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Summary record of the 2942nd meeting

Topic:
Expulsion of aliens

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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.

4. Draft article 4, paragraph 2, should be stricter in stating exceptions to the general rule prohibiting the expulsion of nationals. In that connection, the Commission might use the wording of human rights instruments such as the African Charter on Human and Peoples' Rights, as referred to in paragraph 54 of the report. Mr. Pellet had rightly pointed out with regard to paragraph 2 that more attention should be paid to dual nationals. Mr. Dugard had also made an important comment on denationalization and the tragic consequences it might have, since, in Hannah Arendt's words, it deprived the persons concerned "of the right to have rights".[285]

5. With regard to refugees and the general principle of the prohibition of their expulsion, draft article 5 was generally acceptable. As to the explanations given in the report, a distinction could, of course, be made between the institution of asylum, which had an individual connotation, and the concept of refugee, which had taken on a more collective connotation, but, for practical reasons, the term "asylum seekers" had come to mean persons, often in large numbers, who were fleeing situations of conflict, disaster or civil strife and who were in need of immediate protection. They had to be able to have their claim to refugee status given fair consideration and that could take some time. Perhaps paragraph 2 should expressly mention the principle of *non-refoulement*. In that connection, it would be useful for the Commission to have the advice of or a briefing by an international protection officer from the Office of the United Nations High Commissioner for Refugees, who might provide more detailed information, at the next session, on the relevant standards applicable to refugees and asylum seekers.

6. Referring to draft article 6 on the non-expulsion of stateless persons, the word "lawfully" should be retained because there was nothing to prevent a stateless person from having his presence in the host State recognized by that State. Both draft article 5 and draft article 6 were useful, but Mr. Pellet had been right to say that, if those articles were retained, the terminology of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons should be used. He personally was also not in favour of the inclusion of the word "terrorism" in those two articles, since terrorist acts or activities were covered by the words "threat to national security".

7. In draft article 7 on the prohibition of collective expulsion, the words "demonstrated hostility towards the receiving State" in paragraph 3 were too subjective and it would be better to use wording along the following lines: "engaged in hostile activities or behaviour towards the receiving State".

8. Still referring to collective expulsions, he had been surprised to read the last footnote in paragraph 113 of the report, relating to the reply by Brazil to a questionnaire from the Rapporteur of the Organization of American States on migrant workers and their families, which stated that "Brazil gave a rather lengthy reply in order to obscure the fact that, under its legislation, it is possible to practise collective expulsion". Although he acknowledged that the Brazilian reply was not straightforward, he saw no basis for the Special Rapporteur's assumption with regard to the intention of that reply and considered that it might be helpful to clear up some of the points that might have given rise to that misunderstanding. First of all, what was known in Brazil as an "expulsion" was a specific measure taken against an individual who had committed an offence or who was regarded as a threat to national security or public order; it was thus a penalty involving a prohibition on entering the national territory. That was more clearly indicated in the rest of the reply, which could be found on the Internet, since expulsion procedures were individually considered by a competent judge. Account must also be taken of the provisions of the Brazilian Constitution and the fact that the American Convention on Human Rights: "Pact of San José, Costa Rica" expressly prohibited collective expulsions. Brazil was a party to that Convention and had recognized the competence of the Inter-American Court on Human Rights to consider individual cases.

9. In conclusion, he congratulated the Special Rapporteur on his work and said that he was in favour of referring the draft articles to the Drafting Committee.

10. Mr. VARGAS CARREÑO said that he fully agreed with the rules the Special Rapporteur had proposed by way of an introduction in Part One of his report on general principles. Like the Special Rapporteur, he thus considered that the right of the State to expel aliens from its territory was confirmed in positive international law, but must be exercised in conformity with other basic rules of international law or, in other words, as the Special Rapporteur stated, that the right to expel was a right inherent in State sovereignty, even if it was not an absolute right, since it must be exercised within the limits set by international law. Such limits derived from general international law, as embodied in treaties, international custom and the general legal principles that required a State not to act arbitrarily, but in good faith and rationally. Such limits were, however, also defined in specific instruments, especially in the areas of international human rights law, international humanitarian law and international refugee and migrant worker law.

11. He therefore endorsed draft article 3 as proposed by the Special Rapporteur on the right of expulsion, even if its paragraph 2 could be improved. The Commission might adopt Mr. Pellet's suggestion of indicating that expulsion must be carried out in accordance with the rules stated in the draft articles. It would also be advisable to maintain the principle that expulsion must be in conformity with the basic principles of international law. In any event, those principles had their source in international human rights law, based on the relationship of the State with persons in its territory rather than with other States, and the element of good faith was therefore not unnecessary and must be retained as one of the rules on which the expulsion of an alien had to be based.

12. It was very important that the draft articles should contain a provision relating to the prohibition of the expulsion of nationals, which was, unfortunately not a thing of the past: in Chile, for example, during the military regime in place under General Pinochet until the 1990s, hundreds of Chileans had been administratively expelled from their country simply for having been political dissidents. That

[285] H. Arendt, *The Origins of Totalitarianism*, London, George Allen & Unwin, 1962, p. 296.

must not happen again, in any part of the world. The prohibition of the expulsion of nationals was the corollary, or other side of the coin, of the right of all persons to live in their country, an absolute and unconditional right recognized in international instruments, such as article 22, paragraph 5, of the American Convention on Human Rights: "Pact of San José, Costa Rica", article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights and other texts, such as article 12, paragraph 4, of the International Covenant on Civil and Political Rights and article 12, paragraph 2, of the African Charter on Human and People's Rights.

