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Summary record of the 2969th meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
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Some preliminary drafting comments and proposals had been put forward, concerning, in particular, paragraph 2 of the new draft article, mostly aimed at improving its wording. Some members had suggested that paragraph 2 should be divided into two parts, dealing respectively with a claim by an injured State and a claim by an injured international organization. One member had pointed out that the requirement that the remedy should be “available and effective”, while so defined in article 44 of the draft articles on responsibility of States for internationally wrongful acts,¹⁰⁴ had not been replicated in article 14 of the draft articles on diplomatic protection.¹⁰⁵ However, those were merely preliminary comments and the task of considering the draft article in detail was one that fell to the Drafting Committee. Accordingly, the Working Group recommended that additional draft article 47 *bis* should be referred to the Drafting Committee.

15. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft article 47 *bis* to the Drafting Committee.

It was so decided.

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

[Agenda item 1]

16. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of the effects of armed conflicts on treaties was composed of Mr. Cafilisch, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti and Ms. Xue, together with Mr. Brownlie (Special Rapporteur) and Ms. Escarameia (Rapporteur, *ex officio*).

The meeting rose at 10 a.m.

2969th MEETING

Friday, 30 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Cafilisch, 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. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens¹⁰⁶ (A/CN.4/588, sect. C, A/CN.4/594¹⁰⁷)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPporteur

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the expulsion of aliens (A/CN.4/594).

2. Mr. KAMTO (Special Rapporteur) said that, during the consideration, at the preceding session, of the third report on the expulsion of aliens¹⁰⁸ and, in particular, draft article 4 entitled “Non-expulsion by a State of its nationals”, the Commission had taken the view that the question of the expulsion of persons with two or more nationalities should be studied in more detail and resolved within draft article 4 or in a separate draft article.¹⁰⁹ It had also taken the view that the issue of deprivation of nationality, which was sometimes used as a preliminary to expulsion, deserved thorough study.¹¹⁰

3. In his third report, he had observed that it was not desirable to deal with the issue of dual or multiple nationals in connection with draft article 4, as protection from expulsion should be provided in respect of any State of which a person was a national. That should help strengthen the rule prohibiting the expulsion of nationals, as supported by all members of the Commission.

4. He believed that the issue of nationality—whether it involved one nationality or multiple nationalities—could, in particular, have an impact in the context of diplomatic protection in cases of unlawful expulsion. However, in order to follow up on the Commission’s guidelines in that regard, he had devoted his fourth report to the consideration of that issue, leaving until the next session the preparation of draft articles on restrictions to the right of expulsion, of which some members wished to know the provisions in order to decide on the content of draft article 3. The fourth report was divided into two main parts, one on expulsion in cases of dual or multiple nationality and the other, on loss of nationality, denationalization and expulsion, which should be considered separately.

5. With regard to expulsion in cases of dual or multiple nationality, he questioned whether the principle of non-expulsion was strictly applicable to an individual with two or more nationalities, including that of the expelling State. In other words, could a person liable to expulsion be considered an alien by the expelling State if he or she had not lost any of his or her nationalities? In that regard, he pointed out that some States did, in fact, treat their nationals who also held another nationality as aliens for purposes other than expulsion (paras. 8 and 9 of the report).

¹⁰⁶ For the Commission’s discussion of draft articles 1 to 7, see *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

¹⁰⁷ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

¹⁰⁸ Reproduced in *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

¹⁰⁹ See *Yearbook ... 2007*, vol. II (Part Two), pp. 65–66, paras. 226–232.

¹¹⁰ *Ibid.*, p. 65, para. 227.

¹⁰⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76, at p. 120.

¹⁰⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 26 *et seq.*, para. 50, at pp. 44–46.

6. Secondly, was a State in violation of international law if it expelled an individual with dual nationality without first withdrawing its own nationality from that individual? The rule prohibiting the expulsion of a State's own nationals tended to support the idea that such an expulsion would be contrary to international law. Although cases of expulsion of dual nationals without prior denationalization by the expelling State were not unusual, practice in the opposite direction could also be observed.

7. Based on an absolute approach to the rule of non-expulsion by a State of its own nationals, some persons claimed that any expulsion of a dual or multiple national had to be preceded by his or her denationalization by the expelling State. That was, for example, the opinion of the Director of the International Migration Law and Legal Affairs Department of the International Organization for Migration, for whom paving the way for the expulsion of nationals would be a "step backward" in the development of the law and who would prefer the Commission to discuss the conditions under which a State might or might not deprive its nationals of its nationality in order then to expel a "stateless person" or prevent his or her return. In his own view, the question of an exception to the principle of expulsion by a State of a national was still open to discussion, particularly as, in modern-day practice, States did expel their own nationals. Moreover, the rule stated in draft article 4 was hedged about with a number of safeguards. The Commission therefore had to decide whether to establish an absolute rule of non-expulsion. Requiring the expelling State to denationalize dual nationals prior to expulsion was not without risks, however, because, as indicated in paragraph 11 of the report, that would not necessarily be in the expelled person's interest. Were he or she to return to the expelling State, for example as a result of a change of government, his or her application would be complicated by the denationalization, since he or she would be treated as an alien requesting admission to a foreign State, or else the expelling State would have to restore its nationality.

8. In light of the foregoing, the Special Rapporteur was of the view that the principle of the non-expulsion of nationals did not apply to persons with dual or multiple nationality unless the expulsion could lead to statelessness, and that the practice of some States and the interests of expelled persons themselves did not support the enactment of a rule prescribing the denationalization of a person with dual or multiple nationality prior to expulsion.

9. The legal issues raised by expulsion could be still more complex, depending on whether the expelling State was the State of dominant or effective nationality. That point was dealt with in fairly great detail in paragraphs 14 to 24 of the report. He continued to have doubts about the interest and practical utility of entering into such considerations, which would involve the Commission in a study of the regime of nationality and take it away from the topic of the expulsion of aliens. The possible scenarios to which the question of multiple nationality and the effect of dominant nationality could give rise could more appropriately be discussed in the framework of a study on the protection of the property rights of expelled persons, which he planned to undertake later.

10. The Special Rapporteur considered that a distinction must be made between the question of the loss of nationality and denationalization in relation to expulsion, which were governed by different legal mechanisms, even though their consequences were similar in the case of expulsion. The loss of nationality was the consequence of an individual's voluntary act, whereas denationalization was a State decision of a collective or individual nature. Although nearly all national legislation contained rules relating to the loss of nationality, the same was not true of denationalization. The problems that arose in that regard were discussed in paragraphs 30 to 34 of the report. The conclusions he had reached after considering all the questions discussed in the fourth report were contained in paragraph 35, where he once again stated that he was not convinced that it would be worthwhile for the Commission to prepare draft rules for those situations, even in the interest of the progressive development of international law.

The meeting rose at 10.25 a.m.

2970th MEETING

Tuesday, 3 June 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, 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. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 2.1.6 [2.1.6, 2.1.8], 2.1.9, 2.6, 2.6.5 to 2.6.11, 2.6.12 [2.6.13], 2.6.13 [2.6.14], 2.6.14 [2.6.15], 2.7 and 2.7.1 to 2.7.9 adopted by the Drafting Committee on 7, 9, 13, 14, 16 and 28 May 2008, as contained in the report of the Drafting Committee (A/CN.4/L.723 and Corr.1), which read:

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting international organizations, a communication relating to a reservation to a treaty shall be transmitted:

* Resumed from the 2967th meeting.