hungary²⁵ and Portugal,²⁶ had expressed concern that draft article E1, paragraph 2, identified a *non-refoulement* provision only when an individual was being expelled to his or her country of nationality, whereas the *non-refoulement* provision in the Convention against torture and other cruel, inhuman or degrading treatment or punishment applied to expulsions to any country, not just the country of the expellee's nationality. Similar deviations from other regimes, such as the Convention relating to the Status of Refugees, had prompted the Netherlands to caution that the Commission's work "could cause uncertainty as to which international legal regime applied in a specific situation".²⁷

21. Fourth, some States had expressed misgivings about the scope of the topic, with some of them expressing concerns about the inclusion of the question of extradition. Spain had maintained that "extradition and expulsion were two different categories that must be kept separate in order to prevent expulsion procedures from being exploited for the purpose of extradition".²⁸ Similarly, Chile had noted that it had "particular concerns stemming from the connection between the two related but different institutions of expulsion and extradition, each of which had its own regulations".²⁹ India had been of the view that

[a]lthough both expulsion and extradition led to a person leaving the territory of one State for another, the legal basis for and the laws governing the process and the procedure involved were altogether different, and one could not be used as an alternate for the other.³⁰

Canada had also advocated deleting revised draft article 8 (Expulsion in connection with extradition), asserting that the draft articles should not

attempt to address the issue of extradition, which was both legally and conceptually different from the issue of expulsion of aliens. In many countries, both aliens and citizens could be extradited, but only aliens could be expelled. The main purpose of extradition was to ensure that criminals were not able to escape prosecution simply by fleeing from one State to another. Such considerations would not be relevant in many instances of the expulsion of aliens.³¹

22. In conclusion, he urged the Drafting Committee to take four broad points into account. First, the Commission needed to consider whether the next step should be the adoption of a full set of draft articles on first reading or should instead be a reworking of the current articles into

a series of guidelines or best practices. Second, if draft articles were to be adopted, a guiding principle of the Commission's work should be to rework them so that they truly reflected the current obligations that States had accepted, either through treaties to which they had become parties or through their well-established practice. The draft articles would not be well received if they attempted to create new obligations by blurring distinctions between agreements that were legally binding and those that were not or by extrapolating from legally binding agreements obligations that they did not actually contain. Third, the Commission must be very careful not to undermine existing protections accorded to expellees. And fourth, the draft articles should avoid attempting to regulate areas that were properly regarded as falling outside the scope of the topic.

23. Only by recognizing and addressing those areas of concern would the Commission's work be seen by States as correctly reflecting the obligations they had undertaken. In that connection, he believed that the Czech Republic had been particularly perceptive when it had noted in autumn 2011 that "it was important to ensure not only a high level of protection for the affected persons, but also the wide acceptance by the international community of rules in the matter".³²

24. Mr. AL-MARRI said that the Special Rapporteur's comments regarding the debate on his two previous reports in the Sixth Committee in 2011 indicated that he was willing to look into any positive suggestions in the context of the work of the Drafting Committee. His zeal in protecting the rights of aliens subject to expulsion was praiseworthy, as were the efforts he had made ever since the topic had been included on the Commission's agenda to draw members' attention to very useful information and the concerns they had or ought to have relating to the preservation of the rights of aliens.

25. The present times were troubled; all over the world, aliens who were legitimate residents of countries were increasingly falling under the scrutiny of Governments that wished to return them to their countries of nationality. That was particularly true in Europe, which was traditionally host to aliens from Africa and other regions of the world. Globalization and aspirations for a better life prompted increased migration, which was also caused by natural and man-made disasters as well as by economic and political crises affecting large parts of the world.

