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Summary record of the 2850th meeting

Topic:
<multiple topics>

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armed conflict. He recalled that when the Security Council had raised that issue, it had spoken of deportation, not expulsion.

The meeting rose at 4.35 p.m.

2850th MEETING

Wednesday, 13 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

1. The CHAIRPERSON said members would recall that on 27 May 2005 the Commission had held a joint meeting with the European Society of International Law (ESIL) as part of the Research Forum on International Law which ESIL had held in Geneva. He had just received a letter from Judge Bruno Simma, President of ESIL, thanking the members of the Commission for agreeing to hold the joint meeting, and in particular expressing appreciation to Mr. Gaja, the Special Rapporteur on the responsibility of international organizations, for addressing the Forum on the subject. According to Judge Simma, the participants had considered the meeting to be a highlight of the Forum, and he had been particularly pleased at the reaction of the young students of international law to Mr. Gaja's remarks.

Expulsion of aliens (*continued*) (A/CN.4/554)

[Agenda item 7]

Preliminary report of the Special Rapporteur (*continued*)

2. Mr. BROWNLIE said that the topic of expulsion of aliens was proving much more difficult than had been expected, but was also one of considerable importance. He commended the qualities of the Special Rapporteur's well-researched and comprehensive preliminary report. One difficulty was that the accepted term "expulsion" was merely descriptive. The complexity of the topic became apparent when the question of the causes of action arose. If a person was the victim of an unlawful expulsion, what bases of claim were recognized in international law? One version might be breaches of the normal principles of State responsibility, and in particular what was still referred to in arbitrations as the international minimum standard, which included denial of justice, a concept which, at least in United States sources, was often quite broad. Thus, first there were causes of action in terms of general international law. Secondly, there were numerous bilateral treaties setting what appeared to be rigorous standards for the treatment of aliens and their investments, such as treaties of friendship, commerce and navigation and bilateral investment treaties. Thirdly, claims would probably be available under specific human rights treaties. Fourthly, in extreme cases, expulsions would involve international crimes and perhaps even genocide or crimes against humanity. Lastly, there could be breaches of what was almost certainly a general principle of non-discrimination in international law, a principle which went beyond treaties.

3. The main difficulties, to which the Special Rapporteur had himself referred, concerned the scope of the topic. In paragraph 30 of the report, Mr. Kamto sought members' views on whether the study should include existing treaty restrictions on expulsion. His own view was that it should, for practical reasons: at least in certain, possibly special circumstances, a pattern of treaty provisions might provide evidence of principles of general international law.

4. The Special Rapporteur seemed to favour including a study of cases of lawful expulsion. That would entail a lengthy catalogue of institutions, including extradition and deportation as part of a punishment. While a catalogue of cases of lawful expulsion might be useful, he did not think it was central to the Commission's concerns.

5. Another problem, to which other speakers had already alluded, was what might be called collateral breaches of general international law. If groups of people, including vulnerable persons such as pregnant women or the elderly, were left at remote frontier posts without any assistance available on the other side, then the modalities of the expulsion would themselves constitute breaches of international law even if the expulsion as such was not contrary to international law. The same applied to the principle of discrimination; an expulsion might be lawful on its face, but in fact involve discrimination. There were analogous examples in the law of expropriation, where a legal expropriation was deemed to be illegal if there was proof of discrimination, for example on racial grounds. However, those were secondary questions, and he was not sure that they added much to the subject under consideration.

6. In his view, the real centre of gravity of the subject was not expulsion and refusal of entry, but the control which a State had over its territory. He was very positivist about the importance of States and, while he was aware that it was politically incorrect to say so, maintained that the human rights system still did not provide primary care and attention. Many of the worst patterns of inhumanity stemmed from the collapse of States. A functioning State with boundaries which were properly supervised was thus, in his conservative view, one of the more simple foundations for the protection of human rights. It was when States collapsed that trouble started. Therefore, the basis of any study should be the concept that the State had not only the right but also the duty to control its territory and to maintain law and order. That had to be borne in

* Resumed from the 2847th meeting.

mind as the background to what the Commission might choose to call "expulsion of aliens".

7. "Expulsion" was not a very good descriptive term because it covered an enormous variety of situations, including illegal presence, informal migrants and even unlicensed foreign traders. In Ghana, for example, it had once been common for foreign traders to enter the country across open borders. When they had become sufficiently numerous, their presence had become a matter of contention with the local traders and the Government had expelled them. Those persons were what he would call informal migrants: people who were not immediately expelled or controlled, but tolerated, although they had never been given permission to be present or granted a proper status. Yet another situation was when the territorial sovereign modified its legislation, for example on the licensing of traders, and people who had hitherto been tolerated, or even lawful visitors, might find that their presence had become unlawful and that they were subject to removal.

8. References had been made in the debate to issues of self-determination and statehood, such as the position of the Palestinians. While it was not his intention to play down the expulsion of minorities, forced secession and similar problems, he was not convinced that they were part of the Commission's mandate. Similarly, he would be surprised if the Commission were to decide to define aliens. It would be too ambitious to go into the question of nationality, and he doubted that the Sixth Committee expected the Commission to do so.

