Document:-
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Summary record of the 3002nd meeting

Topic:
<multiple topics>

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66. However, the example of countermeasures provided by the IMF, which, as the Special Rapporteur pertinently observed in paragraph 63 of his report, pertained to sanctions that an international organization might take against one of its members and should not be considered as countermeasures, underscored the need for a cautious approach to the question. He therefore endorsed Mr. McRae's suggestion to restrict the scope of draft article 19 by deleting the word "reasonable" in the phrase "reasonable means" in paragraph 2. He also had some difficulty with the words "lawful countermeasures" in paragraph 1, although the Special Rapporteur had explained that his intention had been to emphasize the lawful nature of the countermeasures in the context of circumstances precluding wrongfulness. The Drafting Committee might wish to give those and other points further consideration. He also looked forward to the forthcoming meeting with the legal advisers of international organizations for additional clarifications in the light of their organizations' practice.

67. Mr. DUGARD said that he held a minority view in that he wished draft article 5 to be reconsidered in the light of relevant judicial decisions. He wished to know how the Special Rapporteur intended to deal with the Commission's discussion of that matter. If the majority agreed that the text of draft article 5 should remain unchanged, he presumed that substantial changes would be made to the commentary thereto in order to reflect the discussion.

68. Mr. GAJA (Special Rapporteur) said that his intention was to draw conclusions on the basis of the discussion of the topic and submit certain proposals to the Drafting Committee. Once the Drafting Committee had reviewed these proposals and the relevant draft articles had been adopted by the plenary, he would revise the commentaries to reflect any changes made and also refer to elements of practice. It would seem strange for the Commission to produce commentaries to the draft articles without considering *Behrami and Saramati*, although the commentaries were not the appropriate place to express critical views of that decision. He therefore intended to refer briefly to how the criterion of effective control had been applied in the decision of the European Court of Human Rights. The commentaries would, of course, be submitted to the plenary for approval.

69. Mr. NOLTE said that while he shared Mr. Dugard's view regarding the European Court of Human Rights decision in the *Behrami and Saramati* case, he would be reluctant for the Commission to reopen the debate on draft article 5. The Court had not purported to try to change the approach of the Commission, but merely to apply draft article 5 to the special situation of the United Nations.

70. Mr. CAFLISCH agreed with Mr. Nolte: the Court had not had international responsibility in mind when dealing with the case, but instead the jurisdiction *ratione personae* of the Court. The Commission was therefore not obliged to take into account the Court's jurisprudence, not because it was in any way inferior, but because it dealt with a different issue.

The meeting rose at 12.35 p.m.

3002nd MEETING

Friday, 8 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. HASSOUNA said that the fact that the Special Rapporteur had enriched his report with the views of Member States for the first reading of the draft articles was perhaps a break with tradition, but it was certainly a valuable one in a field where there was little practice. The Commission was faced with the dilemma of how to deal with the issue of invocation by an international organization of the international responsibility of a State, a matter lying outside the scope of the draft articles as defined in article 1. The issue proved the close interrelationship between the responsibility of States and the responsibility of international organizations. The question thus arose as to whether those two issues should not have been dealt with simultaneously by the Commission several years previously; history alone would judge that. He supported Ms. Escarameia's view that individuals, who had become subjects of international law, should also be entitled to invoke the responsibility of international organizations.

3. He favoured a broad definition of the term "international organization" in article 2, since international organizations now included entities other than States, namely NGOs or other regional or subregional entities. It might be appropriate to add the word "regulations" to the definition of "rules of the organization", which referred to the specific directives issued by most international organizations. It was also a term used in the definition provided by the Institute of International Law in its 1995 resolution (art. 2 (*c*)).[24] He supported the Special Rapporteur's proposals in paragraph 21 of his report concerning the restructuring of the draft articles.

[24] *Institute of International Law, Yearbook*, vol. 66 (1996), Session of Lisbon (1995), Part II, p. 447.

4. Turning to the chapter on attribution of conduct (paras. 22–38), he concurred with the proposed definition of the term "agent" in article 4, paragraph 2, as it was based on the criterion of attribution provided by the ICJ in its advisory opinion on the *Reparation for Injuries* case. However, in the new wording proposed for the paragraph, he suggested that the term "charged" in the phrase "charged by an organ of the organization" should be replaced with the word "entrusted". With regard to the criterion of "effective control" referred to in article 5, he said that if the judicial decisions adopted by the European Court of Human Rights in a number of cases had been prompted merely by the need to determine the Court's jurisdiction *ratione personae*, then the Court's rationale would be understandable. If, on the other hand, they reflected a trend to absolve national contingents from international responsibility and to shift the entire responsibility to the United Nations, that would fully justify legal criticism of them.