26. At the same time, recent trends in the areas of counter-terrorism, organized crime and drug trafficking as well as the growing sense of insecurity engendered by an increase in crime rate were causing the developed countries to reduce the number of aliens in their territory. In Europe and the United States of America, the downturn in national economies and growing debt burdens were adversely affecting the lives of aliens, making it ever more urgent to contain the flow of immigrants and reduce the number of aliens. Expulsion was one of the main instruments invoked by States, which had almost limitless discretion to control the entry of foreigners into their territory and to force aliens to leave.

²³ *Ibid.*, paras. 45–51.

²⁴ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 37.

²⁵ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 57.

²⁶ *Ibid.*, para. 63.

²⁷ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 47.

²⁸ *Ibid.*, para. 49.

²⁹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 7.

³⁰ *Ibid.*, 25th meeting (A/C.6/66/SR.25), para. 14.

³¹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 76.

³² *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 18.

27. The reports and draft articles submitted by the Special Rapporteur deserved careful attention and, to the extent that they sought to ensure that any order of expulsion should be in accordance with the law and international standards and should guarantee due process while preserving the rights of aliens and discouraging disguised forms of expulsion, they should be supported. Now that the Commission was in a position to complete its second reading of two topics and its first reading of another, it was time to give priority to the draft articles that had been submitted and sent to the Drafting Committee. In approaching the draft articles, the Commission must bear in mind the important observations and comments made by States to the effect that the scope of the topic should be precisely defined and narrowed down to ensure that the Commission focused on issues that needed priority attention. Other issues, such as extradition or human rights in general, should be addressed to the extent that they were important and the necessary “without prejudice” clauses could be articulated.

28. He agreed that questions such as denial of admission, extradition, other transfers for law enforcement purposes and expulsions in situations of armed conflict should be excluded from the scope of the draft articles, as should issues related to deportation. Another important consideration was that nationals with multiple nationalities, whether they had been naturalized or had acquired nationality by birth, should not be expelled.

29. As for the human rights of aliens, all prerogatives of States should be in accordance with the principles of the rule of law, due process and equality before the law. The principles, rights and obligations enunciated by the International Court of Justice in its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, to which the Commission’s attention had been drawn, should provide necessary guidance in the articulation of those rights.

30. Mr. WISNUMURTI said that, in general, he endorsed most of the comments made by the Special Rapporteur in his excellent eighth report on the views expressed by States, particularly during the debate in the Sixth Committee of the General Assembly. He nevertheless wished to make an observation with regard to paragraph 10 of the report, which dealt with draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State). The Special Rapporteur considered that neither bilateral cooperation agreements that the expelling State had concluded with the transit State nor domestic law could contradict the rules of international human rights law, from which aliens subject to expulsion must also benefit. While he agreed with that position, he found it difficult to endorse the Special Rapporteur’s proposal to expand the scope of the transit State’s obligations to include all the rules of international human rights law to which it was subject, above and beyond those contained in the instruments to which it was a party. Such a proposal departed from the fundamental principles of international law. In fact, States must not be bound by obligations established in treaties or agreements to which they were not parties.

31. The Special Rapporteur had considered various comments made by States regarding certain aspects of draft article H1 (Right of return to the expelling State). In general, he endorsed the Special Rapporteur’s response to those comments, and he recalled that in the statement he had made on the subject at the previous session he had supported the draft article, considering that it struck an adequate balance between the rights of an alien subject to an illegal expulsion to return to the expelling State and the sovereign right of that State to refuse to allow the alien to return to its territory if his or her return constituted a threat to public order or public security. That said, the Special Rapporteur proposed, in paragraph 18 of his report, that the term “readmission of an alien in cases of illegal expulsion” should be used rather than “right of return” in order to avoid any disagreement as to whether that was in all cases a right of the illegally expelled alien or whether the expelling State retained its power to grant or deny admission to its territory to an alien. That proposal ought to be considered by the Commission.

32. The Special Rapporteur’s response to States’ comments on revised draft article 8 (Expulsion in connection with extradition),³³ contained in paragraph 23 of his eighth report, pointed up the complexity of the situation. While in general, the text of revised draft article 8 did not pose any problem, he believed that, given the controversy that it had generated, it ought to be considered further with a view to harmonizing the institution of expulsion with that of extradition.