9. There was also the question of whether a right of residence existed. Leaving aside the technicalities of nationality law, it had been common, not least in major peace treaties, to grant a status to persons resident or domiciled. Did the right of residence or domicile granted to an alien place limitations on his expulsion? He was leaving aside the question of whether in many cases long-standing residents would in any event have effective nationality in the State concerned.

10. He had a few specific criticisms of statements made in the report. In paragraph 16, he could not follow the assertion that "[t]he State resorting to expulsion is bound to invoke the grounds used to justify it". He was not certain whether, in the absence of a dispute or of another State or institution raising issues, the territorial sovereign had an original duty to invoke grounds of justification. Paragraph 16 tended to contradict some of the general statements of principle in paragraph 15.

11. Paragraph 24 spoke of "collective expulsion", a term which he did not regard as being very precise, as it usually involved other conditions, which were not specified. Was the removal of 100 unlicensed traders more lawful or more unlawful than removing 5? The term should either be spelled out more clearly or else avoided. Paragraph 26 referred to the possibility of States protecting their nationals by providing diplomatic protection. He had no objection to the statements made on that subject, but did not think that diplomatic protection fell within the scope of the present topic. In paragraph 30, the Special Rapporteur expressed his preference for presenting "as exhaustive a legal regime as possible, founded on general principles forming the legal basis for the expulsion of aliens under international law". While he did not want to quarrel with that principle, he had his doubts about what such an exhaustive legal regime would entail.

12. Lastly, there was the question of the subject matter. Mr. Koskenniemi had said that, when approaching a topic, the Commission should seek to analyse the interests involved. The difficulty was that in the present case, a wide range of very varied and specialized interests was involved, including migrant workers, illegal immigrants, international criminals and fugitive offenders. Thus, it was difficult to go beyond an analysis which simply accepted that the policy basis of the subject was the lawful control which a State had over its territory, and that that lawful control was an important element in public order and in that State's ability to discharge its obligations under international law, including human rights standards.

13. Mr. ADDO said that the term "expulsion" was commonly used to describe that exercise of State power which secured the removal of an alien from the territory of a State, either voluntarily, under threat of forcible removal, or forcibly. The sovereign right of States to expel aliens was generally recognized in international law. It did not matter whether the alien was only on a temporary visit or had settled down for professional business or other purposes. While a State had wide discretion in exercising that right, such discretion was not absolute. Customary international law required that a State must not abuse its right by acting arbitrarily in taking its decision. It must also act reasonably in the manner in which it effected the expulsion. Each State could use its own criteria for determining the grounds for expulsion of an alien. The State of nationality of an expelled alien could assert the right to enquire into the reasons for the expulsion. It had been ruled in a number of cases that States must give convincing reasons for expelling an alien. For example, in the *Boffolo* case (1903), which concerned an Italian expelled from the Bolivarian Republic of Venezuela, the Mixed Claims Commission (Italy–Venezuela) had held that States possessed a general right of expulsion, but that it could be resorted to only in extreme circumstances and accomplished in a manner least injurious to the person affected. In addition, the reasons for the expulsion must be stated before an international tribunal when the occasion demanded. Many municipal systems provided that the authorities of a country could deport aliens without stating reasons. The position under customary international law was therefore somewhat confused and uncertain.

14. As far as treaty law was concerned, article 13 of the International Covenant on Civil and Political Rights provided that:

> [a]n alien lawfully in the territory of a State Party to the […] Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

15. Expulsion should not entail hardship, violence or unnecessary harm to the expelled alien. Compulsory

detention of an alien under an expulsion order must be avoided, except in cases where the alien refused to leave or tried to escape from the control of the State authorities. The alien must normally be given a reasonable time to settle his personal affairs before leaving the country and be allowed to choose the country to which he might apply for admission. In *Yeager* v. *Islamic Republic of Iran*, the Iran–United States Claims Tribunal had awarded compensation to an American expelled from Iran who had been given only 30 minutes to pack a few personal belongings without advance notice, on the basis that customary international law recognized that a State must give the foreigner to be expelled sufficient time to wind up his affairs.

16. To sum up, the function of expulsion was to protect the essential interests of the State and to preserve public order. The power of expulsion must not be abused. If its aim and purpose were to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as genocide, confiscation of property or as unlawful reprisal.

17. The function of expulsion, together with the requirement of good faith, involved the subsidiary point that expulsion had to be justified. The expelling State must show reasonable cause, although in determining whether its interests were adversely affected or whether there was a threat to public health and order, international law allowed that State a fairly wide margin of appreciation. The principle of good faith and the requirement of justification demanded that due consideration be given to the interests of the individual, including his basic human rights, his personal interests including family and other connections with the State of residence, his property interests and other legitimate expectations, all of which must be weighed against the competing demands of public order.

18. General international law imposed as a precondition to the validity of an order of expulsion that it be issued in accordance with the law. That rule entailed the further requirement that there should be an effective remedy available permitting an unlawful exercise of discretion to be challenged. The expulsion itself must be carried out in accordance with the general standards of international law for the treatment of aliens, due regard being given to the dignity of the individual and his basic rights as a human being.

