

Document:-
A/CN.4/3004

Summary record of the 3004th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2009, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

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. Candiotti, 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 treaties³⁹ 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

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.

significant progress in that area. By that resolution the General Assembly had, in particular, adopted the statutes of the new United Nations Dispute Tribunal and the United Nations Appeals Tribunal, which were to become operational as of 1 July 2009. The judges of both Tribunals, as well as three *ad litem* judges appointed to the Dispute Tribunal, had been elected by the General Assembly on 2 and 31 March 2009.⁴⁵ As a consequence of the reform, the current joint appeals boards and disciplinary committees, as well as the United Nations Administrative Tribunal, would be abolished in the course of 2009. A number of legal aspects of the reform, however, were still outstanding. They included the issue of ensuring that effective remedies were available to the various categories of non-staff personnel of the United Nations and questions of legal assistance and of the possibility of staff associations filing applications before the Dispute Tribunal. Those outstanding issues had been addressed by the Ad Hoc Committee on the Administration of Justice at the United Nations, which had met in late April 2009, and would continue to be discussed at the sixty-fourth session of the General Assembly.

6. With regard to measures to eliminate international terrorism, since 2001 a Working Group of the Sixth Committee and an Ad Hoc Committee had been exploring ways of resolving outstanding issues in the elaboration of the draft comprehensive convention on international terrorism, relating essentially to the elements to be excluded from the scope of application of the convention. In its resolution 63/129 of 11 December 2008, the General Assembly had decided that the Ad Hoc Committee would meet from 29 June to 2 July 2009 in order to fulfil its mandate.

7. At its February 2009 session, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization had completed its consideration of the working paper submitted by the Russian Federation on fundamental norms and principles governing the introduction and implementation of sanctions imposed by the United Nations, which would shortly be submitted to the General Assembly for consideration with a view to its adoption.⁴⁶

8. As to other activities of the Office of Legal Affairs, there had been several developments in connection with the International Court of Justice during the past year. Following elections held in November 2008, three members of the Court had been re-elected and two members had been newly appointed. Following those elections and the retirement of the Court's former President, Judge Rosalyn Higgins, the new President, Judge Hisashi Owada of Japan, had visited United Nations Headquarters in April 2009 and had met with the Secretary-General, the President of the General Assembly, the Chairperson of the Fifth Committee, the Chairperson of the Advisory Committee on Administrative and Budgetary Questions and herself. In October 2008, the General Assembly had requested an advisory opinion from the Court on the *Accordance with International Law of the Unilateral*

Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. As part of the Secretary-General's statutory duties under the Statute of the Court, the Secretariat had submitted a voluminous dossier for the Court's consideration on the matter, which could be viewed on the Court's website.

9. With regard to the International Criminal Court (ICC), 108 States were parties to the Rome Statute of the International Criminal Court⁴⁷ and 139 were signatories. The Court had been active on a number of cases relating to different situations. In the Democratic Republic of the Congo, where cooperation from the United Nations was essential, former Ituri warlords Germain Katanga and Mathieu Chui had been surrendered to the Court and the arrest warrant against Bosco Ntaganda had been unsealed. The charges against Katanga and Chui had since been confirmed, and the case was being prepared for trial. In January 2009, the case of *The Prosecutor v. Thomas Lubanga Dyilo* had entered the trial phase. The Lubanga trial, the first in the Court's short history, had been widely hailed as a historic event, which probably would not have been possible without the committed support of the United Nations, including, false modesty aside, the Office of Legal Affairs. In 2008, the Office of the Prosecutor had opened a formal investigation on the situation in the Central African Republic, in particular into allegations of rape and other acts of sexual violence against women. The arrest and surrender to the seat of the Court of Jean-Pierre Bemba Gombo by Belgian authorities on 3 July 2008 had been a major success for the Court. There had been important developments also with regard to the situation in northern Uganda, where at the request of the Government of Uganda, the Prosecutor was carrying out an official investigation. Within the framework of the Juba peace process, the Lord's Resistance Army and the Government of Uganda had concluded a series of agreements with a view to ending more than two decades of conflict. While the framework final peace agreement had not yet been signed by the leader of the Lord's Resistance Army, the peace process had not failed. Following the military campaign mounted by the armed forces of Uganda, the Democratic Republic of the Congo and Southern Sudan, the Juba peace process had taken centre stage again. Beyond the fate of the surviving leaders of the Lord's Resistance Army, Uganda must now find ways to reconcile sustainable peace and its people's desire for justice. With regard to the investigation of the situation in Darfur, opened by the Prosecutor at the request of the Security Council, an arrest warrant had been issued against the President of Sudan, the third individual against whom an arrest warrant had been issued in connection with Darfur.