5. In the chapter of the report on breach of an international obligation (paras. 39–44), the Special Rapporteur acknowledged that it was debatable whether obligations under rules of an international organization were obligations under international law, and he proposed to rephrase article 8, paragraph 2, in order to state more clearly that the rules of the organization were "in principle" part of international law. Although the term "in principle" sought to convey the existence of exceptions, he found it inappropriate in that context and would welcome a further rephrasing of the paragraph, focusing on determination in the light of the circumstances of each organization.

6. On the chapter on responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54), he supported the view of some States that the meaning of "circumvention" of an international obligation should be clarified, perhaps in the commentary. He agreed with other States that when an international organization circumvented an obligation through a non-binding act such as a recommendation or authorization, it should not incur responsibility if its members took the authorized or recommended action. He therefore agreed with the new wording of article 15, paragraph 2 (*b*), proposed by the Special Rapporteur, in which the words "in reliance on" were replaced with "as the result of" in order to restrict the responsibility entailed. He also agreed with the proposal to include a new article 15 *bis* to address the issue of the responsibility of an international organization that was a member of another international organization.

7. Turning to the chapter of the report on circumstances precluding wrongfulness (paras. 55–72), he noted that different views had been expressed on article 18, on self-defence, both in the General Assembly and by members of the Commission. While it was true that the concept of self-defence under the Charter of the United Nations applied mainly to States, there were also circumstances where an international organization could and should be allowed to invoke self-defence as a circumstance precluding wrongfulness. In such a case, the legal basis of its action would be not the Charter of the United Nations but the general principles of international law. Consequently, he was not in favour of deleting article 18 as proposed in paragraph 59 of the report.

8. With regard to draft article 19, on countermeasures, he recalled that the Commission had already underlined the uncertainty of the relevant legal regime. However, there was growing acceptance of a restrictive approach to countermeasures taken by an international organization such as the one the Special Rapporteur proposed in draft article 19, paragraph 2. While he agreed with the general concept, he believed that the term "reasonable means" should be replaced with a more accurate term, such as "adequate procedure".

9. Under article 22, necessity did not preclude the wrongfulness of an act of an international organization, save when it purported to protect an essential interest of the international community. He did not share the view expressed in the General Assembly that a regional organization would be precluded from protecting an essential interest of the international community. Regional organizations applied universal principles of international law and adhered to world standards and were thus clearly qualified to protect an essential interest of the international community. The concept of "essential interest" was highly controversial, but he supported the States that had endorsed it and likewise endorsed the Special Rapporteur's preference for not proposing any amendments to article 22. Lastly, he supported the proposals concerning articles 25 to 30 relating to the issue of responsibility of a State in connection with the act of an international organization, and he favoured the adoption on first reading, hopefully at the current session, of the draft articles under discussion.

10. Mr. KAMTO questioned the relevance of article 1, paragraph 2, which read: "The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization." If the provision was retained in its current location, then the title of the topic must be changed to refer to "Responsibility of international organizations and States", and that, of course, was meaningless. Retention of that provision had been advocated on the grounds that it filled in a gap in the draft articles on responsibility of States for internationally wrongful acts. While he understood that argument, he believed that in that case it might be better to place the provision in a separate part that could be entitled "Final and miscellaneous provisions".

11. Concerning article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization), he noted that the criterion of "effective control" was the one established by the jurisprudence of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* cases. Accordingly, the case law of regional courts, even European ones, was of little importance. The problem was certainly not one of hierarchy between the ICJ and the European Court of Human Rights, for example, but one relating to the difference in scope of their decisions: judgments of the ICJ had universal scope, whereas the scope of judgements of the European Court of Human Rights was regional.

12. Article 18 (Self-defence) had no place in the draft under consideration. It should be deleted, as many States

had suggested and as the Special Rapporteur proposed in paragraph 59 of his report. That deletion was warranted since self-defence, as established in Article 51 of the Charter of the United Nations, covered cases in which a State Member of the United Nations was the target of armed aggression. However, only States were Members of the United Nations, and therefore only armed aggression against a State provided the legal justification for the inherent right of self-defence. In addition, the right of self-defence could be exercised only in response to an act of aggression. Under the definition contained in General Assembly resolution 3314 (XXIX) of 14 December 1974, aggression referred to a number of acts in relation to the territory of a State. Since an international organization had no territory of its own apart from that of its member States, it could hardly be given the right to respond to acts of armed aggression against a territory.

