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Summary record of the 2941st meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
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30. In concluding his remarks, he requested the Commission to refer the draft guidelines contained in his twelfth report to the Drafting Committee.

31. The CHAIRPERSON said he took it that the Commission considered, with Mr. Gaja and the Special Rapporteur, that the words "presumption of acceptance" should be used rather than "tacit acceptance" in draft guidelines 2.8, 2.8.1 and 2.8.2 and that it decided to refer the draft guidelines proposed by the Special Rapporteur in his twelfth report to the Drafting Committee.

It was so decided.

32. The CHAIRPERSON said that the Commission had thus concluded its consideration at the current session of the topic of reservations to treaties and that he would adjourn the meeting to enable the Drafting Committee on responsibility of international organizations to meet.

The meeting rose at 11.05 a.m.

2941st MEETING

Tuesday, 24 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

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

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

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. KAMTO (Special Rapporteur), introducing his third report on expulsion of aliens (A/CN.4/581), said that, having defined the scope of the topic and the key terms in his second report,[281] he was now embarking on a consideration of the general principles of the law governing expulsion of aliens and proposing five new draft articles. Upon close examination, the expulsion of aliens was seen to involve, on the one hand, the fundamental principle of State sovereignty in the international order and the territorial jurisdiction that flowed from that principle, and, on the other hand, the fundamental principles underpinning the international legal order and basic human rights which all States must respect.

2. The right to expel could thus be seen to be a right inherent in the sovereignty of the State, not one granted by an external rule of customary law. It was, so to speak, a natural right of the State emanating from its full authority over its territory. That had never raised serious doubts in the literature and was confirmed by State practice and ample international case law. That right, which existed irrespective of any special provision in internal law, was nevertheless not absolute: it must be exercised within the limits of international law—first, limits inherent in the international legal order that formed the basis of the international legal system and existed independently of other constraints relating to special areas of international law; and second, those derived from international human rights law, since expulsion affected human beings who enjoyed certain non-derogable rights under contemporary international law.

3. Draft article 3, entitled "Right of expulsion", proposed a rule on the right of the State to expel an alien and stated that this right was restricted by the fundamental principles of international law, thereby dissociating the requirement of respect for those principles from the requirement of respect for fundamental human rights, something that would be addressed in other provisions. It was to be found in paragraph 23 of the third report and read:

> "1. A State has the right to expel an alien from its territory.
>
> "2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations."

4. Independently of the general rules of international law, the exercise of the right to expel foreigners was limited by a number of principles specifically governing that right. Some of those limits related to the person to be expelled. Even though the topic did not at first sight appear to cover nationals of an expelling State, since they could not be aliens in their own country, it had seemed important to begin by recalling the principle of non-expulsion by a State of its own nationals, especially as historically there had been some—albeit not many—exceptions to that principle, a few of which still persisted. Those exceptions justified addressing the expulsion of nationals under the topic.

5. It would be recalled that, following its consideration of his second report, the Commission had decided to use the terms "*ressortissant*" and "national" as synonyms; anything in the third report that might seem to indicate the contrary should be disregarded. The distinction crept in at certain points and was to some degree pertinent in the context of expulsion of nationals, but he had endeavoured to respect the general trend in the Commission away from making such a distinction.

6. The principle of non-expulsion of nationals was far from absolute. Certain individuals or categories of

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* Resumed from the 2926th meeting.

[281] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573. For the discussion of this report by the Commisison, see the 2923rd to 2926th meetings above.

individuals, particularly deposed Heads of State and the members of their families, had, in the past and even quite recently, been expelled from their own countries and gone into exile. Such had been the fate during the twentieth century of members of certain royal families who had been dethroned, and of the former Head of State of Liberia, Charles Taylor, who had been expelled from his country to Nigeria and subsequently brought before an international tribunal.[282] The only basic requirements were that there should be a State willing to receive the persons expelled in such special cases and that they had the right to return to their own country if the receiving State no longer wished them to be in its territory; in the absence of that right, they would be placed in the same situation as that of a stateless person.

7. Draft article 4 (Non-expulsion by a State of its nationals) was to be found in paragraph 57 of the report, and read:

> "1. A State may not expel its own nationals.
>
> "2. However, if, for exceptional reasons it must take such action, it may do so only with the consent of a receiving State.
>
> "3. A national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State."

