Document:-
A/CN.4/2923

Summary record of the 2923rd meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
2007, **vol. I**

natural resources, to be chaired by Mr. Candioti. His proposal for the Working Group was for it to begin by formulating a recommendation on the future programme of work on groundwaters, oil and natural gas, taking into account the views expressed in the plenary meetings; he then hoped to receive members' input for the preparation of his fifth report, which he would submit early in 2008. He planned to propose the complete set of draft articles for consideration on second reading. It would be very useful if members, and in particular new members, could express their views on the draft articles adopted on first reading and make suggestions for improvements. He would also like to hear whether they thought that the final product should take the form of a convention or of guidelines, as that would clearly affect the drafting.

12. He would hold an informal meeting, immediately following the end of the plenary, to brief the new members on the background to the draft articles on the law of transboundary aquifers adopted on first reading.

13. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) announced that the Working Group was currently composed of Mr. Brownlie, Mr. Comissário Afonso, Ms. Escarameia, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Ms. Xue and himself, together with Mr. Yamada (Special Rapporteur).

The meeting rose at 10.30 a.m.

2922nd MEETING

Tuesday, 22 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

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

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

[Agenda item 1]

1. The CHAIRPERSON informed the members of the Commission that the Special Rapporteur on the expulsion of aliens, Mr. Kamto, had been delayed and would not be able to introduce his report as planned. Consideration of the item would thus be postponed until a later meeting.

2. Before adjourning the meeting, he wished to inform the Commission that in keeping with tradition, he had extended an invitation to the current President of the International Court of Justice, Judge Rosalyn Higgins, to visit the Commission to hold a discussion with the members. Judge Higgins had accepted the invitation and had suggested 10 July 2007 as the date for her visit; the Commission would therefore receive her on that day.

3. It had been brought to the attention of the Bureau that in the past several years successive Presidents of the International Tribunal for the Law of the Sea had expressed an interest in being invited to the Commission for an exchange of views. That interest had been informally reiterated in connection with the current session. The Bureau had discussed the matter and had decided to invite the current President of the Tribunal, Judge Rüdiger Wolfrum, during the second part of the session on the clear understanding that the invitation did not create a precedent and would not necessarily be renewed on an annual basis, something which would be made clear to Judge Wolfrum when he came to the Commission. He had thus extended an invitation to Judge Wolfrum, and the Commission would be informed of the latter's response.

4. Lastly, he said that, at the request of the General Assembly, the Secretariat had prepared a compilation of decisions of international courts, tribunals and other bodies in which reference had been made to the draft articles on responsibility of States for internationally wrongful acts, a topic which the Commission had completed in 2001.[116] As some members of the Commission had expressed an interest in receiving that document, the Secretariat had issued the compilation as documents A/62/62 and Add.1; comments and observations by Governments on the subject had been issued as document A/62/63 and Add.1.[117]

The meeting rose at 10.10 a.m.

2923rd MEETING

Wednesday, 23 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

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

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[*] Resumed from the 2920th meeting.

[116] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

[117] Mimeographed, available at www.un.org.

Expulsion of aliens[118] (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581[119])

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. KAMTO (Special Rapporteur), introducing his second report on the expulsion of aliens,[120] drew attention to a number of editorial corrections to be made to the French text.

2. He reminded members that in his preliminary report[121] he had outlined his understanding of the subject. During its consideration of that report, the Commission had endorsed most of his choices and, broadly speaking, the draft work plan annexed to the report. During the consideration by the Sixth Committee of the Commission's report on the work of its fifty-seventh session, representatives of several States had emphasized the importance, interest and topicality of the subject, but also its complexity and difficulty.[122] On the whole, there had been clear support for the general approach he had proposed. The varied and, at times, contradictory suggestions made on the content and especially the scope of the topic were set out in paragraphs 12 and 13 of his second report. The questions and doubts that had been raised would be answered in the second and subsequent reports.

3. It could safely be asserted that the topic indisputably lent itself to codification, for a number of reasons. Rules of customary law existed on the matter, together with a large corpus of treaties, extensive State practice, legal writings dating back to the nineteenth century, and international and, in particular, regional jurisprudence that, while relatively recent, was nevertheless well established. The subject was without question of topical relevance, and the dramatic and often chaotic upsurge in the phenomena of refugees and illegal immigration lent some urgency to it. The question of expulsion of aliens was further complicated by the complex problem of combating terrorism. States seemed at a loss to cope and had a tendency to give scant consideration to the rights of individuals scheduled for expulsion. The recent practice of a number of States, especially member States of the European Union, included the implementation of policies on the compulsory return of aliens, and even the organization of Community charter flights or "pooled flights" and the conclusion of "readmission agreements" and "transit agreements" with certain countries said to be the source of illegal immigration. Clearly, the expulsion of aliens, as the concept was envisaged in the second report, was becoming a major issue in contemporary international relations.

4. Although the General Assembly had addressed the question of international migration in general terms,[123] the report of the Global Commission on International Migration established to address the phenomenon did not even touch on the problem of expulsion of aliens, instead noting the extent of migration and its significance for the economies of developing countries and recommending some solutions.[124] The conclusions of the Euro-African Ministerial Conference on Migration and Development held in Rabat on 10 and 11 July 2006 adopted a similar approach.[125] Hence, for the time being at least, the Commission was competing with no other international body in addressing the topic.

5. The preliminary report of the Special Rapporteur had concentrated on presenting methodological issues with a view to seeking guidance from the Commission as to how the topic could be discussed in the most suitable and comprehensive manner. He believed that this objective had been attained. While the preliminary report had sketched out the broad outlines of the topic, the second report, by way of embarking on a study of the general rules on expulsion of aliens, would seek to determine the scope of the topic more precisely, and also to propose definitions of its constituent elements.

