Document:-
A/CN.4/3003

Summary record of the 3003rd meeting

Topic:
Expulsion of aliens

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

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

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

The meeting rose at 11.55 a.m.

3003rd MEETING

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

Chairperson: Mr. Ernest PETRIČ

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

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

[Agenda item 6]

Fifth report of the Special Rapporteur (*continued*)

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

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

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

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

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

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

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

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

had only to be in the custody of the torturer, who might or might not be exercising a public function and who might or might not have had any motivation to commit the torture.

9. In draft article 11, she proposed that the phrase "of paragraph 2", should be deleted from paragraph 3 so that the provisions of both paragraphs 1 and 2 would apply when the risk of torture emanated from persons or groups of persons acting in a private capacity. She also had a problem with the standard of "serious risk" proposed by the Special Rapporteur in paragraph 2, as it seemed to be higher than the standard set in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which referred to "substantial grounds for believing" that the person concerned would be in danger of being subjected to torture. In addition, in the various cases of the European Court of Human Rights cited by the Special Rapporteur, such as *Cruz-Varas and Others* v. *Sweden*, *Vilvarajah and Others* v. *the United Kingdom* and *N*. v. *Finland*, the standard mentioned was "real risk", which was also lower than "serious risk". Consequently, her preference would be to replace the word "serious" in paragraph 2 with either "real" or even "substantial".

10. With regard to draft article 12, on the protection of children being expelled, she suggested that the word "child" in paragraph 1 should be qualified in order to highlight the fact that what was intended was the legal definition of the child, since legal and non-legal definitions did not always coincide perfectly.

11. In draft article 13, she had a preference for inserting the word "international" before "law" in paragraph 2, which would have the effect of limiting derogations provided for in domestic law to those also provided under international law.

12. In draft article 14, on the obligation not to discriminate, the Special Rapporteur listed various grounds for discrimination. In her view, there were at least two additional grounds—disability and age—that should be added, as they elicited no controversy and, regrettably, were common bases for discrimination in cases of expulsion. Moreover, in various places in his report the Special Rapporteur had referred to those grounds when providing examples of legal instruments and case law.

13. The reference to non-discrimination in paragraph 2 seemed to concern more a principle than an individual right, and she suggested that it should be moved and inserted after draft article 8, on the general obligation to respect the human rights of persons being expelled.

14. Mr. VARGAS CARREÑO commended the Special Rapporteur for his excellent report, which reflected an in-depth knowledge of European, inter-American and African instruments on the expulsion of aliens as well as the cases in which those instruments had been used. Regional solutions were particularly relevant when considering the topic of expulsion of aliens. As in previous reports, the Special Rapporteur had taken as his starting point the notion that the expulsion of aliens was governed primarily by the domestic law of the States concerned, despite the fact that there were norms of international law that must be respected and that certain practices could be prohibited or banned by international law. He would limit his own comments to the six draft articles proposed by the Special Rapporteur.

15. Although he was satisfied with both the text of draft article 8 and its justification, the important distinction made in that article by the Special Rapporteur between persons who had been expelled and persons who were being expelled had not been maintained elsewhere in the draft articles where the distinction might also be applicable. While he supported the inclusion of provisions on most of the rights suggested by the Special Rapporteur, he believed that the draft articles must include other rights, particularly in the case of draft article 8, where reference was made both to persons who had been expelled and to those who were in the process of being expelled. Some of the additional rights, such as those mentioned by Ms. Escarameia, belonged to the non-derogable hard core, while others could be considered fundamental in the context of the expulsion of aliens. It seemed essential, for example, to include a provision on the need to guarantee the right to recourse to a court of law so as to ensure that persons who had been expelled or were being expelled benefited from procedural safeguards during the expulsion process.

16. The text of draft article 9 was acceptable and, in principle, ought to be endorsed by the Commission. He could not, however, say the same for draft article 10. Although there was no question that the principle of respect for human dignity was, as the Special Rapporteur had noted in his report, the ethical and philosophical underpinning of all human rights, he questioned the advisability of including separate provision on it as a distinct category of rights. It might be preferable to include a reference to human dignity in the preamble or in other provisions of the draft articles.

17. A provision such as draft article 11, which protected expellees from torture and cruel, inhuman or degrading treatment, was vital because it was essential both to protect persons during the expulsion process and to ensure that they were not sent to a country where there was a serious risk of their being subjected to torture or to cruel, inhuman or degrading treatment. Both objectives were achieved by the first two paragraphs of draft article 11. On the other hand, it was inadvisable to prohibit expulsion in paragraph 3 when such a risk emanated from a person or group of persons acting in a private capacity because, according to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at least one of the torturers must be a public official, acting either in an official capacity or with the consent or acquiescence of the State. The Inter-American Convention to Prevent and Punish Torture contained a similar provision. In other words, those conventions did not encompass action performed in a personal capacity.