13. Concerning article 19 (Countermeasures), he recalled that at the previous session he had expressed strong reservations about giving international organizations the right to take such measures. Technically, such a provision was unnecessary in respect of an organization's States members, since the organization ought to have provisions for control and sanction mechanisms in respect of its member States in its own constituent instrument or regulations deriving therefrom. If the provision was intended to cover the use of countermeasures against third States or against another international organization, then granting the right to apply countermeasures was cause for concern. If article 19 was retained, he wished to point out that the phrase "lawful countermeasure" in paragraph 1 was likely to cause problems and generate confusion. As Mr. Fomba had noted at the previous meeting, countermeasures were by definition lawful, as could be seen from the draft articles on responsibility of States for internationally wrongful acts. To speak of lawful countermeasures would give the impression that there might be unlawful countermeasures under international law. If the provision was retained, it should simply refer to "countermeasures" in order to maintain coherence with regard to the meaning and interpretation of the concept. He supported the proposal to replace the words "reasonable means" in article 19, paragraph 2, with the phrase "means available under the rules of the organization".

14. Mr. COMISSÁRIO AFONSO thanked the Special Rapporteur for having given Commission members an opportunity to review the entire text of the draft articles before the completion of the first reading, thereby enabling them to consider it in the light of the comments made by Governments, international organizations, judicial bodies and scholars. In general, he agreed with the proposals made by the Special Rapporteur, in particular those contained in paragraph 21 of his seventh report and the proposal regarding the invocation by an international organization of the international responsibility of a State.

15. He had been one of the Commission members who had defended the alignment of the definition of an international organization with the definition contained in the 1986 Vienna Convention, with the possible addition of a few elements to take account of new developments. However, he now accepted the consensus that had emerged within the Commission.

16. Regarding the important issue of the attribution of conduct, he considered that the Commission had taken the correct stand. He agreed with the rephrasing of article 4, paragraph 2, which reflected the advisory opinion of the ICJ in *Reparation for Injuries*, since it had the merit of making the definition clearer and more precise.

17. He also agreed with the Special Rapporteur's reasoning in paragraph 30 of his report concerning draft article 5, in particular the idea that no change should be made to that provision, which corresponded to article 6 of the draft on responsibility of States for internationally wrongful acts.[25] Both provisions were guided by the criterion of effective control. He nevertheless found disquieting the apparent divergence between that approach and the judgements of the European Court of Human Rights, the House of Lords and the District Court of The Hague, and he wondered whether those divergences were dictated solely by differences in the legal criteria adopted or by compelling policy issues. A deeper analysis would be useful.

18. Regarding article 8, paragraph 2, he shared the view of some members of the Commission that the expression "in principle" suggested by the Special Rapporteur in paragraph 42 of his report was not particularly helpful and that the text should be left as it stood.

19. As to article 15, paragraph 2 (*b*), he thought that neither the phrase "in reliance on" nor "as the result of" constituted a sufficiently strong link of causation. It would probably be necessary to stress the notion of compliance with the authorization or recommendation as elements that could determine that linkage. The Drafting Committee would undoubtedly be able to find the best solution to the problem.

20. On self-defence, he believed that draft article 18 should be retained. The suggestion that the phrase "embodied in the Charter of the United Nations" be deleted could solve the problem. It was clear, as Mr. Kamto had so eloquently recalled, that Article 51 of the Charter was intended to be applied to States, an assertion corroborated by General Assembly resolution 3314 (XXIX), on the definition of aggression. However, he was sensitive to the argument presented by Mr. Dugard as to the need to take account of the evolution of international law and of international relations since 1945. It would be hard to imagine United Nations peacekeeping operations in which the right to self-defence did not come into play. Conceptually, it could be a different right, certainly not an inherent right like the one prescribed in the Charter of the United Nations, but a necessary right—the right to survive in dangerous operations. It was true that weaker States might turn to regional organizations for their self-defence, individual or collective, but strong organizations might abuse that right and make it an instrument of aggression.