19. Mr. MANSFIELD said that the preliminary report was a useful overview, leaving no doubt as to the complexity of the subject but also as to the potential for a significant contribution by the Commission. As the Special Rapporteur had pointed out in paragraph 5, the right to exclude foreign goods or people had long been seen as inherent in State sovereignty. Yet while in recent times States had been moving steadily to reduce restrictions on the entry of foreign goods, there had been no similar movement with respect to the entry of foreign nationals. The reasons were complex, but it was a reality that was unlikely to change in the foreseeable future. What had changed was the state of international law with regard to the rights of individuals, and any treatment of the topic must take those developments fully into account.

20. The Special Rapporteur drew attention to the fact that the topic was plagued with definitional problems closely linked to the issue of the scope of the Commission's work. One of the difficulties in that regard was that national laws did not deal with the issues that concerned the Commission under headings such as "expulsion of aliens". Many of the legitimate actions resulting in the transfer of a foreign national out of the jurisdiction of the receiving State were taken under laws on immigration or temporary entry for business or tourist purposes. Less legitimate actions might be taken under broad-ranging powers, pursuant to innocuously titled legislation or without any legislative basis at all. He therefore agreed with those who had suggested that the Commission must ensure that whatever definitions it used, they encompassed situations where persons were not legally or administratively compelled to leave but in practice had no option to remain.

21. He also thought it would be necessary to cover the removal of foreign nationals who had entered illegally or whose presence had become illegal, in addition to removal of foreigners who were lawfully in the country. In many jurisdictions, persons might have entered legally but their continued presence might have become illegal because they had exceeded the period for which they were given entry or had broken a condition of their entry permit. Like those who entered illegally, they did not perhaps have a right to remain, but they were not without procedural rights, particularly that their removal should be in accordance with the law. That right must surely also involve some ability to seek review of the decision while still in the country.

22. On the other hand, he was inclined to agree with those who had responded in the negative to the Special Rapporteur's question as to whether the Commission should attempt to deal with issues relating to the refusal of admission or prevention of entry. Leaving aside situations when there was dispute as to whether persons had or had not entered the territory of a State, refusal to admit persons or prevention of their entry certainly seemed to lie at the margins of the topic and would be likely to complicate the work unduly. All those considerations led to the point that in order to settle on a work plan, the problems or issues that the Commission was attempting to address must be identified in broad terms.

23. Lastly, he did not yet have a firm view concerning the question posed in paragraph 30 of the report, relating to existing treaty rules on the issue, but was inclined to think that the aim of the Commission's work should be a comprehensive text with references, as appropriate, to other relevant conventions.

24. Mr. RODRÍGUEZ CEDEÑO said that consideration of the topic was justified, first of all, by the large number of persons, now totalling over 100 million, who had left behind their countries of origin, and second, by the conservative attitude of States in immigration matters. The Special Rapporteur had asked some important questions, including how to delimit the scope of the topic and what definitions to establish. On the first question, the Special Rapporteur had raised related issues, such as extradition, asylum, refuge, *refoulement* and deportation,

which needed thorough consideration so as to distinguish them from the specific issue of expulsion of aliens.

25. On definitions, the term "alien" was quite broad, encompassing different categories and groups of persons living in the territory of a State other than their own and covered by differing legal regimes. For example, political asylum-seekers were governed, at any rate in the inter-American context, by the Convention on territorial asylum adopted at Caracas in 1954. Refugees subjected to forced displacement were covered by the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. Migrant workers were another category of persons that were displaced, not forcibly, but in order to seek better living conditions, and their rights were protected in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The term "alien" had to cover all those categories of non-nationals, including stateless persons, who were protected by the domestic legislation of States on aliens or refugees and by existing international regulations.

26. The Special Rapporteur rightly excluded internally displaced persons, who fell within the scope of the topic only when, having crossed a border, they became asylum-seekers. That brought in a principle closely related to expulsion, namely, *non-refoulement*, a fundamental principle in international legislation on refugees, particularly with respect to asylum-seekers, who could not arbitrarily be returned to their country of origin without their requests for asylum having been heard. Thus, the domestic legislation of States and international regulations for the protection of specific categories of non-nationals—a much more appropriate term than "aliens"—must be taken into account when considering the very broad concept of "alien".

27. Concerning the term "expulsion", the State clearly had a right to regulate entry into its territory and, conversely, to expel non-nationals. However, expulsion must not be arbitrary: it must be reasoned and expressed or transmitted through an administrative act so as to enable the person concerned to appeal against any allegedly arbitrary measures taken by the State. The Special Rapporteur and Mr. Pambou-Tchivounda had rightly noted that expulsion was a unilateral act of the State. However, it was very different from the unilateral acts being studied in the context of another, eponymous, topic. He himself saw it as being more closely related to the international responsibility of the State for wrongful acts or for breach of its domestic regulations, and to diplomatic protection.

28. The work plan submitted by the Special Rapporteur in annex I to his report covered the salient points that would have to be addressed as part of the Commission's consideration of a difficult and complex subject. He hoped that the Special Rapporteur would examine some domestic legislation, not only on aliens in general but also specifically on migrant workers, refugees and asylum-seekers, and also look at the case law of the regional courts, for example the Inter-American Court of Human Rights, which was no doubt relevant to the issue of treatment of aliens.

