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Summary record of the 2852nd meeting

Topic:
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situations regarding the expulsion of aliens, which had led to varied national legislation and court decisions.

63. For example, there was the so-called "constructive expulsion", in which the person concerned was not the subject of a formal expulsion, yet the conditions in the host country made it impossible for him to stay. It would be interesting to have the Special Rapporteur comment on that type of expulsion in a future report. It would also be useful to give greater attention to situations in which the right of expulsion was exercised to the detriment of human rights.

64. The use of a double standard was also a problem. Developed countries regularly expelled so-called "economic refugees" to developing countries, but when developing countries expelled illegal aliens, they were accused of violating human rights. To cite an example, one African country had generously hosted hundreds of thousands of refugees, some of whom had settled there and refused to leave, even though the conditions in their country of origin had stabilized. Yet their expulsion had incurred protests from UNHCR, which had invoked the principle of *non-refoulement*. The Special Rapporteur should look into such cases in future reports.

65. As for methodology, the Special Rapporteur should deal with existing treaty rules on the question and then formulate basic principles which could guide States. State responsibility and diplomatic protection should be invoked whenever necessary, without repetition or duplication. The draft should also cover the right of return of expellees.

66. Mr. CHEE commended the Special Rapporteur for his concise and well-written preliminary report. He noted that although a State had the sovereign right to admit aliens and to expel them from its territory, that right was qualified by the right of the State to protect its nationals abroad and by international rules for the protection of human rights. He cited a number of court decisions granting compensation to expellees because the right to expel had not been exercised properly. For example, in the *Boffolo* case, the arbitrator had noted that the State possessed the general right of expulsion, but that "expulsion should only be resorted to in extreme instances and must be accomplished in a manner least injurious to the person affected" (p. 537 of the judgement). It should also be borne in mind that in resolution 40/144 of 13 December 1985 the United Nations General Assembly had adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, article 7 of which provided that, "except where compelling reasons of national security otherwise require, [an alien lawfully in the territory of a State shall] be allowed to submit the reasons why he or she should not be expelled".

67. Migrant workers were currently an important category of aliens, and it would therefore be helpful if the Special Rapporteur devoted more time to analysing the content of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

68. Lastly, he sought clarification from the Special Rapporteur on a number of expressions used in the draft work plan and asked in particular what was meant by the term "extraordinary transfer" in part 1, section I.A.9.

The meeting rose at 1 p.m.

2852nd MEETING

Friday, 15 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Marri, 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.

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

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. KABATSI thanked the Special Rapporteur for his extremely interesting and scholarly report (A/CN.4/554), which provided an overview of the topic and the legal issues pertaining to it, and congratulated him on his mastery and grasp of the subject.

2. Unfortunately strangers were sometimes mistrusted, envied for their industriousness and wealth and made scapegoats for all kinds of misfortunes. For that reason, throughout the ages and in all regions of the world, aliens had been and, sadly, still were being expelled. Admittedly a State was entitled, in exercise of its sovereignty, to exclude "undesirable" aliens from its territory in accordance with its authorities' decisions and through the operation of its internal law. Nevertheless the interplay between States and the dictates of globalization demanded the intermixing and interaction of peoples across borders. Rules attempting to introduce some order into that process existed in general customary international law, in treaties and in international agreements, as well as in State practice and internal laws. It was therefore the task of the Commission and the Special Rapporteur to identify carefully the rules from those sources, to develop them further where possible and to codify them with a view to improving their application.

3. The rules should clearly define the term "aliens" and choose the term, or terms, to be used to describe the process for excluding them, a task upon which the Special Rapporteur embarked in section II of the report. It might be wise to omit from the study aliens who wished

to enter the territory of a State but who were still outside its borders; expulsion following disputes over territory by different groups; and, possibly, aliens illegally present in a State.

4. Although clarification of the concepts involved in determining the scope of the notion of "expulsion of aliens" for the purpose of formulating a set of draft articles would require much time and effort, it would be a useful exercise. For the reasons set out in paragraph 13 of the report, it would be preferable to retain the term "expulsion". While it was correct to emphasize the right to expel, that right must not be abused and must be consistent with internal and international law, especially international human rights and humanitarian law. While State practice with regard to the grounds for expulsion was extremely varied, expelling States must abide by their own internal law and procedures and international law; otherwise they might incur international responsibility for their acts. Account must also be taken of the rights of other States, including the right to exercise diplomatic protection.

5. Existing treaty rules on the subject and other settled rules should not be taken up in the draft articles. The task should be limited to bridging any clearly identifiable gaps. The methodology proposed in the work plan in annex II of the report should be used as a tool to formulate general principles to fill those gaps. On the whole he therefore welcomed and supported the proposals contained in the preliminary report.

6. Mr. SEPÚLVEDA said that the report paved the way for the consideration of a subject of fundamental importance to the protection of human rights. Consideration of the topic would also offer an opportunity for the identification of general international legal standards pertaining to the expulsion of aliens, and for codification and progressive development of international law in that area. The Special Rapporteur had rightly noted that no final solutions yet existed which could be embodied in positive law. For his own part, he therefore wished to assist the process of formulating general rules by highlighting possible inconsistencies in the approaches proposed in the report.

7. It would seem that acknowledgement of an inherent sovereign right of the State to expel aliens ought to be a guiding principle of the report. The concept of the expulsion of aliens comprised various elements: such a measure must be a unilateral legal act; it constituted a coercive measure against a person or group of persons; it was an act inherent in State sovereignty; its application meant that a State obliged a person or group of persons to leave its territory; that person or group of persons had to be the national or nationals of another State; generally speaking, the grounds for expulsion must serve the purpose of protecting public order; international law recognized that any State had the discretionary power to expel aliens as an attribute of sovereignty; and, lastly, it was a principle of customary international law.

