Document:
A/CN.4/2972

Summary record of the 2972nd meeting

Topic:
Expulsion of aliens

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with the addition of a reference to paragraph 2 of draft article 48 [47 bis]. Paragraph 1 of that draft article had not been mentioned, since the condition of nationality of claims did not apply to the invocation of international responsibility under draft article 52 [51]. The commentary would emphasize that point, while also indicating that the solution was in conformity with the correct interpretation to be given to article 48, paragraph 3, of the draft articles on State responsibility, despite the ambiguity that the provision contained.

59. Draft article 53 (Scope of this Part) contained a “without prejudice” clause relating to the invocation of the responsibility of an international organization by a person or entity other than a State or an international organization. That additional draft article had been proposed by the Special Rapporteur in response to the concerns of some members of the Commission, and the Drafting Committee had considered that it should be included for the sake of clarity, even though Part Two of the draft articles on the content of the international responsibility of an international organization already contained a similar provision and Part Three of the articles on State responsibility did not. The purpose of the wording retained was to preserve those situations where a person or entity other than a State or an international organization would have a legal entitlement to invoke the international responsibility of an international organization. That “without prejudice” clause should therefore not be read as conveying any presumption in favour of the existence of such an entitlement. If it was decided to include provisions on countermeasures in the draft articles, some changes might have to be made in the title of draft article 53 and in the references to “this Part” and “the present Part”.

60. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his introduction and invited the members of the Commission to consider draft articles 46 to 53 on responsibility of international organizations article by article with a view to adopting them as a whole.

Draft articles 46 to 51

Draft articles 46 to 51 were adopted.

Draft article 52

61. Mr. KAMTO, noting that the Drafting Committee had chosen to replace the word “protecting” by the word “safeguarding” in paragraph 3, said that he would like the distinction between those two words to be more clearly explained in the commentary because it was not obvious.

62. Mr. HASSOUNA said that, since the title was too long, he wished to know whether it could be simplified to read: “Invocation of responsibility by a non-injured State or international organization” or whether the words “other than” had to be retained.

63. Mr. GAJA (Special Rapporteur) suggested that the first sentence of paragraph 1 could be used for that purpose. The title would thus be slightly shorter and would read: “Invocation of responsibility by a State or international organization other than an injured State or international organization”.

Draft article 52, as amended, was adopted.

Draft article 53

Draft article 53 was adopted.

The draft articles contained in document A/CN.4/L.725, as a whole, as amended, were adopted.

Organisation of the work of the session (continued)*

[Agenda item 1]

The meeting rose at 11.50 a.m.

2972nd MEETING

Thursday, 5 June 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada.

Expulsion of aliens (continued)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. NIEHAUS congratulated the Special Rapporteur on his fourth report, which addressed two questions: the non-expulsion by a State of its nationals when it related to persons having two or more nationalities, and deprivation of nationality, which was sometimes used as a preliminary to expulsion. The first question, dealt with in chapter I of the report, harked back to a time-honoured and undisputed legal concept, namely that it was for a State to determine under its own law who were its nationals. Alongside the interest of the State and its right to make that determination, however, the legitimate interests and

* Resumed from the 2968th meeting.
** Resumed from the 2969th meeting.
rights of individuals in the matter were also, quite correctly, mentioned by the Special Rapporteur. Such rights were enshrined in numerous human rights instruments, beginning with the Universal Declaration of Human Rights, and States were obliged to respect them in exercising their sovereign right to regulation in that area.

2. The practice of dual or multiple nationality was in reality not as recent a trend as the Special Rapporteur seemed to indicate in his report. In the distant past, the ancient Greeks had recognized that an individual could be a citizen of more than one city-State. In more recent times, such well-known figures as Garibaldi had had three or four nationalities. In 1913, the German Imperial and State Citizenship law (Delbrück law) had expressly permitted dual nationality in Germany. While it was true that dual nationality had been fairly rare in the past, it had grown more prevalent in recent years and seemed set to become even more widespread in the future, probably owing to modern lifestyles, increasingly close relations among States and globalization in general. Each State had the right to permit or prohibit dual nationality. In his own country, Costa Rica, for example, only a few years previously, taking a second nationality would have resulted in the loss of Costa Rican nationality. Now, however, following constitutional reforms, Costa Rican nationality was inalienable, and dual or multiple nationality was perfectly acceptable under Costa Rican legislation.

3. As to the question, raised by the Special Rapporteur in paragraphs 7 to 13 of his report, of whether dual or multiple nationalities were aliens, the existing literature and legislation seemed to answer very clearly in the negative, notwithstanding the Special Rapporteur’s arguments. Quite apart from the fact that nationality could be acquired by birth (whether through jus sanguinis or jus soli) or naturalization, once it was acquired, the sources cited and simple legal logic could hardly be said to argue for the existence of first-, second- and third-category nationality. Although certain political rights, such as the right to be elected Head of State, might be constitutionally restricted to nationals born in the country, any further distinctions among nationals on grounds such as their holding of dual or multiple nationality would be discriminatory and in breach of fundamental principles of international law. The examples given in the report should be understood as relating to consular, migration or tax matters in the context of the movement of migrants or transients across borders, not as agreements that fundamentally affected the civil or political rights of individuals lawfully established in a country and that would enable a State to consider a national that held the nationality of another State as an alien.