10. Only a few years into its existence, the ICC had emerged as the centrepiece of the international system of criminal justice. As it advanced in its judicial mission, the United Nations would accompany and support it in every respect.

11. At the heart of many judicial and non-judicial accountability mechanisms lay the dilemma of peace and justice. With the growing involvement of the United Nations

⁴⁵ See *Official Records of the General Assembly, Sixty-third Session, 76th plenary meeting (A/63/PV.76)* and *78th plenary meeting (A/63/PV.78)*.

⁴⁶ *Ibid.*, *Sixty-fourth session, Supplement No. 33 (A/64/33)*, paras. 14–20.

⁴⁷ Report of the International Criminal Court for 2007/08 (A/63/323), para. 71.

in post-conflict situations—both in facilitating the negotiations of peace agreements and in establishing judicial and non-judicial accountability mechanisms—the Organization was frequently called upon to express its position on the relationship between peace and justice, on the validity and lawfulness of amnesty, on the relationship between the ICC and other judicial accountability mechanisms, notably national ones, and on the interaction between United Nations representatives and persons indicted by international and United Nations-based tribunals who continued to hold positions of authority in their respective countries. In the past decade, countries emerging from years of internal conflicts and large-scale violations of international humanitarian law had been caught in the dilemma of peace versus justice. Peacemakers had opted for large-scale amnesties, and that had overridden, for a while at least, the need for justice. In paving the way for calling to account those responsible for genocide, crimes against humanity and war crimes, the United Nations had redefined the lawful contours of amnesty. In Angola, Burundi, Cambodia, Sierra Leone and Sudan, amnesty for genocide, crimes against humanity and war crimes had been rejected, invalidated or declared not to constitute a bar to prosecution. Justice had thus become a component of peace, although in the sequence of events it had sometimes ranked second. After a decade-long debate over how to reconcile peace and justice and whether to pursue them simultaneously or sequentially, it seemed the choice now was no longer between peace and justice, but between peace and the kind of justice.

12. With regard to matters concerning oceans and the law of the sea, in particular the tasks currently performed by the Division for Ocean Affairs and the Law of the Sea, the Commission on the Limits of the Continental Shelf (for which the Division served as secretariat) had adopted recommendations regarding the submissions made, respectively, by New Zealand, Norway and Mexico and the joint partial submission made by France, Ireland, Spain and the United Kingdom. For many States parties to the United Nations Convention on the Law of the Sea, the time period for making such submissions had expired on 12 May 2009. The Commission had received 50 submissions made by coastal States, individually or jointly, pursuant to article 76, paragraph 8, of the Convention. In addition, 39 States had submitted preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles. The Division was expecting to receive sets of preliminary information from States not in a position to fulfil the time-limit requirements pursuant to a decision adopted at the eighteenth Meeting of States Parties to the Convention. In September 2008, the Division had completed its three-year cycle of training to assist developing States in the preparation of submissions to the Commission. A total of 299 scientific and technical experts from 53 developing States had benefited from that training.

13. In the context of fisheries governance, the Division continued to report to the General Assembly on issues relating to illegal, unreported and unregulated fishing and the impact of bottom fisheries on vulnerable marine ecosystems. On the basis of a report to be prepared in cooperation with the Food and Agriculture Organization of the United Nations, in late 2009 the General Assembly would conduct a review of actions taken by States and

regional fisheries management organizations to regulate bottom fishing and protect vulnerable marine ecosystems with a view to formulating further recommendations where necessary. The Division had also begun preparations for the resumption, in 2010, of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, convened by the Secretary-General with a view to assessing the Agreement's effectiveness in securing the conservation and management of straddling fish stocks and highly migratory fish stocks.

14. With regard to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, the Division was currently preparing for the third meeting of the Ad Hoc Open-ended Informal Working Group to study those issues which would be held in 2010 and would provide recommendations to the General Assembly.

15. In order to assist States in the implementation of the provisions on marine scientific research contained in the United Nations Convention on the Law of the Sea, the Division had prepared a revised version of its earlier publication on that subject with the assistance of a group of experts, which had met in April 2009. The Division had also developed a comprehensive training manual and a training course on the implementation of ecosystem approaches to ocean management.

16. The United Nations had designated 8 June as World Oceans Day, beginning in 2009.⁴⁸ The inaugural event would include a high-level panel to discuss, in particular, challenges in fully utilizing the benefits and opportunities of the oceans.