8. The second principle relating to expulsion of individuals was that of non-expulsion of refugees. It might be asked whether there was any need to consider that issue and to devote a draft article to it, given the existence of the 1951 Convention relating to the Status of Refugees and a number of regional instruments that contained provisions on their expulsion. Examination of those provisions led one to answer in the affirmative, for the reasons set out in paragraphs 62 to 73 of the report. Recent developments in international law in connection with the fight against international terrorism suggested that there was arguably a case for including terrorism among the grounds for expulsion of a refugee, in addition to the grounds cited in articles 32 and 33 of the 1951 Convention. As was indicated in paragraphs 76 and 77 of the third report, Security Council resolution 1373 (2001) of 28 September 2001 could be taken to imply that a refugee might be expelled for committing or facilitating terrorist acts.

9. Draft article 5 (Non-expulsion of refugees) was to be found in paragraph 81 of the report, and read:

> "1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.
>
> "2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person]."

10. The square brackets had been placed around the phrase "or terrorism" for reasons explained in the report. Of course, terrorism could be addressed in the context of State security, but since it had been identified as a discrete phenomenon and specific international legal instruments had been elaborated on the question, including a Security Council resolution, which had quasi-legislative authority at the international level, a specific reference thereto might usefully be included in the draft articles by way of progressive development of international law.

11. There was ample justification for proposing draft article 5. It filled a gap in existing legal instruments on refugees. Articles 32 and 33 of the 1951 Convention were worded in the negative, and thus did not establish a rule on expulsion of refugees. The proposed draft article supplemented those provisions without straying too far from existing positive law.

12. The principle of non-expulsion of stateless persons flowed from the same logic, *mutatis mutandis*, as the principle regarding refugees, as paragraphs 82 to 94 of the report showed. Draft article 6 (Non-expulsion of stateless persons) was contained in paragraph 96 of the report, and read:

> "1. A State may not expel a stateless person [lawfully] in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.
>
> "2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. [However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may [, in agreement with the person,] expel the person to any State which agrees to host him or her]."

13. The term "lawfully" in the first paragraph was in square brackets. While it was used in article 31 of the 1954 Convention relating to the Status of Stateless Persons, the question was whether the draft article should cover only stateless persons in a lawful situation, a concept whose meaning was far from clear. A person was stateless because no national legislation existed that made it possible to confer nationality on him or her. It was a *de facto* situation. Could one then speak of "lawful" presence? How was one to determine whether a person with no nationality had entered a country lawfully? The Commission should discuss the issue further.

14. A study of case law showed that if the task of finding a receiving State was left solely to the stateless person who was about to be expelled, the expulsion might never occur, even if there were real grounds for

[282] See Security Council resolution 1688 (2006) of 16 June 2006.

carrying it out, hence the idea that the expelling State could become involved in the search for a receiving State. The principle was that a stateless person must not be expelled when no State of destination had been established, that such a person should only be expelled to a State that agreed to accept him or her, and that the task of finding such a State must not fall solely to the stateless person. The proposed wording to that effect was in square brackets.

15. The principle of prohibition of collective expulsion operated differently depending on whether it occurred in peacetime or in time of war. In the former, collective expulsion was absolutely prohibited. The mass expulsions once so common in Europe, particularly from the seventeenth to the mid-twentieth century, were a thing of the past. The collective expulsion of aliens was now prohibited, and absolutely no derogations were permitted, under a number of international legal instruments and the case law of regional human rights courts. For example, in the *Čonka v. Belgium* case, the European Court of Human Rights had found that the applicants' expulsion might have been collective. However, the mass expulsion of individuals whose individual cases had been examined could not be regarded as constituting collective expulsion.