4. An appropriate conception of the modern phenomenon of dual nationality was to be found in the treaties that Spain had concluded with the majority of Latin American States, which shared its traditions, culture and language. Their purpose was to ensure that nationals of one of the States parties did not feel like foreigners in the other State, were treated with respect and enjoyed the same rights as that country’s nationals. In other words, a Costa Rican resident in Spain was to be treated like a Spaniard, and vice versa. Under no circumstances could dual nationality be seen as affecting a person’s nationality of origin, still less as rendering the person an alien in his or her own country.

5. With regard to the second question, on the legality of expelling a person with more than one nationality if that person had not first been denationalized, he believed that the expelling State was under an obligation to denationalize a dual or multiple national, as in the case of a person with only one nationality, before carrying out the expulsion, if it wished to avoid serious violations of the principles of human rights. The fact that such expulsions occurred in practice neither justified nor authorized them from the standpoint of international law. He found it difficult to comprehend the Special Rapporteur’s retreat from the position that the expelling State had an obligation to denationalize, on the grounds that, were the expelled person to return to the expelling State, for example as a result of a change of government, that action would be complicated by the denationalization, since the person would be treated as an alien requesting admission to a foreign State, or else the expelling State would have to restore its nationality to the person in order to enable the latter to exercise the right of return (paragraph 11 of the report). That would be tantamount to recommending that a national with dual or multiple nationality should be treated as an alien. Such, as he understood it, was the tenor of paragraph 12 (a), pursuant to which “[t]he principle of the non-expulsion of nationals does not apply to persons with dual or multiple nationality unless the expulsion can lead to statelessness”. The correct legal approach would, in his view, be to require that for persons with dual or multiple nationality to be expelled, they must first be denationalized, and that their denationalization must be neither arbitrary nor discriminatory. That was the condition attached by the Special Rapporteur to the denationalization of persons with a single nationality in paragraph 35 (a) of his report.

6. As to the question discussed in paragraphs 14 to 24 of the report, namely whether the expelling State was the State of dominant or effective nationality of the person being expelled, he agreed with the Special Rapporteur on the need to refrain from raising the question as far as was possible, since the topic that should concern the Commission was the expulsion of aliens, not the legal regime of nationality. Nonetheless, when discussing dual nationality in the context of expulsion of aliens, it would be hard to ignore certain basic principles and elements relating to nationality. The concepts of dominant or effective nationality seemed more relevant to conflicts of nationality or of rules under private international law, and were not a good basis for the Commission’s work on expulsion of aliens.

7. Regarding the second major question, namely loss of nationality, denationalization and expulsion, covered in chapter II of the report, it was clear, first of all, that a large number of States parties did not feel like foreigners in the other State, were treated with respect and enjoyed the same rights as that country’s nationals. In other words, a Costa Rican resident in Spain was to be treated like a Spaniard, and vice versa. Under no circumstances could dual nationality be seen as affecting a person’s nationality of origin, still less as rendering the person an alien in his or her own country.

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127 General Assembly resolution 217 A (III) of 10 December 1948.
that trend was well suited to the modern world. The State
could establish, through legal (usually constitutional)
measures, conditions or circumstances that led to the loss
of nationality.

8. Unlike loss of nationality, which, as the Special Rap-
porteur rightly pointed out, was the consequence of an
individual’s voluntary act, denationalization was a State
decision that deprived a class of people or one or more indi-
viduals of the nationality of that State. Denationalization
had not only been a means of defending the interests of the
State, it had also frequently been used to abuse and impro-
perly appropriate property, to usurp and violate the rights of
individuals and to dispossess them of their property prior
to expulsion. That type of denationalization generally took
place in particular circumstances such as State succession
or war. During the Commission’s discussion of the third
report on expulsion of aliens at its previous session,129 he
had alluded to the little-known yet grave abuses committed
during the Second World War in many countries of Latin
America and elsewhere. Denationalization of persons of
German or Japanese origin born in States at war with Ger-
many and Japan had served as a means of unjustly and arbi-
trarily confiscating their belongings and expelling them.
Grave acts had been committed that violated basic human
rights and might easily be repeated at a regional level in
other circumstances. Hence his difficulty in understanding
why the Special Rapporteur, in paragraph 35 of his report,
said that he was not convinced of the necessity or even the
practical utility of proposing one or more draft articles on
the issues dealt with in the fourth report, particularly as he
went on to say that it was within the sovereign jurisdic-
tion of each State to establish in its domestic legislation
conditions for the loss of its nationality and for the dena-
tionalization of its nationals, provided that it did not result
in statelessness and the denationalization was not arbitrary
or discriminatory. What would happen if there were no prior
conditions for denationalization? Was it not precisely
to cover such cases that the Commission should identify
minimum rules or parameters that must be observed in
accordance with fundamental principles of human rights
and international law?

9. In the cases that had occurred during the Second
World War, denationalization had often been declared not
by a competent court but by the Executive itself, and, to
compound the legal absurdity, those nationals, once arbi-
trarily stripped of their nationality and rendered stateless,
had been declared to be German or Japanese nationals,
thereby allegedly providing all the more justification for
confiscating their property and expelling them.