33. As to the final form that the draft articles should take, he disagreed with the view expressed in paragraph 55 of the report, which certain States had put forward and which had been supported by Mr. Murphy, that the topic of expulsion of aliens was not suitable for codification. While it was true that at the current phase of work a decision as to the form the final outcome should take would be premature, there was no denying that the Special Rapporteur’s excellent reports, drawing on an extensive range of legal sources, had made it possible to prepare important draft articles that would provide a solid basis for codification. In that connection, it was essential, as several members of the Commission had noted, that the Special Rapporteur should begin to systematically organize the draft articles so that the Commission could have a more global view of them. From that perspective the new draft plan of work presented by the Special Rapporteur was to be welcomed.

34. Mr. KITTICHAISAREE said that he had attended the discussion on the topic of expulsion of aliens held in the Sixth Committee during the sixty-sixth session of the General Assembly and that, on the basis of their comments, States could be divided into three groups. The first group was made up of the Nordic countries, which adhered to rigorous human rights protection standards that were applicable to aliens, including refugees. The second group consisted of States that preferred to exercise their sovereign right to expel aliens to the maximum extent permissible under international law. The third group was made up of States that were searching for best practices in order to guide their policy in that area.

³³ *Yearbook ... 2011*, vol. II (Part Two), para. 224, footnote 572.

In that connection, note should be taken of the Special Rapporteur's observation in paragraph 56 of his eighth report that "no other topic on the Commission's agenda for the past three quinquenniums ha[d] had a richer and more solid foundation for codification than that of the expulsion of aliens".

35. With regard to the objections to codification raised in the Sixth Committee, which had been summarized by Mr. Murphy and which must be addressed by the Commission, he wished to make the following comments. First, although it was true that rules governing the expulsion of aliens already existed, worked very well and did not require codification, there was no reason why the Commission could not incorporate them into the draft articles or guidelines it was preparing. The latter essentially amounted to best practices that the international community ought to follow. Second, some delegations had expressed concern that the outcome of the Commission's work might impose new obligations or modify existing ones by departing from established practice. The Commission could address that concern at the drafting stage by seeing to it that it did not create new obligations. The third concern expressed was that the outcome of the work might undermine existing protections. Once again, that pitfall could be avoided by following best practices and adhering to international rules that were already operating satisfactorily. Lastly, several delegations had expressed concern that the institution of extradition might be adversely affected. He himself shared that opinion and consequently believed that the Commission should delete all references to extradition from the provisions it was drafting.

36. As to what form the final outcome of the Commission's work on the topic of expulsion of aliens should take, that was a matter to be decided by the Sixth Committee.

37. Mr. TLADI, after noting that he considered the title of the topic to be a terrible one, for he liked neither the word "expulsion" nor the word "aliens", said that, unlike Mr. Murphy, he did not believe that the starting point of work on the topic should be the sovereign right of States to decide who was authorized to reside in their territory and in what circumstances, but rather the balance that should be struck between that right and the need to protect human rights and the individual. Many delegations had pointed to the need to protect aliens while also ensuring that the final product of the Commission's work on the topic was acceptable to States. The same also applied to the topics of immunity of State officials from foreign criminal jurisdiction, protection of persons in the event of disasters and, to a lesser extent, the obligation to extradite or prosecute. Needless to say, that balance could shift depending on the context and state of development of the various areas of law, but the Commission must bear it in mind when discussing the proposed draft articles.

38. Although concerns had been expressed by States and reiterated by Mr. Murphy at the fact that the *non-refoulement* principle underpinned various provisions of the draft articles, that principle was well established in international human rights law. In his previous reports, including in footnote 8 of the revised and restructured draft articles submitted as a supplement to his fifth report

in 2009,³⁴ the Special Rapporteur had referred to various international instruments that incorporated the principle, which was also found in the case law produced by the domestic courts of States. Excluding it from the final product of the work on the topic—whether a set of draft articles or some other form—would upset the balance he had spoken of earlier.