16. In time of war, collective expulsion was a different matter. Practice varied from the eighteenth century to the present. While fairly common in the eighteenth century, the practice of collective expulsion of nationals of enemy States had diminished in the nineteenth and much of the twentieth centuries. However, instances had been recorded recently, for example in the 1998 war between Eritrea and Ethiopia. Neither the law of armed conflict nor international humanitarian law resolved the matter. On the contrary, the monumental research work on customary international humanitarian law carried out under the auspices of the ICRC did not contain a single rule, among the 161 rules identified, on the collective expulsion of foreign nationals of an enemy State in time of war.[283] It appeared, from an analysis of practice, doctrine and case law, that there was no rule of international law that required a belligerent State to allow nationals of an enemy State to remain in its territory; that there was also no rule that required such State to expel them; that the collective expulsion of that category of aliens was practised by some States, to varying degrees; and that the practice was sometimes particularly entrenched in that the literature seemed to consider that such expulsion must be permitted only in the case of aliens who were hostile to a receiving State at war with their country. It followed, *a contrario*, that foreign nationals of an enemy State who were living peaceably in the host State and causing no trouble could not be collectively expelled; their expulsion must obey the ordinary law governing expulsion in time of peace.

17. On that basis, there was reason to propose draft article 7 (Prohibition of collective expulsion), which was contained in paragraph 135 of the report, and read:

> "1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.
>
> "2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.
>
> "3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State."

Paragraph 1 of draft article 7 was based on the case law of the European Court of Human Rights.

18. Having succinctly outlined the content of his third report, he was prepared to hear any criticisms and comments that members of the Commission might wish to offer.

19. Ms. ESCARAMEIA thanked the Special Rapporteur for a comprehensive and well-researched report containing an abundance of historical references. She agreed with a great many of the points made in the report, but wished to comment on a few small matters with which she did not agree. Her remarks should not, therefore, be construed as indicating disapproval of the report as a whole.

20. Her first point, on draft article 3, related to the theoretical distinction—a central issue in the report—between the right of expulsion and the exercise of that right. In paragraph 5, the Special Rapporteur referred to the need to strike a balance between the State's sovereign right and the right of the individual to human dignity. In other words, the right to expel related to sovereignty and the conditions in which it was exercised related to human dignity. The right to expel was therefore considered as an inherent right in the traditional world order, which was divided into States with their respective territories, frontiers and population. However, she wished to challenge that traditional view.

21. In paragraphs 19 to 23 the Special Rapporteur put forward the theory that the limits to the *right* of expulsion derived only from the existence of other States, and were thus "inherent in the international legal order". Such limits were to be distinguished from limits to the *exercise* of the right of expulsion, where human rights considerations were taken into account, referred to in paragraph 24 as "external to the international legal order". She disagreed: the protection of human dignity must be considered to be one of the main pillars of the present international legal order, as integral to it as sovereignty, particularly since some of the norms in question were norms of *jus cogens*. She could therefore not accept the Special Rapporteur's distinction between internal rights, based on sovereignty, and external rights, relating to human rights. In her view, human rights relating to expulsion affected not only the procedure for expulsion, but also the very existence of that right; in certain cases, they might even prevent expulsion from taking place.

[283] See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: *Rules*, ICRC and Cambridge University Press, 2005.

22. As an example of State practice, in the last footnote in paragraph 8 of the report, the Special Rapporteur cited the United States Assistant Secretary of State Dutton's letter to a member of Congress in 1961: "it may be pointed out that under generally accepted principles of international law a State may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner". There again, the Special Rapporteur's theory was based on a distinction between substance and procedure, yet that theory had been challenged many years previously. In paragraph 8 of the report, reference was made to a statement by the umpire in the *Boffolo* case of 1903 to show that the right of expulsion was an inherent right of States. However, another statement by the umpire in the same case showed that the possibility of expulsion was itself limited by the considerations of the dignity of the individual; it read: "A State possesses the general right of expulsion; but—[e]xpulsion should only be resorted to in extreme circumstances and must be accomplished in the manner least injurious to the person affected" [p. 528]. Given that human rights were now far more developed than had been the case at the time that statement was made, the Special Rapporteur's theory warranted further reflection, especially since it had so many practical implications.

23. For example, in paragraph 7 of the report, the Special Rapporteur argued that the right to expel could be restricted "only by the State's voluntary commitments or specific *erga omnes* norms". That seemed to exclude customary law as a source of restrictions on the right to expel, which was particularly puzzling in the light of the Special Rapporteur's remark in his oral presentation to the effect that because the right to expel was an inherent right, customary law should not be taken into account. The wealth of State practice and case law available on the subject indicated the contrary—that customary law did indeed exist in that area. She sought clarification in that regard.