21. With regard to countermeasures, he agreed on the whole with the Special Rapporteur's suggestions in paragraphs 66 and 72 (*b*) of his report. He was also prepared to accept the word "lawful" in draft article 19, paragraph 1, on the understanding that it meant "justifiable". That

[25] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 43–45.

seemed to be how the term was understood by the ICJ in the *Gabčíkovo–Nagymaros Project* case, and the commentaries to the draft articles on responsibility of States for internationally wrongful acts reflected that interpretation. However, after having heard Mr. Candioti and Mr. Kamto, he was prepared to follow the consensus on that matter.

22. Mr. VÁZQUEZ-BERMÚDEZ endorsed the decision made by the Special Rapporteur in his seventh report to deal with the topic as a whole, amending some draft articles and adding some necessary clarification in the commentaries in the light of recent comments by States and international organizations, judicial decisions and the legal literature.

23. The invocation of the international responsibility of a State by an international organization lay outside the scope of the draft articles, as the Special Rapporteur pointed out. However, as some members of the Commission had noted, in order to fill a gap, the Commission should submit a proposal to the General Assembly as to the way forward, following an exchange of views in a working group, as proposed by Mr. Nolte, or in the Planning Group or the Working Group on the long-term programme of work, as Mr. Candioti had suggested. In any event, discussions on the matter and the Commission's ultimate conclusion should in no way hinder the adoption of the draft articles on first reading at the current session.

24. The definition of an international organization in draft article 2 was apt and undoubtedly represented an important contribution by the International Law Commission. The 1969 and 1986 Vienna Conventions confined themselves to describing an international organization as an "intergovernmental organization", a definition that was not very informative, even though at the time it had proved useful in distinguishing between intergovernmental organizations and non-governmental organizations. During the debate, a proposal had been made to incorporate the adjective "intergovernmental" in the definition of the terms "international organization" in order to emphasize the fact that States were included among the members of an international organization. He did not think that was necessary, since the second part of the definition said that "international organizations may include as members, in addition to States, other entities". In reality, the term "inter-State" would be more appropriate, since it was States, not Governments, that were members of an organization. That would make it possible to avoid including, through the use of the word "intergovernmental", entities other than States, such as international organizations that were members of other international organizations. Lastly, if the term "intergovernmental" was construed as referring back to the constituent instrument of an international organization, then there was no need to include it, since the definition expressly indicated that the organization must be established by a treaty or other instrument governed by international law.

25. It was fitting that the definition of "rules of the organization" in draft article 4 should be transferred to draft article 2 in order to make it understood that the definition was a general one for the purposes of the draft articles as a whole. The definition was satisfactory, particularly in its reference, after decisions and resolutions, to "other acts" taken by the organization, a useful addition in the light of the definition given in the 1986 Vienna Convention. The reference to the "established practice of the organization", regularly mentioned by most of the international organizations, should also be retained.

26. In connection with the attribution of conduct to an international organization, Mr. Vázquez-Bermúdez endorsed the way the Special Rapporteur had added to the definition of the term "agent" in draft article 4, paragraph 2, drawing on the advisory opinion of the ICJ in the *Reparation for Injuries* case. The Drafting Committee might nevertheless wish to consider Mr. McRae's proposal to delete the phrase "through whom the international organization acts". On draft article 5, he agreed with the Special Rapporteur who, after having rigorously analysed recent judicial decisions, had concluded that the criterion of "effective control" over the conduct of an organ of a State or of an agent placed at the disposal of an international organization must be retained.

27. Regarding draft article 8, on the breach of an international obligation, he said that he understood the reasons put forward by the Special Rapporteur for submitting a revised version of paragraph 2 concerning the obligations created by the rules of an organization; however, he agreed with those who had criticized the use of the phrase "in principle" to indicate that all the rules of an international organization did not necessarily create international obligations. Yet he did not think that simply deleting that phrase in the new paragraph 2 proposed by the Special Rapporteur would solve the problem. It was true, as Mr. Vasciannie had pointed out, that the words "regardless of its origin and character" in paragraph 1 implicitly covered the international obligations set out in the rules of the organization, but it would be useful to include an express reference to that fact in the article itself, and not merely in the commentary. Instead of adding a new paragraph 2, the Commission could add the phrase "including when it is set out in a rule of the organization" at the end of paragraph 1.