10. For those reasons, unlike the Special Rapporteur, he
thought that there were sufficient reasons for elaborating
draft rules both on non-expulsion by a State of its nation-
als having two or more nationalities and on deprivation
of nationality as a preliminary to expulsion, with a view
to regulating such situations and preventing the arbitrary
acts and abuses to which he had referred.

11. Ms. ESCARAMEAIA said that the Special Rap-
porteur’s fourth report seemed to be based on four main
assumptions, all of which caused her difficulties.

12. The first was that once an individual had a national-
ity, a second nationality did not deserve full protection:
the problem of statelessness could not arise and even in
the event of expulsion, another State could always receive
the individual. A second assumption was that denation-
alization could be used by the State as a sort of precau-
tionary measure to circumvent a general prohibition on
the expulsion of nationals. The third assumption was that
denationalization was permissible, as long as it was not
discriminatory or arbitrary. While the meaning of “dis-
criminatory” was easy to grasp, the meaning attached to
the term “arbitrary” seemed to be heavily influenced by
paragraph 60 of one of the arbitral awards by the Eritrea–
Ethiopia Claims Commission (Ethiopia/Eritrea), accord-
ing to which denationalization was not arbitrary if it had
a basis in law, it avoided statelessness and there were
legitimate reasons for it, considering the circumstances of
the case. The fourth assumption was that the actions of
States were a basis for the formation of rules of interna-
tional law, thus almost ruling out the possibility that such
rules had already existed and that States were breaching
them. She had been surprised to see the emphasis placed
on those assumptions, especially because in paragraph 5
of the report the Special Rapporteur had invoked many
universally accepted documents such as the Universal
Declaration of Human Rights, the International Covenant
on Civil and Political Rights and the European Conven-
ton on Nationality.

13. Her reaction to the report had been fairly personal,
as she had been born in a country that had been subjected
to almost 50 years of dictatorship, during which expulsion
and denationalization had been systematically used to
remove political enemies and as a punitive measure. After
the restoration of democracy in Portugal, the Constitution
and legislation had adopted a completely new approach
to nationality, viewing it as a right. In its article 33, the
Constitution of Portugal forbade, in absolute terms, the
expulsion of any Portuguese citizen, irrespective of how
many nationalities he or she had, and prohibited the loss
of nationality by any means except the will of the dual
citizen involved. Denationalization, as an act of State,
was totally forbidden in Portugal.

14. Legislation on nationality and expulsion that
severely restricted the expulsion even of aliens had been
adopted in 2007.130 It required that the relevant deci-
sion be made by a judicial authority and restricted it to
a very limited number of cases. Administrative expul-
sion was always subject to appeal before a judicial organ
and was restricted exclusively to cases in which an alien
had entered and remained in the country illegally. Thus,
nationality was seen as a right of the individual, not as a
benefit or concession granted by the State and which could
be withdrawn whenever the State so wished, with the sole
proviso that the individual must not become stateless.

15. A similar position had been taken by the Inter-
American Commission on Human Rights in 1977. In
considering several important cases from the Pinochet
era in Chile, it had indicated that since nationality was
generally considered to be a natural right and not a gift or
favour bestowed through the generosity or benevolence

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of the State, the State could neither impose it by force nor withdraw it as punishment or reprisal.\footnote{Inter-American Commission on Human Rights, Third report on the situation of human rights in Chile (OEA/Ser.L/V/II.40 doc. 10), 11 February 1977, chapter IX, paras. 10–11 (www.cidh.oas.org/countryrep/Chile77/eng/index.htm, accessed 19 November 2012).} \footnote{Report of the Human Rights Committee, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40, (A/55/40), vol. I, sect. A, p. 128.} That position was strongly supported by many international instruments that did not differentiate among citizens on the basis of whether they had single, dual or multiple nationality and never assumed that the status of a nationality was diluted by the acquisition of another nationality. Such provisions included articles 5, 7 and 17, paragraph 1, of the European Convention on Nationality; article 15, paragraph 2, of the Universal Declaration of Human Rights; article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights; article 22, paragraph 5, of the American Convention on Human Rights: “Pact of San José, Costa Rica”; article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights; article 12, paragraph 4, of the International Covenant on Civil and Political Rights; General Comment No. 27 of the Human Rights Committee;\footnote{International Law Association, Report of the Sixty-second Conference held at Seoul, August 24th to August 30th, 1986, London, 1987, p. 13.} and the Declaration of Principles of International Law on Mass Expulsion adopted by the International Law Association.\footnote{Inter-American Commission on Human Rights, Third report on the situation of human rights in Chile (OEA/Ser.L/V/II.40 doc. 10), 11 February 1977, chapter IX, paras. 10–11 (www.cidh.oas.org/countryrep/Chile77/eng/index.htm, accessed 19 November 2012).}

16. While the Special Rapporteur had of course referred to many of those documents, he seemed not to have drawn the correct inferences. He seemed to have been unduly concerned with the practice of certain States, some of which was dated or did not constitute real expulsions, as was pointed out by the International Organization for Migration. Other practice, such as the material in paragraph 33 of the report, related to the fight against terrorism. The examples of State practice were thus not a good basis for establishing general rules; they were either exceptions or not pertinent.