18. Admittedly, when the Rome Statute of the International Criminal Court had been adopted in 1998, that instrument had redefined torture in such a way that, under exceptional circumstances, it could be deemed to have been committed by a private individual. However, draft

article 11, paragraph 3, did not contain any reference to such exceptional conditions, which in any case rarely occurred in practice. Moreover, the broad terms in which paragraph 3 had been cast might pose difficulties for a State that had to reach a decision on expulsion, and they fell short of one of the goals of the draft articles, namely that of reconciling international human rights standards with the legislation and sovereignty of the expelling State.

19. Referring to paragraph 97 of the report, which outlined the findings of the European Court of Human Rights in the case *of Cruz Varas and others* v. *Sweden*, he paid a tribute to the admirable conduct of Sweden during the Pinochet dictatorship, when that country had given asylum and refuge to hundreds of Chileans. The case cited in that paragraph, which the Special Rapporteur had done well to include, demonstrated the need to strike a balance in resolving cases of expulsion.

20. He was grateful to the Special Rapporteur for the inclusion of draft article 12 on the protection of children being expelled. He was in full agreement with the three paragraphs proposed, which approached that important matter in a suitable manner.

21. Turning to draft article 13 (Obligation to respect the right to private and family life), he said that the maintenance of family links was a vital legal interest of expellees that merited protection. Although the right to private life was clearly a human right which must be safeguarded, it did not always have a direct bearing on the question of the expulsion of aliens. Conversely, it was essential to defend the family unit in that context and to prevent, insofar as possible, expellees from being separated from their nuclear families. He therefore proposed that the reference to the right to private life in the first paragraph of draft article 13 should be deleted, leaving only the reference to the right to family life. It would then be advisable to add a new paragraph to the draft article stipulating that when States decided to expel an alien, they must take into account family ties to permanent residents of the expelling State and the length of time the alien had resided in that State. There was a precedent for such a clause in international treaty law. With the addition of a new paragraph, existing paragraph 2 would then become paragraph 3.

22. His objections to draft article 14, although serious, related more to the form of that provision: in his view, the general obligation not to discriminate, which was acquiring greater weight in international human rights law, should relate to more than just a State's right of expulsion and should be established as one of the underlying principles of the draft articles. The draft articles must make it clear that an expulsion could never be valid if it was founded on discrimination on grounds of race, sex, language, religion, national origin or other status. He therefore suggested that the first paragraph should be replaced with one prohibiting the expulsion of aliens based on discrimination *vis-à-vis* the nationals of the expelling State.

23. The Special Rapporteur had begun his report by focusing on the "hard core" of rights from which no derogation was permitted. In the sphere of expulsion there were, however, other rights that were extremely important even if they did not amount to fundamental rights. Some of those rights were embodied in international instruments such as the Declaration on the human rights of individuals who are not nationals of the country in which they live, contained in General Assembly resolution 40/144 of 13 December 1985. Accordingly, in subsequent reports the Special Rapporteur might wish to investigate the rights of aliens who had been expelled from the country in which they had been living. There were two rights in particular which ought to be codified and progressively developed in that connection. The most important right was the right of any alien who had been, or was being, expelled to file an appeal with a judicial authority of the expelling State on the grounds that the expulsion was inconsistent with the requirements of domestic law or of due process. Provision had already been made for such a right of appeal in the International Covenant on Civil and Political Rights and in the American Convention on Human Rights: "Pact of San José, Costa Rica".

24. Another important right of expellees that deserved protection was the right to property. Unfortunately, in practice there were cases in which expellees had also had their property confiscated. The draft articles should not tackle such complicated issues as foreign investments or the nationalization or expropriation of foreign assets; however, if they were to be useful and efficacious, they should deal with the confiscation of expelled aliens' property. He looked forward to finding draft articles on those subjects in forthcoming reports.

25. Mr. GAJA said that the fifth report on the expulsion of aliens took the Commission to the heart of the subject matter and contained a wealth of references to the precedents of human rights bodies, as well as to doctrine. Yet, despite the fact that the Special Rapporteur had not shied away from discussing difficult theoretical problems, such as whether a distinction should be drawn between core and other human rights, his general line of enquiry was not entirely satisfactory: while many relevant questions were discussed, they were not always placed in an appropriate context, and the relevance of some of the other issues considered was at times unclear.