8. Yet those elements were at odds with other statements in the report, which affirmed, for example, that a State's right to expel aliens fell within the realm of international law. That argument appeared to contradict totally the principle of a State's sovereign power to expel aliens, an essential attribute of sovereignty which would be eroded if it were subjected to restrictions and limitations. The all-important question was to determine when a State was abusing the right to expel and specify the grounds warranting and legitimizing the expulsion of an alien. It was therefore necessary to identify the limits on sovereign powers and to establish the nature and scope of a general international legal regime deriving from treaties or custom, which was universally recognized, accepted and applied both in wartime and in peacetime. Such a regime would put an end to the ingenious justifications offered by States for arbitrary acts. The various grounds for expulsion listed in paragraph 19 of the report provided a broad range of arguments adduced by States for the adoption of a unilateral measure, whether or not justified, to protect their interests in certain circumstances.

9. The main challenge facing the Commission and the Special Rapporteur was to demonstrate that standards protecting fundamental human rights transcended State competence and that this new state of affairs had consequences for the law pertaining to the expulsion of aliens. As the Special Rapporteur had pointed out, it was necessary to decide which of the many grounds for expelling aliens were admissible under international law and which were to be prohibited.

10. The legal validity of the thesis that rights related to expulsion could derive either from the internal law of the expelling State or from international human rights law was disputable. The report asserted that the lawfulness of the expulsion depended on the measure's conformity with the expulsion procedures in force in the expelling State, and that this requirement could be regarded as an obligation under general international law, rather than as a treaty obligation or an obligation under domestic law alone. That hypothesis was then disposed of in paragraph 23 of the report with an argument that needed to be more solidly grounded, namely, that "[i]n the absence of a treaty, it might be reasonable to claim that the requirement [concerning respect for procedures] has a basis in customary law, or to consider it a general legal principle". Those conclusions ought to be studied in greater depth. It would be difficult to prove that all or a significant majority of States regulated expulsion procedures in their internal law. The international community still aspired to the principle of universal adherence to and applicability of international human rights treaties. It was probable that customary international law on the expulsion of aliens was still in the process of gestation.

11. As for expulsion regimes for migrant workers, it would be advisable to examine the mechanisms used by States to repatriate nationals who were illegally present in another State. Such repatriation could not be described as a unilateral act since it was based on bilateral agreements concerning readmission. Nor did it constitute a coercive measure because it involved the relocation of a person not lawfully present in the territory of a State of which it was not a national. The essence of such agreements was that the authorities of the State of origin would, at the formal request of the authorities of the requesting State, readmit to its territory the nationals of third States who had illegally entered the territory of the requesting State from the

territory of the requested State. Spain, for example, had recently entered into numerous agreements of that kind with European and African Governments and was on the verge of signing several more. The Special Rapporteur could investigate whether such repatriation agreements might be a useful legal method of alleviating the harshness of an expulsion process.

12. Lastly, it would be necessary to explore the possibility that the expelled person's State of nationality could resort to diplomatic protection by taking up the cause of one of its nationals. That possibility presupposed the existence of an injury suffered in consequence of an internationally wrongful act, and would certainly open up very attractive possibilities for defending basic human rights, but only where it could be ascertained that the expelling State had in fact committed a wrongful act. That too would be a valid criterion for the creation of an integrated international legal regime governing the expulsion of aliens in which a system of State responsibilities would play a role.

13. The Special Rapporteur's proposal, in paragraph 28 of his report, that national practice with regard to the expulsion of aliens should be compared in order to identify rules that the international community could be considered to hold in common and that were therefore codifiable as international legal norms would certainly require much effort, but it would be extremely useful.

14. Mr. KAMTO (Special Rapporteur), summing up the debate, thanked members of the Commission for their constructive, enlightening comments and clear, precise answers to the questions he had raised in his preliminary report, which, on the whole, had been well received. Mr. Koskenniemi had been the only member who had basically disagreed with the approach suggested, since he had contended that the Commission should first examine what interests were at stake in the expulsion of aliens as a social process and to what extent legislation, or the law, could supply appropriate responses, before going on to consider the scope and other aspects of the topic. Mr. Koskenniemi had held that the method of commencing with a study of the scope and general principles would be too remote from reality and that, on the contrary, the Commission should formulate norms which would help ordinary people. More specifically, he had expressed reservations about what the Special Rapporteur had regarded as the main problem, taking the view that the key issue was not how to reconcile the State's right to expel with that of the rights of the person expelled. He had been of the view that a State had no *a priori* right to expel and that such an approach would be too general in nature. He had felt that an examination of the four categories of restrictions on expulsion proposed by Mr. Gaja would result in a more practical approach, even if they were not the only possible restrictions.

15. In response to Mr. Koskenniemi's objections, he wished to draw attention to the fact that the historical background to the subject and the main socio-economic considerations related to expulsion had been dealt with in paragraphs 1 to 6 of the report. He did not intend to discuss those matters any further in future reports for, in keeping with the Commission's mandate and established practice, the topics on its programme of work must be studied in order to identify rules established by custom or relevant to the progressive development of international law. General considerations surrounding the topic merely provided an introduction to it and should not take up any more space than was necessary.

16. As for the approach he had proposed, any work plan was always general in nature, as its purpose was to outline categories covering a variety of situations. The latter were listed in part 1 of the work plan in annex I. He hoped that future reports would dispel any impression of lack of specificity which the preliminary report might have created.