17. She had already referred to the Special Rapporteur’s strong interest in one of the arbitral awards by the Eritrea–Ethiopia Claims Commission (Ethiopia/Eritrea). This partial award had been quite controversial and had addressed a very special situation of dual nationality. This partial award had been quite controversial and had

19. Mr. PETRIČ said he endorsed the Special Rapporteur’s approach and had no quarrel with the conclusions set out in paragraph 35 of the fourth report. His criticism concerned the Special Rapporteur’s selection of material. By and large, until the Second World War issues of nationality had been dealt with from the standpoint of States’ interests, the general feeling having been that nationals should not be deprived of their nationality, because to do so might harm the interests of other States. In the modern world, however, practice from the age of monarchies was no longer relevant. Any consideration of practice should bear in mind the fact that since 1945 the focus had been on human rights and the protection of the individual, as evidenced by the many human rights instruments adopted in recent decades, a number of which set forth the right not to be deprived of one’s nationality, in particular for the purpose of a later expulsion. He therefore suggested that in his future work the Special Rapporteur focus more closely on materials of relevance to problems that had arisen in the contemporary context, in which expulsion was an everyday issue.

20. While he agreed with the Special Rapporteur’s interpretation of the Ethiopia/Eritrea case, that case had dealt with a unique, sui generis situation. The cases referred to by the Special Rapporteur in paragraph 8 of the report were also special in that States had concluded arrangements with other States for a particular purpose, relating to the fact that many immigrants who had left Eastern European countries after 1945 had started to return to them on visits, even though the question of their nationality had not been resolved. Having become United States or Canadian nationals, they had visited Poland or Yugoslavia, where they had been at risk of arrest, because they had still been regarded as Polish or Yugoslav nationals. Although the problem had been addressed by a number of conventions to which the report referred, it was not of relevance to the topic under consideration.

21. He had reservations with regard to the question of dual nationality. Current practice was not uniform: some States accepted dual nationality, while others, such as those listed in paragraph 27 of the report, automatically denationalized persons who had acquired another nationality. It should be borne in mind, however, that such individuals voluntarily chose to do so and should be aware that they risked losing the other nationality; indeed, loss of nationality in such instances was very common, as the list in paragraph 27 showed. In practice, however, the process was not automatic, and dual nationality was often tolerated, despite the country’s official policy. On the other hand, many countries did not object to dual nationality. For example, the Federal Law on Citizenship of the Russian Federation specified that the prohibition on the expulsion of Russian nationals extended to citizens who also
possessed the nationality of another State. Some countries had even introduced certain privileges for citizens who had emigrated and had taken dual nationality, setting aside seats for them in parliament and allowing them to enjoy certain rights in their country of origin. Thus, the problem of dual nationality was very complex, and State practice was varied and sometimes even contradictory.

22. On the other hand, he was firmly opposed to the concept of a dominant nationality, which was unclear, and was tantamount to introducing a grading system for nationality. He was opposed to the Special Rapporteur’s tendency to establish different categories of nationality. A person who had dual nationality was simply a national of both States; that was the position taken by many States.

23. Accordingly, he had difficulty accepting the Special Rapporteur’s conclusions in paragraph 22 of the report. The Special Rapporteur himself conceded that his conclusions were an intellectual exercise based neither on State practice nor on any sort of jurisprudence and could at best lead to the progressive development of international law. Yet for the Commission to set out to categorize different kinds of nationality would be very progressive development indeed; such an approach would be unacceptable.

24. With regard to paragraph 28, he noted in passing that the Special Rapporteur, in his list of countries in which denationalization had taken place before the Second World War, had mistakenly included an established democracy of that period, namely Czechoslovakia, which had not denationalized any citizens in those years, whereas it had certainly done so on a large scale after the Second World War. He agreed with the Special Rapporteur’s conclusions on denationalization in paragraph 29: nationality could not be lost legally unless a person had voluntarily adopted another nationality; in other words, it was an act of free will. The points made in paragraph 29 were the key concepts to be borne in mind in dealing with the question.

25. He agreed with the Special Rapporteur’s suggestion that he should confine his study to the expulsion of aliens and not address the issue of the legal regime of nationality, which would lead the Commission into turbulent waters. However, he agreed with Ms. Escarameia that the Special Rapporteur should elaborate, at least tentatively at the initial phase, a draft article specifying that States could not use denationalization or deprivation of nationality as a step towards expulsion.

26. Mr. GALICKI said that, like it or not, the phenomenon of dominant nationality did indeed sometimes occur in practice. For instance, the Constitution of Poland specified that Polish citizens could not be deprived of their nationality without their consent (art. 34, para. 2) or expelled (art. 52, para. 4), and no distinction was made between single and dual nationality. Fairly recently, however, Polish nationals who had travelled to Poland on United States passports had been refused permission to leave the country on those passports, on the grounds that they were Polish citizens. There had also been cases in which persons had tried to enter the country holding a Polish passport and to leave it on a United States passport. While, in practice, the Polish authorities now permitted Polish nationals who also had United States citizenship to enter and leave Poland on United States passports, Polish law nevertheless theoretically provided that a person who had a second nationality was to be treated exclusively as a Polish national. Thus, the situation was not always cut-and-dried, and in practice one nationality might sometimes be treated as dominant. That was a problem which the Commission should address.