13. A person's right not to be expelled from his country undoubtedly involved a link of nationality with the State in question. Even though international law recognized dual nationality, the draft articles did not have to contain a provision on the situation of dual nationals, especially if what was to be protected was the right of every person not to be expelled from the territory of the State whose nationality he held, whatever the origin of that nationality. As Mr. Pellet had recalled at the preceding meeting, many such expulsions that had taken place in the past had concerned persons with dual nationality. The only exceptions to that right related to extraditions in the case of countries that allowed the extradition of nationals or in the case of the execution of a sentence such as banning, which might be provided for instead of a custodial sentence. None of those situations must, however, be regarded as an expulsion and, in order to make that right absolute, no exceptions should be allowed, and paragraph 2 of article 4 should therefore be deleted and paragraph 3 redrafted in order to guarantee persons who did not reside in the territory of the State of which they were nationals the right to return to that State, either on their own initiative or at the request of the receiving State.

14. Draft articles 5 and 6 on non-expulsion of refugees and stateless persons were generally satisfactory. Particularly as far as refugees were concerned, they reflected the principle of *non-refoulement* provided for in the 1951 Convention, as supplemented by later instruments such as the 1984 Cartagena Declaration,[286] which even allowed the principle of *non-refoulement* to be regarded as a rule of *jus cogens*.

15. Like other members of the Commission, he considered that the provision must not refer expressly to terrorism, a problem that had not yet been conventionally defined. The grounds of national security or public order referred to in paragraph 1 of draft articles 5 and 6 should suffice to meet any concern that might arise in that regard.

16. Draft article 6, paragraph 2, was a truly important provision that formed part of the progressive development of the law and filled a legal vacuum.

17. The prohibition of collective expulsions, as dealt with in draft article 7, must apply both in time of peace and in periods of armed conflict. Collective expulsions had been supported by doctrine in the nineteenth and early twentieth centuries, but, at present, the main regional instruments, such as article 22, paragraph 9, of the American Convention on Human Rights: "Pact of San José, Costa Rica", article 4 of Protocol No. 4 to the European Convention on Human Rights and article 12, paragraph 5, of the African Charter on Human and People's Rights, categorically prohibited collective expulsions of aliens, without making any distinction between time of peace and time of war. That was provided for in article 22, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which also contained an interesting provision stating that: "Each case of expulsion shall be examined and decided individually." For those reasons, draft article 7, paragraph 1, must be retained, even if the situation of migrant workers and members of their families could, in view of its particular importance, be the subject of a separate paragraph of draft article 7.

18. The definition of collective expulsion contained in draft article 7, paragraph 2, was satisfactory, but paragraph 3 should be deleted. It was not easy to determine that a group as such had demonstrated hostility to the receiving State and that provision could give rise to subjective interpretations. In any event, a reasonable and objective examination of the particular situation of each of the aliens forming the group provided for in paragraph 1 might be enough protect the legitimate rights and meet the concerns of the receiving State while protecting the rights of the aliens concerned.

19. He was in favour of referring the proposed draft articles to the Drafting Committee.

20. Mr. PERERA said that, in his third report, the Special Rapporteur discussed the basic principles of international law relating to the expulsion of aliens and described the approach he had adopted in preparing the draft articles as the building of a structure that struck a balance between the right of expulsion as an attribute of State sovereignty and the exercise of that right on the basis of respect for human rights and human dignity. Draft article 3 reflected that attempt to strike a balance between the right of expulsion and the ways it was exercised. In general, he endorsed that draft article.

21. With regard to draft article 4, he agreed with the opinion of some members that the principle of the non-expulsion of nationals must be stated categorically and absolutely as allowing for no derogation. The cases of the extradition or handing over of nationals must be distinguished from the exercise of the right of expulsion. In that connection, as had been suggested, the question of dual nationality might be worth studying. It was a growing problem that gave rise to rather complex questions. It might be discussed in the framework of draft article 4 or, as Mr. Pellet had proposed, dealt with in a separate article.

22. Draft articles 5 and 6 stated the rule that, in general, refugees and stateless persons could not be expelled. Those provisions were in keeping with the general protection granted to those categories of persons in the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons and they belonged in the draft articles. In the case

[286] 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.

of exceptions to the rule, the draft articles reflected the two criteria provided for in the above-mentioned Conventions, namely, national security and public order, which had long been recognized. The key question raised by the report under consideration related to the possibility of making terrorism a third criterion in view of the grave danger which it constituted for the international community and which had not existed in all its present forms and manifestations in the 1950s when the two Conventions had been drafted. While conceding that terrorism could be considered as a danger to national security and public order, the Special Rapporteur made convincing arguments in favour of separate treatment of that problem. He referred to Security Council resolution 1373 (2001) of 28 September 2001, which had been adopted under Chapter VII of the Charter of the United Nations and imposed obligations that bound States both before and after the granting of refugee status in order to guarantee that asylum seekers were not involved in terrorist activities. The obligation to prevent the improper use of refugee status for terrorist purposes had originated in the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism,[287] adopted by the General Assembly in its resolution 51/210 of 17 December 1996, which, for the first time, made it an obligation for States to ensure, before granting refugee status, that the asylum seeker had not participated in terrorist acts, and, after granting refugee status, to ensure that this status was not used to commit terrorist acts against other States or their citizens. Those obligations must, of course, be implemented on the basis of respect for international human rights standards. A practically identical provision was to be found in article 7 of the draft comprehensive convention on international terrorism now being negotiated. From the point of view of progressive development, a definite trend was thus taking shape in the practice of States as reflected in General Assembly declarations, Security Council resolutions and the draft conventions being negotiated on the use of refugee status for terrorist purposes. In the context of the draft articles under consideration, however, the use of the generic term "terrorism" as a ground for derogating from the principle, without reference to specific serious offences, might create more problems than it would solve.

23. There were two options the Commission could consider in that regard. It could either use the term "terrorism" in relation to certain offences as defined in generally accepted multilateral conventions on the suppression of terrorism, or it could adopt the less ambitious and direct approach of incorporating the concept of terrorism in "national security" and "public order", with a detailed commentary on trends in the use of refugee status for terrorist purposes. That would facilitate interpretation and application in the context of changes in the way the terms "national security" and "public order" were being used as derogations from the principle of the non-expulsion of refugees.