26. An examination of the expelling State's obligations to protect human rights showed that most of those obligations applied to nationals and aliens alike, irrespective of whether the alien in question was subject to expulsion proceedings. The State in whose territory an alien was present was under an obligation to respect all the human rights of that person, not just the core rights, to the extent that general international law or human rights treaties ratified by that State provided for such an obligation. In that connection, he agreed entirely with the comments of Ms. Escarameia and Mr. Vargas Carreño. The Commission might wish to state that principle somewhere in the draft articles, perhaps in wording along the lines of the text suggested in draft article 8, but care would have to be taken to ensure that the wording chosen contained nothing that might detract, even by implication, from the rights that a person facing expulsion already enjoyed under international law.

27. It seemed unnecessary to discuss which human rights obligations lay with the expelling State since those obligations could vary: there were certain rights

that existed if only general international law applied, but additional rights were also guaranteed if treaties had been ratified by the State concerned. As the Commission was not in a position to list all the rights imposed on States by general international law, it should concentrate on the rights of particular relevance to expulsion, such as rights pertaining to conditions of detention pending expulsion, for example. The specific reference in draft article 12 to the protection that should be afforded to children in detention prior to expulsion was a good idea, but the problem was much more general in nature and arose in many other cases of pre-expulsion detention. Extensive case law already existed, for example, on the permissible length of such detention. Issues of particular relevance to a person who was about to be expelled should be dealt with in the draft articles from the perspective of general international law. The text should likewise encompass procedural rights and the remedies available to persons facing expulsion.

28. The Commission should also enquire into the conditions under which expulsion could be regarded as lawful under international law. Some of those conditions had to be fulfilled by the expelling State irrespective of the situation prevailing in the receiving State. They concerned, *inter alia*, the right to non-discrimination, protection of the right to family life and the fact that expulsion had to be in accordance with law, as stipulated in many treaty provisions.

29. The right to non-discrimination appeared to be relevant to expulsion only if it referred to non-discrimination among aliens. He therefore found some passages of paragraph 151 of the report that referred to non-discrimination between aliens and nationals somewhat disturbing, since nationals should not on the whole be subject to expulsion. The point was that there should be no discrimination among aliens, such as had occurred in the *Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius* case, which had been considered by the Human Rights Committee.

30. The difficulty of stipulating that the right to family life had to be protected in order for an expulsion to be lawful lay in the fact that this right appeared to be protected mainly within the framework of the European Convention on Human Rights, although the report had also quoted the findings of the Human Rights Committee in the *Stewart* v. *Canada* case. The European Court of Human Rights had given a very restrictive interpretation of that right in its jurisprudence, and draft article 13, paragraph 2, which spoke of striking "a fair balance between the interests of the State and those of the person in question", did not afford the expellee much protection either.

31. A more general question concerned the nature of the instrument being drafted by the Commission. If the draft articles were intended as a statement of general international law, the Commission was probably going too far by including provisions on the protection of family life. On the other hand, if it was drafting a human rights instrument that a State could accept or reject, it was not going far enough, because it was adding very little to existing instruments. He assumed that the Commission was taking the first course of action, in which case it should emphasize that the draft articles were not intended to be a norm applicable to all cases of expulsion wherever they occurred, but only a minimum standard, and that it was expected that States would have further obligations under regional treaties and universal conventions.

32. The condition that decisions on expulsion must be taken in accordance with law, as required by the International Covenant on Civil and Political Rights, the American Convention on Human Rights: "Pact of San José, Costa Rica" and the African Charter on Human and Peoples' Rights, although mainly a procedural requirement, also had a substantive element in that it implied a reference to the substantive conditions set forth in the relevant municipal law. Hence expulsion must not be arbitrary but must comply with the relevant provisions of municipal law. That condition should be added to the others which he had already mentioned.

33. Much of the report concerned conditions relating to the risk of infringement of rights in the receiving State. Draft article 11 was designed to ensure that even if the first set of conditions for expulsion had been satisfied, a person could not be sent to a country where the prevailing conditions would place his or her life and safety in danger. A real problem in the context of expulsion lay in the situation obtaining in receiving countries. Since it was necessary to ascertain that a potential expellee would not face an unacceptable risk if repatriated, many Governments were faced with the conundrum of deciding what to do when they could not find a country to which they could expel the person in question.

34. Practice had so far focused mainly on the risk of torture and cruel or inhuman treatment. According to General comment No. 20 of the Human Rights Committee,[34] to which an express reference would be appropriate, States must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. While there was indeed such a prohibition in draft article 11, paragraphs 2 and 3, it should be expanded to cover some other rights. Something should also be said about the degree of risk and the extent to which assurances from the receiving State could be viewed as justification for expulsion.