27. Mr. PELLET said that dominant nationality was not an invention of the Special Rapporteur. The Commission itself had endorsed the concept, in article 7 of the draft articles on diplomatic protection, which provided that “[a] State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim”. The Commission’s commentary to article 7, citing abundant and well-founded case law, had stated that the words “predominant” and “dominant” had the same meaning.

28. Mr. PETRIČ said he had never claimed that the concept of dominant nationality was an invention of the Special Rapporteur. In any event, it was still not clear what exactly was meant by “dominant nationality” and what criteria would be used in deciding which of the two nationalities was dominant. As to the remarks by Mr. Galicki, Polish practice was very inconsistent and was of no help in deciding which nationality was dominant.

29. Mr. SABOIA said that the report sought to clarify a number of aspects of dual or multiple nationality and loss or deprivation of nationality that might be of relevance to draft article 4, on non-expulsion by a State of its nationals, as proposed in the Special Rapporteur’s third report. On the whole, he endorsed the thrust of the fourth report and the Special Rapporteur’s conclusion that it was preferable not to include a specific draft article or articles dealing with those questions. Nevertheless, such a decision should be based on a thorough discussion of the issues involved, and the debate must be duly reflected in the report of the Commission.

30. With regard to the chapter of the report on expulsion in cases of dual or multiple nationality (paras. 4–24), it was true that nationality was essentially governed by internal law, albeit within the limits set by international law. The question was how international law established the legal framework within which the State acted. In matters of nationality, as the Special Rapporteur rightly observed in paragraph 5, the legitimate interests both of States and of individuals must be duly taken into account. In that context, it was appropriate to refer to the right of everyone to a nationality as well as to the right not to be arbitrarily deprived of his or her nationality—rights enshrined in international instruments on human rights, to some of which the Special Rapporteur had alluded.

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31. It was also true that States could regulate the admissibility of dual or multiple nationality, and even deny their nationals the possibility of acquiring or maintaining another nationality. However, as a result of globalization and the increased mobility of individuals and families, there was a trend towards more widespread acceptance of dual or multiple nationality. Such broader acceptance could pose difficulties, particularly when the exercise of rights and the fulfilment of obligations normally related to nationality created conflicts between two different sets of legal systems. States had the right to protect their legitimate interests against the improper or fraudulent utilization of dual or multiple nationality, but there was no compelling reason to adopt a negative approach to dual nationality as such.

32. The report posed the question whether dual or multiple nationals could be considered to be aliens for the purpose of expulsion. With the exception of cases which could lead to statelessness, the Special Rapporteur replied to that undoubtedly complex question in the affirmative, citing State practice and legal precedents in paragraphs 7 to 11. The report also invoked the argument that to establish a rule requiring deprivation of nationality as a precondition for the expulsion of a dual national would work to the detriment of the interests of the person to be expelled, whose right of return would be compromised.

33. However, the examples of State practice presented by the Special Rapporteur to substantiate his assertion were not entirely convincing. The agreements referred to in paragraph 8 between Australia and Hungary, the United States of America and Poland, and Canada and Hungary in respect of the consular treatment of dual nationals must be seen in the context of the limitations established at the time by the regimes in Poland and Hungary, which had restricted the freedom of travel of their own nationals. Thus, the aim had been to protect individuals against restrictions on returning to their country of residence rather than to determine that they were to be treated as aliens for other purposes, and in particular regarding expulsion. Moreover, such differentiated treatment would apply only if the person concerned chose to enter the territory by presenting the passport of his or her other nationality.

34. The decision of the High Court of Australia referred to a footnote to paragraph 8, the effect of which had been to preclude a dual national from being elected to the Federal Parliament, appeared to be a limitation of a restricted nature aimed at preserving certain interests of the State relating to the exercise of political rights, and did not necessarily imply that a dual national would be treated in Australia as an alien for the purpose of expulsion or for other purposes. It remained to be seen whether the distinction between two categories of citizens, as established in that judicial decision, was in conformity with the provisions of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination and with the interpretation given to those instruments by the treaty monitoring bodies.

35. Finding reasons to substantiate exceptions to the rule of non-expulsion of nationals in situations of extradition or enforcement of criminal sentences might also be misleading. In paragraph 51 of his third report, the Special Rapporteur had referred in the footnote to cases in which what had apparently been in dispute was not the right of expulsion, but rather an appeal against measures related to extradition or enforcement of decisions in criminal proceedings.

36. He therefore considered that the Special Rapporteur’s conclusions in paragraph 12 should be reviewed, and in any case should not give the impression that they were the Commission’s own conclusions. As he saw it, the rule of non-expulsion of nationals should be regarded as the general rule, subject only to limited qualifications, which must pass the test of legitimacy of the interest of the State and proportionality. Adopting a different standard for the case of dual or multiple nationals would seriously weaken that general principle. It would also be difficult to treat those cases under the heading of “exceptional reasons”, as in draft article 4, paragraph 2, a provision which must still be clarified and about which he had reservations.