17. Members of the Commission generally agreed on a number of points. First, the current title of the topic should be retained, although the contents of its two constituent elements, "expulsion" and "aliens", should be fleshed out. Second, the central problem identified at the end of paragraph 5 of the report, namely, how to reconcile the right to expel, which seemed inherent in State sovereignty, with the demands of international law, had been deemed apposite. The scope of application had to be carefully considered and the concept of expulsion delimited. Third, refusal of admission and, generally, immigration matters, should not be considered. Fourth, migratory movements and situations resulting from decolonization, the exercise of self-determination or occupation in the Middle East should likewise not be considered, judging from the reservations expressed by Mr. Dugard, Mr. Brownlie and Mr. Matheson and the historical insights provided by Mr. Daoudi. Fifth, the methodology proposed was generally acceptable. While some members, such as Mr. Sepúlveda, had expressed reservations, most agreed that as comprehensive a legal regime as possible should be elaborated, taking up, where necessary, existing treaty rules. Comparative and critical analyses of relevant national legislation should be used as sources. The case law of international and regional human rights bodies, for example, the Human Rights Committee, the European Court of Human Rights, the European Commission of Human Rights, the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights, the Iran–United States Claims Tribunal and the Eritrea–Ethiopia Claims Commission, should be examined. Lastly, most speakers had endorsed the general thrust of the work plan, on the understanding that answers would be provided to the questions they had raised.

18. That, then, was the basis for agreement that had emerged from the debate. On the other hand, reservations had been expressed, *inter alia*, about the definition of expulsion of aliens. Mr. Gaja, supported by Mr. Mansfield, Ms. Escarameia and Mr. Fomba, had said that it should encompass situations in which an alien was compelled in practice, by a variety of manoeuvres, to leave an expelling State's territory. Mr. Fomba had gone on to say that expulsion could in some instances constitute a material or legal event of the State without necessarily taking the form of an official legal act. While he acknowledged that viewpoint, he did not think that the two approaches were mutually exclusive. The future definition would accordingly seek to cover both situations when expulsion took the form of a unilateral, official legal act and those in which it was a legal event.

19. The clarifications of the definition of "alien" requested would have a bearing on the scope of the project, the purpose of which was precisely to specify which categories of persons were covered by the draft. He could already affirm that they would include persons living in the territory of a State of which they were not nationals, a distinction being drawn between those lawfully and unlawfully present. In that connection, it would also be useful to take into account the situation of persons unlawfully present yet already living in an expelling State. In addition, the persons covered by the draft would include refugees, asylum-seekers, stateless persons and migrant workers.

20. It would be difficult, on the other hand, to include persons refused admission, as Ms. Xue had requested. Such persons, if they had already entered the territory of a State, were aliens unlawfully present, but if they had not yet crossed the border and completed immigration procedures, they remained persons requesting admission and, consequently, their situation did not fall within the scope of the topic. Ms. Xue was right in saying that a stateless person might be expelled to a country where he or she had already lived, and Mr. Sreenivasa Rao had suggested that such cases should be studied separately. He had taken due note of those views.

21. He did not intend completely to exclude from the future draft articles rules applicable to expulsion in the event of armed conflict, since international humanitarian law laid down specific rules in that regard. On the other hand, he intended to avoid entering into the complex issues of nationality that often arose following changes in territorial status, such as that which had arisen when Eritrea's accession to independence had resulted in some Ethiopians changing their nationality and being expelled as a result. Nevertheless, the situation of such persons as expelled persons would be addressed to see what international law offered in terms of solutions. The point was to deal with the alien *per se*, without entering into considerations relating to his or her individual nationality.

22. Mr. Chee had queried such concepts as "extrajudicial transfer" and "extraordinary transfer". He was absolutely right to be concerned about certain strange terms that were not necessarily well established in international law. His own objective was to clear away some of the dead wood surrounding the concept of expulsion, delimiting its scope and pruning away any ancillary notions that were not directly germane to the topic. The concepts to which Mr. Chee had referred were often borrowed from the language of political and diplomatic discourse or journalism, and had been mentioned in the work plan only with a view to their exclusion.

23. Some members of the Commission had pointed out that the work plan omitted a number of general principles applicable to expulsion. Mr. Gaja, Mr. Sreenivasa Rao and Mr. Rodríguez Cedeño had made specific suggestions in that regard. While the remarks were justified, the omission was intentional: most of the principles in question were to be listed in part 1, section II.B.2: "Principle of respect for fundamental human rights during expulsion proceedings". But those principles needed to be underscored. Accordingly, when revising the workplan, he would give greater emphasis to the principle that expulsion must be carried out in accordance with the law, meaning both procedural and substantive rules; the principle of non-discrimination; the principle that the expelled person had the right to choose the receiving State if more than one State agreed to receive him; and the principle that the investments and property of the expelled person must be safeguarded. Other rights, such as respect for privacy, family life and human dignity, would be examined in the context of respect for fundamental human rights during expulsion proceedings. The right of expelled persons to consular protection was an interesting issue and could be covered in the context of diplomatic protection through non-judicial means.

24. Some members of the Commission, among them Mr. Sepúlveda, appeared to have misunderstood what he had said about the right to expel. Mr. Economides had said that qualifiers such as "absolute" or "discretionary" should be avoided, but he himself had never used the word "absolute" in that sense. On the contrary, in paragraph 16 of his report he stated that the right to expel was not an absolute right of the State. He had indeed referred to "discretionary" rights, but all writers, without exception, did so. *Oppenheim's International Law*, to quote just one source, indicated that while a State had a broad discretion in exercising its right to expel an alien, its discretion was not absolute.[1]

25. Mr. Brownlie had undoubtedly been labouring under the same misapprehension when he had pointed to a contradiction between paragraph 16, which said that the State was bound to invoke the grounds for expulsion, and paragraph 15, which said that the right to expel was an attribute of the sovereignty of the State. He himself saw no contradiction there: an attribute of sovereignty was not an absolute right, and sovereign rights, in that domain as in others, were always exercised in accordance with international law.