6. First, as to the scope of the topic, he had tried to narrow it down by indicating the various categories of persons affected by expulsion, within the meaning of the term as used in paragraphs 187 to 193 of the second report. There was a consensus within the Commission and in the Sixth Committee that the topic should include persons residing in the territory of a State of which they did not have nationality, with a distinction being made between persons in a regular situation and those in an irregular situation, including those who had been residing for a long time in the expelling State; and also refugees, asylum seekers, stateless persons and migrant workers.

7. The consensus went no further, however, since some members of the Commission and representatives in the Sixth Committee were of the view that it would be difficult to include denial of admission to new illegal immigrants or those who had not yet become established in the receiving country, persons who had changed nationality following a change in the status of the territory where they were resident, particularly in the context of decolonization, or nationals of a State in armed conflict with the receiving State.

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[118] For the discussion of the Special Rapporteur's preliminary report, see *Yearbook … 2005*, vol. II (Part Two), paras. 242–274. For the preliminary report, *Yearbook … 2005*, vol. II (Part One), document A/CN.4/554. At its fifty-eighth session, the Commission had before it the Special Rapporteur's second report (reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573) as well as a memorandum by the Secretariat on the subject (A/CN.4/565 and Corr.1, mimeographed, available on the Commission's website), that it decided to discuss at the subsequent session (*Yearbook ... 2006*, vol. II (Part Two), para. 252).

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

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

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

[122] *Ibid.*, vol. II (Part Two). See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560), sect. E (mimeographed, available on the Commission's website, documents of the fifty-eighth session).

[123] See the report of the Secretary-General on international migration and development (A/60/205) of 8 August 2005.

[124] Report of the Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, Switzerland, SRO-Kundig, 2005.

[125] See the Rabat Plan of Action of the Euro-African Ministerial Conference on Migration and Development, 11 July 2006, available at www.unhcr.org.

8. While he agreed that non-admission should not be covered, he was not convinced that the other situations should be excluded, for the reasons provided in paragraph 41 of the second report. In his view, the topic should include expulsion of aliens residing lawfully in the territory of a State, aliens with irregular status, refugees, displaced persons, asylum seekers and asylum recipients, stateless persons, former nationals of a State, persons who had become aliens through loss of nationality following the emergence of a new State, nationals of a State engaged in armed conflict with the receiving State, and migrant workers. The third report, on the other hand, would address the expulsion of nationals, an act that was, in principle at least, prohibited. Falling outside the scope of the topic were several categories of aliens, listed in paragraph 46 of the second report, the conditions and procedures for whose expulsion were governed by special rules.

9. On the basis of those considerations, he had proposed a draft article 1 entitled "Scope", which was set out in paragraph 122 of the second report and read:

> "(1) The present draft articles shall apply to any person who is present in a State of which he or she is not a national (*ressortissant*).
>
> "(2) They shall apply, in particular, to aliens who are present in the host country, lawfully or with irregular status, to refugees, asylum seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it."

10. As for the definition of key terms, great care must be taken when determining their exact content, since their meanings differed in ordinary and legal usage, the latter itself varying depending whether the terms were construed in a restrictive or a broad sense and whether expulsion was seen exclusively as a legal event or as also including the behaviour of States. For example, instead of defining the concept of alien on the basis of the link of nationality, through a distinction between a "national" (*national*) and a "non-national" (*non-national*), he had chosen to construe the concept from the standpoint of *ressortissant* and *non-ressortissant*, the two French terms "*national*" and "*ressortissant*" both being translated into English as "national". The term "*ressortissant*", when compared with others such as "national", "citizen" and "subject", seemed to be the broadest, and its opposite, "*non-ressortissant*", seemed best suited to designate the entire range of aliens covered under the topic.

11. However, the term "*ressortissant*" could itself be used in several different senses. The plentiful case law of the PCIJ and, subsequently, of the ICJ gave it a restrictive interpretation, in which it had the same meaning as the word "*national*" and meant "possessing the nationality of". Such was the conclusion that could be drawn from the *LaGrand* and *Avena* cases, to cite two recent examples.

12. The term "*ressortissant*" could also be very broad in meaning, especially when used in conjunction with the adjective "enemy". According to the *Dictionnaire de droit international public*, edited by Jean Salmon, the term "*ressortissant ennemi*" [enemy alien] denotes a natural or legal person believed by a belligerent to be subject by law to the authority of an enemy Power, based on criteria used to determine that connection which may vary in domestic law from one State to another.[126] Those criteria could be based on totally disparate elements, as in the *Nottebohm* case, namely "nationality, residence, personal or business associations as evidence of loyalty or inclusion in the Black List".[127]

13. In between the very narrow and broad senses of the term "*ressortissant*", there was an intermediate meaning, broader than the term "*national*" yet also more precise. According to that definition, the term "*ressortissant*" applied not only to nationals but also to persons who were subject to the authority of a given State as the result of a particular legal connection, for example the status of refugee or asylum seeker, the legal relationship resulting from a situation of statelessness, or even a relationship of subordination, such as that created by a mandate or protectorate. That conception was set out in a note dated 12 January 1935 by the French Ministry of Foreign Affairs, cited in paragraph 148 of the report. However, the precise sense in which the term was to be used in the context of the topic was conveyed in the award rendered by the French–German Mixed Arbitral Tribunal on 30 December 1927 in the *Falla-Nataf and brothers v. Germany* case: the full wording was to be found in paragraph 149 of the report.

14. As for the term "expulsion", he had attempted first of all to distinguish it from certain related concepts such as "deportation", "extradition", "removal", "escort to the border" (*reconduite à la frontière*), "*refoulement*", "non-admission", "transfer" (*transfert* or *transfèrement*), and "surrender". He had concluded that for the purposes of the topic, the word "expulsion" covered all the other concepts, with the sole exception of "non-admission", since they all described the same phenomenon, namely an alien compelled to leave the territory of a State. The main question was how the crucial element of compulsion leading to expulsion was exercised. In the preliminary report, he had defined expulsion solely in terms of a unilateral act. However, taking account of the discussion in the Commission during its consideration of that report and of the relevant international case law, he had now acknowledged the need to extend the concept to cover the behaviour of State authorities. Such were the lessons to be learned from the awards by the Iran–United States Claims Tribunal in *International Technical Products Corporation, et al. v. the Government of the Islamic Republic of Iran* and in the case of *Jack Rankin v. the Islamic Republic of Iran*, cited in paragraphs 190 and 191 of the report.