29. Mr. KOLODKIN noted that in paragraph 6 of his report, the Special Rapporteur stated that the essence of a preliminary report was to present the topic, to formulate issues and to suggest approaches rather than to offer final solutions. In his view, the report had fully achieved those aims.

30. One could only agree with the Special Rapporteur that the right to expulsion was an inalienable and sovereign right of States, although after reading paragraphs 14 to 16 of the report, one got the impression that the right had not evolved since the nineteenth century. In paragraph 16, the Special Rapporteur correctly pointed out that the right to expel was not an absolute right of the State; among the factors restricting the exercise of that right, a State had to show grounds for resorting to expulsion. Chapter III of the report was thus devoted to an analysis of the grounds for expulsion, and in paragraph 20 the Special Rapporteur pointed out that "the question to be answered is which of the many grounds for expelling aliens are admissible under international law, or *a contrario*, which are prohibited". Subsequently, in chapter IV, the Special Rapporteur addressed rights related to expulsion, stating, *inter alia*, that "[t]he exercise of the right to expel brings into play the rights of the aliens being expelled and those of their State of origin" (para. 21).

31. The grounds for expulsion and the question whether they were internationally lawful were undoubtedly important, but in his opinion the problem should be viewed from a slightly different angle. It was a matter, not of whether the grounds for expulsion were lawful, but rather of how the right of the State to expel, and the interests protected by the exercise of that right, were related to, or perhaps conflicted with, the rights of expelled persons and their interests. The right of the State to expel was not a thing of value in and of itself, although the State sovereignty from which the right flowed was itself a thing of value. It was necessary, and it was protected under international law, because it in turn was a means for defending the interests of the society in the territory of that State, of preserving law and order and the security of the State and its citizens. In other words, it was a means of defending human rights and, as Mr. Brownlie had pointed out, it was both a right and a duty of the State.

32. Such rights and interests associated with expulsion had to be correlated with the rights of expelled persons such as the rights to privacy and family life, to humane and just treatment and not to be subjected to torture, not only by the State that expelled them but also by that to which they were expelled. Those were simply some of the rights of individuals that must clearly be taken into account. It was precisely the problem of balancing such rights, obligations and interests that was paramount, especially for jurists considering the matter. In that regard he referred to the practice of the European Court of Human Rights when considering expulsion cases. In its 2003 decision in the *Slivenko* case, the Court had stated that its task consisted "in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the [interests of Latvian society] on the other" (para. 113 of the decision). It had reiterated that "no right of an alien to enter or reside in a particular country [was]

as such guaranteed by the Convention"; that it was for States "to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens" (para. 115 of the decision). The Court had been propounding that approach to expulsion cases for many years.

33. Accordingly, it was not only or primarily the grounds for expulsion that limited the sovereign right of States, acknowledged in international law, to expel aliens: rather, it was the right of the individual, protected by international law. The Commission's task in considering the topic was to establish a normative balance between those important rights.

34. In paragraph 22, the Special Rapporteur pointed out that "the lawfulness of an expulsion [depended] on two factors: conformity with the expulsion procedures in force in the expelling State and respect for fundamental human rights". In paragraph 23, he noted that the requirement concerning respect for procedures provided for by law could be considered an obligation under general international law. In paragraph 27, however, he remarked that the responsibility of the expelling State could arise from injury suffered by the persons expelled improperly (rules of procedure) or on grounds contrary to the rules of international law (substantive rules). In other words, the Special Rapporteur reverted to the hypothesis that expulsion procedures were provided for only under domestic law, while the material rights of the expelled person were protected by international law. That hypothesis should be rectified and brought into line with paragraph 23, for contemporary international law did to some extent consolidate the right of the individual to equitable expulsion procedures and the duty of States to provide for such procedures: witness Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

35. In considering the topic, key concepts such as "expulsion" and "alien" had to be defined. In defining "expulsion", a number of similar concepts mentioned in paragraph 8 had to be considered so that a distinction could be drawn. In that regard he cited a number of terms used in Russian legislation that had no equivalent in other legal systems. He agreed with the Special Rapporteur that for the purposes of the topic, the term "expulsion" should be retained but interpreted broadly. On the other hand, the definition proposed in paragraph 13 needed further consideration. The reference to a "legal" act by which a State compelled an individual to leave its territory raised certain doubts, and what categories of individuals were concerned needed to be clarified. In the definition of "expulsion" they were nationals of another State, but in paragraph 7 the term "alien" was described as covering not only nationals of a State other than the expelling State, but also stateless persons. Why, then, did the definition of "expulsion" refer solely to foreign nationals?

36. Questions had been raised as to whether the Special Rapporteur intended to study expulsion from occupied territories and, in general, in times of armed conflict. Those questions, in his view, fell within the sphere of international humanitarian law and should not be taken up under the current topic. If the Commission's final product were to take the form of a set of draft articles, then an article could be incorporated to the effect that the articles were without prejudice to the duties of States under international humanitarian law in respect of civilian populations.