35. By way of summing up, he suggested that the draft articles should be restructured to indicate, first of all, that they contained minimum conditions regarding expulsion and that an alien enjoyed all the rights granted by general international law and human rights treaties. Something more specific should be said about detention. Article 12 should be expanded to consider not only children but all persons detained pending expulsion. Lastly, the conditions for expulsion should be expanded, starting with the relevant aspects of article 9, paragraph 2, and articles 11, 13 and 14.

36. He suspected that the Special Rapporteur would not be too pleased by his suggestions, but they would in fact lighten his burden considerably, saving him from the

[34] Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), Annex VI, p. 193.

nearly impossible task of identifying core rights under general international law and allowing him to focus on those rights that were relevant to the expulsion of aliens. He had full confidence in the ability of the Special Rapporteur to accomplish that task successfully.

37. Mr. McRAE thanked the Special Rapporteur for his fifth report, which was a very interesting study of the development of certain aspects of human rights law and of the debate over the concept of fundamental rights. As was the case with all of the Special Rapporteur's work, it was closely researched and carefully argued; however, the direction being taken raised some concerns. He agreed that it was necessary to move from the basic proposition of a right to expel to the limitations placed on that right by international and human rights law, yet the Special Rapporteur's proposals seemed both too limited where the scope of the rights considered was concerned and too detailed in their articulation of the content of certain rights.

38. The draft articles set out a series of rights of expelled persons, but not in terms of the obligations they imposed on States. Some of the draft articles apparently applied to the expelling State, while others, more general, presumably applied to both the expelling State and the receiving State. It would thus have been clearer if the obligations placed on expelling States had been more clearly differentiated from those of receiving States. He agreed with the Special Rapporteur's starting point, namely that persons being expelled were entitled to respect for their human rights, but he was not convinced that those rights should be restricted to a category of "fundamental" human rights.

39. In paragraphs 16 and 17 of the report, the Special Rapporteur raised the issue of whether aliens being expelled were entitled to enjoy all human rights or whether the specific nature of their status required that only their fundamental rights be guaranteed. Putting aside the interesting debate about what constituted "fundamental" rights, he wondered why the rights of an alien should be curtailed in that way. The Special Rapporteur's argument in paragraph 17 was that it was unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments, and that it seemed more realistic and more consistent with State practice to limit the rights guaranteed to fundamental rights.

40. He wondered why it was more realistic to limit rights. A State that denied medical treatment to an individual for the duration of an expulsion procedure was surely violating human rights, so why did the same not hold true if the State denied access to education? A number of rights that the Special Rapporteur had listed were perhaps not relevant during the expulsion process, but it was not clear that a State had the right to deny them to an alien *ab initio* simply because expulsion was in progress. The 1977 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, contained in General Assembly resolution 40/144, did not contemplate that those rights could be taken away simply through the commencement of an expulsion process. It would be interesting to know whether there was really any State practice to show that States routinely denied such rights to individuals who were in the process of being expelled.

41. The basic proposition that was truly relevant in the context of the topic was that any person who had been or was being expelled was entitled to respect for any applicable human rights. It was because the rights were applicable to the individual, and not because they were fundamental, that they should be respected. In paragraph 14 of his report, the Special Rapporteur cited the judgement of the European Court of Human Rights in the *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium* case to support the proposition that a State must respect the fundamental rights of aliens, including children, even during expulsion proceedings. In that case, however, the European Court had said that the provisions of the European Convention on Human Rights and the Convention on the Rights of the Child were relevant, not because they were fundamental but because they were applicable to Belgium with respect to the particular case and the individuals involved.

42. The proposition that an expelled individual or a person in the process of being expelled was entitled to respect for all applicable human rights was valid whether one was speaking of the expelling State or of the receiving State. There was no reason to think that a receiving State could deny an individual rights that did not fall within the category of fundamental rights just because he or she had arrived in the country by way of expulsion from another country. Such individuals should enjoy the same right to work, to freedom of assembly and to health regardless of whether they had arrived by way of expulsion from another country or by some other means.

43. Thus, draft article 8 (General obligation to respect the human rights of persons being expelled) should stipulate that such persons were entitled to respect for all "applicable human rights", not just "fundamental rights". It was not clear whether the reference to "all other rights the implementation of which is required by his or her specific circumstances" was to be construed as meaning all applicable human rights. If that was the case, then there was no need to refer to "fundamental rights".

44. His questioning of the appropriateness of limiting the rights protected to "fundamental rights" had implications for several other draft articles. If the rights protected were not to be limited to fundamental rights, then there was no need to list the various rights separately. It might be useful to refer in the commentary to the types of rights that might be more relevant than others without drawing up an exhaustive list, which Ms. Escarameia had shown would be difficult to do. There was no rationale for including a partial list, either. Mr. Gaja's suggestion of focusing on rights applicable to the receiving State in the context of expulsion seemed better than the more general list of rights currently in the draft. Moreover, the draft articles should not enter into difficult and perhaps controversial questions about the definition and scope of particular human rights that clearly had implications well beyond the topic.