24. The meaning of the phrase "specific *erga omnes* norms" was obscure. They could encompass several human rights norms, even some norms of *jus cogens*, which would seem to suggest that the right itself had a dimension that did not derive only from the existence of other sovereign States, but also from the existence of individuals whose rights must be respected in the international legal order.

25. The Special Rapporteur's theoretical construct was clearly reflected in draft article 3: paragraph 1 related to the right; paragraph 2 to the procedure. According to the former, the right was absolute and restrictions were placed only on its exercise. Nevertheless, the considerations in the latter paragraph, namely good faith and compliance with international obligations (presumably, the principle *pacta sunt servanda*), also related to the existence of other States. She wondered why no direct reference was made to the rights of the person or to rules of *jus cogens*, some of which would embody such rights.

26. On the actual exercise of the right of expulsion, she endorsed the categorical nature of draft article 4, paragraph 1, but found the expression "for exceptional reasons" used in paragraph 2 unjustifiable. It was not clear what exceptional reasons could justify a State's decision to expel its own nationals. Her understanding of the present state of international law was that the prohibition on the expulsion of nationals was absolute. The Special Rapporteur cited many international instruments to provide examples of exceptions. Of the more recent examples the most interesting one concerned the debate during the drafting of article 3 of Protocol No. 4 to the European Convention on Human Rights, mentioned in paragraphs 50 and 51, but it involved a case of extradition, not of expulsion. Likewise, the case of what was described in paragraph 55 as the "negotiated expulsion" of Charles Taylor in fact concerned his surrender to a special international court.

27. The only instrument that might provide an exception was the African Charter on Human and Peoples' Rights. However, it was a regional instrument, and might be contradicted by the provisions of other regional instruments. Furthermore, some of the situations it covered involved criminal proceedings and were thus more likely to fall into the category of extradition cases. She would welcome some clarification from the Special Rapporteur on those points. Of all the draft articles in the report, draft article 4 was the one that posed the most serious problem of substance. Moreover, it made no reference to due process of law in respect of the expulsion decision, nor did it specify whether the "exceptional reasons" must be based on existing law. Consequently, it provided fewer guarantees for the individual than did the African Charter on Human and Peoples' Rights. Her preference would be to delete paragraph 2; if it was retained, its provisions would need to be made more restrictive.

28. Draft article 5 dealt with the non-expulsion of refugees who were lawfully in the territory of a State, but it would be useful to mention, at least in the commentary, persons waiting to be granted refugee status, since they were afforded protection under article 31 of the 1951 Convention relating to the Status of Refugees. As worded, the grounds on which expulsion of refugees was permitted were too broad, and implied, *a contrario*, that offences against national security or public order and, perhaps, acts of terrorism would not result in a judgement. A reference to the principle of *non-refoulement*, which was guaranteed under article 33 of the 1951 Convention and widely regarded as constituting customary law, might also be appropriate. It should be noted that the Convention listed only two exceptions to the principle of *non-refoulement*: when the refugee was regarded as a danger to the security of the country in question, or, by virtue of having been convicted by a final judgement of a particularly serious crime, constituted a danger to the community of that country. More restrictions were required in order to safeguard the refugee against the risk of persecution in the country of return.

29. As for the bracketed reference to terrorism, Security Council resolution 1373 (2001) of 28 September 2001, which, incidentally, applied to nationals as well as refugees, referred to asylum seekers and persons who abused refugee status and not to refugees in general. Moreover, the resolution was silent on the matter of whether a judgement was required in respect of the terrorist acts in question. In the event of a judgement and conviction, it would be a matter of extradition and not of expulsion.

30. With regard to draft article 6 on the non-expulsion of stateless persons, it was not clear what would happen if no country was willing to host the person in question. Such a situation warranted further reflection.

31. The situation of migrant workers and members of their families, including the possibility of their collective expulsion, should be the subject of a separate article based on article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, rather than being dealt with under draft article 7. Situations involving the expulsion of migrant workers arose much more frequently than those relating to stateless persons, and such individuals required a higher level of protection than did, for instance, nationals of an enemy State.

