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Summary record of the 3005th meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
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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.

had posed at the outset, namely whether it should confine itself to a draft article 8 which simply provided that aliens being expelled enjoyed all human rights, or whether a list of examples of human rights of particular relevance to expulsion should follow.

8. Mr. MELESCANU said that the Special Rapporteur's analysis of comments by States set out in paragraphs 3 to 7 of the fifth report testified to the complexity of the topic. He supported the Special Rapporteur's decision to focus on the question of limitations stemming from the need to respect the fundamental human rights of persons being expelled.

9. He shared the Special Rapporteur's position, set out in paragraphs 10 and 11 of the report, that persons being expelled remained human beings who continued to enjoy all their fundamental rights, and that the equal protection of all people was the cornerstone of all human rights regimes. That approach was supported by the rich international practice which the Special Rapporteur considered in paragraphs 10 to 15.

10. Like most other members, he had serious doubts as to the use of the concepts "fundamental rights" and "inviolable" or "non-derogable rights", which were rather vague and might even be dangerous when developing a legal rule in such a sensitive area.

11. He then turned his attention to the individual draft articles. As he saw it, the Commission could have confined its debate at the current session to the adoption of just one draft article, namely draft article 8, which must clearly stipulate that there was a general obligation to respect all the human rights, without exception, of persons being expelled. Once it had agreed on that essential principle and made it clear that it could not be subject to any limitation, the Commission could then decide whether any details or explanations should be added. As to the list of rights which the Special Rapporteur proposed to insert in the draft articles that followed, he shared Mr. Gaja's point of view: it was dangerous to list such rights, even if they served only as examples. If clarification was needed on any fundamental rights that applied specifically to the expulsion of aliens, then the Commission could endeavour to formulate a number of relevant rules. He suggested that the words "and all other rights the implementation of which is required by his or her specific circumstances" should be deleted from draft article 8 because they could give rise to interpretations contrary to the aim expressed by the Special Rapporteur and endorsed by virtually all the previous speakers on the topic. Since a general and imprecise formulation did not add anything to the protection of persons being expelled, draft article 8 should be recast.

12. If the Commission did agree that a number of rights should be enumerated which were directly related to expulsion, then respect for the right to life, dealt with in draft article 9, should be one of them because of its relevance in the context of persons being expelled. In paragraph 2 of that article, however, he found it difficult to see what kind of guarantee a State must obtain to ensure that the death penalty was not carried out—would it be a political or a legal guarantee? He wondered also what was

meant by a guarantee that was obtained previously. As it stood, the provision was very general, and its application might well create difficulties. The Drafting Committee should try to find a better wording.

13. He had no observations on the substance of draft article 10 (Obligation to respect the dignity of persons being expelled), which was an important provision, but he had been convinced by the arguments put forward by Ms. Escarameia and other members that the obligation to respect the dignity of persons was not a right relating to expulsion but constituted the very basis of all other rights and determined the manner in which all other rights must be applied to persons being expelled. He had also taken due note of Mr. Vargas Carreño's point that this obligation was the ethical foundation of all other rights and did not belong in the draft articles. Once again, the Drafting Committee should attempt to produce a wording to reflect the concerns voiced.

14. He endorsed the proposal made by Ms. Escarameia with regard to draft article 11, concerning protection from torture. The commentary should refer to the definition of torture embodied in the Rome Statute of the International Criminal Court.

15. He recognized the importance of draft article 13 (Obligation to respect the right to private and family life) for the topic of expulsion, and he endorsed the proposal by Mr. Vargas Carreño to differentiate between private and family life. A person's family life should be taken into consideration before any decision on expulsion was made. Perhaps the Drafting Committee could find wording to that effect.

16. With regard to draft article 14, he said that the obligation not to discriminate was another essential element in the context of the limitations that must be imposed on expulsion. Had he drawn up the draft articles himself, he would have produced just two, the first one stipulating that all human rights were applicable and the second one prohibiting discrimination during expulsion procedures. The wording of paragraph 1 should therefore be strengthened to prohibit any expulsion having its basis in discrimination. He agreed that paragraph 1 should be expanded to cover persons with disabilities, pregnant women and other vulnerable categories mentioned by Ms. Escarameia, Mr. Niehaus and Mr. Saboia.

17. He shared Mr. Gaja's concern as to the need to restructure the draft articles and to take a clear decision on the legal nature of the instrument that the Commission intended to submit to the General Assembly. In order not to delay the work of the Commission in plenary meeting, it would be best to refer draft articles 8 to 14 to the Drafting Committee and to request the Bureau to discuss the proposals relating to structural questions made by Mr. Gaja and others and make suggestions to the Commission as soon as possible so that a decision could be taken at the second part of the current session.

18. Ms. JACOBSSON commended the Special Rapporteur on his well-researched and intellectually stimulating report. The starting points of the topic were the classic right of States to expel aliens, on the one hand,

and the need, on the other hand, to take into account modern developments in international law—i.e. the focus on human rights—when expulsion was about to take place. Human rights applied in all situations, regardless of time or place. She agreed with Mr. Saboia that human rights were indivisible and interdependent, a view that had been upheld in the 2005 World Summit Outcome document, in which States had reaffirmed that “all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing”.⁵⁸ That was not the same as saying that they were perceived as being equally important, particularly not in the case of someone faced with a serious threat to his or her person; it simply meant that no person could be denied the enjoyment of his or her human rights.