26. Mr. Pambou-Tchivounda had claimed that the heading of part 2 of the work plan (annex I), "Expulsion regimes", did not reflect the concept of a regime. Yet if "legal regime" was taken to mean the set of rules applicable to a legal institution, covering both organs and standards, then part 2 would indeed deal with the legal regimes, in the plural, applicable to the various categories of aliens who had been or could be expelled. General rules were set out in part 1, and the subdivisions of part 2 referred, not to separate rules forming a single legal regime, but rather to separate categories of aliens subject to expulsion, with each category to be studied in terms of the specific rules applicable to it. There could be no unified regime for part 2, since the situations it covered were not uniform, but varied depending on whether they involved refugees, persons lawfully present in a country, stateless persons, etc.

27. The problem of justiciability of an expulsion act would be taken up in part 2, as would the relationship between the expelling State and third or transit States, a relationship which was covered by the specific expulsion

[1] See *Oppenheim's International Law*, vol. I, Peace, 9th edition, R. Y. Jennings and A. D. Watts (eds.), Harlow, Longman, 1992, pp. 940–941.

regimes of certain categories of persons such as refugees or asylum-seekers. Part 2 would also affirm the principle of the right of a State to expel any person unlawfully in its territory, on the grounds of unlawful presence alone: on that point he was fully in agreement with Mr. Matheson. Respect for expulsion procedures and for the rights of persons in the event of expulsion was of course an entirely different matter.

28. Conditions for expulsion would be covered in part 2. The distinction he had drawn between conditions set by international law, including international human rights law, and by the internal law of the expelling State, seemed to him to be well grounded. In the first instance, the State was bound by the *pacta sunt servanda* rule: it had undertaken and had also to respect a number of international obligations, relating to expulsion procedures and the substantive conditions applicable in that context. In the second instance, the State was bound by the rule of *tu patere legem quam ipse fecisti*: it had to comply with the legislation that it had itself enacted. If there was internal legislation setting out procedures for expulsion of aliens, the State that had freely adopted them had to respect them. In the first instance, failure to respect the rule could render the expulsion proceedings unlawful and entail the international responsibility of the expelling State, while in the second instance, non-respect rendered the expulsion proceedings unlawful and could lead to its annulment in domestic courts. To avert any ambiguity, it would doubtless be best to speak, even in the latter instance, of conditions for expulsion rather than of expulsion proceedings, since even domestic legislation might combine procedural and substantive rules. The 1987 decision of the Iran–United States Claims Tribunal in the *Yeager* v. *Islamic Republic of Iran* case clearly showed that the granting of a reasonable period of time for the expelled person to pack his or her belongings could be viewed both as a procedural rule and as a substantive rule.

29. Lastly, on part 3 of the work plan, "Legal consequences of expulsion", some members of the Commission seemed to have reservations about referring to diplomatic protection and the responsibility of the expelling State. There, too, there was apparently a misunderstanding. As he had indicated in paragraph 27, that would not involve studying again the relevant regimes, but rather, taking advantage of rules already developed in order to devise a complete legal regime for expulsion of aliens by examining the legal consequences of unlawful expulsion. As to the right to return, on which Mr. Dugard had raised questions, he himself did not see it in the context of the Palestinian–Israeli conflict, but simply as a right of an individual who had obtained the annulment of unlawful expulsion proceedings to return to the country from which he or she had been unlawfully expelled.

30. He wished in closing to request all members of the Commission to transmit to the Secretariat the legislation of their countries or others concerning expulsion of aliens. He would be particularly grateful to Mr. Kateka if he would be willing to draft a short paper and transmit any relevant documentation explaining the concept of "constructive expulsion", of which he had to confess ignorance. He would also be grateful if the Secretariat would prepare a study similar to the one it had produced on the effects of armed conflict on treaties but comprising a compilation of documents relating to expulsion of aliens, organized according to the work plan on which the Commission appeared to be broadly agreed. Such a study would facilitate his analytical work, on the basis of which he would then be able to draw consequences with a view to formulating the draft articles.

31. In conclusion, he undertook to make every effort to submit a first report on the topic to the Commission at its next session.

32. Mr. KOSKENNIEMI thanked the Special Rapporteur for his exhaustive overview of the debate and especially for responding to the concerns he himself had expressed. The Special Rapporteur had labelled those concerns "reservations", but he had not intended them as opposition of any kind, precisely because it was unclear to him what there was to oppose or support at the present stage of the work. What he wished to see was a historical and socio-economic overview of the topic, to be conducted at the outset of the codification process. He persisted in thinking that such an overview was necessary before the Commission could identify a legislative purpose for its work.

33. His concern that such historical or socio-economic studies should be carried out went beyond the topic of expulsion of aliens to a number of issues that the Commission was now dealing with or might take up in future. The topic of expulsion of aliens was fundamentally different from others that the Commission had handled successfully in the past. As an academic from a developed country, he had very limited knowledge of the factual circumstances surrounding expulsion of aliens, the different interests at stake and the motivations of particular actors. He sometimes read reports in the press about such events, which seemed very remote from his own experience. He had been moved by Mr. Fomba's account of encountering on an aeroplane a compatriot being expelled from a European country. While that was an isolated incident, it did indicate that legislation was necessary if the rule of law was to be upheld in such situations.

34. He therefore asked himself, as a public international lawyer, what attitude he should take towards the codification exercise. In the past, the Commission had dealt successfully with topics such as the law of treaties, diplomatic relations and State succession, immunity and responsibility. All of those were matters in which he was an expert, as were the other members of the Commission, and it was only right that they should be the ones to codify the law in such areas. In respect of expulsion of aliens, however, he did not feel at all like an expert: in fact, he felt very vulnerable to objections that his position was based on insufficient knowledge of the subject.