32. It seemed from the report that the Special Rapporteur had some doubts as to whether the prohibition on collective expulsion was a prohibition under international law, although the wealth and comprehensive nature of the examples of regional practice he had proffered, drawn from every continent but one, should leave no room for doubt. The text of draft article 7 required some refinement. In paragraph 1, the word "reasonable" should be replaced by a stronger word such as "fair". Moreover, in paragraph 3, it was not sufficiently clear that the phrase "[f]oreign nationals of a State engaged in armed conflict" referred to nationals of a State directly engaged in armed conflict with the host State. The phrase "taken together as a group" was dangerously ambiguous. The words "demonstrate hostility", too, were vague, and some qualifier such as the adjective "grave" or "serious" should be inserted. The need for a threshold for such hostility should also be made clear in the commentary.

33. In conclusion, she said that, broadly speaking, she endorsed the basic principles outlined by the Special Rapporteur in his third report. She was in favour of the draft articles being referred to the Drafting Committee, with the possible exception of draft article 4, given her conviction that the prohibition on the expulsion of nationals should be absolute.

34. Mr. PELLET said he had found the third report interesting and on the whole convincing, although he had some sympathy with the criticisms voiced by Ms. Escarameia. The Special Rapporteur was less persuasive concerning the draft articles themselves, on which he would focus his comments. However, he wished at the outset to make two points on the report.

35. First, he quite failed to see the relevance to the topic of the distinction drawn by Herbert Hart between "primary rules" and "secondary rules"[284] referred to in paragraph 24 of the report. Secondly, there seemed to be several instances in the report—for instance, in paragraphs 51 and 55—of confusion between the concepts of expulsion and extradition, a number of examples of which had been given by Ms. Escarameia. Although the distinction between expulsion and extradition had been discussed in connection with the second report, it would appear that it needed to be reviewed and applied more rigorously.

36. With regard to draft article 3, paragraph 2 seemed to state the obvious, and was surely true, *mutatis mutandis*, of any right exercised by a State. It invited the absurd inference that, *a contrario*, there were some rights of States that could be exercised in bad faith and in disregard of the fundamental principles of international law and of those States' international obligations. Rather than knocking on open doors, it would be preferable to state explicitly at the outset that the right of expulsion could be exercised only in accordance with the provisions of the draft articles, and also, but perhaps elsewhere in the text, that the State must of course comply with its specific obligations under the relevant treaties. However, he agreed with the Special Rapporteur's view that the question of compliance with procedural rules could be dealt with at a subsequent stage.

37. The text of draft article 4 was unobjectionable as it stood, but its scope should be extended. In the paragraphs introducing the draft article, the report discussed in some detail the question of the acquisition of nationality, with particular reference to specific cases of dual or multiple nationality, the aim apparently being to highlight the fact that the problem of expulsion was particularly acute, both in theory and in practice, in cases of dual or multiple nationality (two distressing cases in point being the expulsion of Franco-Algerians by France and of Anglo-Pakistanis by the United Kingdom). Having built up a formidable body of evidence, however, the Special Rapporteur had not developed the theme further and the draft articles themselves, curiously, did not broach the question of dual or multiple nationality at all. He wondered, therefore, given the substantial practice described in the report—including a number of recent cases, some of which might, however, relate to extradition rather than to expulsion—whether it might not be worthwhile to draft an article specifically dealing with the question of what might more appropriately be called "banishment", or at least to mention it in draft article 4. Such a course of action would also make it possible to clarify the phrase "for exceptional reasons", which Ms. Escarameia had, rightly, in his view, criticized for its vagueness.

38. With regard to draft articles 5 and 6, he was, as he had said before, doubtful whether it was right to concentrate on the specific cases of refugees and stateless persons. He had not been persuaded either by the draft articles themselves or by the Special Rapporteur's assertion in his introduction to the report that there were serious omissions from the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. Articles 32 and 33 of the former and article 31 of the latter were well-established provisions and, by attempting to rewrite them, the draft articles risked creating conflicts of rules that might be difficult to settle. The two Conventions worked reasonably well, but, if they had shortcomings, it would be more sensible to amend the Conventions themselves than to produce alternative rules.