24. As to draft article 7, the Special Rapporteur provided a great deal of useful documentation in his report on the implementation of the principle of the prohibition of collective expulsions in time of peace and in time of war. He was to be commended on the explicit reference to "migrant workers and members of their families", since protection was granted to that category of persons by article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Because of the vulnerability of those categories of persons, who must be better protected, he agreed with Ms. Escarameia's proposal that there should be a separate provision on the question.

25. Mr. Petrić thanked the Special Rapporteur for his report, whose basic premise he endorsed. A close study of relatively recent cases of expulsions that had taken place since the Second World War in Europe might help shed some light on the topic. He was thinking, for example, of the collective expulsions authorized by the Potsdam Agreement of 2 August 1945,[288] and those to which Mr. Dugard had referred at the preceding meeting and which South Africa had carried out during the apartheid period after stripping the persons concerned of their nationality.

26. The Special Rapporteur indicated that the right to expel aliens was a sovereign right of the State, but that the State was not authorized to expel its own nationals (draft article 4). Could it be considered that the collective expulsion of nationals was implicitly covered by draft article 4? He also referred to so-called "population transfers", which were in fact collective expulsions.

27. With regard to draft article 3, he did not share Ms. Escarameia's opinion concerning the distinction the Special Rapporteur had drawn between primary and secondary rules. The victims of expulsion enjoyed their fundamental rights, which were of the same nature as the rights of the State to expel aliens, but, in specific cases of expulsion, the fundamental rights of the individual placed procedural limits on the fundamental right of the State to expel. The Special Rapporteur had not tried to establish a hierarchy between the right of the State to expel and the fundamental rights of the individuals expelled. He also agreed with Mr. Pellet's comments on draft article 3: mere "respect for the basic principles of international law" was not enough and might, to some extent, cause confusion. It would therefore be better to adopt the wording proposed by Mr. Pellet and endorsed by Mr. Vargas Carreño and Mr. Saboia, namely, "in accordance with the rules stated in the present draft articles".

28. He agreed with the principles embodied in draft article 4, paragraphs 1 and 2, but considered that the procedural guarantees applicable to the expulsion of an alien should also be applicable to the consent of the receiving State as a condition for the lawfulness of the expulsion. He was nevertheless in favour of referring draft articles 3 and 4 to the Drafting Committee.

29. Like other members of the Commission, he was of the opinion that draft articles 5 and 6 were not really necessary, since the specific problems of refugees and stateless persons were well covered in the 1951 and 1954 Conventions. In fact, the Commission must take a decision of principle: if it wanted to adopt a position *de lege lata*, those two draft articles were unnecessary,

[287] General Assembly resolution 49/60 of 9 December 1994.

[288] *British and Foreign State Papers*, vol. 145, p. 852.

but, if it wanted an approach *de lege ferenda*, a new text was necessary and the reference to terrorism should be retained because it was a fact of life in the modern-day world, despite the lack of a legal definition. Its absence from the draft articles might be interpreted *a contrario* as meaning that expulsion did not apply to terrorists. He was nevertheless in favour of the deletion of those two draft articles.

30. As to draft article 7, he supported Ms. Escarameia's proposal for a separate provision on migrant workers. Referring to paragraph 114 of the report and the footnotes thereto, the Special Rapporteur attached too much importance to the number of persons expelled in determining whether a collective or an individual expulsion was involved. In his own view, it was not so much the number of persons concerned as the lawfulness of the procedure that must be taken into account in distinguishing between the two.

31. At the end of draft article 7, paragraph 3, the words "taken together as a group, they have demonstrated hostility towards the receiving State" should be deleted or redrafted because they had a connotation of collective guilt or collective punishment. It would be better to stress the idea that, even in the event of armed conflict, the collective expulsion of aliens was unacceptable. He nevertheless agreed that draft article 7 should be referred to the Drafting Committee.

32. Mr. McRAE thanked the Special Rapporteur for his report, which shed good light on the practice of States in respect of expulsion. Although he agreed with the basic principle stated in draft article 3, paragraph 1, he thought that the words "fundamental principles of international law" introduced unnecessary complexity. Like Mr. Pellet, moreover, he considered that the distinction between primary and secondary rules was not really necessary because it gave the impression that customary international law in general was not taken into account. In his view, reference should be made simply to international law, and not only to the draft articles, since this emphasized that the right of expulsion was not unlimited.

33. Draft article 4 related to the expulsion of nationals and he wondered why that question was dealt with in draft articles on the expulsion of aliens. In that connection, he agreed with Mr. Dugard, who was of the opinion that, if the Commission wanted to include nationals in the draft articles, it should discuss the question of denationalization prior to expulsion and then deal specifically with the situation of persons with dual nationality or multiple nationalities.

34. Like Mr. Pellet and Mr. Petrić, he thought that the inclusion of some provisions of the 1951 and 1954 Conventions in draft articles 5 and 6 might create some confusion; it would suffice to say that the expulsion of refugees was governed by the 1951 Convention and the expulsion of stateless persons, by the 1954 Convention. Draft article 4, paragraph 2, was also somewhat problematic because, if reference was to be made to "exceptional reasons", it must at least be explained what those exceptional reasons were.

35. In draft article 5, the Special Rapporteur proposed that reference should be made to terrorism. In his own view, "grounds of national security or public order" included "grounds of terrorism", but the real question was whether the Commission wanted to include a reference to terrorism in the draft articles or whether it preferred that States should do so. If it did not do so, States would. It was therefore better for the Commission to do so because it could thus circumscribe the issue, as Mr. Perera had indicated.

36. The fact of applying draft article 6 only to stateless persons "lawfully" in the territory of a State gave rise to a problem because stateless persons "unlawfully" in the territory of a State should also benefit from protection. The question was whether the same type of protection should be provided. A distinction should be drawn between those two types of stateless persons, but without excluding those in an unlawful situation from the draft articles.

37. He agreed with the reservations expressed with regard to draft article 7, paragraph 3, on measures of collective expulsion in the event of armed conflict. The Commission must not depart from the fundamental principle that expulsion had to be applied on an individual basis. A general provision thus worded would make it possible to target groups in which some members might have engaged in hostile activities. If the Commission followed Mr. Pellet's reasoning that collective expulsion might be in the interest of the group, it would have to be clearly stated that it was justified in order to protect the group.