19. At least four different legal scenarios influenced the assessment of a particular case. First, there might be situations in which certain human rights were not relevant in the specific circumstances; secondly, there might be situations in which a particular human right was derogable; thirdly, a State might have to fulfil a human rights obligation the nature and extent of which were not entirely clear; and fourthly, universal and regional human rights obligations might not be identical—regional standards might in fact be stricter or more detailed. Such situations were temporary and did not reflect the main rule or the status quo. If a State wished to disregard a human rights obligation, it could do so only if it had a clear legal ground for it.

20. It was against that background that she questioned the need to draw a distinction between fundamental rights and what must be regarded as non-fundamental rights. Although reference was made to fundamental rights in a number of treaties, she did not think that making such a distinction would be useful to the Commission in establishing specific guidelines. Ms. Escarameia’s comments had shown the difficulty of identifying even the most obvious candidates for the category of fundamental rights. The crucial question was not whether a human rights obligation could be categorized as fundamental, but whether it was relevant to the situation in question and whether there was a legal ground for derogating from it. Consequently, the starting point should be the applicability of all human rights to a person who had been or was being expelled, and not a preset division between fundamental and non-fundamental rules.

21. While welcoming the fact that the right to life was explicitly addressed in draft article 9, she expressed concern about the background information contained in the report concerning the death penalty. There was a growing trend towards abolition of the death penalty, and not only in Europe. Moreover, General Assembly resolution 62/149 of 18 December 2007, entitled “Moratorium on the use of the death penalty”, clearly stated that the use of the death penalty undermined human dignity. Such a trend must be reflected in the Commission’s work; at the very least, the wording of draft article 9, paragraph 2, should be stronger, and she endorsed Mr. Dugard’s proposal to that end.

22. Turning to draft article 10, she said that she was not convinced that the concept of the obligation to respect human dignity warranted a separate draft article. The problem with that concept was its lack of clarity. For example, it had been used by States that sought to avoid implementing clear-cut human rights obligations, and it also had different meanings in different legal systems. Moreover, the fact that it could have a theological dimension meant that its legal content could be blurred.

23. She welcomed the inclusion of draft article 14, on the obligation not to discriminate, but believed that it failed to address one important aspect: the obligation not to discriminate on the grounds of sexual orientation. She did not share the Special Rapporteur’s view that such an obligation existed only in Western countries, given that same-sex marriage was allowed in South Africa, for example. Furthermore, in its Views on the *Toonen v. Australia* case, the Human Rights Committee had found that the reference to “sex” in articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights was to be taken as including sexual orientation [para. 8.7]. She therefore agreed with Mr. Niehaus that the Commission’s mandate relating to the progressive development of international law required that the draft articles should contain an explicit reference to that particular ground of discrimination.

24. In conclusion, she said that the Commission needed to decide whether it wished to work on the assumption that it had to identify certain fundamental human rights. If draft article 8 was to be retained, it should be redrafted along the lines suggested by Mr. Dugard. The need for draft articles 11, 12 and 13 would then have to be assessed in the light of the decision on draft article 8. Draft articles 9 and 14 were necessary because they related directly to the expulsion of aliens.

25. THE CHAIRPERSON commended the Special Rapporteur on his well-researched report which had provided the Commission with much food for thought as it considered a topic of increasing importance in contemporary society. By and large he shared the views expressed by many members, including Mr. Dugard, Ms. Escarameia, Mr. Gaja, Mr. McRae and in particular Sir Michael Wood, who had expressed uncertainty about where the Commission was trying to go with the topic. In his view, the Commission should endeavour to draft a legal instrument regulating the expulsion of aliens for the purpose of the codification or possibly even the progressive development of international law. The Commission should also bear in mind the importance of having the instrument ratified by as many States as possible. The Special Rapporteur should therefore broaden the scope of his research to ensure that the instrument was based on the most relevant contemporary State practice and jurisprudence on the topic, including those of States outside the Schengen area and non-European States.

26. The point of departure for the topic, the sovereign right of States to expel aliens, was a right *de lege lata*. The instrument to be drafted by the Commission would impose certain limitations on that right, taking into account the human rights of persons to be expelled. It should comprise a set of rules of international law that balanced the rights of States against those of persons to

⁵⁸ General Assembly resolution 60/1 of 16 September 2005, para. 121.

be expelled. Maintaining that balance, which was no easy task, was a *sine qua non* for the successful completion of the Commission's task.

27. He understood the term "aliens" to mean all aliens legally and illegally in the territory of a State, including refugees and stateless persons. All aliens should enjoy the same human rights as all other human beings. He shared the view that drawing a distinction in draft article 8 between different categories of human rights was not necessary and could even be misleading in the context of expulsion. All persons subject to expulsion should be granted all human rights, although not all human rights were equally applicable or relevant in every case. Draft article 8 was thus extremely important and should therefore be referred to the Drafting Committee and redrafted so as to offer a basic guarantee of all human rights relevant or applicable in the context of the expulsion of any alien.

28. The human rights associated with due process, mentioned by Ms. Escarameia, were of special importance in cases of expulsion. Expulsion should always be the result of due process and should be decided by a judicial authority, possibly a court. He had taken due note of the fact that the Special Rapporteur intended to deal with those rights in his sixth report.

29. Draft articles 9 to 14 set forth the rights the Special Rapporteur considered to be fundamental. However, it was not clear that all of them were specifically relevant to cases of expulsion and ought to be included in the instrument. Draft article 9, which dealt with the right to life, was of particular relevance, since no person should be expelled from a State that had abolished the death penalty to one in which it could be applied. With some amendments, including the one suggested by Mr. Dugard, draft article 9, paragraph 2, had a place in the instrument and should therefore be referred to the Drafting Committee.