28. In his view, draft article 18, on self-defence as a circumstance precluding wrongfulness, should be retained. Even if situations in which that article might be relevant for an international organization occurred only rarely, the very fact that they might arise—in connection with the administration of a territory or a peacekeeping operation, for example—justified the retention of the provision. It should, of course, be stated in the commentary that self-defence was a relevant factor only for some organizations, e.g. the United Nations, which was not the case with States. In order to take account of Mr. Comissário Afonso's warning about preventing abuse of the provision, article 8 should be retained, thereby averting the possibility that an international organization might invoke self-defence on the basis of a general "without prejudice" clause such as the one in draft article 62.

29. With regard to draft article 19, on countermeasures, he said that in general he endorsed its content but that, like Mr. Candioti, he thought that the adjective "lawful" in paragraph 1 should be deleted. As to paragraph 2, he thought Mr. Nolte's proposal would be helpful to the Drafting Committee in limiting the options for the use of countermeasures.

Expulsion of aliens[26] (A/CN.4/604,[27] A/CN.4/606 and Add.1, sect. E, A/CN.4/611,[28] A/CN.4/617,[29] A/CN.4/618[30])

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

30. Mr. KAMTO (Special Rapporteur), introducing his fifth report on expulsion of aliens (A/CN.4/611), recalled that in his fourth report[31] he had considered the issue of expulsion in cases of dual or multiple nationality and that of loss of nationality or denationalization. While his analysis of those issues had given rise to heated discussion in the Commission, most of its members had shared the Special Rapporteur's conclusion that it would not be worthwhile for the Commission to set out draft rules specific to those issues, even in the interest of progressive development of international law, since the topic dealt not with the nationality regime but with the expulsion of aliens.

31. He also recalled that the working group that had been established in 2008, at the sixtieth session of the Commission,[32] to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion had concluded that, first, the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applied also to persons who had legally acquired one or several other nationalities and that, secondly, the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. Those conclusions had been approved by the Commission, which had requested the Drafting Committee to take them into consideration in its work. It was clear from the discussion in the Sixth Committee in 2008 that most of the delegations that had spoken on the topic shared the Special Rapporteur's view regarding the treatment of the issues of expulsion in cases of dual or multiple nationality, loss of nationality and denationalization (A/CN.4/606, paras. 71–74). It could thus be considered that the question of approach had been settled.

32. The fifth report continued the study of rules limiting the right of expulsion begun in the third report,[33] where he had stated that the right of expulsion must be exercised in accordance with the rules of international law.

33. Following on the consideration in the third report of the limits relating to the person to be expelled, the fifth report addressed the limits relating to the requirement of respect for fundamental human rights. Persons being expelled, for whatever reason, remained human beings who, as such, must continue to enjoy all their fundamental rights. In its judgement in *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium*, the European Court of Human Rights had recalled that in exercising their sovereign right to control their borders and the entry and stay of aliens, States must comply with their international obligations, including those assumed under the European Convention on Human Rights. According to the Court, "the States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by [the European Convention on Human Rights and the Convention on the Rights of the Child] or deprive foreign minors, especially if unaccompanied, of the protection their status warrants" [para. 81 of the judgement].

34. There was thus a general obligation to respect human rights, and that general obligation was reflected in draft article 8. However, it was unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments and by the domestic law of the expelling State. For example, how would it be possible to guarantee, throughout the expulsion process, the exercise of their right to education, to freedom of assembly and association or to free enterprise, or their right to work, to marry and so forth? It seemed more realistic and more consistent with State practice to limit the rights guaranteed during expulsion to the fundamental human rights. He had discussed in detail the concept of "fundamental rights", a term found in a number of international legal instruments, including the Charter of the United Nations, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, but also widely used in legal theory and approached indirectly in the case law of the European Court of Human Rights, notably in the judgement that it had handed down in the case of *Golder* v. *the United Kingdom*.

35. What constituted fundamental rights was not, however, set in stone. Legal theory had identified a "hard core" of human rights considered to be inviolable. More particularly, where protection of the rights of the person being expelled was concerned, those inviolable rights, which derived from international legal instruments and were reinforced by international case law, were: the right to life; the right to dignity; the right to integrity of the person; the right to non-discrimination; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; and the right to family life.

36. The general obligation to respect human rights had been set out very clearly in the judgment of the ICJ in the *Barcelona Traction* case, although legal theory had referred at length to the existence of that obligation much earlier. In that judgment, the Court had stated:

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human

[26] For the discussion by the Commission of draft articles 1 to 7, see *Yearbook … 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265. See also *Yearbook ... 2008*, vol. II (Part Two), chap. VIII.