35. One could identify clusters of problems on which studies could be carried out. What, for example, was the geographical region in which expulsion of aliens occurred most often? What modalities, namely individual or mass expulsions, were the most problematic? What were the economic reasons for expulsion, the racial reasons—surely more dubious—or the security reasons? The Special Rapporteur dealt with those reasons as motivations. When

States engaged in suspect activities, they gave explanations of their motivations that put them in the best possible light. Beneath such acceptable motivations, however, there was often an underlying unacceptable reason for expulsion, for example, racism. One did not unearth that real reason until a socio-economic study had been done.

36. There were thus two ways to proceed in such an exercise: one was to identify a problem and try to solve it; the other, to identify a concept and try to clarify it. The Commission had very often chosen the latter option in its work on the topics he had mentioned earlier. However, expulsion of aliens was a different matter. There the focus was on a specific topical problem which needed to be resolved. The report's reference to the concept of the expulsion of aliens was thus frustrating, because he was not interested in the concept, but in the problem.

37. He was asking for a socio-economic study, not out of academic interest or because the subject of expulsion of aliens was especially intellectually stimulating, but because such a study would help the Commission to identify the purpose of the legislative effort. That might seem a daunting task. The members of the Commission were not economic or social experts, and he was not asking for a 500-page paper on the subject, replete with graphs and statistics. Rather, an overview should be produced of the most important problems and situations involving the expulsion of aliens that had arisen over the past 20 years, from which typical cases and interests could be identified. That was how Max Weber would have proceeded.

38. In sum, a novel approach was needed to address the subject, the core issue of which was different from that of earlier, more traditional topics of public international law which the Commission had dealt so successfully with in the past.

39. Mr. BROWNLIE said that despite the care that the Special Rapporteur had taken in responding to comments, he had failed to deal with three points. The first was the relationship between paragraphs 15 and 16. He himself continued to believe that they were contradictory, and it did not help to say that the right of expulsion should not be abused—that would apply to almost any topic which involved principles of some kind or another. It just happened that in the literature there was a tendency to say that, because it was a discretionary right, that right should not be abused.

40. Admittedly, the Special Rapporteur had not asserted that the right to expel was an absolute right, but one had to ask what was the polarity between discretion and its opposite. Discretionary power was also regulated by law, and thus there was no simplistic polarity between discretionary power on the one hand and discretion which was regulated by law on the other. The Commission would get itself into terrible trouble if it did not accept that in a general way, the State had discretionary power, albeit regulated by law and limited by other principles of international law.

41. Thus—and that was his second point—it was important to maintain the simple distinction between a right and the modalities for exercising it. There had been the usual erroneous focus on human rights matters. Human rights came into the picture in connection with modalities. Even if in principle a State exercised the right of expulsion on a lawful basis, certain modalities of human rights standards must be observed, but they were different. They were applicable, highly relevant and very important, but they were not central to the subject.

42. His third point, which in a sense overlapped with Mr. Koskenniemi's concerns, was that the problem was not what interests were concerned, because they were multiple. Some were human rights interests, because a State had a duty, not only under multilateral standard-setting human rights treaties, but also under customary international law, to maintain order on its territory so that it could protect its own people and visitors, who might include long-term migrant workers; indeed, visitors were a very complex group. Thus, it was not so much a matter of reviewing the socio-economic history, because that would vary from country to country and from region to region within a particular country. The subject was not "about" expulsion of aliens. Why should the Commission focus on a State which announced that it was going to expel aliens? Not many States bothered to expel aliens as an end in itself. Rather, the subject was the lawful control by a State of its territory in order to enforce its own municipal law and principles of international law. The expulsion of aliens in appropriate circumstances was a mode of exercising that control. The Special Rapporteur had disregarded that important focus. The expulsion of aliens was a useful label and the conventional term, but it did not provide a very good description. If he was right, denial of entry should not be excluded from the topic of expulsion, because it was part of the overall issue of appropriate and effective control by a State of conditions on its territory.

43. Ms. XUE said she doubted whether the physical crossing of a boundary by an alien should be a required criterion. If a State had an inherent right to expel aliens from its territory, that immediately touched upon the territorial scope of the State and the territorial scope of a sovereign right. All cases involving the expulsion of aliens actually had to do with the scope of State jurisdiction and control. The example given by Mr. Fomba illustrated that point. An alien did not have to be placed on board an aeroplane in the physical territory of the expelling State, but merely in an area that was under the expelling State's jurisdiction and control. If the Commission confined itself to the aspect of territory and disregarded the extent of jurisdiction and control, the study would fail to cover a number of cases.

44. No particular case could best be categorized under the broad heading of "expulsion of alien". Such cases could always be reduced to specific categories of issues such as illegal immigration, State actions against transboundary crimes, border control issues, migrant workers, refugees or asylum-seekers. Now that the Commission was attempting to draw up a comprehensive regime on the expulsion of aliens, it must ask what practical interests were involved. She was very impressed with Mr. Koskenniemi's eloquent remarks in that connection. The expulsion of aliens was not an isolated problem, but an everyday occurrence and a very topical issue. A balance must

be struck between a State's right to expel aliens and the need to protect the interests of individuals. The topic was very important: cases involving the expulsion of aliens affected the interests of many more individuals than did cases involving diplomatic protection.

45. The CHAIRPERSON, speaking as a member of the Commission, and taking up Ms. Xue's point that the subject went beyond territorial sovereignty alone, said that the expulsion of stowaways was another question which might be addressed; indeed, it had already been considered by the international community, and an international text had been adopted on the protection of the basic rights of such persons, who often did not have the nationality of the flag State whose authorities expelled them.