30. He believed that the obligation to respect human dignity was a reflection of respect for all human rights. It was not a human right *per se*, and reference to it as such in the instrument would merely lead to confusion. Of course, a person's dignity should be respected at all times, but such respect was not specifically relevant to cases of expulsion, and there was thus no special reason to include draft article 10 in the instrument.

31. He likewise saw no need to include draft article 11, paragraph 1, since the basic human right it addressed—not to be subjected to torture—was dealt with in many international legal instruments. However, he was in favour of retaining paragraphs 2 and 3, which were of particular relevance to the expulsion of aliens and should be referred to the Drafting Committee.

32. Children and possibly other categories of people, such as the elderly and pregnant women, should be afforded special protection in cases of expulsion. Accordingly, draft article 12 should be retained.

33. The right to private and family life referred to in draft article 13 was a general human right whose scope was sometimes disputed. The inclusion of the draft article might prove to be problematic.

34. Non-discrimination was a basic principle of international law. It was clear that in cases of expulsion there should be no discrimination between the persons being expelled and other persons, or between different categories of expellees. Nevertheless, he did not consider it necessary to include draft article 14, which dealt with the principle of non-discrimination in an instrument on expulsion.

35. In his next report, the Special Rapporteur should focus on rights that were of particular importance to cases of expulsion and essentially constituted guarantees that expulsion would be conducted according to law, in full observance of the relevant human rights. In addition to maintaining a balance between the rights of States to expel aliens and the human rights of expellees, however, he should also take into account the rights and obligations of the receiving State, which in most cases was the State of nationality. That triangle of rights to be balanced must be kept in mind at all times if work on the topic was to progress.

36. Mr. FOMBA welcomed the Special Rapporteur's fifth report, which was, as usual, instructive and well researched. It was regrettable, then, that the Special Rapporteur seemed to fall victim to his own legitimate concern for rigorous analysis, on the one hand, and his desire to comply strictly with the working methods set forth in the Commission's Statute, on the other, since members of the Commission occasionally had difficulty following him.

37. Focusing on the report in detail, he said that he shared the Special Rapporteur's conclusions regarding the comments and observations by States, which were outlined in paragraphs 3 to 7 of the report. Turning to the part concerning the protection of the rights of all human beings, he endorsed the basic ideas put forward in paragraph 10. He welcomed the overview of legal instruments that established the protection of human rights as an obligation (paras. 11–15), drawing particular attention to the important role played by the African Charter on Human and Peoples' Rights. In his view, the reference to persons "subject to the jurisdiction" of the State in the European Convention on Human Rights (para. 13) did not conflict with the principle of universality or ubiquity. He agreed that unlawful residence could not justify a lessening of fundamental human rights and therefore endorsed the position taken by the European Court of Human Rights in its judgement in the *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* case. The Special Rapporteur's criticism of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁵⁹ was justified, and the approach that he proposed at the end of paragraph 15 was logical and effective.

38. The question regarding the concept of fundamental rights in paragraph 16 was correctly framed. It was important to remember that this concept was not the same in different legal systems and that the contingency of fundamental rights was a subject of major controversy. Although he had some hesitations in the matter, he believed that

⁵⁹ General Assembly resolution 40/144 of 13 December 1985, annex.

a category of inviolable human rights did exist. It was important to recall in that connection that no precise definition of the concept of fundamental rights existed. He shared the view that although there was no ready analogy between the theory of the fundamental rights of States and that of fundamental human rights, the same basic idea underpinned both, namely the notion of rights that were essential to existences. He welcomed the Special Rapporteur's references to the notions of fundamental human rights and fundamental freedoms in paragraph 24 of the report and endorsed his conclusions in paragraph 25 concerning the inconsistency of the terminology used in the Charter of the United Nations. The Special Rapporteur had provided a thorough analysis of the European Court of Human Rights judgement in the case of *Golder v. the United Kingdom*; it was regrettable that jurists had shown little interest in the matter (para. 27).

39. Turning to the section of the report dealing with fundamental rights and the "inviolable" or "non-derogable core" of human rights, he agreed that the term "fundamental rights" should be understood as being synonymous with the "hard core" of human rights and the rationale behind it. Finding an operative identification criterion was crucial, and the writings of Frédéric Sudre⁶⁰ had provided useful clarifications in that connection. The Special Rapporteur was right to say that the existence of a "hard core" was based on *lex lata*, and that all human rights were neither protected in the same manner nor shared a single legal regime. He agreed that the notion of the "hard core" was useful from both a legal and practical standpoint.

40. On the subject of which criteria should be used to identify the rights forming the hard core, he endorsed the criticism of *jus cogens* set out in paragraph 36 of the report. He agreed with the Special Rapporteur's choice of the criterion of inviolability and thought that the indicative list of fundamental rights forming the "hard core" provided by the Special Rapporteur was helpful, but the fact that the content of such rights would vary in time and space must be emphasized. Various lists were proposed in the report, and he favoured the idea of making a synthesis and identifying the "lowest-common-denominator" human rights. The list of fundamental rights contained in paragraph 43 seemed to reflect the basic protection needs of persons being expelled. He endorsed the view expressed in paragraph 44 to the effect that the protection afforded by respect for fundamental rights should lead to the implementation of the right to dignity—in other words, it was the implementation of fundamental human rights that gave effective content to the right to dignity.