[27] Reproduced in *Yearbook … 2009*, vol. II (Part One).

[28] *Idem.*

[29] *Idem.*

[30] *Idem.*

[31] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/594.

[32] *Ibid.*, vol. II (Part Two), paras. 170–171.

[33] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/581.

person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character. [paras. 33–34 of the judgment]

That decision was of fundamental importance, because with it the Court had established the basis in jurisprudence of the general obligation to respect human rights, which was imperative for all States regardless of whether they were parties to a convention. In the same vein, the Court had noted, in its judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua*, that "the absence of ... a commitment [with regard to human rights] would not mean that [a State] could with impunity violate human rights" [para. 267]. That general international obligation to respect human rights was all the more imperative when it applied to persons whose legal situation made them vulnerable, as was the case with aliens who were being expelled. For that reason, on the strength of the elements of international case law mentioned earlier and the degree of agreement on the subject in the legal literature, which was widely supported by the work of authoritative codification bodies, he proposed draft article 8, entitled "General obligation to respect the human rights of persons being expelled", which read: "Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances."

37. The first right in the "hard core" of fundamental rights relating to the expulsion of aliens was the right to life. He had analysed that concept and its application in paragraphs 53 to 65 of his report and had then drawn conclusions in paragraph 66. First, the right to life of every human being was an inherent right, formally enshrined in international human rights law. As such, it applied to persons in a vulnerable situation such as aliens who were the subject of extradition, expulsion or *refoulement*. In that regard, it could be understood as an obligation on the part of the expelling State to protect the lives of the persons in question, both in the host country and in the State of destination. Such was the tenor of article 22, paragraph 8, of the American Convention on Human Rights: "Pact of San José, Costa Rica", which imposed significant restrictions on expulsion and placed an obligation on the expelling State to protect the right to life of the alien. Secondly, the right to life did not necessarily imply the prohibition of the death penalty or of executions. It was certainly the case in terms of treaty law and regional jurisprudence in Europe that any extradition or expulsion to a State where the person concerned might suffer the death penalty was in and of itself prohibited. However, it would not be appropriate to generalize the rule, since it was not a customary norm, and many regions of the world had yet to follow European practice. Thirdly, a State that had abolished the death penalty could not extradite or expel to another country a person sentenced to death without having previously obtained guarantees that the death penalty would not be carried out in that instance; however, that obligation applied only to States that had abolished the death penalty. On the basis of those conclusions, he proposed draft article 9, entitled "Obligation to protect the right to life of persons being expelled", which read:

"1. The expelling State shall protect the right to life of a person being expelled.

"2. A State that has abolished the death penalty may not expel a person who has been sentenced to death to a State in which that person may be executed without having previously obtained a guarantee that the death penalty will not be carried out."

38. The second right comprising the hard core of fundamental human rights was the right to dignity. The concept of dignity had been the subject of great interest in recent legal literature. At the international level in particular, the concepts of human dignity and fundamental rights had emerged and developed concomitantly. In that process, dignity was both a justification and a framework principle within which other rights were forged. As the ethical and philosophical foundation of fundamental rights, the principle of respect for human dignity provided the basis for all other individual rights. He drew attention in that connection to the various international instruments that he analysed in paragraphs 69 to 72 of his report. It was fair to say that international jurisprudence had reinforced the positive quality of the concept of human dignity in international human rights law in the decision rendered by the Trial Chamber of the International Tribunal for the Former Yugoslavia in the *Furundžija* case. Human dignity was a fundamental precept in human axiology that conveyed the concept of the absolute inviolability of fundamental rights, or the "hard core" of human rights. It was thus, in addition to the right to life, which was a basic right, a fundamental right of every human being. Accordingly, it appeared that the rule did exist and that it could be codified, and that had led him to propose, in paragraph 72 of his report, draft article 10, entitled "Obligation to respect the dignity of persons being expelled", which read:

"1. Human dignity is inviolable.

"2. The human dignity of a person being expelled, whether that person's status in the expelling State is legal or illegal, must be respected and protected in all circumstances."

Greater weight could be lent to the expelling State's obligation to respect human dignity by reworking the second paragraph. If the Commission decided to refer that draft article to the Drafting Committee, that paragraph could be reformulated to read: "The expelling State must respect and protect the dignity of a person being expelled in all circumstances, irrespective of whether that person is legally or illegally present in its territory."