15. It was also noteworthy that in a case brought before the African Commission on Human and Peoples' Rights in 2003, *Interights (on behalf of Pan African Movement and Inter Africa Group) v. Eritrea*, the complainant had alleged that in the second quarter of 1998, a period during which an international armed conflict had broken out between Eritrea and Ethiopia, "thousands of persons of Ethiopian nationality were expelled from Eritrea, either directly or constructively by the creation of conditions in

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[126] Brussels, Bruylant, 2001, at p. 1001.

[127] Response of the Government of Liechtenstein, in *Pleadings, Oral Arguments, Documents, Comprising Texts, Maps and Charts*, vol. I, p. 411, para. 99.

which they had no choice other than to leave" [see paragraph 2 of the decision]. Unfortunately, the African Commission on Human and Peoples' Rights had not rendered a decision in that case, but the awards by the Iran–United States Claims Tribunal were unequivocal precedents.

16. Lastly, it had seemed to him that since the expulsion of an alien could be viewed solely in relation to the territory of the expelling State, and since the crossing of the territorial frontier of that State was necessarily involved, those two concepts needed to be defined in the context of the topic under consideration. He had accordingly proposed definitions, not only of "alien", "expulsion" and "*ressortissant*", but also of "frontier" and "territory".

17. A draft article on those definitions figured in paragraph 194 of the report, and read:

> "For the purposes of the draft articles:
>
> "(1) The expulsion of an alien means the act or conduct by which an expelling State compels a *ressortissant* of another State to leave its territory.
>
> "(2) (*a*) An alien means a *ressortissant* of a State other than the territorial or expelling State;
>
> "(*b*) Expulsion means an act or conduct by which the expelling State compels an alien to leave its territory;
>
> "(*c*) Frontier means the zone at the limits of the territory of an expelling State in which the alien no longer enjoys resident status and beyond which the national expulsion procedure is completed;
>
> "(*d*) *Ressortissant* means any person who, by any legal bond including nationality, comes under [the jurisdiction] [the personal jurisdiction] of a State;
>
> "(*e*) Territory means the domain in which the State exercises all the powers deriving from its sovereignty."

18. He also wished to propose an alternative to the definition of "*ressortissant*" in paragraph (2) (*d*) of draft article 2. Unlike the current definition, which deemed nationality to be merely one of a number of legal links that determined who was a *ressortissant* of a State, the alternative definition would make nationality the principal legal link, which might be supplemented by other links. A *ressortissant* would accordingly be taken to mean "any person who has the nationality of a State or who, by any other legal bond, comes under [the personal jurisdiction] [the jurisdiction] of a State". That question of wording was perhaps a matter for the Drafting Committee to resolve if, as he hoped, the draft articles were referred to it for consideration.

19. Ms. ESCARAMEIA said that the Special Rapporteur had produced a well-researched, up-to-date, comprehensive and clear report. The topic posed two main problems. First, as expulsion of aliens was not covered as a separate chapter in the classic textbooks on international law, the Special Rapporteur had had to do a great deal of research to furnish material for the report. The focus was on results that actually affected people, rather than on some broad conceptual framework. Second, the use of terminology was quite difficult because the reality being described was constantly and rapidly evolving. Moreover, it depended to a great degree on internal laws, which often used different terms to refer to the same thing, or similar terms to refer to different things.

20. With regard to the scope of the topic, the Special Rapporteur was right to insist on the need to include as many aspects of the question as possible. Having heard the Special Rapporteur's introduction, she was pleased to note that he was now in favour of excluding denial of entrance from the topic, since it was not a case of expulsion.

21. She agreed with the Special Rapporteur that expulsion in situations of armed conflict should be included. The Commission needed to fill the lacuna that, despite the existence of practice, existed in that area. Like the Special Rapporteur, she was in favour of including the case of persons who had become aliens as a result of losing their citizenship.

22. The extremely helpful memorandum by the Secretariat on the topic[128] stressed the importance of addressing collective or mass expulsions, which differed from individual cases in that they might be more heavily influenced by political factors. She also agreed that expulsion of aliens with a special privileged status and of nationals should not form part of the topic.

23. She had questions about some of the categories to be included. With regard to the concept of aliens with irregular status (paragraphs 54–56 of the second report), she sought clarification on the difference between the illegal stay and the illegal residence of an alien, referred to in paragraph 55. She supported a broad definition of refugees (paras. 57–71), which reflected recent developments in law, especially at the regional level, and she appreciated the Special Rapporteur's effort to distinguish asylum seekers and asylum recipients from refugees (paras. 96–99), the two cases having often been conflated.

24. The assertion, in paragraph 106 of the second report, that loss of nationality resulted from a voluntary act was not always true, as, for instance, in the cases of women required to abandon their nationality in favour of their husband's when they married a foreigner. The Commission had debated the issue when it dealt with diplomatic protection, and both the International Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the nationality of married women dealt with the question.

25. With regard to deprivation of nationality (para. 107), she was not certain whether a person could be legally deprived of his or her nationality for failure to comply with the laws on nationality of the State of which he or she had become a national. That seemed to be a conditional conferral of nationality. She would welcome clarification from the Special Rapporteur on that question.

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

26. She also had problems with the reference in draft article 1, paragraph (2) (para. 122 of the second report), to aliens present in the host country "lawfully or with irregular status"; did "irregular status" mean "unlawfully", or did it mean something else? As it stood, the phrase seemed vague; she suggested replacing it by "independently of the lawfulness of their status", to show that the issue of lawfulness or unlawfulness was irrelevant.