41. The general obligation to respect human rights was firmly anchored in international law, jurisprudence and doctrine, and he shared the Special Rapporteur's views concerning the consequences of a breach of that obligation by States. That obligation was of particular significance when the legal situation of the persons in question—i.e., aliens facing expulsion—made them vulnerable.

⁶⁰ In particular, *Les grands arrêts de la Cour européenne des droits de l'homme*, 5th rev. ed., Paris, Presses universitaires de France, 2009; and *Droit européen et international des droits de l'homme*, 9th rev. ed., Paris, Presses universitaires de France, 2008.

42. Turning to the draft articles, he suggested that the title of draft article 8 should be aligned with the text of the operative paragraph to read "General obligation to respect the human rights of persons who have been expelled or are being expelled". More generally, the Commission might wish to harmonize the titles of other draft articles with the operative text for the sake of consistency. The distinction drawn in draft article 8 between fundamental rights and all other rights was useful, as it offered a pragmatic approach that covered all possible scenarios. In that connection, the phrase "the implementation of which is required by his or her specific circumstances" was highly significant.

43. With regard to the specially protected rights of persons being expelled, he emphasized that aliens should be viewed first of all as human beings who enjoyed general protection of their human rights. Only subsequently should they be considered in their specific circumstances of being expelled and thus benefitting from special protection. The complaint that such persons were deprived of all their human rights seemed to him unfounded.

44. The right to life was the basis of all other human rights. The current text of draft article 9, dealing with that right, posed no problem and should be retained.

45. Draft article 10 (Obligation to respect the dignity of persons being expelled) was an essential provision, and he had no reservations about either of its two paragraphs. Some members of the Commission had maintained that "dignity" was a vague notion and that it was not in itself a human right but rather a basic principle underpinning all human rights. It had further been suggested that dignity should be considered without reference to torture and cruel, inhuman or degrading treatment. However, torture and cruel, inhuman or degrading treatment manifestly constituted a grave infringement of human dignity. In fact, human dignity was not a vague notion or a basic principle, but a human right, a kind of "conditional right", so to speak. Moreover, in paragraph 44 of his report, the Special Rapporteur rightly underlined the cause-and-effect link between the right to dignity and other human rights. If there was a problem, it derived from the fact that, logically speaking, draft article 10 seemed to be in the wrong place in the text.

46. Draft article 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment) was another vital provision. Paragraph 1 did not pose any problems. Paragraph 2 was important because it established a balance between the expelling State and the receiving State. The term "serious risk" did not appear to raise any major problems of interpretation, inasmuch as it was easy to identify and assess such a risk in an era when it was clear whether a State was governed by the rule of law or had a democratic government. Reservations predicated on the scope of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been expressed about paragraph 3, but the scope of the Convention was not sufficient reason to exclude acts committed by persons or groups of persons acting in a private capacity: such acts were a reality that could not be ignored.

47. Draft article 12 (Specific case of the protection of children being expelled) was crucial. He had no comments

to make on paragraphs 1 and 3, and he welcomed the important observation made in paragraph 2.

48. Draft article 13 (Obligation to respect the right to private and family life) allowed for the safeguarding of family links, thereby ensuring that the life of the individual concerned was viewed from a sufficiently broad perspective. Paragraph 2 was a well-balanced saving clause, insofar as it took into account both the interests of the State and those of the person in question. However, he wished to draw attention to an error in the French version of that paragraph: the word “*alinéa*” had been used, whereas the correct term was “*paragraphe*”.

49. Draft article 14, on non-discrimination, was clearly a key provision. Although the point had rightly been made that the discrimination at issue was that between aliens and not discrimination between nationals and aliens, the underlying principle of equal treatment of nationals and aliens remained valid nevertheless, since special protection did not do away with general protection.

50. He noted that the Special Rapporteur was not categorically opposed to extending the list of fundamental rights and that in draft article 8 he had referred to “fundamental rights” and “all other rights”. The addition of various rights had been proposed, and it seemed that future draft articles might encompass procedural rights or the protection of an expellee’s property. The Commission should therefore demonstrate flexibility and leave the door open to such additions.

51. Draft articles 8, 9, 11, 12 and 13 could be sent to the Drafting Committee. If the majority of Commission members considered that draft articles 10 and 14 raised questions of principle that called for a decision by the plenary Commission, it would be necessary to ask the Special Rapporteur to recast those provisions, giving him clear guidance on the matter, or to set up a working group to discuss their fate. If there was a consensus to take that line of action, he would support it, but he himself saw no valid reason for proceeding in that manner and would prefer to send draft articles 10 and 14 to the Drafting Committee as well.

52. Mr. NOLTE praised the Special Rapporteur’s extensive analysis of the jurisprudence of the Human Rights Committee and the European Court of Human Rights. His use of European jurisprudence was of particular relevance for the interpretation of non-derogable human rights, such as the right to life and the right to freedom from torture.

53. Although there was merit in the Special Rapporteur’s assumption that it was necessary to identify a hard core of fundamental human rights which specifically protected persons subject to expulsion, that approach required some qualifications. All human rights applied to persons who were in the process of being expelled. Draft article 8 should therefore be formulated accordingly. For example, the Commission should make it clear that every State must respect its obligations under the human rights treaties to which it had acceded. Those treaties conferred certain rights on all persons, including persons who were being expelled. While some of those rights might be limited for a certain period or to a certain degree, they

must be recognized in principle so that the extent and proportionality of the restrictions placed on them could be judicially verified. For that reason, he suggested that draft article 8 should speak of “human rights” and not of “fundamental rights”.