46. Mr. CHEE recalled that in the *Boffolo* case a crucial distinction had been made between the existence of a right and the manner of its application. Judge Hersch Lauterpacht, too, had stressed that an unjustifiable method of expulsion amounted to an abuse of rights.[2] In the *Yeager* v. *Islamic Republic of Iran* case the principle was the same: the manner of expulsion, in which the person had been given 30 minutes to pack his belongings, had been wrongful. Thus, wrongful manner of expulsion or abuse of expulsion had to be borne in mind in discussing the right to expel as one inherent in State sovereignty. With reference to the case law of the international tribunals, the doctrine of the publicists and international instruments, it may be held that it is customary that aliens who are legal residents may not be unjustly expelled from the country in which they reside.

47. The State has various grounds under which to exercise its right to expulsion. The Special Rapporteur concludes that the lawfulness of expulsion depends on two factors: (*a*) conformity with expulsion procedure in force in the expelling States and (*b*) respect for fundamental human rights. Goodwin-Gill suggests that there are substantive as well as procedural limitations on the power to expel aliens: State practice accepts that expulsion is justified: (*a*) for entry in breach of law; (*b*) for breaching the conditions of admission; (*c*) for involvement in criminal activities; and (*d*) in the light of political and security considerations.[3]

48. In paragraph 25 of his report, the Special Rapporteur deals with the case of migrant workers and refers to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Today the most salient feature of the expulsion of aliens concerns aliens who are migrant workers everywhere in the world. The Special Rapporteur could have gone more in detail to help the Commission.

49. Mr. ECONOMIDES said he wanted to dispel a misunderstanding. His point that qualifying adjectives such as "absolute", "discretionary" or "sovereign" should not be used with "the right of expulsion" had not been meant as a criticism of the Special Rapporteur, but was a remark of a general nature addressed to all members of the Commission concerning future work on the topic. The right of expulsion was exercised in accordance with internal law, but the latter must not be contrary to international law, which governed the law of expulsion and which set conditions and limits for the exercise of all rights. The Commission should not talk of discretionary or absolute rights before considering those conditions and limits. If, at the end of its work, the Commission found there was a need for qualifiers for legal reasons, it could add them at that stage, but the qualifier "discretionary" was premature at the present juncture.

50. Mr. MANSFIELD said that the Special Rapporteur's approach was not at all incompatible with Mr. Koskenniemi's. If the Commission took Mr. Brownlie's conception of the subject, namely, the lawful control of a State over its territory, that included access not only of persons, but also of goods. If the Commission were to address the question of access of goods, it would be helpful to have an overview of the most recent problems with regard to the import of goods, such as the application of health regulations to exclude goods, difficulties in applying rules of origin for goods, and problems relating to the potential introduction of alien species. That would help to inform the Commission's work. Likewise, if the Secretariat could prepare a summary of the most pressing and controversial problems encountered in the past 20 years concerning the expulsion of aliens, that, too, would usefully inform the Special Rapporteur's work.

51. Mr. BROWNLIE said he was obviously not suggesting that the Commission should study special boundary regimes, demarcations, control of territory and other matters as subjects in their own right. Rather, it should look at the rationale of the subject. The expulsion of aliens was an important aspect of the problem of control, and the Commission was studying the expulsion of aliens against the background of what it was about, namely, the effective control of national territory for the purpose of maintaining the rule of law.

52. Ms. ESCARAMEIA commended Mr. Koskenniemi's eloquent remarks. Like Mr. Mansfield, she did not think there was any incompatibility between the two approaches. Any paper prepared by the Secretariat should analyse specific situations in which aliens had been expelled. That did not contradict Mr. Brownlie's remarks, because such situations were a consequence of the need for State control of its territory. She therefore endorsed Mr. Mansfield's proposal.

53. She also suggested that, as had been done in the case of other topics, the Commission should hear the views of experts in the field in order to gain an insight into the situation of persons who were expelled. She had in mind experts from IOM, UNHCR and OHCHR, as well as from non-governmental organizations active in the field. The scientific community had been very informative on the topic of aquifers, and there was also a precedent in the Commission's contacts with United Nations human rights treaty bodies on the topic of reservations to treaties.

54. Mr. KEMICHA, referring to Mr. Koskenniemi's moving testimony on how little he knew about the reality

[2] H. Lauterpacht, *The Function of Law in the International Community*, Oxford University Press, 1933, p. 289.

[3] G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford University Press, 1978, p. 307.

of expulsions and how isolated from that reality international legal experts were, pointed out that the incident described by Mr. Fomba was not exceptional: such incidents took place every day at European airports, in European aeroplanes and at European harbours. One need only open one's eyes and ears to take note of what was taking place.

55. Mr. Brownlie had stressed that a State had every right to enact and apply legislation for the protection of its territory, but nothing in the Special Rapporteur's preliminary report asserted the contrary. It went without saying that every State had legislation and safeguards to ensure that expulsions took place with due regard for internal law. As for the right of return, he referred to the recent case of a person who had successfully appealed against an expulsion order and had been allowed to return to France from Algeria. Such cases were referred to in paragraph 27 of the report. It was therefore unfair to maintain that the Special Rapporteur disregarded the basic right of the State to protect its territory and its citizens.

56. Mr. BROWNLIE said that if he was right in saying that the rationale for studying the subject was the effective control of State territory for reasons of international public order, then the Commission must decide whether it was logical to include the question of refusal of entry. Thus, there would be practical consequences if the Commission decided to confine the topic to expulsion of aliens, which was just one mechanism that could be used to characterize the problem of effective control of State territory in relation to the movement of foreigners. If he was correct, it would be logical to extend the subject to include refusal of entry.

57. Mr. Sreenivasa RAO, commenting on Ms. Escarameia's suggestion, said that at this early stage in its study of the topic it would be premature for the Commission to seek the views of experts on expulsion of aliens. It would be preferable to give the Special Rapporteur the opportunity to study the materials available and to inform the Commission on the outcome of his research in a subsequent report. The Commission was not a fact-finding body, and should be wary of setting a precedent that might not be in keeping with its specific mandate. While he endorsed the idea of greater flexibility and the need for the Commission's work to be of relevance to contemporary society, there were better ways of achieving those ends than by risking unnecessary exposure to the vagaries of public opinion.