37. In response to a number of questions raised by the Special Rapporteur in paragraph 30 of his report, he would say that a set of draft articles on the topic would be of interest only if they were comprehensive, albeit not exhaustive, in nature. He found it difficult to see how the work could be limited to bridging certain gaps in international treaty law, since in his view it could scarcely be said that there was any reasonably well developed universal conventional regime in the field at present. He likewise concurred with the Special Rapporteur's suggestion in paragraph 29 that an analysis of regional practice, including court decisions and treaties, was essential for future consideration of the topic.

38. Mr. PAMBOU-TCHIVOUNDA said that Mr. Kolodkin had talked of expulsion to another State. That raised the question of whether expulsion always occurred on a State-to-State basis, or whether third States or transit States might sometimes be involved. If so, did the transit State have any rights? Was its consent required? Could it oppose the expulsion proceedings?

39. Mr. FOMBA commended the Special Rapporteur's clear, concise but informative preliminary report. The freedom of movement of persons and the expulsion of aliens were major concerns for peoples and States, as abuses in the conduct of States were commonplace. To cite only the example of his own country, every day at least one Malian citizen was forcibly expelled from French territory, and he had once had to protest in his official capacity about the inhumane treatment of a compatriot deportee on a flight from France to Mali. Such incidents were legion, and gave the impression that a State could get away with anything in the name of sovereignty in an area on which international law was silent. The preliminary report provided an opportunity to refute the mistaken notion that there was a legal vacuum, to call States to order and to guarantee individuals and groups of individuals their fundamental rights.

40. The report provided a good introduction to the central issue, namely, how to reconcile the right to expulsion inherent in sovereignty with the requirements of international law and to interpret them from the standpoint of *lex lata* and *lex ferenda*. The objectives and general approach described in paragraph 6 seemed to be heading along the right lines. Paragraphs 7 to 13 raised the problem of how to define the concept of expulsion, but for the time being the Special Rapporteur merely sought the Commission's advice on the methodology, rather than on the substance. While he endorsed the idea of clarifying the concept of expulsion in a subsequent report, the provisional definition given in paragraph 13 seemed a good basis for discussion.

41. On the question, raised in the last sentence of that paragraph, "whether a distinction should be made between the legal act of expulsion and the expelled person's physical crossing of the border or leaving the territory" concerned, he wished to make a few general comments. At

first sight there seemed to be a logical connection between the basic concept of the expulsion of aliens and related factors such as nationality, territory, borders, the right of entry, residence and settlement which argued in favour of its definition as both a legal act and a legal event, particularly when a distinction between *de jure* and *de facto* expulsion was recognized. There were many different types of situations: in some cases, even when the expulsion was based on a court decision, the enforcement of the decision could give rise to unlawful acts; in other cases, as in time of war or raids on lawfully or unlawfully resident aliens, there was no legal basis and such acts were totally arbitrary. He agreed with the Special Rapporteur that the right to expel aliens fell within the realm of international law (para. 16), the question being to what extent.

42. The report clearly defined the grounds for expulsion in paragraphs 17 to 20, and he agreed that "[t]he question to be answered [was] which of the many grounds for expulsion were admissible under international law, or *a contrario*, which [were] prohibited" (para. 20). He endorsed the reservation regarding the absolute nature of the prohibition on collective expulsion (para. 24); and agreed that it was worthwhile to examine all the legal consequences of expulsion within the context of the responsibility of the expelling State and the ensuing compensation due for the injury suffered by victims (para. 27).

43. Broadly speaking, he endorsed the Special Rapporteur's methodological approach. He noticed, however, that no reference was made in paragraph 28 to specific legal regimes such as those of the European Community and other regional and subregional regimes, based on new concepts of nationality, territory and frontiers that might call for a different approach to the question.

44. On the two questions raised by the Special Rapporteur in paragraph 30, his response to the first question was that while existing treaty rules on the expulsion of aliens could be taken up in the future draft articles, any legal gaps should also be bridged. The reason for that was that the rules in question were far from clear to everyone, even at ministry level, as was borne out by the reaction in his own country to some articles he had written in the national press on the subject of the mass expulsion of Malian citizens from France.

45. As for the second question, namely, whether the draft articles should be restricted to the formulation of basic principles relative to the expulsion of aliens or propose an entire legal regime, he was in favour of the latter course, for at least two reasons. First, experience showed that a simple body of general principles was seldom very useful. Second, the Commission's work must be as effective and thorough as possible. It must produce a text that would help prevent or handle disputes involving the expulsion of aliens in the best way possible. In concluding, he said that the draft work plan proposed by the Special Rapporteur was a good basis for the future work of the Commission.

46. Mr. GALICKI said that the new topic was an interesting one, both intrinsically and in the combination of factors it embraced. On the one hand, it was a well-established subject in traditional international law, based on the principle of the exclusive sovereign prerogatives of States; on the other, it reflected contemporary trends in international law influenced by relatively new ideas of the international protection of human rights. Those contradictory trends made the Special Rapporteur's task all the more challenging. It should also be borne in mind that the expulsion of aliens was still used as a means of retaliation in relations between States, often being applied to a special category of aliens, namely, those with diplomatic status.