38. In conclusion, he agreed that draft articles 3 and 7, and draft article 4, could be referred to the Drafting Committee if the Commission was of the opinion that the case of nationals should be included. Draft articles 5 and 6 could be referred to the Drafting Committee as well, subject to the reservation he had mentioned concerning the conventions on refugees and stateless persons.

39. Mr. CAFLISCH thanked the Special Rapporteur for his report, whose rigour and attention to practice he greatly appreciated. With regard to terminology, he wondered whether the word "non-expulsion" might not be replaced by the words "prohibition of expulsion" or "prohibition on expelling".

40. Draft article 4, which related to the prohibition of expulsion by a State of its own nationals, raised the question of dual nationals, as well as that of denationalization prior to expulsion. Those two questions would have to be settled either in draft article 4 or in one or two separate provisions. Basically, he could not yet see how the problem of dual nationality was to be solved. Denationalization prior to expulsion must quite simply be prohibited. Exceptions to the prohibition of the expulsion of nationals should, moreover, be defined as precisely as possible. The words "for exceptional reasons" did not fully meet that requirement. He nevertheless agreed on the need, as provided for in draft article 4, paragraph 2, not to expel nationals, even "for exceptional reasons", unless the receiving State so consented.

41. He appreciated the explanations that preceded draft article 5 on the expulsion of refugees, as well as the relative precision of the wording describing the reasons allowing a State to derogate from the prohibition on expelling a refugee, but he had not yet decided whether terrorism should be mentioned, although Mr. Pellet's arguments in that regard were quite interesting.

42. Referring to draft article 7 on collective expulsions, he welcomed the way in which the Special Rapporteur dealt with the question of the expulsion of enemy nationals in time of conflict, i.e. "prudently". Despite wording that was somewhat inexact, such as "they have demonstrated hostility" and "taken together as a group", draft article 7, paragraph 3, was generally acceptable.

43. Subject to his comments on draft article 4, he agreed that draft articles 3 to 7 could be referred to the Drafting Committee.

44. Mr. PELLET, referring to the condition relating to the consent of the receiving State laid down in draft article 4, paragraph 2, said that, when an alien was expelled, he was either sent home or the approval of the receiving State was required. In any event, that alternative should be referred to somewhere; hence, as far as aliens were concerned, paragraph 2 did not belong in draft article 4.

45. Mr. KAMTO (Special Rapporteur) said that the destination of the person expelled would be dealt with later. With regard to the expulsion of nationals by a State, precision was necessary and a provision to that effect must be included in the draft articles.

46. Mr. GAJA said that the Special Rapporteur's third report contained a number of useful proposals which did not contest the principle that a State was authorized to expel aliens, but tended to impose some restrictions designed to provide greater protection for the individuals concerned. Restrictions applicable to expulsion should be affirmed in the same paragraph as the right of the State. The Commission did not have to look for the basis for those restrictions in general international law or the general principles of law. It could simply identify a general trend in favour of such restrictions in human rights instruments and the practice of the relevant treaty bodies.

47. Although he agreed with the tenor of draft article 4, paragraph 1, he had some reservations about the exception provided for in paragraph 2. He could understand that, in some cases, the presence in the territory of a State of a former emperor or dictator might be a security risk, but such exceptional situations were not important enough to be mentioned. Moreover, since most human rights instruments prohibited the expulsion of nationals, none of them clearly provided for exceptions, and practice in relation to exceptions was limited, if not nonexistent, he would prefer draft article 4, paragraph 2, to be deleted, thereby supporting the position of some of the speakers who had preceded him, but perhaps not for the same reasons. As Mr. Caflisch had suggested, one should consider whether the prohibition of expulsion should not be extended to persons who were not nationals, but who were closely linked to the State concerned. Draft article 6 on non-expulsion of stateless persons was designed to protect stateless persons, but only to a certain extent. However, a specific provision prohibiting expulsion in certain cases ought to go farther than the 1954 Convention. In the views it had adopted in 1996 in *Stewart v. Canada*, the Human Rights Committee had cited a number of cases in referring to article 12, paragraph 4, of the International Covenant on Civil and Political Rights, which provided that "[n]o one shall be arbitrarily deprived of the right to enter his own country", without expressly mentioning nationality. The Human Rights Committee referred to "nationals", but also to persons having "special ties to or claims in relation to a given country". The Human Rights Committee also included "long-term residents", "nationals of a country who have there been stripped of their nationality in violation of international law and … individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them" and finally referred to long-term immigrants [paras. 12.1 to 12.8 of the decision]. That list of special cases was in no way exhaustive and should be completed.

48. In paragraphs 41 and 42 of his report, the Special Rapporteur referred in the context of nationality to the existence of family ties as grounds for the prohibition of expulsion. That question should be considered separately because it also related to immigrants who had been residing in the country for a relatively short time. He did not understand why reference was made in paragraph 46 to the practice of certain countries that did not expel the persons in question, on ethnic and other grounds, as being closely linked to the majority of nationals. That restriction was based only on the internal law of certain States, so that no general conclusion could be drawn. It also reflected a nationalistic approach that was not unlawful, but should not be encouraged.

49. He supported the principle of the prohibition of collective expulsion in time of peace and the way it was set out in draft article 7. He nevertheless considered that the risks frequently run by persons, particularly large numbers of persons, who were subjected to collective expulsion should be emphasized more than had been done in the commentary. The tragic cases that had occurred over the years showed that such persons were often treated inhumanely and even lost their lives.

50. Mr. HASSOUNA said that he agreed with the structure of draft article 3, which struck a balance between the right of the expelling State and the rights of the expelled person. Thus, paragraph 1 recognized the right to expel an alien as an established principle of international law, while paragraph 2 restricted the exercise of that right under the principles of international law. In that context, it was indicated that the State must act in good faith and on the basis of respect for its international obligations. In his view, a general reference to international law might be enough, but, if more precision was required, a reference to the fundamental rights of the expelled persons might be added.