39. With specific regard to draft article 5, he was strongly against the inclusion of the words "or terrorism"

[284] H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, 1994, chap. V, pp. 79 *et seq*.

in paragraph 1. Not only was the expulsion of terrorists sufficiently covered by the phrase "on grounds of national security or public order", but the specific inclusion of a reference to the fashionable concept of terrorism might give the false impression that, by contrast, article 32 of the 1951 Convention would not permit the expulsion of foreign nationals in case of a terrorist threat. Moreover, as Ms. Escarameia had noted, the problem of terrorism was not exclusively confined to situations involving refugees and stateless persons. He was also opposed to the inclusion in paragraph 1 of only part of the wording of article 33 of the 1951 Convention, reproduced in paragraph 66 of the report. Such a cherry-picking approach in the draft article risked upsetting the careful balance of the original provision.

40. As for draft article 6, he saw no need to delete the word "lawfully", which appeared in square brackets; to do so would, again, be to rewrite the well-established provision contained in article 31, paragraph 1, of the 1954 Convention relating to the Status of Stateless Persons, thereby fragmenting the law of statelessness. Despite the arguments put forward by the Special Rapporteur, he could not see that, in the special circumstances of expulsion, it made much difference whether the stateless person's presence in the country was lawful or unlawful. He was therefore opposed to the inclusion of draft articles 5 and 6, whose provisions might conflict with those of the very widely ratified 1951 and 1954 Conventions, which, in his view, reflected general international law and should remain untouched. However, should the Commission nonetheless decide to refer those two draft articles to the Drafting Committee, he commended draft article 5, paragraph 2, which introduced a valuable new element in the context of the progressive development of international law, though not of its codification *stricto sensu*. Whatever course the Commission decided to adopt, it should take care not to change the general sense of the provisions of the 1951 and 1954 Conventions.

41. With regard to draft article 7, like Ms. Escarameia he had some concerns about the wording, although they differed from hers. In his view, the phrase "reasonable and objective examination" was perfectly appropriate in the circumstances. The more detailed the requirements, the more ways States would find of bypassing the intended effect; conversely, by couching the requirement in general terms, the draft articles might well provide more effective protection for the aliens concerned. The same went for the word "group": the more flexible the language of the draft article, the more effective the prohibition of collective expulsion would be.

42. There might also be a case for reversing the order of paragraphs 1 and 2. Paragraph 3, meanwhile, was excessively high-minded. Realistically, provision should be made for situations in which nationals of States engaged in armed conflict with the host State might be expelled, if that was the only, or the most effective, way of ensuring their protection from popular vengeance. After all, it was better to be expelled than exterminated.

43. He therefore recommended that, while draft articles 3, 4 and 7 should be referred to the Drafting Committee, it would be premature to refer draft articles 5 and 6 to that subsidiary body, for a reason of principle, namely that the whole issue of the expulsion of refugees and stateless persons should be considered in depth by the Commission in plenary session, perhaps following the establishment of a working group that could briefly consider the main issues. The need to protect refugees and stateless persons must be balanced against the need to protect the integrity of the relevant provisions of the 1951 and 1954 Conventions. He intended no criticism of the report; he merely felt that the full Commission should give more thought to the principles involved before the text of draft articles 5 and 6 was referred to the Drafting Committee.

44. Mr. AL-MARRI, after thanking the Special Rapporteur for his excellent report, said that, although the right of expulsion was a sovereign right of the State, it was not absolute, since States were obliged to act within the limits prescribed by international law, as stated in draft article 3, paragraph 2. The report mentioned a number of general principles, particularly in relation to regional human rights case law, under which States were prohibited from the collective or arbitrary expulsion of refugees or stateless persons and were obliged to observe the principles of non-discrimination and respect for the basic rights of the person expelled. Moreover, in expelling an alien, a State was required to respect its own laws and applicable international rules. In that connection, the phrase "for exceptional reasons" in draft article 4 required further clarification.

45. The report rightly distinguished between refugees and asylum seekers: whereas the status of the former was determined by international law, regional asylum seeking was governed by internal law. The Commission should undertake a careful study of the rules governing the expulsion of persons in both categories. As for the exceptions to the principle prohibiting the expulsion of a refugee, although national security and public order constituted possible exceptions to the rule, other categories might be added, including combating terrorism. That was reflected in draft article 5.

46. Draft article 6 rightly set out the principle that the expulsion of stateless persons should be prohibited. Since the expulsion of a stateless person was different from that of an alien, however, in that it would not be easy to find a country willing to accept a stateless person, the proposed wording of paragraph 2 was not satisfactory, and amounted to progressive development of international law. In that connection, he wondered what the position would be if a person deported to his country of origin was exposed to harassment owing to his or her ethnic origin, religion or political opinions. The Commission should seek an alternative solution.