39. The third obligation related to the individual's right to integrity, a necessary precondition of which was the prohibition of torture and of cruel, inhuman or degrading treatment or punishment embodied in the International Covenant on Civil and Political Rights. That prohibition was backed up by a wide range of international legal instruments, as well as by international and regional jurisprudence, especially the case law of the European Court of Human Rights, to which reference was made in paragraphs 75 and 76. With regard to torture, one could cite, in addition to the *Furundžija* case, which he had already mentioned, the case of *Mutombo* v. *Switzerland*, which was described in

paragraphs 84 to 87 of the report, as well as other decisions on the subject which were discussed in paragraphs 88 to 119, especially the *Delalić* case, which had preceded the *Furundžija* case. In the light of those precedents, in paragraph 120 he proposed draft article 11, entitled "Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment", which read:

"1. A State may not, in its territory, subject a person being expelled to torture or to cruel, inhuman or degrading treatment.

"2. A State may not expel a person to another country where there is a serious risk that he or she would be subjected to torture or to cruel, inhuman or degrading treatment.

"3. The provisions of paragraph 2 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity."

40. The notion of "serious risk" in paragraph 2 was drawn from case law. Paragraph 3 was likewise based on legal precedent, namely a case involving a Colombian national who was to have been expelled to Colombia, where he would have been likely to be subjected to cruel treatment not by the Government of Colombia but by drug cartels. Thus the risk might stem from the State but also from clearly identified groups of private individuals, and he had considered those developments to be sufficiently significant and interesting to form the subject of proposals for codification. The case law likewise stipulated that children should receive special protection; that was apparent from the analysis contained in paragraphs 121 to 127 of the report, which rested chiefly on the ruling delivered in the case of *Ana Cajamarca Arízaga and her daughter Angélica Loja Cajamarca* v. *Belgium*, where the specific protection that must be enjoyed by children in such circumstances had been distinguished from that to which adults were entitled. In the *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium* judgement, the European Court of Human Rights had found Belgium guilty of inhuman and degrading treatment because it had detained a five-year-old child for two months in Transit Centre No. 127. After studying that decision from the point of view of the Convention on the Rights of the Child and regional child protection instruments, the Special Rapporteur had been led to propose draft article 12, entitled "Specific case of the protection of children being expelled", which read:

"1. A child being expelled shall be considered, treated and protected as a child, irrespective of his or her immigration status.

"2. Detention in the same conditions as an adult or for a long period shall, in the specific case of children, constitute cruel, inhuman and degrading treatment.

"3. For the purposes of the present article, the term 'child' shall have the meaning ascribed to it in article 1 of the Convention on the Rights of the Child of 20 November 1989."

41. The fourth obligation related to the right to family life of the person being expelled, which was embodied in international legal instruments and on which case law, especially that of the European Court of Human Rights, had placed great emphasis. He had listed the universal and regional legal instruments which enshrined that right in paragraphs 128 to 130 of his report, and he had examined the relevant jurisprudence in paragraphs 131 to 146, where he had focused in particular on the precedents established by the Human Rights Committee, namely in *Canepa* v. *Canada* and *Stewart* v. *Canada*. The European Court of Human Rights had taken that jurisprudence a step further in several cases, for example, in *Abdulaziz* et al. v. *the United Kingdom* and *C.* v. *Belgium*, which he had considered in paragraph 133, showing how jurisprudence had developed and how a distinction had emerged between private and family life. He therefore proposed in paragraph 147 draft article 13, entitled "Obligation to respect the right to private and family life", which read:

"1. The expelling State shall respect the right to private and family life of the person being expelled.

"2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by law and shall strike a fair balance between the interests of the State and those of the person in question."

42. That notion of a fair balance between the interests of the State and those of the individual in question derived directly from the jurisprudence of the European Court of Human Rights which, of all the universal and regional courts, was the one that had the most abundant and highly developed case law on the notion of a right to private and family life. It went without saying that if the Commission decided to refer that draft article to the Drafting Committee, it would be necessary to clarify the content of that notion and the criteria used by the Court in such cases.