39. The treatment given to the State of destination of expelled aliens in the Special Rapporteur's sixth report³⁵ and particularly in the second addendum thereto was comprehensive and helpful. Consideration of the subject in the report and in the debate had revolved around the sovereign right of expelling and receiving States to set conditions of entry into and exit from their respective territories. That was, of course, a very important consideration, but the choice made by the individual must also be taken into account—again, for the sake of balance. Although draft article E1 did provide to a certain extent for the transfer of expelled individuals to their State of choice "where appropriate", in his view, the State of destination should be the one chosen by the expelled person, provided that the State in question consented to receive that person. Draft article E1 should be reformulated in order to avoid conveying the impression that the expelled person's choice carried little weight.

40. Similarly, the issue of the right of return to the expelling State also related to the balance to be struck between States' sovereign right and the human rights of expelled persons. The main issue was to determine whether, in the event that a decision to expel was annulled, there nevertheless remained grounds for the removal of the individual in question. It was generally agreed that while every State had the right to expel aliens, that right was governed by international law. Consequently, it should also be generally agreed that, where a decision to expel was annulled, the effects of the expulsion should also be annulled. Hence, if an expulsion led to the revocation of a residence or stay permit, for example, the expelled person should be granted the opportunity to reclaim the status originally afforded by that document. To do otherwise would amount to authorizing *de facto* expulsion in circumstances in which international law did not permit it. That approach, which took into account the status of the expelled person prior to expulsion, had the further advantage of drawing a distinction between aliens lawfully present and those unlawfully present in the territory of a State. He was not convinced by the distinction drawn by the Special Rapporteur in his eighth report between the effects of the annulment of an expulsion order flowing from the violation of a substantive rule of international law, on the one hand, and those from a procedural norm, on the other. After all, the purpose of procedural guarantees was to facilitate substantive protection. If a court or other competent authority annulled an expulsion order on the grounds that, for example, the *audi alteram partem* rule had been violated, it would be dangerous to suggest that the consequences of such a violation were less serious than if the expulsion had been annulled on the

³⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617 (footnote referring to draft article 14).

³⁵ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

ground that the individual did not pose a threat to public security. After all, the purpose of the *audi alteram partem* rule was to ensure the legitimacy of substantive findings.

41. As to the final form its work on the topic should take, the Commission could decide that more easily once it had before it a complete set of draft articles. Nonetheless, form influenced content and vice versa; thus at the current stage the Commission should already have a clear idea of the form its final product should take. To that end, it had to assess whether there was a sufficiently large body of positive law to justify the elaboration of a set of draft articles. In that connection, the Commission should bear in mind the Special Rapporteur's observation that no other topic on the Commission's agenda for the past three quinquenniums—aside from diplomatic immunity and State responsibility—had had a richer or more solid foundation for codification than the current topic. More importantly, rather than seeking to codify what States were already doing, the Commission might wish to engage more in progressive development by laying down principles that could or should guide States' practice in the area of the expulsion of aliens. If, as Mr. Murphy had suggested, it was necessary to choose between draft articles that provided weak protection for aliens, on the one hand, and principles or guidelines that offered them stronger protection, on the other, he would not hesitate to choose the latter.

42. Sir Michael WOOD, after commending Mr. Kamto for his admirable chairpersonship of the sixty-third session of the Commission, said that he agreed with Mr. Tladi's comment concerning the title of the topic.

43. The topic was a very controversial one, and the sensitivity of the domestic issues involved for many States made it a particularly challenging area of study for the Commission.