47. The report gave a clear picture of how the Special Rapporteur intended to approach the topic and contained a useful—albeit "partial"—bibliography (annex II). In general he found the approach outlined acceptable; nonetheless, he had identified some problems. First, he would not be in favour of a very broad definition of expulsion that embraced some of the related concepts listed in the draft work plan (annex I). In the light of recent practice, the Commission should keep the expulsion of aliens separate from those related concepts, which were based on different factual and legal grounds, in its thorny task of codification.

48. Secondly, not enough emphasis had been placed on the human rights aspect of the expulsion of aliens. For example, article 13 of the International Covenant on Civil and Political Rights, which laid down the requirements for the expulsion of aliens, had merely been referred to in a footnote. Similarly, although there was also a footnote reference to article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibited the collective expulsion of aliens, no mention was made, in the list of international documents, of Protocol No. 7 to the same Convention, whose article 1 contained procedural safeguards relating to expulsion of aliens that went further than those contained in the two aforementioned instruments. It was also worth noting that article 3 of the 1955 European Convention on Establishment provided that nationals of any Contracting Party lawfully residing in the territory of another Party could be expelled only if they endangered national security or offended against *ordre public* or morality. Lastly, it should be recalled that special international regulations governed the excessive use of the expulsion of aliens by States in situations of emergency, such as those connected with the fight against terrorism. Particularly noteworthy was Guideline XII of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism adopted in 2002.[1] In conclusion, he expressed his appreciation of the preliminary report and draft work plan, which would provide a good basis for further work on the topic.

49. The CHAIRPERSON, speaking as a member of the Commission, sought clarification regarding Mr. Galicki's comment about States resorting to expulsion by way of retaliation in their relations with other States. Such action was prohibited under the provisions relating to countermeasures contained in chapter II of part three of the draft

[1] Adopted by the Committee of Ministers on 11 July 2002, at the 804th Meeting of the Ministers' Deputies, document CM/Del/Dec(2002)804, appendix 3; annexed to the "Letter dated 1 August 2002 from the Permanent Representative of Luxembourg to the United Nations addressed to the Secretary-General" (A/57/313).

articles on the responsibility of States for internationally wrongful acts adopted in 2001.[2]

50. Mr. GALICKI said that his comment about expulsion being used as a means of retaliation did not of course imply his endorsement of that procedure. He was merely giving an example of current practice. Moreover, the fact that the matter had been considered by the Commission several years previously did not mean that it could not be raised again in connection with the topic under discussion.

51. Mr. MATHESON commended the Special Rapporteur's very interesting and useful introduction to a topic of considerable importance on which the Commission should be able to make a significant contribution. At that early juncture, he could do no more than comment briefly on the scope of the topic and the issues to be covered.

52. First, he agreed with Ms. Escarameia and Mr. Mansfield that the issue of refusal to admit aliens should not be dealt with. Denial of admission was a much less onerous action than expulsion and involved quite different questions of law and policy. The Commission should not allow itself to be diverted from the serious issues relating to expulsion in an attempt to investigate the whole complex area of immigration law.

53. Second, the provisional definition of expulsion given in paragraph 13 of the report was understandably very broad, but might cover situations that did not fall within the scope of the topic. For instance, it could be interpreted as covering transfers of aliens to the authorities of another Government for law enforcement purposes. Such transfers involved an entirely different set of issues, norms and policy considerations, many of which would presumably be dealt with when the Commission turned to the new topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)".[3] For the sake of simplicity, they should be excluded from the scope of the current topic. Moreover, as Mr. Galicki had pointed out, the definition embraced foreign diplomatic personnel, who were already adequately covered by the separate body of law and conventions on diplomatic privileges and immunities.

54. Third, a distinction must be drawn between aliens who were lawfully present in a country and those who were not. The right of a State to expel persons not lawfully present in its territory was an integral component of that State's right to deny admission or set conditions for it. Any alien who entered a country illegally, or who violated the conditions of his entry, was liable to expulsion on those grounds alone. That distinction between aliens lawfully and not lawfully present was clearly recognized both in State practice and in international agreements such as the Convention relating to the Status of Refugees (art. 32) and the International Covenant on Civil and Political Rights (art. 13). If it were decided that it was desirable for the Commission to deal with the removal of persons who were not lawfully present, perhaps for the purpose of addressing such questions as due process and humane treatment, it would at least be necessary to acknowledge that States had the right of expulsion without the need for further justification.

55. Fourth, the Commission could not begin to deal with the question of legitimate grounds for exclusion of aliens lawfully present in a country without a comprehensive study of State practice. Thus, it was gratifying to learn that the Secretariat would be conducting just such a study. While he suspected that it might prove difficult to find a coherent pattern of admissible and inadmissible grounds for exclusion, it was important for the Commission to base its work on a thorough grasp of that practice.

56. Lastly, while it was understandable that the Special Rapporteur should wish to produce as exhaustive a legal regime as possible, the Commission should not attempt to revert to—still less change—all the rules and principles it had already elaborated on State responsibility, diplomatic protection and liability. Instead, it should first focus on the basic question of States' rights and duties with respect to expulsion, leaving a decision on whether to examine the consequences of breaches of those duties for a later stage.