54. In cases where a State had not ratified a particular human rights treaty, the applicable human rights regime was customary international law. At first sight, the Special Rapporteur’s approach of concentrating on a few particularly important rights that might appear to be appropriate, but in fact all human rights recognized in customary international law were applicable in expulsion proceedings. They might be subject to more far-reaching limitations than rights arising from treaty obligations, but those more extensive limitations could never affect what the Special Rapporteur termed the “hard core” of human rights, which was derived from the source of all human rights, namely the principle of human dignity.

55. While he welcomed the fact that the Special Rapporteur stressed the concept of human dignity, he did not concur with the Special Rapporteur’s proposal to formulate a draft article—article 10—enunciating a right to human dignity in the middle of several other draft articles reaffirming certain human rights that were particularly relevant in the context of expulsion. Human dignity was not a human right, but a general principle from which all human rights flowed and which was harder to apply than specific human rights. The draft articles should therefore reaffirm that general principle before mentioning all the other specific human rights which flowed from it. That was how the principle of human dignity was conceived in the Charter of the United Nations, in most human rights treaties and in most national constitutions. The Commission should avoid referring to human dignity as a specific human right, since it was a rather vague, broad term. Nevertheless, in certain exceptional cases where specific human rights did not provide an appropriate solution, the principle of human dignity could be invoked. The *Furundžija* case, to which reference was made in paragraph 71 of the report, did not, however, establish the existence of a human right to dignity, since the International Tribunal for the Former Yugoslavia had based its reasoning on a provision of its statute and had not claimed that it was directly applying a human right. He therefore suggested that draft article 10 should be deleted and that a reference to human dignity as a general principle informing all human rights should be inserted in draft article 8.

56. Like other members, he did not think that it was necessary to identify a “hard core” of human rights, either in general or for the purposes of the draft articles, but if the Commission did decide to take that approach, it should follow the example of some constitutional systems, such as the German system, and endeavour to identify the extent to which certain rights, such as the right to life, gave expression to the principle of human dignity. The decision of the Federal Constitutional Court of Germany cited in paragraph 20 of the report was based on an explicit constitutional provision that could not easily be transposed to the level of international law, where it would be difficult and potentially divisive to try to identify the human-dignity element of every human right. For the Commission’s purposes, then, it would not be helpful to postulate

a new subcategory of human rights that were supposedly more fundamental than others. The terminology of the Charter of the United Nations and a number of human rights treaties, which seemed to draw a distinction between “human rights” and “fundamental freedoms”, was not supposed to denote a substantive difference between various categories of rights.

57. In the light of the Special Rapporteur’s explanation that the main reason for characterizing some categories of rights as more fundamental than others was to emphasize those human rights that were of particular importance for persons who were being expelled, he would not object to the adoption of that approach, provided that in doing so the Commission did not create the impression that it wished to de-emphasize other human rights.

58. He readily agreed that in the context of expulsion special mention should be made of the right to life, the right to physical integrity and the right to freedom from torture. The same was true in principle of the right to family life and the right not to be subjected to discrimination. However, the right to life and the right to freedom from torture were clearly defined, whereas assessing the exact implications of the right to family life and the right not to be subjected to discrimination was a more complicated process. The Special Rapporteur seemed to accept that distinction, since he added a rather vague limiting clause to his formulation of the right to family life in draft article 13 but did not add any such clause in the provision on the right to life, although the latter could be restricted in certain circumstances according to the main human rights treaties. The Commission should be consistent in that respect; it should include clauses limiting any human rights it mentioned if they were generally subject to such a restriction. The draft articles should also mention the right to due process, since it was pertinent in the context of expulsion and the exact implications of that right in that context could be spelled out in a separate chapter.

59. As to whether the draft articles should be sent to the Drafting Committee, or whether the various objections raised indicated that the Special Rapporteur’s approach should be modified and that the Commission should content itself with a general provision along the lines of draft article 8, stipulating merely that all human rights must be protected when aliens were expelled, he observed that there were inherent pros and cons in either approach and it would be premature to decide on the matter at the present juncture. He therefore suggested that the Commission should follow the course of action it had adopted the previous year when it had been unsure whether to include a chapter on countermeasures in the draft articles on the responsibility of international organizations:⁶¹ in other words, it should establish a working group to ascertain whether agreement could be reached on a list of human rights deserving specific mention as particularly relevant in the context of expulsion. If no agreement could be reached, the Commission should follow Sir Michael Wood’s suggestion and formulate a general provision on human rights along the lines of draft article 8.

⁶¹ *Yearbook ... 2008*, vol. II (Part Two), paras. 128–131 and 148–162.

60. Draft article 12, paragraph 2, should be recast to reflect more clearly the fact that children’s special need for protection sometimes required that children not be detained in the same conditions as adults, while at other times it required that they be kept with adults. Otherwise the draft article could lead to the conclusion that the prolonged separation of children from their parents might be justified. It should be recalled in that connection that article 37, subparagraph (c), of the Convention on the Rights of the Child stipulated that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”. A number of States had formulated reservations to the Convention with a view to permitting juveniles to be detained with and in the same conditions as adults, but those reservations were not necessarily of decisive importance for the Commission’s consideration of the topic of expulsion.