44. The Special Rapporteur's eighth report focused on the debate held on the topic in the General Assembly, and it was very important for the Commission to take full account of the comments made by delegations. He wished to thank the Secretariat for the topical summary (A/CN.4/650 and Add.1) it had prepared of the discussions held in the Sixth Committee on the Commission's report; the summary contained a long section on the expulsion of aliens, which also deserved the Commission's careful attention. The procedure that had been adopted by the Special Rapporteur on reservations to treaties provided an excellent model: in his reports, Mr. Pellet had examined in detail every comment made by every State, both in the Sixth Committee and in writing, with explanations as to why he could or could not accept each one. The Commission might wish to follow a similar procedure at the current stage of its consideration of the topic of expulsion of aliens.

45. The Special Rapporteur had indicated in his eighth report that some members of the Sixth Committee might have misunderstood the current state of work on the topic. If that was the case, and it might very well be, three comments were in order. First, it was perhaps the Commission's own fault. When drafting its report, the Commission should clearly explain the current state of its work, indicating, for example, whether there were draft articles under

preparation in the Drafting Committee that had not yet been included in the report, the purpose being to avoid a situation in which delegations to the Sixth Committee prepared comments on outdated drafts. Second, some members of the Commission, including those who had been members during the previous quinquennium, might not themselves know with absolute certainty where things stood on the topic. He himself looked forward to receiving a complete set of draft articles, since it was only then that possible inconsistencies to which attention had been drawn previously would become obvious. Third, and last, the Commission should not imply that the comments made in the Sixth Committee had been based on misunderstanding, as the Commission should not be seen as downplaying the importance of those comments.

46. With regard to what form the final outcome of the work on the topic should take, he drew attention to paragraph 27 of the topical summary prepared by the Secretariat (A/CN.4/650 and Add.1), which revealed clearly that the Sixth Committee itself was divided on that very important matter. He agreed with Mr. Tladi that substance determined form and vice versa. Lastly, he indicated that he would comment on the substance of the draft articles in the Drafting Committee and in plenary meeting, once the Drafting Committee had completed its work.

47. Mr. PETRIČ thanked the Special Rapporteur for his eighth report, which revealed that States attached great importance to the topic and rightly considered it a very sensitive one. It was significant that States had responded with keen interest to issues such as the expellee's State of destination, protection of the expelled person's property, the right to return in the event of unlawful expulsion, the relationship between extradition and expulsion, and the suspensive effect of an appeal against an expulsion decision, which had also been vigorously debated in the Commission and in the Drafting Committee.

48. When preparing the draft articles, the Special Rapporteur had endeavoured to strike the balance referred to by Mr. Tladi between the sovereign right of States to expel aliens and the protection of the rights of such persons. In that regard, he recalled that, although it had not prevailed in the Commission, his position from the outset had been that a clear distinction should be drawn between aliens lawfully present and those unlawfully present in the territory of a State. It should not be possible to expel the former, save in exceptional circumstances, such as when State security or law and order were threatened. Aliens illegally present in the territory, on the other hand, were in a totally different situation. It was probably because the Commission put both in the same basket that so many draft articles posed problems, and if there had been misunderstanding in the Sixth Committee, it was because that distinction had not been maintained.

49. As to what form the final outcome of the Commission's work on the topic should take, he was of the view that since the Commission had been elaborating draft articles and not general principles all along, it was preparing draft articles with a view to a future convention. Drawing attention to paragraph 57 of the eighth report, in which the Special Rapporteur stated that "it is doubtless premature to decide on the final form of the Commission's

work on the topic of the expulsion of aliens”, he said that he fully shared the view expressed earlier by Mr. Tladi. If the Commission was in fact contemplating the preparation of draft articles for a future convention, it should take greater account of State practice, which was abundant but very diverse, and by which the Commission was to some extent bound. If, on the other hand, what it was doing was drafting general principles that would aim to promote the development of an *opinio juris* in favour of individuals and the protection of human rights, then the Commission had more leeway and could go a little bit further.