27. As to the definitions, she found it surprising—albeit hardly crucial—that, in paragraph 133 of his second report, the Special Rapporteur distinguished between citizens and subjects, depending on whether the form of government was a republic or a monarchy. In her view, the point was whether an individual had rights *vis-à-vis* the political system, regardless of what that political system might be. To cite one example, the Constitution of Spain used the word "citizen". Thus, the word "subject" was not automatically used wherever the form of government was a monarchy.

28. On the term "*ressortissant*" (paras. 136–152), the Special Rapporteur explained that it was synonymous with "national" and had repeated that assertion in his introduction. She noted, however, that the English version of draft article 1 rendered *ressortissant* as "national (*ressortissant*)", and also that in paragraph 150 it was stated that the term was broader and was understood to mean "any person who, as the result of any legal relationship, including nationality, comes under the authority of a given State". Such a definition would include not only refugees and migrant workers, but even private investors who concluded a bilateral investment treaty or contract with a State. Thus, the reference in the definition to a "legal relationship" with a State was too broad. She thought that the term "national" should be used instead of "*ressortissant*".

29. When discussing the definition of expulsion, the Special Rapporteur dealt with a number of related concepts. In his consideration of extradition (paras. 159–161), he should have made it clear that a criminal procedure was always involved, and that it was based on agreements between two States, which was not necessarily the case with expulsion and the other related concepts.

30. It might also be useful to include other concepts and to distinguish them from expulsion. For instance, the Commission should perhaps reflect on the defining characteristics of the concept of rendition, now commonly used in the context of the fight against terrorism. In that connection, she drew attention to an oversight in the penultimate sentence of paragraph 175 of the English version of the second report: the reference should be to the Rome Statute of the International Criminal Court, not to the Statute of the International Court of Justice.

31. Turning to the concept of territory, which in draft article 2, paragraph (2) (*e*), was defined as the domain in which the State exercised all the powers deriving from its sovereignty (para. 194 of the second report), she asked whether, in the Special Rapporteur's view, that also applied to territories under administration. As, in an era of self-determination, a State was probably no longer permitted to divest itself of such territories, she was not certain whether the exercise of sovereignty was an appropriate criterion for defining that term.

32. Nor did she understand why the Special Rapporteur defined "frontier" (draft art. 2, para. (2) (*c*)) in terms of the resident status of an alien. In her view, the concept of "frontier" also applied to other categories of persons who might not have the status of resident alien, such as migrant workers, refugees or asylum seekers. As for the definitions given for "expulsion of an alien" and "expulsion" (draft art. 2, paras. (1) and (2) (*b*)), they covered expulsion in terms of the act itself but not in terms of the consequences. For expulsion to be completed, the person must actually be expelled. Thus, reference should also be made to the enforcement and completion of the expulsion order.

33. On the definition of "alien" (draft art. 2, para. (2) (*a*)), she would be grateful if the Special Rapporteur could cite instances in which the territorial State was not the expelling State. In her view, it would be preferable to have a simpler definition, along the lines of: "an alien means any individual who is not a national of the State in which he or she is present". That was the definition given by the General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.[129] Some years previously, the Institute of International Law had come up with a definition the gist of which was that an alien was a person who was not a national of the State where that person was present, without distinguishing between the different categories.[130] Such a simple definition would greatly simplify matters.

34. On the definition of "*ressortissant*" (draft art. 2, para. (2) (*d*)), she noted that the Special Rapporteur had offered an alternative definition of that term. However, a person could be under a State's jurisdiction in respect of an act that took place on just one occasion, such as an investor or a contractor. On the difference between "jurisdiction" and "personal jurisdiction", she asked whether, given the change just proposed by the Special Rapporteur, personal jurisdiction, like nationality, had to do with the personal status of the individual.

35. In her opinion, other concepts, such as "refugee", "migrant worker" and "asylum seeker" would probably also have to be defined. Nonetheless, she was in favour of referring draft articles 1 and 2 to the Drafting Committee, taking into account the comments made in plenary.

36. Mr. VARGAS CARREÑO said that the Special Rapporteur's second report was a good introduction to the topic, one that was important and of undeniable topical interest but also complex and difficult. He agreed with the predominant view in both the Commission and the Sixth Committee that the subject should be dealt with in a general, broad manner. However, caution should be exercised, because, strictly speaking, a number of issues related to the topic did not form part of it and should therefore be excluded from the process of codification and progressive development.

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[129] General Assembly resolution 40/144 of 13 December 1985.

[130] See article 1 of the "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 Septembre 1892" (International regulations on the admission and expulsion of aliens proposed and adopted by the Institute of International Law at Geneva on 9 September 1892), *Annuaire de l'Institut de droit international*, 1892–1894, vol. 12 (Geneva session), Paris, Pedone, p. 218 (available only in French).

37. He agreed with the Special Rapporteur about the methods and sources to be used, but believed that in addition to looking at national legislation, the Commission should also consider national jurisprudence. Not many national laws had dealt with the subject, and of those that had, most recognized the right of the State to expel aliens. However, in some cases—as was the recent practice of Latin American countries—judicial decisions had not accepted the absolute, unconditional right of the State to expel aliens and had set a number of conditions so as to ensure that such persons were not treated in an unjust or arbitrary manner. The codification process must take account of those recent judicial decisions and the relevant rules of international law, which, admittedly, were not very numerous either. One such rule, which was embodied in article 22, paragraph 9, of the 1969 American Convention on Human Rights ("Pact of San José, Costa Rica"), was the prohibition on the collective expulsion of aliens. That provision, which had been adopted against the background of an armed conflict between El Salvador and Honduras and the collective expulsion by Honduras of Salvadoran nationals from its territory, had universal validity and might perhaps be incorporated in the draft articles under consideration.