17. The work of the Division had increasingly focused on activities taking place in areas beyond national jurisdiction. Incidents of piracy off the coast of Somalia had raised a number of legal issues relating, *inter alia*, to the exercise of jurisdiction, the use of force, international human rights law and prosecution of alleged offenders. The Division provided reports to the General Assembly on relevant developments at the global and regional levels. In addition, it provided advice and assistance to States and intergovernmental organizations on the uniform and consistent application of the provisions of the United Nations Convention on the Law of the Sea relating to piracy, including by reference to the commentary on the draft articles relating to piracy adopted by the International Law Commission in 1956.⁴⁹ For its part, the Office of the Legal Counsel had been monitoring proposals for an international judicial response to incidents of piracy.

18. The International Trade Law Division served as the substantive secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The mandate of UNCITRAL included the enhancement of international

⁴⁸ General Assembly resolution 63/111 of 5 December 2008, para. 171.

⁴⁹ *Yearbook ... 1956*, vol. II, document A/3159, pp. 260–261 (articles concerning the law of the sea, in particular articles 38–45).

trade and development by the promotion of legal security in international commercial transactions, in particular through the promulgation and dissemination of international norms and standards. To that end, it addressed relevant aspects of public sector governance as well as private international commercial transactions. With regard to public sector governance, UNCITRAL was engaged in public procurement law reform at the national level and was scheduled to discuss revisions to its 1994 Model Law on Procurement of Goods, Construction and Services⁵⁰ at its June–July 2009 session.⁵¹

19. Concerning private international commercial transactions, in 2008 the General Assembly had adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”) on the basis of the text prepared and approved by UNCITRAL. That instrument aimed at creating a contemporary and uniform law for modern door-to-door container transport. UNCITRAL was also currently revising one of the most successful international instruments of a contractual nature in the field of arbitration, the 1976 UNCITRAL Arbitration Rules,⁵² so as to take account of developments in arbitration practice over the past years. In the area of electronic commerce, it was in the process of developing standards applicable to single window facilities. In the area of insolvency, UNCITRAL was promoting cooperation and coordination between courts, and between courts and insolvency representatives, including the use of cross-border agreements, and it was promulgating standards with respect to the treatment of enterprise groups in insolvency.⁵³ Lastly, in the area of security interests, UNCITRAL was harmonizing and modernizing secured financing law through the 2007 UNCITRAL Legislative Guide on Secured Transactions,⁵⁴ which was being broadened to include security over intellectual property assets. In addition to assisting UNCITRAL in fulfilling its legislative mandate, the International Trade Law Division was carrying out technical assistance and cooperation activities to promote the dissemination and effective and uniform implementation of UNCITRAL texts, coordinating activities in related fields among international organizations and assisting the Commission in undertaking a comprehensive review of its working methods.

20. With regard to the dissemination of international law, in 2008 the Codification Division had continued to expand its websites dedicated to international law, including through the establishment of three new websites, one of which was the United Nations Audiovisual Library of International Law, launched in October 2008 (www.un.org/law/avl/). The new site was the result of a decision

⁵⁰ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1)*, annex I. Also available from the UNCITRAL website: www.uncitral.org/uncitral/en/publications/publications.html.

⁵¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, chap. IV.

⁵² *Ibid.*, *Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C.

⁵³ In particular, UNCITRAL Model Law on Cross-Border Insolvency in the 2004 UNCITRAL Legislative Guide on Insolvency Law, *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, chap. III.

⁵⁴ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, Part two, para. 100.

by the Secretariat to revive the Audiovisual Library as an important tool for disseminating information on international law, especially in developing countries. It had three main components: the Lecture Series, which provided video lectures by eminent international law scholars and practitioners from different countries on virtually every subject of international law; the Historic Archives, containing introductory notes prepared by internationally recognized experts, audiovisual materials tracing the history of the negotiation and adoption of significant legal instruments, the procedural history as well as the text of the legal instruments and other key documents; and lastly the Research Library, which provided an extensive online library of international law materials—treaties, jurisprudence, United Nations documents, yearbooks and legal publications as well as scholarly writings. Thanks to a generous contribution from Germany, the Codification Division had initiated a pilot project providing for the interpretation of the lectures into all official languages of the United Nations. All of those materials were available free of charge to any user of the website. The website had already been accessed by thousands of students and practitioners of international law in over 150 countries representing 61 different languages. It would continue to be updated and expanded in the coming years.