37. The question whether denationalization should be seen as a step preliminary to expulsion would also have to be reconsidered. In addition to the same caveat against stating an exception to the general rule, a point on which he agreed with the Special Rapporteur, attention should also be given to the need to guarantee individual rights. Depriving someone of nationality for the purpose of expulsion should require the fulfillment of guarantees that the act was not arbitrary or discriminatory and that it complied with due process and other human rights standards.

38. As the Special Rapporteur rightly indicated, the issue of whether the expelling State was the State of dominant or effective nationality of the person being expelled was relevant for the purposes of the current study regarding dual and multiple nationality. It also seemed correct to assert, as was done in paragraph 17, that if the expelling State was the State of dominant nationality of the person in question, it could not expel that person, by virtue of the rule of non-expulsion of nationals. The complexity of questions regarding the relationship of an individual with two or more States in respect of which that individual might be considered as having a dominant nationality substantiated the point made by the Special Rapporteur in paragraph 24 of the report that, instead of dealing with scenarios involving conflicts of nationalities at the current stage, it might be preferable to address the issue in the framework of a study on protection of the property rights of expelled persons. Similarly, the protection of other rights that might be negatively affected by expulsion should also be dealt with at that later stage.

39. The chapter of the report on loss of nationality, denationalization and expulsion (paras. 25–35) contained a useful analysis of the practice of States in those areas. It rightly distinguished between loss of nationality, which derived from an act of the individual, and denationalization, which was an act of the State.

40. With regard to denationalization, the examples of collective withdrawal of nationality through the enactment of restrictive nationality laws referred to in
paragraph 28 (a) belonged to the unfortunate history of flagrant violations of the most basic provisions of international law concerning non-discriminatory treatment. Withdrawing the nationality of large numbers of persons on ethnic, linguistic, religious or other grounds had frequently resulted in statelessness and had been, and might still be in many cases, the prelude for the perpetration of genocide and crimes against humanity.

41. Denationalization, as described in paragraph 28 (b) of the report, and deprivation of nationality as referred to in paragraph 28 (c), were lawful procedures, but in order to conform to international standards, the respective processes they entailed must respect rules regarding the prohibition of discriminatory or arbitrary measures, must be conducted in such a way as to safeguard the rights of defence and judicial review, and, as indicated in paragraph 29, should not lead to statelessness.

42. With regard to paragraphs 30 to 35 of the report, while it was perhaps true that customary international law did not provide a clear rule regarding dual nationality, there was at least a strong presumption in international law regarding the prohibition of the expulsion of nationals, which must apply to dual nationals as well, except perhaps in very special circumstances.

43. The arbitral awards of the Eritrea–Ethiopia Claims Commission should be treated with circumspection. The reports of the Claims Commission had strongly emphasized the unique nature of the circumstances that had prevailed between Ethiopia and Eritrea at the time and the challenges it had faced in determining whether or how several potentially relevant bodies of international law might apply in dealing with it. Among the obstacles had been issues relating to the succession of States, disagreement over the facts and differing perceptions as to the applicability of nationality laws and the ways of expressing a will to acquire a different nationality. Added to those was the outbreak of war, which had enabled Ethiopia to take measures invoking the law of armed conflict. In considering the claims, the Claims Commission had arrived at varying conclusions that depended on the particular circumstances of the persons who had been deprived of nationality and, in several cases, had found that Ethiopia had acted in ways that were unlawful and contrary to international law.

44. In view of the great complexity, both legal and factual, of the Ethiopia/Eritrea case, one had to be very cautious in drawing general conclusions regarding the deprivation of nationality of relevance to the current study. The Eritrea–Ethiopia Claims Commission itself had noted in paragraph 71 of the partial award of 17 December 2004 that "[d]eprivation of nationality is a serious matter with important and lasting consequences for those affected. In principle, it should follow procedures in which affected persons are adequately informed regarding the proceedings, can present their cases to an objective decision maker, and can seek objective outside review."

45. As he had indicated at the beginning of his statement, he agreed with the Special Rapporteur’s conclusion that it was preferable not to prepare draft articles on the issue dealt with in the fourth report. Nevertheless, the Commission’s discussion of that important issue must be duly reflected in its report in order to allow for analysis of the views expressed during the debate. Those views might have implications for the further consideration of draft article 4 regarding the non-expulsion of nationals.

46. Mr. BROWNlie said that, despite the obvious relevance of the arbitral decisions and awards of the Eritrea–Ethiopia Claims Commission, which had been emphasized by Ms. Escaraméia and other members, the Commission should, as had already been indicated, be cautious in drawing inferences from those sources. In the first place, the decisions and awards in question did not, contrary to appearances, have the authority of the Permanent Court of Arbitration, since the latter served merely as registry to the Claims Commission. The Claims Commission, for its part, had been the product of a bilateral agreement negotiated by Ethiopia and Eritrea at the end of the war. Furthermore, the Special Rapporteur should check the way in which the applicable law in the Ethiopia/Eritrea case had been defined. The issues before the Claims Commission had been somewhat unusual and pertained to a situation in which no one had been prosecuted for any offence, thus reflecting some degree of waiver of liability in the resulting peace settlement. The Commission should accordingly exercise caution with regard to those sources.