38. Like the Special Rapporteur, he thought it necessary to bear in mind the international jurisprudence that had recently begun to emerge. The starting point for the consideration of the subject should be that it was of great importance not only for international relations, but also because of the topicality of issues such as terrorism and the problem of the illegal entry, particularly into Western Europe and the United States, of economic refugees. The United States Congress was currently considering some highly controversial legislation on immigration, and it would have been useful for it to have had rules of international law to which to refer. Thus, the Commission would be filling a significant gap in that area.

39. However, despite its importance for international relations, the topic continued by and large to be governed by internal law. In principle, just as the State had the right to admit an alien, it also had the right to expel such a person, but that should not be an absolute, arbitrary and unconditional right, and must be subject to certain criteria which it was up to the Commission to establish. In formulating those criteria, the Commission should bear in mind article 22, paragraph 6, of the American Convention on Human Rights ("Pact of San José, Costa Rica"), which provided that an alien lawfully in the territory of a State party to the Convention could be expelled from it only pursuant to a decision reached in accordance with law. Thus, a State did not have full jurisdiction arbitrarily to expel an alien.

40. He also commended the Special Rapporteur's efforts to define the scope of the topic and to distinguish the expulsion of aliens from other cases. That approach was the correct one, and every category of alien needed to be examined separately. The case of aliens residing legally in the territory of the expelling State was different from that of aliens with irregular status, refugees, displaced persons and beneficiaries of territorial asylum (as opposed to the Latin American phenomenon of diplomatic asylum), not to mention that of stateless persons, former nationals and migrant workers, all of whom should probably not be included in the topic.

41. It was also important to define the term "expulsion" carefully and precisely and to distinguish it from other situations which, in his view, should be excluded from consideration. Subject to some qualifications, he agreed with the Special Rapporteur's approach. Expulsion could also take the form of deportation, removal or "escort to the border" (*reconduite à la frontière*), but a number of other situations were completely extraneous to the topic and should not be included, although they might perhaps become the subject of separate codification work. Those situations included extradition, the legal basis for which did not reside solely in the domestic legislation of the State that granted extradition, but also in the law of the State requesting extradition. As Ms. Escarameia had rightly noted, extradition presupposed the initiation of criminal proceedings, which was not the case with the expulsion of aliens. *Refoulement* was likewise an entirely different case from the right of a State to expel an alien. Indeed, the principle of *non-refoulement* was an achievement for human rights protection embodied in the 1951 Convention relating to the Status of Refugees and the 1969 American Convention on Human Rights. Moreover, the 1984 Cartagena Declaration on Refugees[131]—which, although adopted on the basis of regional problems, had universal validity—established that the principle of *non-refoulement* was a rule of *jus cogens*. Nor did he believe that transfer, regardless of whether it was in conformity with international law or, as in the case of the transfer of persons to the Guantanamo Bay detention camp, contrary thereto, should be included in the topic.

42. The second report provided an excellent starting point for the codification process upon which the Commission was embarking. The two draft articles would, however, need further discussion; it was important that the introductory articles on the topic be compatible both with other international instruments and with other rules that the Commission might go on to incorporate in the draft articles. It would therefore be appropriate to refer them to the Drafting Committee, which should, however, defer their consideration until progress had been made with the rest of the text. Draft articles 1 and 2 should, without prejudice to any future developments, reflect the substantive rules that would gradually be adopted.

43. Mr. SABOIA, after commending the second report and the Secretariat memorandum on the expulsion of aliens,[132] which provided full information on the legal background, case law and State practice, noted that the topic had always been a source of controversy. The arbitrary expulsion of aliens was the cause of suffering, hatred among peoples and violence, and even a legal body such as the Commission should not lose sight of the manifold topical aspects of the question. The undisputed sovereign right of States to exercise control over the presence of aliens in their territory should

[131] Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in OEA/Ser.L/V/II.66 doc. 10, rev.1. OAS General Assembly, fifteenth regular session (1985), resolution approved by the General Commission held at its fifth session on 7 December 1985.

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

be tempered by respect for the rules of international law that prohibited practices such as mass and collective expulsion, and by the recognition that all persons, including illegal aliens, were entitled to respect for their human rights and should not be subjected to humiliating treatment or arbitrary separation from their families. The rules of humanitarian law must also be strictly applied to the expulsion of aliens in situations of armed conflict. Special consideration should be given to the situation of particularly vulnerable groups, such as children, women and elderly, disabled or sick persons.

44. He welcomed the reference in paragraphs 17 to 19 of the second report to the continuing growth of the phenomenon of expulsion as a consequence of policies adopted by States in combating terrorism. Although the prevention of terrorism and the prosecution of its perpetrators must be priorities for the international community as well as for individual States, some policies had resulted in unduly generalized and arbitrary action being taken against persons—and particularly aliens—of specific ethnic, cultural or national origins or religious affiliation. States had sanctioned torture and inhuman or degrading treatment, indefinite detention and even the summary execution of innocent persons on the pretext of protecting national security. The practice of secretly transferring aliens for interrogation in other countries—so-called "extraordinary rendition"—was a serious breach of international human rights law and possibly of the law relating to the expulsion or transfer of aliens. The Special Rapporteur should examine that practice.

45. The report also described the arbitrary treatment suffered by aliens as a result of policies adopted to stem illegal migration flows. Notwithstanding the right of States to regulate and control immigration, it should be recognized that increasing flows of migrants from poor countries as a result of globalization had led to a tightening of immigration policies and practices. Countries of origin or transit had often been pressed to enter into agreements on the early return of aliens, which greatly reduced their access to protection in the form of asylum or admission as a migrant. The Special Rapporteur should, however, make an effort not to appear selective by singling out certain countries—mostly in Western Europe—as the source of policies that caused difficulties for aliens. Examples could also be found in other regions.

46. With regard to the scope of the topic, he generally endorsed the proposals made in paragraphs 36 to 41 of the second report, particularly with regard to the situation of persons who had changed nationality following a change in the status of the territory in which they were resident. Such changes of nationality were often imposed on persons who had lawfully resided in the territory concerned for a long time. He also agreed that the question of the prohibition of expulsion of nationals fell outside the scope of the topic, although a reference to the question might be made in the introduction or in the commentary.