45. Since he did not see any need for provisions on specific rights, he would not comment on draft articles 9 through 11 and 13. However, he did think a case could

be made for retaining the reference to the treatment of children in draft article 12, paragraph 1. Draft article 14, on non-discrimination, was also an important provision and he supported it, although he agreed with Mr. Gaja that it was about discrimination between aliens rather than between aliens and nationals, amounting to a kind of "most-favoured-alien" provision. In addition, it indicated an appropriate direction for other draft articles, as Mr. Vargas Carreño had pointed out, by looking at the procedural guarantees States must observe when expelling aliens.

46. In sum, he was opposed to proceeding on the basis that persons subject to expulsion were entitled only to the protection of "fundamental human rights". In the footnote to paragraph 8, regarding "fundamental rules of international law", the Special Rapporteur indicated that he had abandoned the idea of speaking about fundamental rules of international law because of comments about the difficulty in distinguishing between rules that were fundamental and those that were not. That was a welcome development, and he believed that the adjective "fundamental" should likewise be eliminated when referring to human rights. The draft articles would then simply guarantee the protection of all applicable or relevant human rights during the expulsion process.

47. Mr. NIEHAUS said that the Special Rapporteur's fifth report, remarkable in its clarity and depth of legal analysis, was a valuable contribution to the elaboration of legal rules that placed the right to expel within the framework of the fundamental principles of international law—in other words, respect for the fundamental rights of the human individual. The basic principle was that all persons, regardless of their race, ethnic origin, sex, religion or nationality, were equally entitled to enjoy their fundamental rights by virtue of what had been called the universal identity of human beings. That principle had been amply developed in the legal literature, judicial decisions and international legal instruments.

48. Indisputably, a fundamental element of the topic under consideration was that aliens present in the territory of a State, whether lawfully or unlawfully, who were about to be expelled, must have full assurances of respect for their fundamental rights. Alien status and the prospect of expulsion made the individual particularly vulnerable to the danger that that principle would not be upheld. There was thus a need for the prompt elaboration of national and international legal standards to protect such individuals. While in principle an alien being expelled ought to be able to count on respect for all the inherent rights of human beings, the Special Rapporteur maintained in paragraph 17 of his report that that was unrealistic, and that it would be more consistent with State practice to limit the rights guaranteed during expulsion to fundamental human rights, a view with which he agreed. The problem lay in determining what constituted fundamental rights and which were the most important among them. The question was a simple one, but the answer was not.

49. The use of different terms to refer to fundamental rights further complicated the task of identifying them, as did the argument of many legal experts that classifying rights as either first-tier—i.e. basic or fundamental—or second-tier—i.e. less important or complementary—might undermine the very concept of human rights. The Special Rapporteur was right in noting that—despite some reluctance, the idea that a category of inviolable human rights existed had ultimately prevailed. Although a precise definition and detailed list of such rights were lacking, there was a clear sense that within the broader notion of human rights there existed rights that were essential and fundamental to the human person.

50. It was more difficult, however, to identify within those fundamental human rights a so-called "inviolable core", a small set of rights from which there could be no derogation, which represented the minimum that was needed to protect the physical integrity and security of the individual, and which were binding everywhere and on all authorities. Despite criticism of that idea, and he did not entirely accept the Special Rapporteur's view in paragraph 31 that such criticism was ideological rather than legal, he could accept the notion that a hard core of rights did exist.

51. The next, more difficult question was how to determine which rights fell into that exclusive category. The legal literature suggested a variety of answers, and it was hard to discern a consensus on such rights in international legal instruments. The Special Rapporteur had suggested six rights that might form the hard core. Some of them unquestionably did, such as the right to life, for example, but the choice of others would be more problematic.

52. Turning to the texts proposed by the Special Rapporteur, he said that draft article 8 (General obligation to respect the human rights of persons being expelled) was acceptable and constituted a logical preamble to the following articles. Draft article 9, on protection of the right to life, was also logical and valuable, for as the Special Rapporteur noted in paragraph 66 (*a*) of his report, the right to life was by definition an inherent right. Thus, paragraph 1 of draft article 9 was entirely acceptable; paragraph 2, however, was worded in a confusing manner, although that might be a translation problem. The reference to a State "that has abolished the death penalty" might be better phrased to read: "A State in which the death penalty does not exist". He was also concerned by the lack of any mention, of what a "guarantee that the death penalty will not be carried out" might consist of.