47. Mr. GAJA said that, while he acknowledged the quality of the fourth report on the expulsion of aliens, he was not entirely persuaded by some of the Special Rapporteur’s arguments. In the first place, the rule prohibiting the expulsion of nationals could not be interpreted to mean that a State was free to expel an individual on condition that the individual had previously been denationalized. That would be tantamount to prescribing a two-step procedure in which a State first denationalized an individual and then proceeded to expel him or her. Acceptance of the rule prohibiting the expulsion of nationals necessarily implied that a State could not circumvent it by denationalizing individuals with a view to expelling them. A statement to that effect could be included, possibly in the commentary, while there would be no need to specify the circumstances in which denationalization would be lawful and in which the State would be entitled to take the subsequent step of expulsion.

48. His second point concerned the expulsion of dual nationals. Like other speakers, he was opposed to leaving aside that issue, regardless of whether a rule prohibiting the expulsion of nationals was to be included in the draft articles. Even if no such provision was included, the question whether a State of nationality could expel one of its nationals who was a dual national would have to be addressed, either in a provision or in the commentary.

49. Practice with regard to the expulsion of dual nationals appeared to vary. Like Mr. Brownlie, Ms. Escaraméia, Mr. Petrić and Mr. Saboia, he found it difficult to give much weight to the conclusions of the Eritrea–Ethiopia Claims Commission, which had upheld, in the context of an armed conflict, the lawfulness of the expulsion of dual nationals following the acquisition of their second nationality. The Claims Commission had considered that certain persons, for security reasons, had been
lawfully deprived of Ethiopian nationality and subsequently expelled “as nationals of an enemy belligerent”. That solution should not be taken by the Commission as the basis for a general rule. The practice of several States pointed in a different direction. Mr. Galicki had referred to practice in Poland, and, in its recent comments, the Russian Federation had indicated that the prohibition on the expulsion of Russian nationals also applied to dual nationals. Several other examples could be found along the same lines. If the Commission followed the latter approach and made no distinction between dual nationals and persons having a single nationality, there would be no exception to the rule prohibiting the expulsion of nationals in the case of dual nationals.

50. While it was true that, in the event of expulsion, dual nationals could find refuge in the other State of nationality, that hardly constituted an adequate remedy against the pernicious effects of their expulsion. The fact that there was another State of nationality might actually make it easier for the expelling State to proceed with the expulsion, thus emphasizing the need for protection of the persons concerned.

51. Various paragraphs in the fourth report, including paragraphs 17 to 32 and 32 to 34, considered the issue of the State of destination. The existence of a State willing to accept an expelled individual—whether a State of dual nationality or another State—no doubt affected the possibility of expulsion, but should not be a decisive element in determining its lawfulness. The issue of the State of destination raised a number of questions—one of which was whether the person to be expelled had any say in the matter. He hoped that those questions would be addressed by the Special Rapporteur in future reports.

52. Mr. McRAE thanked the Special Rapporteur for his ready response to the request by members at the previous session to consider the question of dual nationals under the topic of the expulsion of aliens. He agreed with the Special Rapporteur that delving too deeply into the issue of nationality risked diverting attention from the true focus of the topic. The basic question appeared to be to what extent the Commission should use the draft articles on expulsion of aliens as a vehicle for strengthening protection in relation to the law of nationality, and particularly, with regard to dual nationals. The Special Rapporteur’s position seemed to be that the Commission should not go down that road—a view apparently shared by Ms. Escaramea, though perhaps for the opposite reason, namely that anything the Commission might formulate along those lines risked undermining the law of nationality. While he could understand the Special Rapporteur’s reluctance to include draft articles on dual nationals, he was not entirely convinced that the Commission could afford to take that course.

53. The problem stemmed in part from the inclusion of a provision on the non-expulsion of nationals. At the previous session, he had questioned the rationale for including, in a set of draft articles on expulsion of aliens, a provision on the non-expulsion of nationals. That was not because he objected to its content but rather because he doubted the need for such a provision. One of the consequences of including it was that it raised the question of dual nationals, since it was not possible to include a rule on the non-expulsion of nationals without specifying whether it also applied to dual nationals. The Special Rapporteur’s response seemed to be that, on the basis of certain practice and doctrine, States could denationalize nationals so long as they did not render them stateless. The implication of that proposition was that it was possible to expel dual nationals so long as they were denationalized first. Since they would still have a nationality, they were not stateless, and would, as aliens, potentially be subject to expulsion.

54. Although the Commission could perhaps avoid that problem if, as Mr. Gaja had suggested, it did not include a draft article on the non-expulsion of nationals, he was not sure that the matter could be resolved that easily. As aliens were defined by reference to non-nationals, the question inevitably arose whether the right to expel an alien included the right to expel someone who had become an alien through denationalization or denaturalization. Hence, regardless of whether the draft articles included a provision on the non-expulsion of nationals, the Commission still had to address the limits on the power to denationalize, which was the basic issue in respect of dual nationals. Moreover, given the Special Rapporteur’s objective, as set out in his second report, of providing the Commission with as exhaustive a regime as possible on the expulsion of aliens, it was not really an option to leave the question of dual nationals aside.