43. The last right that he had singled out was the right to non-discrimination, which encompassed two elements: first, the alien being expelled must not be subjected to discrimination *vis-à-vis* nationals of the expelling State and must enjoy the same fundamental rights; and, second, there must be no difference in treatment among aliens being expelled. He had examined that principle in the light of the advisory opinion of the Permanent Court of International Justice (PCIJ) on *Settlers of German Origin in Poland* and of its judgment in *Minority Schools in Albania*. In paragraphs 149 to 151 of his report he had then scrutinized international human rights instruments, almost all of which incorporated that principle. He had subsequently considered the way in which the principle was construed in international jurisprudence, in particular that of the Human Rights Committee in the case of *Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius*, showing how the Committee had interpreted the principle of non-discrimination; in that instance the discrimination had been based on sex. On 28 May 1985, the European Court of Human Rights had then followed the position taken by the Human Rights Committee in the Mauritian women case in its judgement in *Abdulaziz* et al. v. *the United Kingdom*. His analysis of that jurisprudence had led him to propose, in paragraph 156 of his report, draft article 14, entitled "Obligation not to discriminate", which stated:

"1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind, on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

"2. Such non-discrimination shall also apply to the enjoyment, by a person being expelled, of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State."

44. In conclusion, he explained that, owing to the deadline for the submission of his report, he had been unable to investigate the principle of prohibiting disguised expulsion. He would deal with that point in an addendum that could be considered at the second part of the Commission's sixty-first session, and he would tackle procedural questions in his sixth report.

The meeting rose at 11.55 a.m.

3003rd MEETING

Tuesday, 12 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Expulsion of aliens (*continued*) (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

Fifth report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the fifth report on expulsion of aliens (A/CN.4/611).

2. Ms. ESCARAMEIA commended the Special Rapporteur for the thoroughness of his research and endorsed his decision to consider both the limits relating to the obligation to respect the human rights of persons being expelled and some practices that were prohibited by international law on expulsion.

3. With regard to draft article 8, she wished to raise two basic issues. First, it was not entirely clear what criterion had been used to establish the list of fundamental or "hard-core" rights which persons who had been or were being expelled enjoyed. If, as stated in paragraph 37, the operative criterion for identifying such rights was their inviolability and if, as the report seemed to imply, their inviolability was related to their non-derogability, then it was hard to understand why the Special Rapporteur had not included in his list of fundamental rights the prohibition of slavery, *nullum crimen sine lege, nulla poena sine lege*, the right to legal personality, freedom of thought and religion or any mention of the judicial guarantees that protected those rights. All those rights were generally recognized as non-derogable in the three major international instruments the Special Rapporteur had cited by way of example.

4. Secondly, she disagreed with the general principle in draft article 8 that persons being expelled were entitled to respect of only their fundamental rights and rights whose implementation was required by their specific circumstances. Persons being expelled were human beings like all others, and even if it was factually impossible for them to exercise certain rights, that did not change the fact that they theoretically possessed those rights. She therefore suggested that draft article 8 should contain a statement to the effect that any person being expelled was entitled to respect for all of his or her human rights.

5. She had no argument with the contents of draft article 9 or the justifications provided by the Special Rapporteur in his report. Nevertheless it seemed that neither the report nor the text of the draft article, particularly paragraph 2, was entirely clear as to whether the issue being discussed was expulsion or extradition. Her impression was that the draft article referred to extradition, and she thought that the matter could perhaps be clarified in the commentary.

6. Turning to draft article 10, she concurred with the Special Rapporteur's assessment that human dignity was broader than an individual right, constituting a general principle that provided the basis for all other individual rights.

7. Drawing attention to paragraph 78 of his report, she noted that the Special Rapporteur made reference there to a norm that prescribed that there should be no derogation from the prohibition of torture and inhuman or degrading treatment, even in time of war or other public emergency threatening the life of the nation. She wondered whether, in the Special Rapporteur's opinion, that norm gave rise to rights of *jus cogens* and, if so, what specific rights were involved. She also sought clarification as to whether the Special Rapporteur considered those rights to be among the fundamental rights enumerated in paragraph 52 of his report.

8. Furthermore, she was surprised to note that among the many references that the Special Rapporteur had included to international instruments and case law relating to the prohibition of torture, he made no mention of the most recent negotiations on the definition of torture as a crime against humanity in the Rome Statute of the International Criminal Court. Having personally been involved in those negotiations, she recalled that a particular effort had been made not to stipulate in that definition any requirement of motivation or of exercise of a public function on the part of the torturer. According to that definition, a victim