47. As for draft article 7, he commended the discussion in the report of State practice and jurisprudence governing the prohibition of collective expulsion in both peacetime and time of war. On that basis, he found the text of the draft article generally acceptable. Collective expulsions should be prohibited; instead, each case should be considered on its merits and individuals should be expelled only if they constituted a threat to the State.

48. Mr. DUGARD, after congratulating the Special Rapporteur on an informative, thorough and thoughtful report, said that he wished, nonetheless, to draw attention to a number of issues, some of which had already been raised by Ms. Escarameia and Mr. Pellet. First, he noted that paragraphs 7 and 22 of the report referred to restrictions on the right to expel aliens imposed by *erga omnes* and *jus cogens* rules and by peremptory norms. Consideration should, however, be given to the fact that such restrictions were most frequently imposed by customary norms of international law, which did not necessarily constitute peremptory norms.

49. With regard to draft article 5, he fully endorsed the views expressed by Mr. Pellet and Ms. Escarameia: it would be very unfortunate to include a reference to terrorism in the draft article. The principal difficulty lay in the inability of the international community to agree on a definition of the term "terrorism", and, in that connection, he looked forward to hearing from Mr. Perera, who was deeply involved in the efforts by the Sixth Committee to come up with a comprehensive definition. States abused the term for political purposes and even the Security Council, in its wisdom, was prepared to use the term in the absence of an agreed definition. The report mentioned Security Council resolution 1373 (2001) of 28 September 2001 in that connection, but others, such as Security Council resolution 1465 (2003) of 13 February 2003, were of equal importance. If the Special Rapporteur felt it necessary to cite examples of exceptional cases constituting a threat to national security, he need look no further than the core crimes listed in the Rome Statute of the International Criminal Court.

50. The report should also, in his view, have paid much more attention to the question of whether a State had the right to deport a holder of dual or multiple nationality. Dual nationality was a fact of international life, and was not contrary to international law, yet the practice persisted of deporting political dissidents or other groups considered undesirable. Political dissidents had been expelled from South Africa under the apartheid regime. In that connection, the Commission should consider whether it should support the inclusion in the draft articles of the "genuine link" principle of the *Nottebohm* case.

51. Similarly, even though the United States Supreme Court had ruled the practice unconstitutional as long ago as the nineteenth century, some countries used denationalization as a punishment and as a prelude to expulsion. Although it was frequently the case that no other State was prepared to accept such a person, denationalization was seen by some States as providing a licence for expulsion. Political dissidents had been stripped of their nationality in the Soviet Union in the 1930s, as had the German Jews in 1941; some 8 million black South Africans had suffered that fate in the 1970s and 1980s. That phenomenon, too, was not dealt with adequately in the present draft articles.

52. He would be happy for the draft articles to be referred to the Drafting Committee, subject to further consideration of his suggestion concerning the problems of dual or multiple nationality and deprivation of nationality in connection with the expulsion of aliens.

The meeting rose at 11.35 a.m.

2942nd MEETING

Wednesday, 25 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

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

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

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

2. Mr. SABOIA said that he agreed with the approach adopted in the report, namely, that the right of expulsion should be defined as a right of the State, but not as an absolute right, since it must be exercised within the limits set by international law. The Special Rapporteur distinguished between the limits deriving from the international legal order, as referred to in draft article 3, paragraph 2, and the limits or obligations specific to particular areas of international law forming part of the conditions for the exercise of the right of expulsion. In the light of the discussion at the preceding meeting, account must be taken of the comment by Ms. Escarameia, who had stressed that human rights rules must not be regarded as external to the international legal system and that they must therefore be seen not only as determining the exercise by the State of its right to expel aliens, but also as affecting the content of that right. In his own view, consideration should also be given to the possibility of including a reference in paragraph 2 to the peremptory norms of international law, mentioned by the Special Rapporteur in paragraph 22 of his report.

3. Draft article 3, paragraph 2, would be more explicit, and more normative, if, as Mr. Pellet had proposed, it contained the words "in accordance with the draft articles" and a reference to the applicable treaty rules and rules of general international law.