55. The question, then, was how far the Commission should go into the issues of dual and multiple nationality for the purposes of establishing such a regime. In his view, it had to go at least far enough to provide certain minimum protections, but without prejudice to the law relating to nationality. Ms. Escaramea seemed to be suggesting that the Commission should take up the law relating to nationality as a separate topic.

56. In his view, the answers to that question were already set out in the Special Rapporteur’s fourth report. In order to provide a coherent treatment of rules on the non-expulsion of aliens in relation to dual or multiple nationals, two minimum principles had to be established. First, if the Commission included in the draft articles on expulsion of aliens a rule on the non-expulsion of nationals, then it had to supplement it with a rule prohibiting denationalization if such action led to statelessness. Although that provided a basic minimum level of protection, it also clearly implied that States could, in fact, denationalize. Difficult though it might be for some members to accept, there was no denying that denationalization occurred in practice. One could even consider the denial of nationality or the loss of nationality upon acquiring another nationality to be a form of denationalization since, even though it resulted from the individual’s own initiative, it still remained an act that took away his or her nationality.

57. While setting limits on denationalization might provide some degree of protection for sole nationals, a rule that prohibited denationalization only when it resulted in statelessness did not protect dual nationals; in fact, to some extent, it licensed denationalization.

Accordingly, that rule needed to be supplemented by the second principle found in the Special Rapporteur’s report, or at least by a variation of it, whereby a State could not denationalize an individual for the sole purpose of expulsion. The denationalization and expulsion of individuals considered to be a security threat might, in fact, violate that principle, but if the denationalization and subsequent expulsion of an individual resulted from his or her violation of the domestic law of the expelling State, then there seemed to be very little difference between denationalization as a result of committing a grave criminal offence and denationalization as a result of committing a security-related offence.

58. That was a variation on the Special Rapporteur’s suggestion, based on the Ethiopia/Eritrea case, that denationalization should not be arbitrary or discriminatory. On balance, it therefore seemed better to include in the draft articles one principle prohibiting denationalization that led to statelessness and a second principle prohibiting denationalization for the sole purpose of expulsion. That suggestion did not, however, preclude the possibility of seeking to formulate better rules on the protection of dual nationals in the different context of a study of the law of nationality. All he was suggesting was that those were the minimum requirements to be included in the rules on expulsion of aliens in order to make the draft articles as exhaustive as possible. If no draft article on the non-expulsion of nationals was included, then all that would be needed was the rule prohibiting denationalization for the sole purpose of expulsion. Yet, so long as there was a draft article on non-expulsion of nationals, the other two principles, which were found in the Special Rapporteur’s report, were necessary. It would not be sufficient merely to refer to them in the commentary.

59. Mr. KOLODKIN said that in paragraph 27 of his fourth report, the Special Rapporteur referred to cases involving the loss of nationality as “the consequence of an individual’s voluntary act”, whereas denationalization was “a State decision of a collective or individual nature”. Paragraph 27 also contained a long list of States, including the Russian Federation, whose legislation allegedly contained rules prescribing the loss of nationality for individuals who acquired a foreign nationality. He wished to point out that there had never been a rule or a provision in the domestic law of the Russian Federation pursuant to which a Russian national lost his or her Russian nationality on acquiring another nationality. No such provision existed in the former law on citizenship of the Russian Federation of 1991, to which the Special Rapporteur referred, nor in the 2002 law, which was currently in force. Indeed, the current law contained a diametrically opposite provision, pursuant to which Russian citizens did not lose Russian nationality upon acquisition of another nationality. The information concerning former Russian legislation contained in the compendium published in the United States, to which the Special Rapporteur referred in his report, appeared to be more or less correct; however, it provided no grounds whatsoever for including the Russian Federation in the list of States contained in paragraph 27.

60. Like Mr. McRae, he had some doubts regarding the Special Rapporteur’s hypothesis that the loss of nationality referred to in paragraph 27 differed in principle from denationalization. It was true that the acquisition of another nationality was, in many cases, a voluntary act; however, if the legislation of the State of which the person acquiring a foreign nationality was a national provided, in such cases, for the automatic denationalization of the individual or loss of the first nationality, then there appeared to be no clear distinction between loss of nationality and deprivation of nationality. In his view, that situation might be referred to as the “automatic deprivation of nationality”.

The meeting rose at 11.40 a.m.

2973rd MEETING

Friday, 6 June 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflish, Mr. Candioti, Ms. Escaramiea, Mr. Fomba, Mr. Gaja, Mr. Gallicki, Mr. Hassouma, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencía-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Expulsion of aliens (continued)


[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. NOLTE thanked the Special Rapporteur for his stimulating report. He agreed with certain parts of his analysis and, in particular, the concerns expressed in paragraphs 20 and 33 on the expulsion of persons to countries where their lives would be in danger.

2. The question whether a dual or multiple national was an alien in cases of dual or multiple nationality, as posed in chapter I, section A of the Special Rapporteur’s fourth report (paras. 7–13), would take the Commission in a problematic direction. Nationals were not aliens, and that was not merely empty formalism. One purpose of establishing a clear distinction was to prevent States from creating different classes of nationals or citizens, as Mr. Petrić had pointed out. If States sometimes treated some of their nationals, for certain purposes, as if they were aliens, they either had a special justification or they were violating international law. Such exceptions could be justified only exceptionally, for example, if they were