51. With regard to draft article 4 on non-expulsion by a State of its nationals, he was grateful to the Special Rapporteur for having used the terms "*ressortissant*" and

"national" of a State as synonyms, thus taking account of the comments made by various members of the Commission during the consideration of the second report.[289] Noting that draft article 4, paragraph 2, referred to the possibility for a State to expel its own national "for exceptional reasons", he said that this rather vague term should be clarified and explained in order to prevent any kind of abuse. According to draft article 4, paragraph 3, a person expelled from his own country had the right to return to it at any time at the request of the receiving State, but he thought that the right of return should also be granted in the case where the ground for the expulsion had ceased to exist, for example, if there was no longer any reason for the expulsion because new evidence had been uncovered in the context of legal proceedings.

52. He welcomed the fact that the two categories of persons dealt with in draft article 5 (Non-expulsion of refugees) and draft article 6 (Non-expulsion of stateless persons) had been included in the draft articles despite the existence of a statute or legal regime applicable to them in treaty law and customary international law. The draft articles on the expulsion of aliens could supplement those specific legal regimes without contradicting them.

53. Draft article 5, paragraph 1, included reasons of "national security" and "public order" as grounds for the expulsion of a refugee, but the meaning of those terms was broad enough to cover any act of terrorism of which a refugee might be suspected or guilty. It was therefore not necessary to refer specifically to terrorism, particularly as international efforts to agree on a definition of terrorism had still not been successful. If, however, some members considered that the Commission should refer to terrorism in its draft articles in order to emphasize the importance of that problem at the present time, the term "national security" might be explained in the commentary.

54. In draft article 6, paragraph 1, it would be better to delete the word "[lawfully]" and distinguish in the commentary between lawful and unlawful residents. He also thought that the words "[or terrorism]" should be deleted for the reasons he had just explained. In paragraph 2, he agreed with the Special Rapporteur's suggestion that reference should be made to the intervention of the expelling State to find a host State for the expelled stateless person, since that was a matter of the progressive development of international law.

55. The prohibition of collective expulsions, as dealt with in draft article 7 on prohibition of collective expulsion, was based on rejection of the concept of collective guilt that was widely present in international human rights law and international humanitarian law. Collective expulsions were contrary to the provisions of most regional human rights conventions, such as the Arab Charter on Human Rights, article 26, paragraph 2 of which provided that the collective expulsion of aliens was prohibited "under all circumstances". The order of the paragraphs of draft article 7 should be inverted so that the definition of collective expulsion came before its prohibition; the word "reasonable" in paragraph 1 should be replaced or even deleted because of its ambiguous connotation; and the reference in paragraph 3 to "[f]oreign nationals of a State… taken together as a group, [demonstrating] hostility towards the receiving State" should be replaced or amended. Lastly, he agreed with the suggestions that particular attention should be paid in some draft articles to a number of important and topical questions as the expulsion of migrant workers, dual nationality and denationalization. In conclusion, he supported the referral of draft articles 3 to 7 to the Drafting Committee.

56. Mr. WISNUMURTHI said that the research the Special Rapporteur had conducted and his clearly-worded analysis of State practice, judicial decisions, arbitral awards and *opinio juris* had enabled him to understand the bases on which the five draft articles had been prepared. In that regard, however, he considered that draft article 3, paragraph 2, on the right of expulsion did not sufficiently reflect the different limitations mentioned by the Special Rapporteur. Of course, mentioning all of them would overload the paragraph. In order to solve that problem, there were three possibilities: first, delete the second sentence of paragraph 2 and keep only the first; secondly, delete the second sentence, keep the first and add a provision, perhaps a new paragraph 3, referring to *pacta sunt servanda*, good faith and the requirement of respect for *jus cogens*; and, thirdly, on the basis of what Mr. Pellet had proposed, amend paragraph 2 by stating simply that expulsion must be carried out in accordance with the provisions of the treaty or convention in question.

57. In draft article 4 on non-expulsion by a State of its nationals, the words "for exceptional reasons" in paragraph 2 were too general and might give rise to multiple interpretations. Perhaps the Special Rapporteur could explain why he had not used the same terms as in draft article 5, paragraph 1, i.e. "on grounds of national security or public order", while, in paragraph 55 of his report, he used the words "national security". He therefore proposed that the words "for exceptional reasons" should be replaced by the words "for reasons of national security".

58. Draft article 4, paragraph 3, confirmed the right of a person expelled from his own country to return to his country of nationality, only at the request of the receiving State. Did that mean that, if the receiving State did not make such a request, a national could not exercise his right to return to his country of nationality? Perhaps the Special Rapporteur could clarify that point. Still with regard to draft article 4, he agreed with Mr. Pellet and Mr. Dugard that the Special Rapporteur should broaden the scope of the provisions on non-expulsion of nationals to include persons with dual or multiple nationality.

59. Referring to draft article 5 on non-expulsion of refugees, he agreed with the Special Rapporteur's arguments in paragraph 76 of his report that terrorism justified special treatment and that this was the approach taken by the international community in dealing with acts of terrorism, which were not considered ordinary crimes. That was reflected not only in a number of Security Council resolutions, but also in the final document of the 1995 World

[289] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573. See also the 2923rd to 2926th meetings above.

Summit for Social Development.[290] For those reasons, he was of the opinion that the words "or terrorism" in draft article 5, paragraph 1, should be retained. He nevertheless shared the concern of some members that the use of the word "terrorism" separately from the words "national security" might imply that terrorism was not covered by the words "national security". In order to solve that problem, he proposed that the words "including terrorism" should be added after the words "national security".

60. His opinion concerning the need to include the word "terrorism" in draft article 5 also applied to draft article 6 on non-expulsion of stateless persons and, in particular, its paragraph 1. He proposed that the square brackets around the word "lawfully" should be removed, in conformity with the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. Paragraph 2 of draft article 6 did not give rise to any problems, but he did wonder about the words "in agreement with the person" in square brackets. In the situation referred to in the second sentence of paragraph 2, was it really necessary for a State to ask for the stateless person's agreement before it could expel him?