61. He endorsed the view expressed by other members of the Commission that sexual orientation should be included among the other prohibited grounds of discrimination listed in draft article 14. He agreed with Mr. Gaja that the draft article presupposed that there was a possibility of discriminating between nationals and aliens with respect to expulsion; moreover, there might be legitimate grounds for discriminating between different categories of aliens when it came to expulsion, for example, between citizens of States belonging to the European Union and citizens of non-member States. The Convention implementing the Schengen Agreement envisaged special expulsion procedures for aliens, who were defined therein as “any person other than a national of a Member State of the European Communities” [art. 1]. Readmission agreements might likewise constitute legitimate grounds for treating different groups of aliens differently with respect to expulsion.

Mr. Wisnumurti (Vice-Chairperson) took the Chair.

62. Mr. VASCIANNIE said that the Special Rapporteur had provided the Commission with an intellectual treat, as his fifth report was a stimulating exposition that was attentive to important points of law and policy. While he agreed with some aspects of the Special Rapporteur’s approach, he was nevertheless concerned that the idea that the topic lay at the crossroads of human rights law and general international law might be construed as implying that human rights law and general international law provided different sets of answers to expulsion issues. The rules of human rights law constituted part of general international law once they had passed into the corpus of customary international law, an approach which the Special Rapporteur accepted in parts of his report. Thus, some human rights rules formed part of general international law, others might be binding on States parties as treaty rules and some human rights concepts were policy prescriptions that might or might not be accepted *de lege ferenda*. He preferred that perspective to the crossroads analogy, because the term “crossroads” implied that legally binding human rights rules and rules of general international law met at a point and then went off in different directions. That was not the case, because legally binding human rights rules were part of general law, except for human rights treaty rules that had not become custom. The crossroads was not therefore between human rights and general law, but rather between policy prescriptions and law favouring the

individual on the one hand and policy prescriptions and law based on ideas such as State sovereignty, security and national self-interest on the other. He wished to make that point in order to suggest that the proper significance of human rights law in the area of expulsion should not be reduced by contrasting it with general international law.

63. Turning to the draft articles, he said that draft article 8 should be sent to the Drafting Committee, but in modified form. The distinction between any person “who has been or is being expelled” was useful and should be retained. The Special Rapporteur might, however, wish to consider whether the phrase “being expelled” was too imprecise for the purposes of the draft articles. At what point was someone “being expelled”? The decision of the European Court of Human Rights in the case of *Vijayanathan and Pusparajah v. France* clearly suggested that “being expelled” might be different from being the subject of an expulsion order. The process of being expelled was presumably broader than being placed under an expulsion order and so, from the individual’s standpoint, the Special Rapporteur’s wording might be preferable, although it might also give rise to some degree of uncertainty. In any event, the title of the draft article needed to be amended to encompass persons who had been and were being expelled.

64. More fundamentally, draft article 8 had been criticized justifiably for its treatment of the question of fundamental versus other rights. He agreed with those members of the Commission who took the view that the general obligation referred to in the title of the article should cover not just fundamental rights but all human rights that might be relevant in the case of an individual who had been or was being expelled. Perhaps the Special Rapporteur was trying to achieve that result, but that was not clear from the current wording of draft article 8. Apart from anything else, the reference to “other rights the implementation of which is required by [a person’s] specific circumstances” could mean any right at all, including private law rights such as contractual rights. In short, draft article 8 should be revised to refer to established human rights, such as those set out in international covenants on human rights, as applicable in the case of the individual concerned. The distinction between fundamental rights and other rights was not very helpful in that context.

65. It could also be argued that draft article 8, as currently worded, implied that if a person was being expelled and if such expulsion was contrary to his or her fundamental rights, then the expulsion should not take place. That led him to wonder whether the Special Rapporteur had a specific remedy in mind for persons who had already been expelled contrary to the terms of draft article 8. Should the solution lay in the right of return, compensation or some other form of restitution? Taking the matter further, he wondered whether possible remedies should be proposed in the draft articles or in the commentary, or whether they should be consigned to the Commission’s draft articles on the responsibility of States for internationally wrongful acts.⁶²

66. Draft article 9, concerning the obligation to protect the right to life of persons being expelled, should be sent

to the Drafting Committee. It had been suggested that the concepts of the person who had been expelled and the person who was being expelled should be applied generally, but that approach would be impossible in draft article 9, paragraph 1. That paragraph dealt with the situation of a person being expelled, and the person’s right to life applied at that time. Once the person had been expelled, it would be unrealistic to expect the expelling State to protect the person’s right to life. Liability for expulsion would be incurred but the person would in all likelihood be outside the jurisdiction of the expelling State. He therefore supported the first paragraph of draft article 9 as it stood.

67. He also supported the submission of the second paragraph of draft article 9, on the death penalty, to the Drafting Committee. While that provision represented an important policy position, it was not necessarily a statement of the law prevailing outside Europe. Significantly, the Special Rapporteur did not offer much in the way of evidence in support of the paragraph; although he cited the cases of *Ng v. Canada* and *Soering v. the United Kingdom*, he correctly noted that, in the final analysis, neither case was about extradition or expulsion in breach of the right to life *per se*. None of the cases from the Inter-American human rights system that he had cited in the report—*Hugo Armendáriz v. United States*, *Marino López et al. (Operation Genesis) v. Colombia* and *Haitians and Dominicans of Haitian origin in the Dominican Republic*—had been decided on the merits, and although they concerned the right to life at least in part, they had nothing to do with expulsion, extradition or deportation to face the death penalty. Thus they were not directly relevant to draft article 9, paragraph 2. The Special Rapporteur did discuss *Judge v. Canada*, which was directly relevant and which provided firm support for draft article 9, paragraph 2. However, he did not consider the decision in the case of *Kindler v. Canada*, which the Human Rights Committee had had to reinterpret in order to reach its position in *Judge v. Canada*, nor did he assess the extent to which the views of the Human Rights Committee in one case might be said to reflect the *lex lata*.