53. In draft article 10 (Obligation to respect the dignity of persons being expelled), the definition or content of the term "dignity" posed a major problem. In reality, the term was so broad as to cover respect for all fundamental rights, so that to cite respect for the dignity of persons as part of the hard core of fundamental rights was equivalent to making all human rights part of the hard core, since they were all integrally bound up with human dignity. The problem could be avoided by using a term other than "dignity" or by spelling out what the term covered, and that would not be an easy task.

54. Draft article 11, on the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment, paralleled the obligation spelled out in draft article 9 to protect the life of persons being expelled, and he had no difficulties with it. He also had no problems

with draft article 12, which dealt specifically with the protection of children facing expulsion. The obligation to respect the private and family life of persons being expelled was less clearly explained than the obligations relating to the right to life and protection from torture, but he had no objection to its inclusion in the hard core of fundamental rights or to its treatment in draft article 13.

55. The obligation not to discriminate set out in draft article 14 should obviously be reflected in the special group of inviolable human rights, but he wished to point out that both the draft article and the majority of international instruments failed to cite sexual orientation among the grounds for discrimination. One exception was the Charter of Fundamental Rights of the European Union, as the Special Rapporteur pointed out in paragraph 150, where he went on to say that the current state of the law of Western countries was far from reflecting the general situation with regard to sexual orientation, and in the related footnote, where he referred to numerous precedents in European and North American case law and the fact that many countries in Africa, the Arab world and Asia had retained their laws penalizing homosexuality. The Special Rapporteur's intention in making those remarks, however, was not clear. In draft article 14, he gave a list of prohibited grounds for discrimination that followed the best-known precedents. Yet it might be more in keeping with the Commission's responsibility for the progressive development of international law to adopt a more modern and comprehensive approach, such as that used in the Charter of Fundamental Rights of the European Union. That instrument also mentioned age and disability, two additional criteria that had been suggested for inclusion in draft article 14 by Ms. Escarameia.

56. Mr. SABOIA thanked the Special Rapporteur for his well-researched and clear fifth report and recalled that at its previous session, the Commission had decided that it would not be necessary to have a draft article dealing with the issue of persons of dual or multiple nationality.[35] The debate had been helpful in clarifying the Commission's understanding that the principle of non-expulsion of nationals was equally applicable to dual and multiple nationals.

57. The fifth report undertook to examine the legal obligations that a State purporting to expel an alien must meet, which derived from the rules of international human rights law and other provisions of international law that prohibited certain practices. In paragraphs 10 to 14 of the report, the Special Rapporteur rightly drew attention to the basic principle that all human beings, whether nationals or aliens, were entitled to the protection of their human rights, regardless of the lawfulness of their status in the country, even during expulsion proceedings. In support of that principle, the Special Rapporteur referred to the judgement of the European Court of Human Rights in *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium* (2006), in which the Court recalled that in exercising their sovereign right to control their borders and the entry and stay of aliens, States must comply with their international obligations, including those established in the European Convention on Human Rights.

58. In discussing the concept of "fundamental rights" in the following paragraphs, however, the approach taken by the Special Rapporteur was problematic. He started, in paragraph 17, by saying that it would be "unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments and by the domestic law of the expelling State". That appeared to contradict the principle laid down by the European Court of Human Rights and supported by the Special Rapporteur in his previous section, particularly in paragraph 14. On the other hand, as human rights were inherent, no one could lose their entitlement to those rights, irrespective of their status or condition. He also disagreed with most of the arguments developed by the Special Rapporteur regarding the indivisibility and interdependence of human rights, but he did not think it necessary to launch into a discussion of that topic at the current stage.

59. The enjoyment of some rights might, of course, be subject to certain limitations, which must be strictly essential to ensure the exercise by the expelling State of legitimate and proportional interests linked to its security and public order, and it must also be subject to judicial control. In other words, in the field of human rights it was the limitations that should be subject to a restrictive interpretation, not the rights; such limitations must also be admitted by law and be proportional to the interest of the society that was meant to be protected by them.

60. There was no reason to consider that during the expulsion process an alien should be deprived of certain economic, social and cultural rights, such as those mentioned by the Special Rapporteur in paragraph 17. That was particularly true as the expulsion process could take a long time and affect both the alien and his or her family, with consequences that might endanger their future ability to resume normal life. Important rights in that connection included the right to access to health services, to a lawyer and to information about one's legal situation. The subject of limitations on or derogations from human rights had been dealt with in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The International Covenant on Civil and Political Rights stipulated in article 4 that in time of public emergency which threatened the life of the nation, States parties could take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures were not inconsistent with their other obligations under international law and did not involve discrimination. Pursuant to that provision, whose threshold was very high, certain rights, such as the right to life and the prohibition of torture, could not be derogated from.