47. With regard to the issue of refugees and asylum seekers, it was important to take into account not only the relevant principles and rules of the refugee conventions and protocols but also the decisions and recommendations of the Executive Committee of UNHCR. The language proposed for draft article 1 would therefore appear to be adequate.

48. With regard to the chapter on definitions, he had doubts as to the usefulness of relying on old jurisprudence that distinguished between nationals and members of minorities, such as the 1935 advisory opinion concerning *Minority Schools in Albania* mentioned in paragraph 141. The test of nationality and equality before the law should reflect contemporary rules of international law that had emerged since the establishment of the United Nations, such as article 15 of the Universal Declaration of Human Rights[133] and articles 12 and 13 of the International Covenant on Civil and Political Rights.

49. With regard to *refoulement*, international legal instruments on refugees and decisions and principles adopted by the Executive Committee of UNHCR should be taken into account and treated as *lex specialis* in relation to persons who might be defined as refugees or asylum seekers. *Non-refoulement* was a basic principle ensuring that persons in danger of persecution or displaced persons were not deprived of essential safeguards or the minimum right to have their claim heard by the appropriate authorities, which should include representatives of UNHCR. Mass movements of people caught up in armed conflict were a cause of particular concern. The definitions of the terms "expulsion" and "refusal of admission", and the commentary thereto, must therefore not be such as to jeopardize the principle of *non-refoulement*.

50. He endorsed the statement contained in paragraph 176 of the second report regarding the illegality of the practices of extrajudicial transfer and extraordinary rendition, from which the rule of law was totally absent.

51. The practice referred to in paragraph 185 of the second report, whereby States established so-called "international areas" in airports, where aliens were considered to be still outside the national territory, could give rise to abuse. Indeed, such areas could not be considered to be outside the jurisdiction of the State concerned, whose laws and international obligations—including the right to consular assistance—must be respected. There had been cases in which, having served their sentence, aliens were sent back not to their country of habitual residence but to the last port of transit.

52. Lastly, while he found the text of draft article 2 provisionally acceptable, he hoped that the Special Rapporteur would take account of the points he had raised in the follow-up provisions dealing with the legal circumstances delimiting States' action in the field of expulsion of aliens.

53. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that the discussion so far had been two-dimensional, dealing only with the meaning of various terms. No headway would be made until the Commission was clear what the topic was actually *about*. The term "expulsion of aliens" conveyed little, unless accompanied by what common lawyers called "causes of action" or what the ICJ called "basis of claim". Thus, in some cases, expulsion of aliens was accompanied by

[133] General Assembly resolution 217/III of 10 December 1948.

general ill-treatment or torture, or by expropriation, in which case the question of damage to the rights of the State of origin might arise and the issue of diplomatic protection become relevant. Another possibility was that such expulsion might occur quite lawfully in principle but might, for example, involve the expulsion of pregnant women from a remote frontier post in a desert region. That would obviously represent a breach of general international human rights law. If State responsibility arose as a result of an expulsion, the responsibility could arise under general international law or, frequently, under a friendship, commerce and navigation treaty, which might well contain a compromissory clause—a reference to the jurisdiction of the court—and which might therefore be more relevant than general international law. He was confident that the Special Rapporteur would deal with all such matters in due course, but there was little evidence that the Commission had confronted the difficulty yet. As it stood, the definition of scope in the second report was somewhat limited.

54. Mr. KAMTO (Special Rapporteur), responding to Mr. Brownlie's comments, said that the issues raised had been covered in the preliminary report[134] and would be dealt with systematically in future reports, as was made clear in the draft work plan annexed to that document. Thus, the Commission was not in danger of losing sight of the overall picture. For the present, members should concentrate on the two draft articles contained in the second report and, if they deemed appropriate, refer them to the Drafting Committee, which, for its part, could defer their consideration until the thrust of the other draft articles became clear.

55. Mr. HMOUD said that the scope of the topic, as currently defined, dwelt too much on the relationship between the individual and the State. He would favour a more general scope, which concentrated on the legality of a given action and the results of that action. The human rights focus of the present report made it more suitable for consideration by other international bodies. The Commission, however, should take a broader view.

56. Mr. CANDIOTI said that the draft articles represented the mere beginnings of a text, which would need fleshing out. Clearly, the scope of the draft articles could not be restricted to the experiences of individuals but must ultimately deal with the whole regime of the expulsion of aliens. Draft article 1 was a first attempt to determine the scope of a much wider subject.

57. Mr. COMISSÁRIO AFONSO, after paying tribute to the academic distinction of the Chairperson and the competence and professionalism of the Secretary to the Commission, Ms. Arsanjani, commended the second report on the expulsion of aliens, which built on the preliminary report, a document which had also been well received by the Commission and the Sixth Committee. He fully endorsed the Special Rapporteur's methodology and urged him to follow the draft work plan contained in annex I of the preliminary report, making the necessary adjustments as the work progressed. In that connection, he noted that, although detailed and exhaustive, the second report appeared to be silent on some of the concepts contained in the work plan, such as the concept of population exodus, which was surely still relevant to the topic.

58. He accepted the Special Rapporteur's decision to reverse the order in which the scope and the definitions were considered, as indicated in paragraph 43 of the report. It did not seem of fundamental importance which was treated first. The Commission had, in the past, adopted both approaches, and both were equally justifiable.

59. The Special Rapporteur had, in his view, been too cautious in his approach to draft article 1, in paragraph (1) of which the expressions "alien" and "expulsion" that were at the core of the topic did not appear at all. The use of the word "*ressortissant*" in the first paragraph and the word "alien" in the second made the scope seem more like a definition, which would come under draft article 2. A simpler approach would be to state clearly that "the present draft articles shall apply to the expulsion of aliens". The business of defining those concepts would come under the heading "Use of terms", possibly in draft article 2.