58. Mr. KAMTO (Special Rapporteur), responding to the comments and suggestions made during the discussion, said that while he understood Mr. Koskenniemi's concern about the need for background studies to place the topic in its overall context, he also endorsed Mr. Sreenivasa Rao's comments with regard to the Commission's mandate and working methods. There was nothing to prevent him drawing on the material or advice of experts available on the subject, but there seemed no need to make a formal request for their input to the Commission at the present juncture. He was therefore in favour of Mr. Mansfield's suggestion that the Secretariat should be requested to prepare a brief overview of the situation, covering mainly the historical background but possibly also some socio-economic factors, in the form of an information document for members rather than as part of the Special Rapporteur's subsequent reports.

59. The Special Rapporteur took note of Mr. Brownlie's very valid point concerning the distinction between a right and the modalities for exercising it, which should help to settle the matter of whether the right of expulsion was indeed one inherent in State sovereignty. However, he took issue with the view that expulsion should be seen as part of the wider issue of the right of the State to control its territory, and that accordingly the question of non-admission should fall within the scope of the topic. Broadening the scope to such an extent would merely complicate matters by diluting the very concept the Commission was trying to define. Moreover, he found it difficult to reconcile the ideas of expulsion and non-admission, since someone who had not yet entered a territory could not be expelled from it. Even if one were to take up Mr. Brownlie's correct assertion that expulsion was one aspect of a State's right to exercise control over its territory, a distinction must be drawn between measures adopted by a State to that end by refusing entry to persons who did not meet certain conditions, and other measures governing persons already on its territory who might be subject to expulsion.

60. As for the question, raised by Ms. Xue, whether the concept of expulsion could be extended to include areas that were not territorial *stricto sensu* and thus cover situations where persons on board vessels or aircraft were refused entry into the territory of a State, he had already rejected such an approach in the preliminary report by referring to the *MV Tampa* case (para. 9), and he maintained his position on the matter. The concept of expulsion could not apply to persons until they had physically crossed the border and gone through the entry formalities of the State in question; consequently, refusal of entry and *refoulement* should not be dealt with. Although some members might feel that that would limit the scope of the topic unduly, such limitations were necessary; otherwise the Commission would make its task more difficult and the set of draft articles it produced would create more problems than it resolved. In any case, the Commission's task was to deal with the problem of expulsion in the context of international law, not with problems of immigration and admission that were clearly matters of internal policy.

61. He took note of Mr. Economides' clarification, but considered nonetheless that in the light of Mr. Brownlie's remarks on the distinction between a right and the modalities for exercising it, the term "discretionary" could be used without prejudice to the concept of expulsion. However, for the time being he would not press the matter, since he was certain it would come up again, given that the literature unanimously asserted that expulsion was a right inherent in State sovereignty, and consequently a discretionary one too.

Unilateral acts of states (A/CN.4/549 and Add.1, sect. C and A/CN.4/557)[4]

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

62. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his eighth report on unilateral acts of States (A/CN.4/557), recalled that a Working Group, chaired by Mr. Pellet,[5] had been set up to analyse some of the examples of State practice contained in the seventh report,[6] with a view to their further consideration in the present report. He thanked all members of the Commission who had provided valuable input in that connection. Moreover, in its discussion of the topic during the fifty-ninth session of the General Assembly, the Sixth Committee had emphasized that as the next step the Commission must develop a clear definition of unilateral acts and formulate general rules applicable to all unilateral acts and declarations considered by the Special Rapporteur in the light of State practice with a view to promoting the stability and predictability of their mutual relations (A/CN.4/549, para. 75). The definition of unilateral acts must be sufficiently broad and flexible to give States room for manoeuvre in carrying out their political acts and must also include other types of conduct capable of producing legal effects. He hoped that task could be achieved during the current session.

63. Chapter I of the report provided detailed information on 11 examples of different types of acts to be considered on the basis of the guidelines agreed on by the Working Group at the previous session and listed in paragraph 12 of the report. The first example was the note dated 22 November 1952 from the Minister for Foreign Affairs of Colombia concerning the sovereignty of the Bolivarian Republic of Venezuela over the Los Monjes archipelago. It was of particular interest since it highlighted the diverging views of two different branches of State power: the Government of Colombia had accepted the validity of the note, whereas the Council of State of Colombia had nullified it.

64. The second example was the Declaration of the Minister for Foreign Affairs of Cuba concerning the supply of vaccines to the Eastern Republic of Uruguay. The case was of interest because the addressee had rejected the act in the sense it had been intended by Cuba—namely, as a donation—and had viewed it as a commercial transaction.

65. The third example was Jordan's waiver of claims to the West Bank territories, which differed from the earlier examples in that it had prompted reactions from other States, including the United States and France. It also raised the important issue of whether the person making the declaration on behalf of the State—the King of Jordan—had been competent to do so. Given that the Constitution of Jordan prohibited any act related to the transfer of territory, it would appear that the King had exceeded his authority, although that had not prevented the waiver from producing legal effects, since the transfer of the territory to the State of Palestine had actually taken place. The example illustrated the subsequent confirmation of an act formulated by a person not competent to do so under the domestic laws of the State in question.

66. The fourth example was the Egyptian declaration of 24 April 1957. The fifth example, of statements made by the Government of France concerning the suspension of nuclear tests in the South Pacific, was noteworthy because, although the statements had taken various forms, including a diplomatic note and a statement to the General Assembly, they constituted a single unilateral act (para. 72).