21. The Codification Division had also established a new website for the *United Nations Juridical Yearbook* (www.un.org/law/UNJuridicalYearbook/index.htm). It had digitized and placed on the Internet almost all the official records of major diplomatic conferences that had resulted in the adoption of international conventions, in particular those based on the work of the International Law Commission. In addition, it was now possible not only to search the full text of individual series, such as the *Yearbook of the International Law Commission*, but also to search across all the legal publications that the Division had placed on the Internet. Recently, the Secretariat had negotiated an agreement with HeinOnline, a major Internet distributor of legal materials available in most regions of the world, whereby a number of United Nations publications, including the *Yearbook of the International Law Commission*, would be made available to its subscribers. That was in addition to the free access to the *Yearbook* available to users of the Commission’s website. The Division had also continued to prepare *ad hoc* and regularly mandated publications. A new edition of the *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*, covering the period 2003–2007, had just been issued.⁵⁵

22. She also wished to say a few words about the new and substantially enhanced website, in both English and French, launched in September 2008 by the Treaty Section (treaties.un.org). The United Nations Treaty Collection website was the authoritative source of information on multilateral treaties deposited with the Secretary-General and treaties registered with the Secretariat. The user registration requirement had been discontinued and the treaty collection was now completely free for all categories of users. The new website offered expanded possibilities for

⁵⁵ ST/LEG/SER.F/1/Add.3, United Nations publication (Sales No. E.08.V.6), available from: <http://www.un.org/law/ICJsummaries> (accessed 5 July 2013).

legal research and training. Among its features were convenient and timely access to the world's largest database of treaties deposited or registered with the Secretary-General, daily updates on the participation status of over 500 multilateral treaties deposited with the Secretary-General (openings for signature, signatories, parties, reservations, declarations), full-text search capability for treaties registered with and published by the Secretariat online in the *United Nations Treaty Series*, monthly statements of treaties and international agreements registered with the Secretariat, automated subscription to the latest depositary notifications and the latest treaty texts in their authentic languages and related information made available online shortly after registration by the Secretariat.

23. The "2009 Treaty Event: Towards Universal Participation and Implementation" would be held from 23 to 25 and 28 and 29 September 2009 in the treaty-signing area in the General Assembly building in New York. It would coincide with the general debate at the sixty-fourth session of the General Assembly. As in previous years, the occasion would provide a distinct opportunity for States to demonstrate their continuing commitment to the central role of the rule of law in international relations.

24. As for funding related to the work of the Commission in what were obviously times of dwindling resources, the United Nations had been proceeding on a zero-growth budget for quite some time, which had imposed budgetary constraints on programmes, from which the Commission's activities had not been spared. Creative ways of meeting the Commission's objectives had to be found if the situation did not improve. Members of the Commission were aware that there had been limitations on budgetary growth at the United Nations for the past several bienniums. That had meant that funding for travel and daily subsistence allowances for members had not been able to grow to meet increasing costs. In other words, it had been costing more and more in United States dollars to make payments in Swiss francs for the Commission's expenditures. In recent years, it had been possible to overcome such shortfalls by identifying other available funds within the overall budgetary allocations made to the Office of Legal Affairs, but the scope for alleviation of shortfalls in the future was likely to be much reduced.

25. In conclusion, the work of the International Law Commission exemplified the important effort that the General Assembly was making to encourage the progressive development of international law and its codification. The Commission's sixtieth anniversary celebrations had demonstrated its continuing relevance, and it could count on the continuing support of the Legal Counsel at a time when the reaffirmation of the central role of the rule of law in international relations had become so essential.

26. Mr. GALICKI stressed the importance of the special role played by the Secretariat and in particular the Codification Division in introducing technological and institutional innovation in the assistance given to the Commission. Those who had long been members of the Commission like himself could remember the gradual introduction of electronic versions, on the Internet, of such materials as the *Yearbook*, the reports and other documents of the Commission. Such materials were

continuing to be introduced and their scope was enlarging significantly every year. Another significant achievement had been the opening in 2008 of the United Nations Audiovisual Library of International Law, a formidable tool for the members of the Commission and one that was also stimulating interest in international law in general and facilitating its wider dissemination, something that was of crucial importance both for enhancing friendly relations among States and for making international law more accessible to a greater number of people. Members of the Commission, being also either academicians or diplomats, could enjoy the benefits of using the Audiovisual Library and other electronic tools made available through the dedicated work of the Secretariat. They were grateful to the Secretariat for that, and hoped that such activities would be continued and developed in future and that appropriate funds would be found in the United Nations budget, even in times of economic crisis. Opening international law to States, societies and individuals, making it accessible and understandable for all, was of priceless value and worth all the expenditure involved. The investment would foster a true interest in strengthening international understanding, cooperation and peace.

27. Mr. PELLET expressed admiration for the formidable work done by the Codification Division, especially on the Commission's Internet site and the Audiovisual Library, which were extraordinary achievements, as shown by the fact that HeinOnline had "grabbed" them. He was grateful to the Office of Legal Affairs for having discontinued paid access to those sites, a step that constituted a great advance in the dissemination of international law. Nevertheless, he regretted that the United Nations did not always provide the Commission the information it needed, particularly on the responsibility of international organizations, even though it held the key to practice in that field. It made one think that the Commission's special ties with the United Nations were an impediment rather than an advantage. The previous Legal Counsel, lamenting the fact that Special Rapporteurs did not always participate in the work of the General Assembly, although some did so with funding by their Governments, had hinted that United Nations might take such expenditure upon itself. Given the Legal Counsel's not very encouraging account of the Organization's finances, he wished to know whether the possibility was still open.