61. Draft article 7 on the prohibition of collective expulsion did not give rise to any difficulty. He supported Ms. Escarameia's proposal that, in paragraph 1, the word "reasonable" should be replaced by the word "fair".

62. In conclusion, he agreed that draft articles 3 to 7 should be referred to the Drafting Committee.

63. Mr. VASCIANNIE said that, according to the Special Rapporteur, the right of expulsion was an inherent right. States had that right because they were States. They could expel persons because they had the "natural" right to do so, and it emanated from their sovereignty. He was not enthusiastic about that approach, which was based on writings and arbitral decisions relating to expulsion. He would prefer the right of expulsion to be grounded in customary law so that it would then have no "inherent" status and would be subjected it to the same processes of change and development as other customary rules. When reference was made to an "inherent" right, it was not known exactly whether it had a special status in relation to other rules of law which might in fact restrict the right of expulsion. Of course, that was purely a matter of policy preference and, if the facts led the Special Rapporteur to the conclusion that the right of expulsion had traditionally been and continued to be regarded as an inherent right, the facts must then be respected. In that connection, he nevertheless noted that one of the authorities in that field, Mr. Goodwin-Gill, tended to regard the right of expulsion as a positive right that had developed from the practice of States and *opinio juris*, and not necessarily as an inherent right.[291]

64. His second general comment related to the question of human rights. Noting that, in several parts of his report, the Special Rapporteur carefully evaluated the role of human rights in relation to the right of expulsion, he wondered, also from a policy perspective, whether more emphasis might not be placed in certain places on the impact of human rights developments that had taken place since widespread acceptance of the International Covenant on Civil and Political Rights. The point was not that the Special Rapporteur relied unduly on end-of-century State practice, for such practice still had evidential weight. He was simply suggesting that the Special Rapporteur might place greater emphasis on certain human rights, as Ms. Escarameia had pointed out, with more details and greater clarity.

65. As to the content of the draft articles, he agreed with the wording of draft article 3, paragraph 1, but he had some reservations about paragraph 2 because it could be considered, as Mr. Pellet had said, that it merely stated the uncontroversial point that expulsion must be carried out in compliance with the basic principles of international law. He personally thought that, quite apart from that statement of the obvious, the main problem to which that article gave rise was that it was limited to saying that a State must act in good faith and in compliance with its international obligations. Perhaps the Special Rapporteur should incorporate in the text of that draft article some of the specific rules of international law that actually limited the right of the expelling State. For example, article 13 of the International Covenant on Civil and Political Rights provided that an alien lawfully in the territory of a State party could be expelled "only in pursuance of a decision reached in accordance with law" and it embodied safeguards that the expulsion decision would be reviewed. Similar wording could be included in draft article 3, paragraph 2, to reflect those procedural rules, which were important because they were also substantive rules. The Special Rapporteur might also question whether the exercise of the right of expulsion provided for in draft article 3, paragraph 1, should not be limited when it was nearly certain that the person being expelled would be subjected to torture and other forms of inhuman treatment in breach of the Covenant. It might be mentioned in the body of draft article 3, paragraph 2, or in the related commentary that the State must take account of a number of elements before carrying out the expulsion of an alien. In some countries, the length of residence, conduct and family or community ties were examined, as part of the expulsion process, if such elements had not risen to the level of customary law. Those were humanitarian considerations that States should be encouraged to bear in mind when they were about to hand down an expulsion order.

66. He could support draft article 4 as proposed by the Special Rapporteur, but, as part of the codification and progressive development of international law, he could also support a provision simply stating that a State could not expel its nationals. The exception to that rule now set out in paragraph 2 was not easy to justify and it was, in addition, sharply limited by paragraph 3; those two paragraphs should therefore be deleted.

67. In draft article 5, the inclusion of a provision relating to refugees might help strengthen the notion that the principle of *non-refoulement* was part of customary law

[290] Report of the World Summit for Social Development (Copenhagen, 6–12 March 1995), A/CONF.166/9, Resolution I, Annex 1 (Copenhagen Declaration on Social Development) and Annex II (Programme of Action of the World Summit for Social Development).

[291] G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 21–22.

and, consequently, dissuade States from thinking about denouncing the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. However, Mr. Pellet had made the point that deviating from the approach adopted in the 1951 Convention might weaken the system of protection established by that instrument. The Commission therefore had to be cautious in wording draft article 5 in order to prevent it from appearing to derogate from the regime established by the 1951 Convention and the 1967 Protocol. It was also not necessary to keep the words in square brackets in draft article 5, paragraph 1; however terrorism was defined, it constituted a danger to national security and public order and was thus already covered.

68. Draft article 6 was acceptable, provided that the terms "lawfully" and "terrorism" were not retained and it was specified that, if a stateless person could not find anywhere to go or the State expelling him could not find a State willing to receive him, he should be authorized to remain in the country wishing to expel him. The approach taken in draft article 7 was appropriate, but paragraph 3 could be amended in order better to protect individuals and avoid any possibility of collective guilt. In conclusion, he said that he was in favour of referring the draft articles to the Drafting Committee, even though he had reservations about draft article 3.

69. Mr. NOLTE said that he agreed with most of the Special Rapporteur's views and suggestions and would therefore speak only on the points on which his own views differed. Like several other members of the Commission, he had some reservations about the methodological approach adopted by the Special Rapporteur and, while he fully endorsed the basic premise stated in draft article 3 that the right of a State to expel aliens was not absolute, he would explain the limitations applicable to the exercise of that right in a slightly different way. The main limitations were human rights as derived from treaties and customary international law, including rules of *jus cogens*. He would thus not emphasize, as the Special Rapporteur did, the "limits inherent in the international legal order" because they basically involved inter-State relations, not international law relations between a State and an individual. In his opinion, the second sentence of draft article 3, paragraph 2, should be amended to read: "In particular, the State must respect its obligations arising from human rights." As Mr. Gaja had suggested, moreover, paragraphs 1 and 2 should be combined in order to make the principle a more unitary one. Apart from the question of the basis and limits of the right of expulsion, he agreed with Ms. Escarameia that the distinction between the internal and external limits of the right of expulsion did not serve much purpose, and with Mr. Pellet and Mr. McRae that the distinction Herbert Hart had drawn between "primary rules" and "secondary rules"[292] did not really fit in the present study.