60. Secondly, the report in general and the draft articles in particular paid little attention to the concept of the presence of an alien in the territory of a State. A clear definition of the word "presence" would seem to be important, not just because it was linked to the territory but also because it was implicit in and had some connection with the concepts described in paragraphs 154 to 177 of the report, including deportation, extradition, removal and *refoulement*. Indeed, a connection could also be found between presence and non-admission. Although the report rightly considered that non-admission did not fall within the scope of the topic, some caution and prudence were needed in the interests of a broader view. The draft articles should help to clarify the extent to which non-admission was compatible with the concepts enumerated in the report. One example might be the principle of *non-refoulement*, as applied to refugees, whose situation came under the scope of draft article 1, paragraph (2). Granted, the right to admit or not to admit an alien into its territory—like the right to expel or not to expel—was inherent to the sovereignty of a State. There should, however, be restrictions to both. In the case of a person seeking refuge, non-admission by a State would be tantamount to a breach of the principle of *non-refoulement* if there was a well-founded threat to the life or freedom of that person. *Non-refoulement* could, after all, apply even before refugee status had been granted. A closer look at the issue might well be warranted.

61. There was also a more practical dimension to the issue; recent events had borne out the findings of the Secretariat memorandum[135] that States were increasingly resorting to the practice of intercepting illegal aliens who were attempting to reach their shores by sea. At the same time, the developments in the field of irregular immigration and expulsion, which the Special Rapporteur had outlined so well in paragraph 20 *et seq.* of his second report, testified to the need to pay greater attention to the concept of non-admission.

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

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

62. Although the report had demonstrated that the expulsion of aliens was indeed an act, or conduct, which could be attributed to a State, "conduct" appeared to be too general and too broad a term to form a constitutive element of the definition of expulsion, and should be regarded as the exception rather than the rule. Basically expulsion should be defined as an act, in other words a concrete measure taken by the expelling State and effected on the basis of law or of administrative procedures. State responsibility might be a better context in which to deal with conduct by a State which compelled an alien to leave its territory.

63. He was in favour of referring the draft articles to the Drafting Committee with the recommendation that the definitions should follow as closely as possible those already adopted in various international legal instruments.

64. Mr. PELLET said that, although he had always maintained that the expulsion of aliens was not an appropriate subject for the Commission, the Special Rapporteur's excellent preliminary report, which had set the scene, and his clear second report which had, in accordance with good practice, begun with the formulation of definitions, had almost persuaded him to the contrary.

65. The basic reason why, in his view, the topic did not lend itself to progressive development or codification was that the Commission would be required to steer a course between two almost unavoidable pitfalls. The first was that of being over-academic: despite the very substantial human dimension and emotionally charged nature of the subject matter, there was a danger that it might be treated too blandly, in order to avoid arousing opposition. The second was that an excessively militant pro-human rights stance might lead the Commission to adopt well-intentioned draft articles which would be unacceptable to States and therefore completely unrealistic.

66. It was very difficult to strike the right balance because there was no legal reason for choosing between the two alternatives of a bland and sanitized codification exercise and political and moral advances which would quickly be consigned to the graveyard of good intentions. Progress could be achieved on the subject only by making political choices, which was not the Commission's remit. In fact the subject called for negotiation among Governments rather than codification by experts possessing no political legitimacy. The wise opinion reflected in footnote 55 of the second report therefore continued to hold good.

67. For the record, he had been disappointed that the subject had been included rather hastily in the Commission's programme of work,[136] while a much more attractive and useful topic proposed by the Special Rapporteur, that of international protection of persons in critical situations, seemed to have been consigned to oblivion.

68. Despite those grumbles, he commended the Special Rapporteur's presentation of two clear, sound and, on the whole, convincing reports. As to the question raised in paragraph 30 of the preliminary report, namely, how to deal with existing treaty rules on the issue, the Commission should not confine itself to attempting to bridge legal gaps in existing treaty rules or to take those rules up again in the draft articles, but should study the existing rules on the subject, compare them and endeavour to identify general rules, while retaining treaty rules as *lex specialis*.

69. The Special Rapporteur's disquisition on refugees and stateless persons, in paragraphs 57 to 71 and 100 to 104, respectively, of his second report had provided some useful insights and, like Ms. Escarameia, he had particularly appreciated the elucidation of the difference between asylum and refugee status. Nevertheless he still wondered how the Special Rapporteur intended to deal with the question of stateless persons in his study and in future draft articles. Notwithstanding the express reference to them in draft article 1, paragraph (2), it would seem from the definition contained in draft article 2, paragraph (2) (*d*), that the Special Rapporteur deemed refugees to be *ressortissants* of their countries of residence. While in any case they would certainly not lose the nationality of the country from which they had fled, it seemed difficult to contend that refugees had no personal legal bond with their former country even if, simultaneously, they had a link with the receiving country which was not solely territorial. He therefore concluded that the Special Rapporteur's obsession with the term "*ressortissant*" merely created additional complications and did nothing to resolve the problem. Hence he agreed with several previous speakers, who had doubtless read the report in English or Spanish, that the differentiation between "*ressortissant*" and "national" should be abandoned in favour of the much simpler distinction between the nationality or non-nationality of the person expelled.

70. A further reason why the question of the expulsion of stateless persons and refugees should not be included as such in the study was that both categories of persons had a very special status which was clearly and fully determined by positive international law, one with which it would be unwise to meddle. Moreover, the inclusion of stateless persons and refugees in the draft articles would lead the Commission to repeating what was already laid down in existing treaties or, worse, to amending their provisions, something which it had not been asked to do.

71. On similar grounds, he would be less categorical than the Special Rapporteur had been in paragraph 41 of his second report about including the expulsion of aliens in situations of armed conflict within the scope of the topic. In that connection, he dissociated himself from the comments made by some speakers. Humanitarian law, whose well-established rules governed the law of armed conflict, covered expulsion in those circumstances. While the separation between the law of war and the law in time of peace was less marked than it had been in the past, he feared that, if the Commission embarked on the question of expulsion during wartime occupation, it would confuse the two issues and depart too far from a reasonable conception of the topic. On that point he disagreed with Ms. Escarameia.