28. Mr. DUGARD said that he wished to raise yet again the question of payment of honoraria to members of the Commission, particularly to special rapporteurs. The United Nations seemed to take the view that independent experts did not need to be paid. Normally, they did four to five months of work free of charge, and that was grossly unfair. Speaking on behalf of past and future special rapporteurs, he said it was necessary to reconsider the question of payment of honoraria to them, even in a time of funding crisis, and that the matter weighed very heavily with members of the Commission.

29. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, Legal Counsel), replying to Mr. Pellet's remarks, said that at the meeting of legal advisers on responsibility of international organizations, she had promised that the United Nations would provide the Commission in a timely

fashion with the information it needed for its work on the topic of responsibility of international organizations. With regard to the issue of payment for special rapporteurs, she said she understood and was sympathetic to the position of members of the Commission but that she had not been informed of the indication given by her predecessor and that the era was unfortunately one of fiscal rectitude. She would ensure that the question was duly examined but did not wish to create false expectations or provide any guarantees, in view of the extreme pressure under which the United Nations was now operating.

30. Ms. ESCARAMEIA, referring to the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization and to the adoption of the document on sanctions submitted by the Russian Federation,⁵⁶ asked whether it was to be discussed next in a working group of the Sixth Committee or in the Committee itself. The future of the document was of great interest since the issue of sanctions had been central to the Special Committee's discussions for many years. Regarding the law of the sea and the considerable number of submissions to the Commission on the Limits of the Continental Shelf, she wished to know whether the United Nations had set a target date for responding to those submissions, in view of the human and financial resources required for that purpose in a time of budgetary constraints. Concerning the websites, which were remarkable, more publicity for them would be useful, since it often seemed the United Nations did excellent work that was unfortunately not well known to the public. It would also be useful to offer training on how to navigate the sites, since using them to do research was often difficult. Lastly, on the status of members of the Commission, she pointed out that special rapporteurs often did a great deal of work on their topics outside the Commission session and that Commission members carried out activities in post-session periods. However, their *laissez-passer* expired on the final day of each session, so they were no longer able even to enter United Nations premises to do research, their passes no longer being valid for entry. That was not a budgetary but an organizational question, which could undoubtedly be resolved easily through the Legal Liaison Officer.

31. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the document submitted by the Russian Federation would be considered by the Sixth Committee, which would decide whether it should be adopted unchanged; so far the establishment of a working group had not been suggested. The launch of the Audiovisual Library had provided an opportunity to publicize the websites of the United Nations in Member States, but she had been interested to hear Ms. Escarameia's observations on that subject and would transmit them upon her return to New York. She had also taken note of the difficulties encountered by members of the Commission and assured them that there would be further discussion of these issues in New York and that the United Nations would try to find satisfactory solutions insofar as resources permitted.

32. Mr. HASSOUNA, noting that the Legal Counsel had given her views on the activities of the International Court of Justice and the International Criminal Court, said that it would also be interesting to hear her opinions about the *ad hoc* tribunals created by the United Nations. Many wondered if they had the necessary legal means and sufficient support of Member States to carry out their missions. Divergent views had been heard, for example, concerning the International Tribunal for Rwanda. One might also wonder how the Special Tribunal for Lebanon would tackle the resolution of the problems, both domestic and international, that had been tearing Lebanon apart for so long. The Tribunal's recent order to release suspects detained in Lebanon had stirred up a great deal of controversy, some people saying that the suspects should not have been detained in the first place, while others saw that measure as proof that the Tribunal was independent and was not politicized.

33. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, established in 1993 and 1994, respectively, had come to the completion phase of their work. The Security Council's Informal Working Group on International Tribunals was attempting to determine which residual mechanisms should be left in place to carry out the remaining activities of the two tribunals and address the issues that remained outstanding after their closure. One of those issues was the prosecution of fugitives, of which there were 2 in the case of the International Tribunal for the Former Yugoslavia and 13 in the case of the International Tribunal for Rwanda. The aim was to finish trials and appeals in both tribunals by the end of 2010, but a certain amount of flexibility would be called for. As to the Special Tribunal for Lebanon, it had been established only recently, in March 2009, thus achieving the transition from the International Independent Investigation Commission established following the assassination of Rafiq Hariri. The suspects detained in Lebanon had been released by order of the pretrial judge at the request of the Prosecutor, in the context of the transfer of the case, a procedure which, under the statute of the Tribunal, also included the possible transfer of detainees. In fact, the order had not been for the transfer of the detainees, but for their release, which had been considered necessary. It was a judicial decision; the Office of Legal Affairs respected it; and it was not for her to comment on the political implications. Another international court was the Extraordinary Chambers in the Courts of Cambodia for the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, which was very active, its first trial having involved five detainees. Maintaining it nevertheless posed a number of difficulties, principally due to its hybrid nature and also to issues of corruption within the national component of the tribunal. The Office of Legal Affairs was assiduously following that very sensitive issue. Lastly, the question about the capacity for action of the various international tribunals could be discussed during the private session that was to follow.