50. Should that idea emerge in the Sixth Committee, causing the Commission to reconsider the final form of its work, it would be wise not to exclude a debate on the matter. It might actually be better to debate it now, rather than after the Commission had finished its work. On the other hand, and in view of the excellent work done by the Special Rapporteur, he was also ready to continue to develop the topic following the approach taken by the Commission to date, and to do so until the final outcome was submitted to the General Assembly, which would decide on the definitive form it wished to give it. To sum up, if the majority of Commission members favoured a particular option, he would go along with them. On the other hand, if there was no clear majority, he would prefer for the Commission to continue its work using the approach it had followed up to that point.

51. Mr. SABOIA thanked the Special Rapporteur for his eighth report and said that he agreed entirely with Mr. Tladi on the need to strike a balance between the rights of States and the rights of individuals subject to expulsion. He also agreed with many of the remarks made by Mr. Petrič regarding the final outcome of the Commission’s work on the topic, considering it inappropriate to change the form of that outcome when the Commission was on the verge of completing its consideration of the draft articles on first reading.

52. Contrary to the contention that the topic was not ripe for codification because of the various regimes and conventions that existed in that area, it was precisely because the rules applicable to the expulsion of aliens were scattered that it was necessary to codify them. He pointed out in that connection that the refugee regime, which had been mentioned previously, was a very specific regime and did not apply to all aliens but only to refugees. It was therefore necessary to select from the provisions contained in conventions that were of general applicability, leaving it to the Drafting Committee to harmonize the wording.

53. In his seventh report, the Special Rapporteur had referred to the 2010 judgment handed down by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo*. In that judgment, the Court had highlighted a number of obligations under international law that should be taken into account by States’ domestic courts when dealing with matters relating to the expulsion of aliens.

54. Lastly, with regard to the issue of extradition, he agreed that it was indeed a separate situation and should not be a focus of discussion, with one possible exception: when expulsion was actually a disguised form of extradition.

55. Mr. HMOUD said that work on the topic of expulsion of aliens should be continued within the Drafting Committee, given that the Commission was already at an advanced stage in its first reading of the text. He also wished to comment on statements made by earlier speakers concerning the report in general and the progress of the Commission’s work on the topic.

56. The Special Rapporteur’s eighth report incorporated some of the comments made by Commission members at previous sessions, largely having to do with duplications between the text of the draft articles and the applicable laws. That was the issue that most concerned him and on which he had made a number of comments at previous sessions. In that connection, he wished to endorse some of the arguments put forward by Mr. Murphy. However, he himself did not think that the Commission should abandon a topic that was among the most important it had ever undertaken and that could have a considerable influence on international relations. Moreover, there were numerous legal sources on which the Commission could draw in formulating the draft articles, including State practice and the laws applicable under it. Given variations in State practice, it was necessary to establish normative criteria. Those differences, which were sometimes significant, could also be traced to the political orientations or the internal policies of expelling States. The Commission’s work on the draft articles would have an impact on those political orientations at both the domestic and international levels.

57. The Commission had started from the premise that the issue of the expulsion of aliens was a matter that related to the sovereignty of States, which had the right and the duty to protect their territory and borders. That right was not absolute, however, but was subject to certain restrictions. Accordingly, the rights of the expelled person or the person facing expulsion must be respected, just as the rights of States other than the expelling State should also be respected. The draft articles must thus offer some “added value” with regard to existing legal norms and should not weaken the regimes in force.

58. He did not believe that the final form should be decided at the current stage of the Commission’s work, and he agreed with the Special Rapporteur on that point. Moreover, the Commission could always come back to that question on second reading or leave it to the General Assembly to decide.