70. With regard to draft article 4, he agreed with the principle stated in paragraph 1 that a State could not expel its own national, but, like several other members of the Commission, he was not sure whether the exception stated in such vague terms in paragraph 2 ("for exceptional reasons") was well founded. After all, the cases cited by the Special Rapporteur to justify it related mainly to extradition, not to expulsion. He was also not sure whether the Special Rapporteur was reintroducing his initial interpretation of the concept of "*ressortissant*" in paragraph 43 of his report in order to extend the concept of "national", which had apparently been agreed on as being the opposite of that of "alien". The Special Rapporteur used that usual interpretation of the concept in paragraph 28 of his report, but the reference to the decision of the Human Rights Committee in the *Stewart v. Canada* case (para. 43 of the report) was not sufficient. While agreeing that the questions raised by Mr. Gaja about the term "national" were worth asking, he did not think that they belonged in a draft article relating to "*ressortissants*".

71. Referring to draft articles 5 and 6 relating to refugees and stateless persons, respectively, he supported the view expressed by Mr. Pellet and other members such as Mr. McRae and Mr. Petrić that the Commission should not use language different from that of the 1951 and 1954 Conventions. He did, however, fully agree with the principle stated in draft article 7 and wished to refer in that regard to certain experiences that had not been mentioned in the report. Under the Nazi regime, Germany had carried out terrible, inexplicable mass expulsions as a prelude to the Holocaust and as part of the aggressions it had perpetrated during the Second World War. It must also not be forgotten that, after the war and as a reaction to the German aggression, over 10 million Germans had been expelled from their homeland. It was of course not a matter of relativizing German guilt, but it was conceivable that the collective expulsions of Germans after 1945 would not be justified today. As to the text of the draft article, he agreed with the Special Rapporteur's view, as further explained by Mr. Pellet, that the words "reasonable and objective examination" in paragraph 1 were better than the word "fair", as suggested by Ms. Escarameia. The word "reasonable" was probably more helpful for the victims of collective expulsions than the word "fair" because it left more room for considerations other than legal process. Referring to draft article 7, paragraph 3, he shared Ms. Escarameia's doubts about the words "taken together as a group, they have demonstrated hostility towards the receiving State", which were too vague and general and thus gave a State engaged in armed conflict too easy an excuse for carrying out an unjustified collective expulsion. It would be better to apply the principle of the distinction drawn in international humanitarian law between civilians and combatants, with the result that only the members of the group who had actually behaved in a clearly hostile manner would be liable to expulsion in time of war.

72. On the basis of those comments, he agreed that draft articles 3, 4 and 7 should be referred to the Drafting Committee. He nevertheless shared Mr. Pellet's view that the Commission as a whole should decide whether the draft articles should contain rules relating to refugees and stateless persons and, if so, whether such rules should deviate from the relevant conventions. He personally did not endorse either of those two options.

[292] Hart, *op. cit.* (see footnote 284 above).

73. Mr. HMOUD commended the Special Rapporteur on his third report on the expulsion of aliens, which gave a good overview of theory and practice in that regard. The Special Rapporteur had adopted the approach of reconciling different political and legal considerations and giving an overview of the formulation of the rules of international law relating to the expulsion of aliens. The fact was that the State had a set of powers enabling it, for example, to control its territory and conduct its internal affairs for the purpose of safeguarding its interests and its security. However, the rights deriving from those powers, particularly the right to expel aliens, were not of an absolute nature in international law. The right of the expelling State was thus limited by other considerations linked primarily to human rights such as the right to lawful and non-arbitrary proceedings. The State had discretionary power by which it could decide whether aliens could be present in its territory in return for respect for its internal procedures, but it had to fulfil its obligations under international law and, in particular, act in good faith and respect its human rights obligations. In that context, draft article 3 struck a suitable balance between the rights of the State and its obligations under international law.

74. There was at first glance no reason to consider the question of the expulsion by a State of its own nationals in draft articles relating to the expulsion of aliens. Although those two questions received different legal treatment, they shared a number of principles which served as the basis of human rights in international law. In addition, practical problems arose in the case of dual nationality or the effective nationality of the person in question, and that justified the inclusion in the draft articles of certain principles relating to the expulsion of nationals. International law offered maximum protection to nationals against expulsion from their State of nationality and the source of the obligation of the State not to expel its nationals was to be found in international law, as the practice of States, some human rights instruments, jurisprudence and doctrine showed. It could, however, be asked whether there were any exceptions to the rule. Draft article 4, which authorized a State to expel its nationals "for exceptional reasons", allowed a State the possibility of abuse and such "exceptional reasons" would have to be defined so that the expulsion of a national would appear to be an extreme measure of last resort. The extradition of nationals was not prohibited in international law, however, and the wording of the relevant draft articles should reflect the fact that the extradition of nationals was not subject to the rules prohibiting their expulsion.

75. He stressed once again that draft articles 5 and 6 dealt with questions relating to the international law applicable to refugees and stateless persons, and establishing hybrid principles in the present draft articles in order to protect that category of persons from expulsion amounted to the rewriting of the international law on those two issues. The 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons had codified the protection of refugees and stateless persons, including the protection of such persons from forced return and expulsion. State practice was abundant, and those Conventions could be amended only in accordance with certain procedures. In his report, the Special Rapporteur drew attention to the "gaps" in the 1951 Convention with regard to the protection of refugees in time of war. It was not, however, the Commission's task to redefine the concept of "refugee" and to include a principle of the prohibition of such persons in its draft articles, for that would not strengthen the protection of refugees fleeing an armed conflict. Even if draft article 5 was adopted as it stood, a State bound only by the definition of "refugees" contained in the 1951 Convention would be bound only to protect against the expulsion of refugees covered by that definition and persons who had become refugees as a result of war would be excluded from the scope of that protection.