57. Ms. XUE said that the expulsion of aliens was a rather complicated issue because States followed a wide variety of procedures for preventing foreign nationals from entering or staying in their territory. Yet national restrictions on the movement of people had international political, economic and social repercussions. In an era of globalization it would therefore be helpful to identify some general rules of international law in order to protect States' interests and individuals' rights. The Special Rapporteur's preliminary report provided an extremely useful analysis of the issue.

58. Regarding the general approach to the topic, she agreed with the Special Rapporteur that it would be wise to formulate a whole set of general principles of international law forming the legal basis for the expulsion of aliens, since the matter was for the most part governed by national laws and existing treaty law in that area was fragmented, covering only certain categories of persons. Of course, existing treaty regimes should remain intact as *lex specialis* within a general legal framework. In general, the methodology proposed by the Special Rapporteur was acceptable.

59. Turning to the draft work plan and the scope of the topic, she drew attention to the key importance of the notion of "aliens" or "non-nationals". Hence, mass expulsions of the sort referred to in paragraph 10 of the report, such as the case of the Palestinians, should be excluded from the scope of the draft articles, not only because they were politically sensitive and legally inappropriate in that they concerned territorial claims and occupied territory, but also because it was disputable whether those people had been expelled from a foreign territory and, indeed, whether they were aliens. There was no need for a separate definition of each kind of expulsion, but it might be necessary to clarify the term "alien" by specifying that it referred to two kinds of foreign nationals: those who stayed or lived in a foreign country, either legally or illegally, and those who were denied entry before they physically set foot in the country concerned. Similarly, it would

[2] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 116–138.

[3] See *Yearbook … 2004*, vol. II (Part Two), chap. XI, sect. A.1, para. 362, and annex.

be necessary to decide whether the physical crossing of the expelling State's border by the person expelled was a constituent of the concept of expulsion or whether it was a consequence thereof. In her view, a broader concept should be adopted, because aliens prevented from entering the territory of the State concerned while they were still on the high seas or on board an aeroplane might nonetheless be regarded as expelled aliens.

60. While every State had the sovereign right to expel aliens from its territory on any grounds it deemed appropriate, that right was subject to certain limitations under international law. Referring to the three principles outlined in part 1, chapter II, section B of the draft work plan (annex I of the report), she said it was questionable whether the Commission should address the principle of the non-expulsion of nationals, since the right of nationals to leave and return to their home country belonged to a different area of the law. The principle of not expelling stateless persons was sound, because such expulsion might result in unbearable hardship for those persons. She wondered, however, if the principle should still apply if the stateless person to be returned to a State of which he or she was a permanent resident had illegally entered the expelling State.

61. On the second principle, the fundamental rights and dignity of aliens must be respected throughout the expulsion process. National laws tended to neglect that question, and unfair treatment of aliens and abuses of their human rights were matters to which neither the authorities nor the public of expelling countries paid sufficient attention. It was to be hoped that the Special Rapporteur would pay due regard to the practical aspects of that problem.

62. On the third principle, she sought clarification of the term "collective expulsion", which, to judge from paragraph 24 and footnote 34, appeared to refer to expulsions on grounds of nationality or race. Although such expulsions should certainly be prohibited, situations could nonetheless arise in which States might find it necessary to expel a boatload of people collectively in order to curb illegal immigration. In such circumstances, once exceptions were allowed the consequences could be serious. Migrant workers should be treated separately, and the relevant international treaty should apply.

63. Grounds for expulsion were primarily determined by national laws. From the international standpoint, maintenance of public or political order and national security could be regarded as absolute grounds for denying an alien the right to enter or stay in the country. Rather than considering whether there were still higher interests of States, the Commission should perhaps consider what factors could not serve as grounds for expulsion. While everyone agreed that no one should be expelled on grounds of nationality, the position was much more complicated when it came to religious belief, sexual behaviour or an alien's physical or mental state. For instance, when a foreigner from a region affected by an epidemic of a serious disease was refused entry temporarily for reasons of public health, denial of entry on those grounds might be hard on the person concerned, but was perfectly legitimate. Even in such circumstances, however, the right to denial of entry under international law was not absolute.

64. Lastly, with regard to part 3 of the draft work plan, in view of their vulnerable status, respect for aliens' individual rights and dignity was especially important. Where it was found that a person who had been resident in the expelling State for a long time had been expelled groundlessly, that person should enjoy the right of return and might, in some instances, be entitled to State compensation for personal injury and material damages. The draft articles should therefore make specific provision for such compensation. The provisions on State responsibility and diplomatic protection were also relevant and should apply in the context of the expulsion of aliens.

65. Mr. ECONOMIDES agreed with the content of the concept of "expulsion" as set out in paragraphs 12 and 13 of the report. That notion had to be broad enough to cover all procedures for the removal of foreigners from the territory of the State exercising the right of expulsion, irrespective of whether they were legally resident. Only *refoulement* at the border should be excluded from the scope of the study.