34. Mr. MIKULKA (Secretary to the Commission), replying to the questions relating to the law of the sea, said that the deadline initially set for submitting requests for the

⁵⁶ See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 33 (A/63/33)*, para. 20 and annex.

extension of the continental shelf had been 10 years from the entry into force of the United Nations Convention on the Law of the Sea. That deadline had long ago expired, however, and the Meeting of States Parties had decided to consider that the 10 years began to run from the date of adoption of guidelines by the Commission on the Limits of the Continental Shelf. That new deadline had expired on 12 May 2009 for the first group of States to ratify the Convention. As the Legal Counsel had stated, 50 submissions had been received to date, two thirds of them just before the deadline. In addition, 39 States had indicated they were not in a position to make a submission in due form but had submitted some information. Making a submission was an extremely lengthy and costly process for coastal States. That was why at their most recent meeting, the States parties had decided to give yet another interpretation to the deadline contained in the Convention by construing it to be met *bona fide* if a coastal State provided some information on the progress of its work on the submission and on the expected limits of the continental shelf. The consideration of the growing number of submissions was indeed a major challenge for the Commission on the Limits of the Continental Shelf, as Ms. Escarameia had remarked.

The public part of the meeting was suspended at 11.20 a.m. and was resumed at 12.25 p.m.

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*)

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

36. Mr. DUGARD said that the fifth report on expulsion of aliens offered an interesting survey of the relevant international human rights rules. He agreed with the Special Rapporteur on the need to distinguish the different kinds of human rights, as long as that distinction was made in the specific context of the topic under consideration, because not all rights were relevant to the expulsion of aliens. Some, like the right to life, the right not to be subjected to torture and the right to non-discrimination, had an obvious role to play, but others, such as many of the political, economic, social and cultural rights, could not be exercised in the context of expulsion. He was not sure, however, that it was wise to distinguish between fundamental and non-fundamental human rights, the concept of fundamental rights being just as imprecise as the concept of *jus cogens*, which the Special Rapporteur had preferred not to apply precisely because of its uncertain content. For example, the right not to be tried twice for the same offence (*non bis in idem*) was a fundamental right under the European Convention on Human Rights, but clearly was not going to feature as such under the topic being considered. Other rights not mentioned by the Special Rapporteur were also important in the context of expulsion, such as the right to due process and the right to counsel—perhaps they would be dealt with later in a

chapter on procedure. Another important right was the right to property. The Special Rapporteur referred to it in draft article 14, but how it fit in with the obligation of non-discrimination was not clear.

37. Prior to 1945, the rule had been that a State in the exercise of its sovereignty had the right to expel aliens, as long as it did not contravene international minimum standards, but those rules were vague and had merged with international human rights norms. In general, a more pragmatic approach would be preferable, particularly in draft article 8, which might read: “Any person who has been or is being expelled is entitled to respect for all human rights that may be relevant to the expulsion.” Another solution would be to add a “without prejudice” clause to state that article 8 was without prejudice to other human rights.

38. Protection of the right to life, covered in draft article 9, was obviously of crucial importance. He could not understand, however, why only States that had abolished the death penalty were the subject of paragraph 2, and not those that still had the death penalty on their books but did not apply it. In article 10, it would be wiser to focus on torture and other cruel, inhuman or degrading treatment rather than on human dignity, which was a very vague concept. Draft articles 11, 12 and 13 should be retained as worded. The same was true for draft article 14, although he was surprised that the Special Rapporteur considered that the principle of non-discrimination did not fall into the category of “hard-core rights”. It was enshrined in Article 55 of the Charter of the United Nations and had been central to the *Barcelona Traction* case dealing with obligations *erga omnes*.

39. Mr. GALICKI said that the question of the expulsion of aliens elicited an unavoidable confrontation between the traditional right of States to expel aliens from their territories and the right of persons not to be subjected to discrimination in the enjoyment of their fundamental rights guaranteed by the relevant provisions of specific international treaties. He wished to concentrate his remarks on draft articles 8 and 14, which in his opinion were the most important and the most meaningful of all the draft articles dealing with human rights in the context of the expulsion of aliens.