59. Mr. ŠTURMA said that it might be premature to determine what the final form of the Commission’s work on the current topic should be and that further discussion would no doubt be necessary. He agreed that the wording of the draft articles should not differ from that of most treaties unless there was a valid reason for it. In any event, it would be up to the Drafting Committee to decide on the matter. Lastly, concerning the issue of extradition, he drew attention to paragraph 25 of the Special Rapporteur’s eighth report, where reference was made to a “without prejudice” clause, which he himself considered to be perfectly acceptable.

60. Mr. KAMTO (Special Rapporteur) thanked the members who had expressed their views on his eighth

report. Some of their statements largely reflected views that had already elicited a sometimes intense debate within the Commission and to which the Commission had attempted to respond, both in plenary meetings and in the Drafting Committee. Obviously, not all problems had been resolved, and consideration of the set of draft articles would thus continue with the Drafting Committee, taking into account new contributions made at the current session.

61. With regard to a number of points, responses had, for the most part, been provided or suggested in the eighth report. That had been the case, for example, with the issue of expulsion as it related to extradition. In the light of the discussions held in the Sixth Committee, the Special Rapporteur had thought it advisable to address the concern raised by States by proposing a “without prejudice” clause in paragraph 25 of his report, although it had not been his preferred choice. That solution, if adopted by the Drafting Committee, could provide an acceptable response and allay States’ fears in that regard. The Special Rapporteur had also taken into account the question of the right to return and had followed the proposals made by States on that point.

62. The question of the multiplicity of regimes brought him back to an issue that never ceased to amaze him: the endless debate on the question of whether the topic lent itself to codification. In fact, expulsion of aliens was the topic that had supplied the most abundant practice since the nineteenth century (with the possible exception of State responsibility for internationally wrongful acts and, to a certain extent, diplomatic immunity). If that subject did not lend itself to codification, then he wondered what the Commission was doing and why it codified certain topics that lacked a basis in customary law and that were based on very limited practice. The Commission had recognized that the topic might give rise to draft articles and those articles had been submitted to the General Assembly, which had taken note of them.

63. The Commission could, of course, limit itself to what was known as codification “on the basis of established law”—in other words, consisting solely of a compilation of provisions that already existed in various conventions. That was not the task assigned to the Commission, whose mission, according to its statute, was the progressive development of international law and its codification. In fact, it seemed to him that, to date, the Commission had done very little progressive development on the topic of expulsion of aliens, which was generally based on State practice and international case law.

64. Without wishing to pre-empt the Commission’s eventual decision, he urged the Commission once again, as he had done from the outset, to submit the outcome of its work to the General Assembly in the form of draft articles. Whatever follow-up the General Assembly might wish to give to those draft articles—whether the elaboration of a draft convention or the convening of a diplomatic conference—fell outside the scope of the Commission’s competence.

65. Mr. HMOUD (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of

expulsion of aliens would be composed of Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Kittichaisaree, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti and Sir Michael Wood, together with Mr. Kamto (Special Rapporteur) and Mr. Šturma (*ex officio*).

The meeting rose at 1 p.m.

3130th MEETING

Friday, 11 May 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, 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. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON said that he had not yet completed his informal consultations regarding the manner in which topics on the Commission’s agenda or new subjects should be approached. He hoped that he would be able to provide more information at the plenary meeting on Wednesday, 16 May.

2. Ms. JACOBSSON thanked the Chairperson for consulting his colleagues with regard to the work of the current session and suggested that, as the Planning Group was supposed to advise the Commission about the organization of its work, it might be wise to hold a meeting of the Group in May, in keeping with previous practice. A meeting early in the session would also be beneficial for the new members of the Commission.

3. The CHAIRPERSON said that the Bureau had already considered that matter and was in favour of holding a meeting of the Planning Group as soon as he had completed his informal consultations.

4. Mr. CANDIOTI said that he supported the idea of holding a meeting of the Planning Group as soon as was appropriate. The Group should consider the Commission’s functioning and work for the entire quinquennium and should be prepared to answer any questions that new members might have in that connection.

* Resumed from the 3128th meeting.