68. It could thus be argued that draft article 9, paragraph 2, was a policy position, and the Commission could therefore consider going further. In the context of expulsions, the Special Rapporteur might indicate that a State could not expel a person who had been sentenced to death to a State in which the person might be executed unless it had previously received a guarantee that the death penalty would not be carried out. He therefore suggested that the paragraph should be amended to read: “A State may not expel a person to face the death penalty”. That amendment would bring the wording of article 9, paragraph 2, more into line with the progressive development of policy outlined by Ms. Jacobsson earlier in the meeting.

69. As for article 10, he shared the view that human dignity provided the rationale for several human rights but might not constitute a right on its own. A reference to human dignity could be an important element of the preamble to the final outcome of the Special Rapporteur’s work, but he was against sending draft article 10 to the Drafting Committee, because the meaning of human dignity as a free-standing right seemed to lack clarity.

⁶² See footnote 10 above.

70. Draft article 11 should be sent to the Drafting Committee, but he agreed with those members who would prefer to delete the phrase “in its territory” from paragraph 1 in order to broaden the scope of the prohibition against torture or cruel, inhuman or degrading treatment. Mr. Saboia had provided telling examples of why it would be useful to delete that phrase. Ms. Escameia’s point that private persons should be prohibited from committing acts of torture or engaging in inhuman or degrading treatment in either the expelling State or the receiving State was well made. He also supported her proposal to delete the phrase “of paragraph 2” from paragraph 3.

71. Draft article 12 should likewise be sent to the Drafting Committee because it properly sought to protect children, who formed a vulnerable group in need of special attention. The actual formulation of that article might, however, need to be reconsidered. For example, the implications of being “considered, treated and protected as a child” in the context of expulsion might be elucidated further. Mr. Gaja’s suggestion that human rights should be linked specifically to expulsion was pertinent in that context.

72. Draft article 13 should also be sent to the Drafting Committee: the Special Rapporteur’s discussion of the case law applicable in respect of family life was noteworthy for its clarity and precision. Family life issues were central in the context of expulsion. He hoped that the commentary to draft article 13, paragraph 1, would explain some of the implications of the right to private life in cases of expulsion.

73. Draft article 14 on non-discrimination should be sent to the Drafting Committee, subject to the inclusion of the additional grounds of age and disability. It should also be made clear that the discrimination prohibited was discrimination among aliens.

74. Lastly, thought might be given to including three additional provisions, one of which might indicate that expulsion procedures lasting for an inordinately long time could amount to inhuman or degrading treatment, not only for children, as stated in draft article 12, but for adults as well. The Special Rapporteur might consider including a criterion of reasonableness in that connection. The second additional provision might stipulate that, for human rights reasons, expulsion should not be used as a form of reprisal or as a countermeasure. Lastly, a provision might be included to say that the declaration of a state of emergency did not allow a State to derogate from the human rights that were listed in the draft articles.

75. Mr. HASSOUNA thanked the Special Rapporteur for his comprehensive report. In seeking to define the limits of the obligation to respect the human rights of persons being expelled and identify the practices relating to expulsion that were prohibited by international law, he had courageously dealt with issues that were clearly open to differing legal interpretations. However, while he had drawn on a wide range of sources for his specific proposals, including legal instruments, judicial decisions, academic opinions and the practice of human rights bodies, he had neglected to cite the Arab Charter on Human Rights among the regional human rights

instruments listed. In its prohibitions of discrimination, physical and psychological torture and slavery and human trafficking and its reaffirmation of the indivisibility of human rights, the inherent right to life and respect for the inherent dignity of the human person, the Arab Charter on Human Rights embodied what the Special Rapporteur had described as fundamental human rights, or the hard core of human rights.

76. As to the wisdom of incorporating the concept of fundamental rights in draft article 8, he subscribed to the view that no distinction should be drawn between the fundamental and non-fundamental human rights of expelled persons. Consequently, draft article 8 should be redrafted to include all human rights relevant to the case of expulsion, while at the same time omitting the reference to the implementation of rights required by specific circumstances.

77. The Special Rapporteur seemed to reject *jus cogens* as a criterion for identifying the hard core of non-derogable rights on the grounds that it remained controversial and was subject to contrary interpretations. Under established international practice, however, certain non-derogable rights were also *jus cogens*, and the significance of that equivalence could be considered in the commentary to the draft articles. While the report stressed the fact that the prohibition of torture was a rule of *jus cogens*, the Special Rapporteur might say the same thing about the right to life and the prohibition of discrimination on grounds of race.

78. The fact that draft article 9, paragraph 2, referred to the death penalty was a policy development, as previous speakers had pointed out. That paragraph also mentioned the need to obtain from the receiving State a guarantee that the death penalty would not be carried out, but the term “guarantee” was somewhat ambiguous. It raised a number of issues that might be dealt with in the commentary, including what constituted a guarantee, when it was deemed sufficient, what follow-up to a guarantee might be envisaged by the expelling State and what the implications of a breach of the assurances given by the receiving State might be.

79. Regarding draft article 10 and respect for dignity, he recalled that dignity was the overriding principle of all human rights protection; it was the rationale of human rights law and was mentioned in most human rights conventions and legal instruments. Respect for human dignity could be mentioned in the preamble to the draft articles or as part of a general obligation to respect the human rights of the expelled person as contained in the redrafted article 8.