61. The concept of non-derogable rights in the Covenants was not dissimilar to the principle of "fundamental rights" or "hard core" rights which Mr. Kamto discussed in paragraphs 28 to 44 of his report, but the context in the former was one of public emergency, not expulsion of aliens. On the other hand, article 4 of the International Covenant on Economic, Social and Cultural Rights established that "the State may subject such rights only to such limitations as are determined by law only in so far as this

[35] See *Yearbook ... 2008*, vol. II (Part Two), paragraphs 191–197, especially paragraph 195.

may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". Thus, even if the exercise of some of their rights was somehow limited, aliens did not cease to enjoy all their rights during the expulsion process, and any limitations on those rights must be restricted to what was necessary for the protection of the essential and legitimate interests of the State and must be subject to due process.

62. With regard to draft article 8 (General obligation to respect the human rights of persons being expelled), he basically agreed with the text but considered that the word "fundamental" should be deleted. A reference to possible limitations could be inserted, with the proviso that such limitations must be justified to protect legitimate interests of national security and public order, proportional to the threat perceived, and subject to due process.

63. Draft article 9 (Obligation to protect the right to life of persons being expelled), as proposed in paragraph 67 of the report, was acceptable. In paragraph 2 of that article, however, additional wording should be added to reflect the idea that expulsion to a State where the alien might be subject to the death penalty should also be prohibited—as currently worded, the draft article covered only the case of a person who had already been sentenced to death.

64. He welcomed the approach taken to the obligation to respect the dignity of persons being expelled in draft article 10, and particularly the fact that the Special Rapporteur had combined respect with protection. He therefore endorsed the proposed wording.

65. The analysis of the prohibition of torture and cruel, inhuman or degrading treatment or punishment and its effect on expulsion (para. 73) was adequate. Draft article 11 was thus acceptable on the whole, but the expression "in its territory" in paragraph 1 might provide a loophole in the prohibition of torture. In view of recent flagrant examples of torture at Guantanamo, Abu Ghraib and elsewhere, and the practice of rendition, whereby prisoners were sent to other locations in order to be interrogated under "special procedures", a more comprehensive formulation might be preferable, such as "in any territory or place under its jurisdiction or control". An alternative would be to delete the words "in its territory".

66. He endorsed the Special Rapporteur's approach to the situation of children (paras. 121–126) and the proposed text of draft article 12 on that subject. Children constituted a category of aliens who were especially vulnerable when they were about to be expelled. However, other categories should also be addressed, including women, in particular pregnant women, persons with physical or mental disabilities and the elderly. Other members of the Commission had made useful suggestions to that effect. There were international instruments that dealt with the protection of those categories of persons, and a new draft article could cover such cases.

67. He also agreed with the wording of draft articles 13 (Obligation to respect right to private and family life) and 14 (Obligation not to discriminate), although Mr. Vargas Carreño and other members had argued that the notion of non-discrimination should refer to a more general prohibition that should be covered at the beginning of the draft articles.

68. Mr. KAMTO (Special Rapporteur) said that he would not respond at the current stage to the substance of the comments made, but he wished to make a brief remark in order to ensure that the discussion stayed on track.

69. The topic of expulsion of aliens was unique in that it lay at the crossroads of the general rules of international law and international human rights law. It was perhaps for that reason, then, that some members had been impatient from the outset to take up certain aspects of the topic at an early stage. During the consideration of his second report[36] in particular, many members had expressed a preference for specifying which rights of expelled persons limited the State's right to expel, yet that could not be done until other issues had been addressed.[37] There must first be a debate on the overall approach of the topic. Previous speakers had also shown impatience with procedural questions, even though he had repeatedly explained that such issues would be taken up later, as would questions that were partly procedural and partly substantive in nature, such as conditions of detention. It was, of course, a fact that not all expelled persons were initially placed in detention centres; when a decision to expel was taken, some aliens were immediately removed from the national territory. Thus, the question of conditions of detention should be addressed when the Commission considered questions relating to the detention process, such as the principle of an expelled alien's right of appeal.

70. Similarly, while he agreed entirely that there could be no derogation from the right to property, that question should not be taken up at the current stage, because it did not affect all expelled aliens; it would be preferable to address it in the part of the report devoted to responsibility and to consider how diplomatic protection might help expelled persons protect that right if it was violated. The problem of when to consider certain questions arose in connection with many other issues. It was in fact difficult to give the topic structural consistency, which was not the case with the topic of responsibility of international organizations, where a model existed in the form of the draft articles on responsibility of States for internationally wrongful acts.[38]

71. The current debate indicated that there was a problem with the approach. Should the Commission speak of a hard core of rights or of rights in general? It could decide to speed matters up by merely stating that all rights of aliens must be protected, but that would mean leaving the situation as it currently stood. The Commission must decide which core rights specifically linked to alien status must be respected without fail during the expulsion process. Yet in detention centres, on the other hand, it was essential to protect not only the hard core of human rights but also others relating specifically to the situation of

[36] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/573. The Commission decided to postpone the discussion of this article to its fifty-ninth session, in 2007 (*ibid.*, vol. II (Part Two), p. 185, para. 252).