76. The temporary protection of refugees in time of war outside the framework of the 1951 Convention ended when the conflict ended. The refugees must then return to their country, even *en masse*, and that was, on the face of it, contrary to draft article 7 on the prohibition of collective expulsion. That example showed the type of problems to which the draft articles could give rise if they applied to the expulsion of refugees or overlapped with the law relating thereto. Draft article 5 reproduced the wording of articles 32 and 33 of the 1951 Convention in such a way that it had the effect of altering the scope of article 33, which applied to any refugee, whether "lawfully" or "unlawfully" in the territory of the receiving State, and prohibited expelling or returning a refugee to a country where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Under that article, moreover, the refugee could be returned only if there were serious reasons for regarding him as a danger to national security or if he had been convicted as a result of a final judgement, but draft article 5 applied only to refugees "lawfully" present in the territory of the receiving State, and that was contrary to article 33 of the 1951 Convention. Consequently, draft articles 5 and 6 should be replaced by articles providing that the expulsion of refugees or stateless persons was subject to the rules of international law and the legal obligations of the receiving State.

77. International practice showed that States had different opinions on the question of collective expulsion and that no universal rule prohibiting that practice seemed to exist. A principle of that kind, together with exceptions, nevertheless seemed to be emerging from regional practice. A State that enforced its own laws in a "non-arbitrary" manner should be in a position to expel a group of individuals in strict conditions, provided that it respected the right to due process of each individual making up the group. The adoption of an absolute prohibition of collective expulsion was therefore contrary to the power of the State with regard to the conduct of its internal affairs. Although the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families prohibited collective expulsion, there was no reason for a specific provision of the draft articles to be devoted to migrant workers. That Convention had been in force only since 2003 and the prohibition of expulsion for which it provided was more a treaty obligation than an obligation of customary

international law. As such, that obligation must remain in the Convention as an obligation on its own merits and not be stated in the draft articles in favour of migrant workers. Consideration should also be given to the question whether the definition of collective expulsion as the expulsion of a "group of aliens", as taken from the work of the European Commission on Human Rights, should or should not be further refined. What did the term "group of aliens" mean? Did it reflect a specific number or must it be considered that a group of aliens was one regarded or treated as such by the expelling State? Must it be considered that a State which expelled a large number of persons whose residence permits had expired was carrying out a collective expulsion (even though it applied due process of law and did not contravene the principle of non-discrimination)? The answer to those questions would determine whether the act in question came within the definition of collective expulsion or was an exception to the principle of the prohibition of collective expulsion.

78. The practice of States with regard to expulsion in time of war was mixed. The law of armed conflict did not prohibit the expulsion of aliens from the territory of a belligerent State and he was not in a position to support the Special Rapporteur's view that the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV) implicitly prohibited such a practice. If it did, a provision to that effect would have been included in that text, as in the case of an occupying Power which proceeded to transfer its own civilian population to the territory it occupied. Nonetheless, such considerations should not prevent the Commission from deciding to prohibit collective expulsion, provided that the rule was accompanied by broader exceptions than those provided for in time of peace. Such exceptions should be applied only in the light of considerations of high national security and after all the other possible options had been exhausted. In conclusion, he was in favour of referring draft articles 3, 4 and 7 to the Drafting Committee. He would like draft articles 5 and 6 to be amended in accordance with the suggestions just made.

The meeting rose at 12.55 p.m.

2943rd MEETING

Thursday, 26 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, 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. Mr. FOMBA congratulated the Special Rapporteur on his highly erudite and instructive third report on the expulsion of aliens (A/CN.4/581), with its emphasis on thorough research and rigorous analysis. The general aim was twofold: first, to strike a balance between the interests of the expelling State and those of the expellees; and secondly, to identify balanced general principles resting on *lex lata*, or *lex ferenda* if necessary—a difficult and sensitive exercise in which the Special Rapporteur had succeeded brilliantly. He broadly endorsed the Special Rapporteur's views concerning the method of work and the conceptual basis of the draft articles.

2. Draft article 3, paragraph 1, was well founded in international law and practice regarding the right of expulsion, and the content of paragraph 2 was convincingly explained in paragraph 22 of the report. While the wording of that draft article should certainly underscore the need to respect the fundamental principles of international law, the formulation "in accordance with international law" might be sufficient. There was no need to go any further and place particular emphasis on such axiomatic legal principles as good faith and compliance with international obligations.

3. *Prima facie* there was reason to doubt the wisdom of referring to the non-expulsion by a State of its own nationals in the context of the expulsion of aliens, since the terminology could seem vague and contradictory, as was illustrated by the fact that in draft article 4, paragraph 1, the Special Rapporteur had decided to use the terms "*ressortissants*" and "nationals" as synonyms, yet in paragraph 43 of the report he stated that the principle of non-expulsion of nationals should be understood in the broad sense, as applying to "*ressortissants*" of a State. Hence, it would seem that the notion of "*ressortissant*" was wider in scope than that of "national", which made it all the more vital to determine which categories of persons were covered. The clear and logical explanation set out in paragraph 43 should, however, remove any doubts as to the pertinence of the draft article. In any event, the fact remained that the notion of "alien" could be understood only by reference and in opposition to that of "national", and that the question of the equal or unequal treatment of aliens as compared with nationals and its implications for expulsion were an underlying element of the Special Rapporteur's conceptual approach.

4. The uncertainty therefore related to whether draft article 4, paragraph 1, should refer to "its own nationals" or "its own *ressortissants*". If the term "national" in the strict sense were to be retained, that would leave unresolved the question of the status of a person who had been stripped of his or her nationality but who had not acquired another nationality and who was being expelled from the territory of his or her former national State. On the other hand, if the term "*ressortissant*" were to be retained, that would make it possible to cast a wider net