66. While every State had the right to expel aliens, qualifying adjectives such as "discretionary", "absolute" or "sovereign" should not be applied to that right because, far from being absolute or discretionary, it was governed by certain principles of international human rights law and by States' internal law. Generally speaking, domestic law permitted the expulsion of aliens only on certain specified grounds, which usually served the same purposes, such as the protection of public order or State security. Those grounds ought to be clarified rigorously. To that end, national laws would have to be compared in order to identify common solutions which might be said to acquire an international character.

67. International law prohibited the expulsion of aliens in some exceptional circumstances defined in international human rights conventions and in the case law of the judicial bodies or other organs set up under those conventions. All those exceptions would have to be examined individually in order to determine if they could be accepted as customary law, if they were rules coming under the heading of the progressive development of international law, or if some or all of them ought to be rejected.

68. Collective expulsions imposed by a strong State on a weaker State during an armed conflict were always illegal; any other interpretation would be dangerous and retrograde. The Special Rapporteur should also examine all the procedural steps preceding the execution of an expulsion order. In that connection, it would be useful to study States' internal law and international law, including that of the Council of Europe. Two issues of vital importance in that respect were the State's obligation to notify the alien concerned of its decision to expel him, and the right of that person to have a reasonable period of time within which to lodge an appeal against that decision. It was equally important to ensure that the execution of the decision to expel was carried out in a manner which was not inhumane, degrading or humiliating, since respect for

the dignity of the alien being expelled was indeed one of the standards guaranteed by international law.

69. The question of the right to expel aliens had to be treated in its entirety, following the Commission's usual approach of codification and progressive development. It was too early to say what form the final product should take but, bearing in mind the sensitive nature of the subject matter, a code of conduct might be more effective than a legally binding text.

70. Mr. KEMICHA said that, although every State had a sovereign right to expel from its territory aliens whose presence it deemed undesirable, that right was not and must not be absolute. The crux of the matter was, as the Special Rapporteur had stated in paragraph 5 of his report, how to reconcile the right to expel, which seemed inherent in State sovereignty, with the demands of international law and, in particular, the fundamental rules of human rights law. That consideration must serve as the starting point for the Commission's work in the years ahead.

71. The minimalist definition of "expulsion" proposed in paragraph 13 of the report, while clear and succinct, did not embrace the full complexity of an act which could have extremely serious consequences, particularly for the person expelled. The grounds given by a State for expulsion must be consonant with and limited by international law and the principles of respect for the rights of individuals. The rights related to expulsion comprised aliens' rights and the rights of their States of origin and raised the two crucial issues of the responsibility of States which had committed a wrongful act and the possible exercise of diplomatic protection by the alien's State of origin in the event of improper or illegal expulsion. The Commission would doubtless be able to apply the rules it had codified on State responsibility and diplomatic protection in its study of the expulsion of aliens. The methodology and work plan proposed were certainly useful at the current stage of the Commission's deliberations and it would also be helpful if the Secretariat were to prepare a documentary study of the subject.

The meeting rose at 12.55 p.m.

2851st MEETING

Thursday, 14 July 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabasti, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (*continued*)

[Agenda item 11]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The PRESIDENT welcomed Judge Shi Jiuyong, President of the International Court of Justice, and invited him to address the Commission.

2. Mr. SHI (President of the International Court of Justice), noting that it was the third time he had addressed the Commission in his capacity as President of the International Court of Justice, recalled that the intensity of the work accomplished by the Court had been a recurrent theme of his statements. Over the past year, as in previous years, the activity of the Court had been particularly sustained. The Court had rendered one advisory opinion (para. 4 below) as well as final judgments in 10 cases (the judgments in the 8 cases concerning the *Legality of Use of Force* had been rendered simultaneously).[1] That made 11 decisions in one year. The Court had also held oral hearings in three cases. During the same period, one new case had been filed with the Court, by Romania versus Ukraine,[2] attesting to the Court's vitality and the continuing trust States placed in it. As a result of its efforts, the total number of cases on its docket, which had stood at 21 one year earlier, had dropped to 12. He could not but insist on how much had been accomplished since that not too distant time when there had been talk of a serious backlog of cases at the Court.

3. As in the previous year, he wished to brief the Commission on the judgments and other decisions rendered by the Court since his last visit; in view of their number, however, he would confine himself to some of the principal legal findings contained in each of those decisions, in the hope that such a selective overview would prove more interesting to the members of the Commission than a comprehensive presentation.

4. On 9 July 2004, exactly two days after his previous visit to the Commission, the Court had handed down its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. As the members of the Commission would remember, on 8 December 2003, the General Assembly had adopted resolution ES-10/14 in which it had requested the Court, pursuant to Article 65 of its Statute, to "urgently render an advisory opinion on the following question: [w]hat are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General [prepared pursuant to General Assembly

[1] In addition to the final judgments rendered on 15 December 2004 in the 8 cases concerning *Legality of Use of Force*, the ICJ also rendered a decision in *Certain Property* (*Liechtenstein* v. *Germany*) on 10 February 2005 (see paragraph 18 below) and in *Frontier Dispute (Benin/Niger)* (see paragraph 21 below).

[2] *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), Application instituting proceedings, filed in the Registry of the Court on 16 September 2004, 2004 General List No. 132.