40. His first serious objection concerned draft article 8, which stated: “Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances.” To make a precise determination of both kinds of categories of human rights cited might be very difficult and even impossible in practice. The term “fundamental rights” was used in various national and international legal instruments that differed significantly in respect of both the content and the scope of fundamental rights. Some of these instruments, such as the Charter of Fundamental Rights of the European Union, used the term “fundamental rights” in a very broad sense, while others, like the European Convention on Human Rights and the International Covenant on Civil and Political Rights, identified a set of non-derogable rights without labelling them as “fundamental rights”. Since the Special Rapporteur admitted in paragraph 28 of his report that

“[t]here is no legal definition of the concept of ‘fundamental human rights’”, it was not logical for him simultaneously to propose in draft article 8 to use the concept of fundamental rights as the basis for a general obligation to respect the human rights of persons being expelled. It seemed more advisable to include a short catalogue of the human rights which were to be considered particularly relevant to the expulsion of aliens. In fact, the Special Rapporteur had already identified some of those rights and described them in paragraph 51 of his report as “[s]pecially protected rights of persons being expelled”.

41. Another problem was the question of the obligation not to discriminate, formulated in draft article 14. There were two sides to that obligation, as reflected in the two paragraphs of the article: the first related to the exercise by the State of its right of expulsion with regard to the persons concerned, while the second related 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. The question seemed to reside in how the concept of non-discrimination should actually be treated *vis-à-vis* both the “right of expulsion” and the “the rights and freedoms provided for in international human rights law”. As the Special Rapporteur correctly noted in paragraph 154 of his report, “[t]he prohibition of discrimination with respect to human rights in general, and expulsion in particular, ‘does not exist independently’ in that it is meaningful only when it is observed in relation to a given right or freedom”.

42. In article 14 of the European Convention on Human Rights, the prohibition of discrimination appeared not as a separate protected right, but as an additional, auxiliary principle that must always be connected to a right or freedom directly protected by the Convention or its Protocols. It was worthy of note that an attempt to transform that rule into an independent right to non-discrimination, undertaken in Protocol No. 12, had not been very successful. The Special Rapporteur rightly concluded in paragraph 155 of his report that the rule of non-discrimination should not be formulated in terms of rights which all beneficiaries should enjoy without discrimination. But then to suggest that it should be formulated in terms of the State’s obligation not to apply the rights in question in a discriminatory fashion seemed to go too far. Instead of referring to an “obligation”, it might be more appropriate to use a phrase employed earlier, “the rule (or principle) of non-discrimination”.

43. Sir Michael WOOD said that, whenever possible, the Commission should take an early decision on the form that it wished to give, even provisionally, to its final output on a topic, something that so far had not been done for the current topic. He wished to make two main points, both of which raised questions of principle. First, he shared the view of the many Commission members who had said that persons being expelled, being persons in the territory or under the jurisdiction of the State, were entitled to the enjoyment of all applicable human rights, in other words, those rights set forth in the treaties to which the State was a party and under customary law. Second, he also agreed with those who had said that the right to dignity was best viewed not as a separate human right but

rather as a principle underlying all civil and political, economic, social and cultural rights.

44. On the first issue, Ms. Escameia had rightly pointed out that persons being expelled were entitled to the enjoyment of all applicable human rights and that it was therefore unnecessary to seek to draw up a list of “fundamental rights”. In paragraph 17 of his report, the Special Rapporteur said that he “considers it unrealistic to require that a person being expelled be able to benefit from all human rights guaranteed by international instruments and by the domestic law of the expelling State” and he went on to say: “It seems more realistic and more consistent with the State practice to limit the rights guaranteed during expulsion to the fundamental human rights.” With regard to State practice, he himself did not interpret the description of State practice in the report as justifying a limitation of the rights of persons being expelled to a supposed category of “fundamental human rights”. In the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the European Court of Human Rights had not been suggesting that persons being expelled were entitled only to respect for their fundamental human rights. The fact that the Court had stressed the fundamental nature of the rights at issue in that case did not carry the contrary implication that other rights would not be applicable. If the Special Rapporteur’s aim was to determine which human rights were likely to be relevant and important for a person being expelled and which rights were less likely to be relevant, that would be understandable, though not necessarily very useful. It might well be that some rights of some persons being expelled were restricted in accordance with the terms of a treaty, as was the case with prisoners, for example, but any restrictions had to be justified as being in accordance with the law and necessary in a democratic society. On the other hand, it was wrong in principle to say that only some rights and not others should be available to such persons, and he could not support such an affirmation.