67. The sixth example was of two unilateral protests by the Russian Federation against Turkmenistan and Azerbaijan in relation to the status of the waters of the Caspian Sea, in the form of diplomatic notes. They had been sent directly to the addressees with the intent of producing specific legal effects: to prevent the acquisition or the formation of certain rights or claims by the two countries in question.

68. The seventh example, the statements made by nuclear-weapon States to the Security Council and the Conference on Disarmament, had already been touched on by the Commission. The statements were similar in content and their objective was to provide negative guarantees of the non-use of nuclear weapons. The eighth example was the Ihlen Declaration of 22 July 1919. The ninth example was the Truman Proclamation of 28 September 1945, which had been considered by the Commission in connection with the draft conventions on the law of the sea and by the ICJ in its judgment in the *North Sea Continental Shelf* case.

69. The interesting feature of the tenth example was that the act in question was addressed, not to a State but to an international organization, and consisted of various statements made by different authors or organs in Switzerland at different times on the subject of tax exemptions and privileges of the United Nations and its staff members. The last example concerned the conduct of Thailand and Cambodia with reference to the *Temple of Preah Vihear* case.

70. Chapter II set out the conclusions that could be drawn from the statements analysed. What was noticeable was their very varied nature in terms of subject matter, form, authors and addressees. The latter included specific States or those *in statu nascendi*, such as the Palestine Liberation Organization in 1988, staff of international organizations, groups of States or the international community in general. Similarly the consequences of unilateral acts were varied: in some cases they had resulted in international treaties, in others they had profoundly affected an important legal regime. In others again, the unilateral act had been intended to avoid undesirable effects that could result from silence. Generally speaking, it was difficult to draw any hard and fast conclusions regarding the evolution of unilateral acts over time.

71. He hoped that the examples contained in the report would serve as a basis for constructive discussion with a view to adopting a definition of unilateral acts of

[4] Reproduced in *Yearbook … 2005*, vol. II (Part One).

[5] See *Yearbook … 2004*, vol. II (Part Two), p. 96, paras. 245–247.

[6] *Ibid.*, vol. II (Part One), document A/CN.4/542.

States during the current session, on the basis of which certain rules or principles governing the matter could be identified.

The meeting rose at 1 p.m.

2853rd MEETING

Tuesday, 19 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

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

Unilateral acts of states (*continued*) (A/CN.4/549 and Add.1, sect. C and A/CN.4/557)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA thanked the Special Rapporteur for his report but said she was disappointed that he had not devoted more time to the conclusions and that the report did not contain any proposals as to how work should proceed.

2. The topic of unilateral acts of States gave rise to two types of criticism. One, more radical, was that there was no such thing as a legally binding unilateral act of a State, because such an act involved only one party and thus could be modified or revoked at any time (inapplicability of the principle of *pacta sunt servanda*). However, the report had shown that that position was untenable, given international jurisprudence (namely, the *Legal Status of Eastern Greenland*, *Temple of Preah Vihear* and *Nuclear Tests* cases). In the *Nuclear Tests* case, the ICJ had clearly rejected the possibility of revocation of a unilateral act: "the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration" (para. 82 of the report). Then there were those who felt that the unilateral acts of States were so diverse that they could not be a source of international law. Although such acts differed considerably, the practice described in the report indicated that they had a number of common traits, which had been identified by the Working Group, on which the Commission could base its work.

3. Whereas the date, form and content of the act might not be so decisive, the author and its competence (*vis-à-vis* international law rather than domestic law) must be taken into consideration. In that connection, article 7 of the 1969 Vienna Convention on the Law of Treaties, although too restrictive, might offer some guidance, provided that competence was expanded to include other authors, including legislative bodies. Intent, context and circumstances were fundamental in determining whether an act produced legal effects. Once again the ICJ, in the *Nuclear Tests* case, had declared that "statements [...] must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made" (para. 83 of the report). The addressees could also vary considerably, but they should always be subjects of international law. The reaction of addressees was particularly important when it consisted of action taken on the basis of the act in question or in reply to a specific request. The reactions of third parties could also help to determine whether a unilateral act was involved, as could the adoption of implementing instruments, whether by the author, the addressees or third parties.

4. As to how the Commission should proceed with its work, she did not think that the 1969 Vienna Convention was the best model; it should only be used as a reference, particularly for the competence of authors. Unilateral acts were in fact very different from treaties; they were acts by States which produced legal effects on their own. Thus the Commission should begin by agreeing on a definition, drafted in sufficiently broad terms to leave scope to manoeuvre: for example, "an act that originates in a State authority and produces international legal effects". It should then analyse case law and State practice to compile the list of factors (intent, circumstances, reactions of the addressees or third parties, etc.) that supported the presumption that a given act produced legal effects. In that connection, it would be very useful if the Secretariat could produce a paper similar to the excellent document on the effects of armed conflicts on treaties (A/CN.4/550 and Corr.1–2). Once the notion of unilateral act was established, the Commission might consider what cases did not fall under that category and then consider the consequences of unilateral acts, such as responsibility for their violation. For the time being, those objectives were sufficient, because the project was very ambitious. States would then have an idea of what they could or could not do and with what consequences.

5. Mr. PELLET said that he shared Ms. Escarameia's interest in the subject but did not think that the project was too ambitious. The aim was to tell States the extent to which they risked becoming trapped by their own declarations, i.e. their own commitments. States needed to know, for example, what statements they could make in the international arena without such statements being regarded as legal acts that could be used against them.

6. In essence, the report was based on the work of the Working Group. The practice described was more limited than in the previous report,[1] but more usable, although the acts addressed were perhaps not entirely representative. The report's conclusions were not developed to any great extent, but they constituted a starting point for further consideration. He noted several ambiguities (paras. 179 and 199) and some vagueness (paras. 183 and 186), in particular with regard to the Ihlen Declaration, about

[1] See 2852nd meeting, footnote 6.