72. Ethnic cleansing was, however, a different matter. It was regrettable that the term appeared solely in paragraph 114 and that the Special Rapporteur's interest in

[136] *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

the notion and in its relationship with the subject had been confined to a few sparse allusions, for example in paragraph 156. In his own opinion, ethnic cleansing fell within the scope of the topic only when the persons who had been the victims of such cleansing were aliens, which had certainly not been the case in the principal instances of ethnic cleansing in recent years in Europe, namely in Bosnia and Herzegovina. Leaving aside his own hesitations, he considered that the Commission should certainly discuss whether to include ethnic cleansing under the heading of expulsion of aliens.

73. His foregoing remarks did not detract in any way from his generally favourable opinion of the second report and he therefore saw no reason why draft articles 1 and 2 should not be referred to the Drafting Committee. They did, however, require substantial recasting and to that end he would go on to suggest some amendments.

74. Like Mr. Comissário Afonso, he thought that the first paragraph of draft article 1 on scope encroached too far on the definitions contained in draft article 2. Moreover the two draft articles did not appear to be entirely consistent with one another. In draft article 1, the second half of paragraph (2) should be moved to paragraph (1) and paragraph (2) should be worded to read: "The present draft articles shall apply to aliens who are present in the host State/territorial State, lawfully or with irregular status". Nevertheless, he was dubious about the expression "host State" since expulsion was hardly a hospitable action, and, for that reason, "territorial State", "State of residence" or "State in which they are present" might be more suitable terms.

75. Secondly, paragraph (1) of draft article 1 must state whether or not the draft articles applied in the event of an armed conflict. It might be prudent to exclude such a possibility and to concentrate on the law in time of peace, but either way it was necessary to explain which option had been chosen.

76. Thirdly, it must be clearly indicated that the draft articles concerned only natural persons. Perhaps that was axiomatic and it would be sufficient to include an unambiguous statement to that effect in the commentary. Fourthly, he was not opposed to attempting to list in a second paragraph of draft article 1 individual categories to which the draft articles would apply, provided that it was made clear that the list was not exhaustive, as had been done through the inclusion of the phrase "in particular". He was, however, of the opinion that refugees and stateless persons should be expressly excluded by wording to that effect which could form a third paragraph.

77. As for draft article 2, despite the Special Rapporteur's lengthy explanations, he was still convinced that there was nothing to be gained by preferring the term "*ressortissant*" to "national", since it would give rise to confusion and complicate the Commission's deliberations, without offering any countervailing advantages. As the Special Rapporteur had demonstrated, the two words were very often interchangeable, and even in French the distinction between them was far from self-evident. Furthermore, not only did he fail to see any justification for the Special Rapporteur's *cri du coeur* at the beginning of paragraph 129 that "[i]n any case, we will refrain in the context of the present topic from defining 'alien' by invoking the criterion of nationality" but, what was more, that assertion could lead the Commission onto dangerous ground. It would be much simpler to state that, for the purposes of the draft articles, an alien was understood to mean a natural person who did not have the nationality of the expelling State, or of the State in which he was present, or of the State of residence. He really could not fathom the underlying reasons for the much more complicated solution proposed by the Special Rapporteur.

78. He also had reservations about the definition of "*ressortissant*" in paragraph (2) (*d*) of draft article 2. First, the formulation in French was rather dated. According to paragraph 149 of the second report, it had been taken from the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), or from an arbitral award of 1927 (*Falla-Nataf and brothers v. Germany*), but such terminology was no longer used in French at the beginning of the twenty-first century. The phrasing "*par quelque lien juridique ... relève de la compétence*" ("by any legal bond ... comes under the jurisdiction") was old-fashioned and somewhat precious. Obviously, if that had been his only complaint, the Drafting Committee could easily have found a remedy, but he had a more radical suggestion—simply not to employ the word "*ressortissant*", which served no useful purpose in the context of the topic, thus obviating the need for a definition of the term in the draft articles. An alien was certainly a non-national and the wording proposed by Ms. Escarameia seemed entirely apt, especially as the wording in square brackets put forward by the Special Rapporteur in paragraph 194 was evidence of his difficulties and neither of the notions he had suggested—"*juridiction*" or "*compétence personnelle*" ("jurisdiction" or "personal jurisdiction") was very convincing. He would personally favour deleting paragraph (2) (*d*) and replacing the term "*ressortissant*" in articles 1 and 2 with wording such as "a State compels a person not possessing its nationality to leave its territory" or "an alien is a person not possessing the nationality of the territorial State/expelling State/State of residence/State in which he is present", whichever was considered to be more suitable. If the notion of residence was used, it would also be necessary to include that of presence. The decisive proof that the term "*ressortissant*" was inappropriate and that "national" must be used instead was that the French word had been retained in italics in the English version of the report, because it had proved impossible to find any equivalent term in English. Hence the linguistic subtlety of the French expression had been entirely lost, although even in French the precise definition of "*ressortissant*" was doubtful and the more usually accepted term was "national". In fact, the judgments of the ICJ cited by the Special Rapporteur in his second report used the two terms interchangeably [paras. 136–152].

79. As they stood, paragraphs (1) and (2) (*b*) duplicated each other. It would be necessary either to draw a distinction between the two definitions by adopting a more general definition of "expulsion", or to delete subparagraph (*b*). Subparagraph (*a*) referred to the "territorial or expelling State", but there was no mention of "territorial State" elsewhere. The terminology must therefore be unified.

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

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

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

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

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

The meeting rose at 12.55 p.m.

2924th MEETING

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

Chairperson: Mr. Ian BROWNLIE

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

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

[Agenda item 1]

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

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

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

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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

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

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* Resumed from the 2922nd meeting.

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