45. The idea of a category of non-derogable rights did not appear to be a particularly helpful one in the present context. The list of non-derogable rights differed from instrument to instrument, as did the reasons why a certain right was non-derogable. The circumstances of individuals subject to expulsion were infinitely variable from one person to another, and it would be very difficult to come up with an exhaustive list of their rights. Given the basic point that all human rights were potentially engaged in the case of persons being expelled, it was unclear to him why a listing of particular rights such as was found in draft articles 9 (Obligation to protect the right to life of persons being expelled), 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment) and 13 (Obligation to respect the right to private and family life) had a place in the draft articles. Draft article 8, suitably worded, could suffice to cover all the rights in question.

46. Turning to his second point, he agreed with those who did not see the “right to dignity” envisaged in draft article 10 as a distinct human right. It was, rather, a basic principle mentioned, among other places, in the preamble to the Charter of the United Nations, which underlay all human rights.

47. With regard to draft article 8, he agreed with those who had proposed the deletion of the concluding words “the implementation of which is required by his or her specific circumstances”, for the reasons of principle outlined earlier. He pointed out also that the category of persons who had been expelled was not included in other articles and that perhaps the draft articles should be made consistent in that regard.

48. Regarding draft article 11, he shared the view that the words “in its territory” were unnecessary and potentially harmful. Lastly, in respect of draft article 14 (Obligation not to discriminate), he agreed with the members who had suggested that other grounds for discrimination, such as those listed in the Charter of Fundamental Rights of the European Union, should be expressly mentioned.

49. Mr. KAMTO (Special Rapporteur) requested that speakers state whether or not they were in favour of referring the draft articles to the Drafting Committee. One could not say, on the one hand, that a given provision was unnecessary, yet, on the other hand, give the impression that it could be textually improved. He had selected only those human rights that had a link with expulsion. If members did not want the Commission to speak of them, they should so say clearly, so that there would be no ambiguity.

The meeting rose at 1 p.m.

3005th MEETING

Thursday, 14 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Later: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, 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. Vázquez-Bermúdez, Mr. Wako, 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. Mr. CAFLISCH said that the topic under consideration was particularly difficult. If the Commission had to decide again, he probably would not be in favour of retaining it. Yet the choice had been made, and the Commission must now make the best of it. The topic’s main difficulty lay in the fact that it was situated at the

crossroads of national law, international law and human rights. The fifth report focused on principles relating to what were called the hard core of human rights. As he saw it, all human rights, and not just some of them, were applicable in the context of the expulsion of aliens. Why, for example, should freedom of thought not extend to an alien who was being expelled? While it might not be possible for aliens—aliens who were being detained, for example—to exercise some rights with the same intensity as others, that did not mean that those rights were not applicable. Thus it would probably be sufficient to state that all human rights apply; the reference to “fundamental rights” should be deleted.

2. In his first report on the effects of armed conflicts on treaties,⁵⁷ the Special Rapporteur on that topic had listed a number of examples of applicable rights, and the Commission might wish to adopt a similar practice in the case of the topic currently under consideration, enunciating in draft article 8 the general principle of the applicability of human rights and citing in draft articles 9 to 14 examples of highly important human rights that were particularly relevant in the area of the expulsion of aliens.

3. He had a number of comments to make on individual articles. With regard to draft article 10 (Obligation to respect the dignity of persons being expelled), he favoured retaining only paragraph 2, if that, since in his view the content of the article was quite abstract.

4. In draft article 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment), the word “cruel” did not add anything: torture and inhuman or degrading treatment were cruel by definition.

5. He endorsed the wording of draft article 12 (Specific case of the protection of children being expelled), but thought that it would be preferable to insert a reference to the extreme vulnerability of children, something which the European Court of Human Rights had underscored in paragraph 55 of its judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*. Other groups of persons, such as the elderly, also deserved special consideration.

6. If draft articles 9 to 13 were retained, then draft article 14 (Obligation not to discriminate) should be, too, although he agreed with Mr. Gaja that it was non-discrimination between aliens that was at issue. Admittedly, article 14 of the European Convention on Human Rights referred solely to protected rights, and the general prohibition set out in Protocol No. 12 to that instrument only concerned the 17 States that had ratified it. However, if all those articles were to be retained as examples, the prohibition of discrimination ought to be retained and should be general in nature.

7. In closing, he said that the proposed articles could be referred to the Drafting Committee, but not before the Commission decided how to resolve the problem he

⁵⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, pp. 220–228, paras. 62–118. For the draft articles adopted by the Commission on first reading and the commentaries thereto, see *Yearbook ... 2008*, vol. II (Part Two), paras. 65–66, especially draft article 5 and the related annex.