[37] *Yearbook … 2007*, vol. II (Part Two), p. 63, paras. 206–207 and p. 65, para. 222.

[38] See footnote 10 above.

detainees. Thus there were clearly two schools of thought in the Commission, one maintaining that what mattered was human rights as a whole, and another arguing that there was a hard core of rights which conditioned the respect of other rights.

The meeting rose at 12.30 p.m.

3004th MEETING

Wednesday, 13 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

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

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Ms. O'Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, thanked her for her interest in the Commission's work and invited her to address the Commission.

2. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that a number of significant developments in connection with the Sixth Committee had taken place during the sixty-third session of the General Assembly. The Assembly, in its resolution 63/123 of 11 December 2008, had expressed its appreciation to the Commission for the work accomplished at its sixtieth session. It had particularly emphasized the completion of the first reading of the draft articles on the effects of armed conflicts on treaties[39] and of the second reading of the draft articles on the law of transboundary aquifers.[40] The latter articles had been taken note of, without prejudice to the question of their future adoption. The General Assembly would go back to the item at its sixty-sixth session, and States had been requested to take into account the principles embodied in the articles in their interactions. The General Assembly had also taken note of the Commission's decision to include the topics "Treaties over time"[41] and "The most-favoured-nation clause"[42] in its programme of work. In addition, it had requested the Secretary-General to prepare a report on the assistance currently provided to Special Rapporteurs and options regarding additional support of the work of Special Rapporteurs. The Assembly had also adopted resolution 63/118 of 11 December 2008 entitled "Nationality of natural persons in relation to the succession of States", a topic previously considered by the Commission.[43] Deciding to revert to that item in 2011, the General Assembly had invited Governments to indicate whether they deemed it advisable to elaborate a legal instrument on the question.

3. The promotion of the rule of law at the national and international levels remained one of the salient items on the United Nations agenda. In the Sixth Committee, delegations had appreciated the useful contribution made by the Commission on that topic in its report on the work of its sixtieth session.[44] In its resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels, the General Assembly had reaffirmed its own role in encouraging the progressive development of international law and its codification and, *inter alia*, invited the Commission to continue to comment in its reports on its current role in promoting the rule of law. For the next three sessions to come, the Sixth Committee had selected specific subtopics for its debate: "Promoting the rule of law at the international level" in 2009, "Laws and practices of Member States in implementing international law" in 2010 and "Rule of law and transitional justice in conflict and post-conflict situations" in 2011. Throughout the United Nations system, the rule of law had become an issue of the utmost importance and efforts were being made to improve the coordination, coherence and effectiveness of related activities system-wide.

4. The criminal accountability of United Nations officials and experts on mission had been on the agenda of the General Assembly since 2006. To supplement resolution 62/63 of 6 December 2007 on criminal accountability of United Nations officials and experts on mission, in which the Assembly strongly urged all States to consider establishing jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, the General Assembly had adopted resolution 63/119 of 11 December 2008, aimed at enhancing international cooperation to ensure the criminal accountability of United Nations officials and experts on mission. The new elements concerned, *inter alia*, mutual assistance in connection with criminal investigations and criminal or extradition proceedings, including with regard to evidence; the facilitation of the use, in criminal proceedings, of information and material obtained from the United Nations; effective protection of witnesses; and enhancement of the investigative capacity of host States. The General Assembly had decided that work on that topic should continue in 2009 in the framework of a working group of the Sixth Committee. The possibility of elaborating a legally binding instrument on the matter remained an open question.

5. The reform of the system of administration of justice at the United Nations was another salient issue on the agenda of both the Sixth and Fifth Committees. The adoption of resolution 63/253 of 24 December 2008 marked

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[39] *Yearbook ... 2008*, vol. II (Part Two), paras. 65–66.

[40] *Ibid.*, paras. 53–54.

[41] *Ibid.*, paras. 25 and 353 and annex I.

[42] *Ibid.*, paras. 25 and para. 354 and annex II.

[43] For the draft articles on the nationality of natural persons in relation to the succession of States adopted by the Commission at its fifty-first session, see *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

[44] *Yearbook ... 2008*, vol. II (Part Two), paras. 341–346.