80. Draft article 11, on protection against torture and other forms of ill-treatment, assumed great importance in the light of contemporary State practice. An extensive discussion had recently been held in the United States Congress on that very sensitive issue. In paragraph 1, the reference to the territory of a State should be supplemented by a reference to territory under a State’s jurisdiction and territory under foreign occupation. With regard to the practice of rendition, mention could be made in paragraph 2 of the need to obtain a guarantee

from the receiving State that the expelled person would not be tortured or subjected to ill-treatment. Lastly, there was a strong need to reaffirm in the draft article or in the commentary that the right of protection against torture and other forms of ill-treatment could not be suspended in emergency situations such as conflicts, natural disasters or situations that might threaten the security of the State. That rule should always take precedence over any contrary rule enshrined in national legislation.

81. The draft articles could also provide for a right to basic medical assistance pending expulsion proceedings for those aliens who were sick and under immigration detention. The right to health was a fundamental human right enshrined in the International Covenant on Economic, Social and Cultural Rights. By focusing not only on civil and political rights but also on social rights, the Commission would be adopting an approach to the topic that was more in line with the principle of indivisibility of all human rights.

82. With those remarks, and subject to his views on the redrafting of certain articles, he would agree to refer the draft articles as a whole to the Drafting Committee.

Mr. Petrić resumed the Chair.

83. Mr. WISNUMURTI thanked the Special Rapporteur for his excellent report and comprehensive study of the observations of Member States and international organizations, legal instruments and judicial precedents relevant to the topic of expulsion of aliens. He agreed with the view expressed in paragraph 3 of the report that the Commission should not undertake the preparation of draft articles on dual or multiple nationality, loss of nationality and denationalization in the context of expulsion, thereby keeping the focus of the work on expulsion of aliens. He also agreed that there should be a balance between the sovereign right of States to expel aliens and the limits imposed by international law on that right, particularly the rules relating to the protection of human rights and the treatment of aliens.

84. One of the most discussed aspects of the report was the Special Rapporteur's fundamental-rights-based approach to his work. Despite the Special Rapporteur's strong arguments in support of that approach, he himself agreed with those who had expressed reservations about the idea of singling out fundamental rights as the primary rights to be protected. Why should persons being expelled enjoy only their fundamental rights? True, fundamental rights, or the hard core of human rights, were non-derogable and as such were important as a minimum guarantee of protection, but the approach unnecessarily limited the degree of protection afforded to the person being expelled. There were other rights that a person who had been expelled or was being expelled should continue to enjoy insofar as they were applicable to a particular case of expulsion.

85. For those reasons, it was essential to replace the words "fundamental rights and all other rights" in draft article 8 with the words "all rights" or "all applicable rights". It had been proposed that the reference in the last part of the draft article to rights "the implementation of

which is required by his or her specific circumstances" should be deleted. Although he could live with the retention of those words, he could also agree to the proposed deletion as long as his proposal to replace "fundamental rights and other rights" was adopted.

86. Concerning draft article 9 (Obligation to protect the right to life of persons being expelled), paragraph 1 presented no difficulty but paragraph 2 did because it applied only to States that had abolished the death penalty. Did it mean *a contrario* that a State in which the death penalty still existed could expel a person who had been sentenced to death to States in which he or she might be executed? Paragraph 2 was based on the findings of the Human Rights Committee in *Judge v. Canada*, yet relying solely on that case, involving a State that happened to have abolished the death penalty, did not serve the Commission's purpose. There would probably be cases in which a State that had the death penalty or that had a self-imposed moratorium on its implementation should also be subjected to the prohibition contained in article 9, paragraph 2. He therefore proposed the deletion of the words "that has abolished death penalty".

87. He shared the doubts expressed by Mr. Dugard and Sir Michael Wood regarding draft article 10, on the obligation to respect the dignity of persons being expelled. The notion of "dignity" was indeed vague: there were still differences of opinion as to whether it was a legal concept or an ethical or philosophical concept. References to dignity appeared in the preamble of the Charter of the United Nations and in the Universal Declaration of Human Rights; accordingly, the rightful place for a reference to respect for the dignity of persons being expelled should be in the preamble of the draft articles, and not in the body of the instrument.

88. Turning to draft article 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment), he noted that Mr. Saboia had suggested that the words "in its territory" in paragraph 1 be replaced by "in any territory", in order to cover a situation where a State exercised jurisdiction or control—real or presumed—over a territory outside its own. He could see the justification for that suggestion but thought that it would be better simply to delete the words "in its territory". He agreed with Ms. Escarameia's proposal to replace the words "serious risk" in paragraph 2, with "real risk", a term used consistently in the decisions of the European Court of Human Rights in *Cruz Varas and Others v. Sweden*, *H.L.R. v. France* and in *N. v. Finland*. The Commission would thereby maintain consistency with those sources.

89. In its decision in *H.L.R. v. France*, the European Court of Human Rights had stated that article 3 of the European Convention on Human Rights might be applicable where a danger emanated from persons or groups of persons who were not public officials, but that it must be shown that the risk was real and that the authorities of the receiving State were not able to obviate the risk by providing appropriate protection. Paragraph 3 of draft article 11 omitted that important requirement, which should be added at the end of the paragraph, so that it would then read: "The provisions of paragraph 2 of this article shall

also apply when the risk emanates from persons or groups of persons acting in a private capacity and the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”

90. He had no particular comments on draft articles 12, 13 or 14, although he agreed that, since article 14 was general in nature, it should perhaps be moved up to follow draft article 8.

91. He was of the view that the draft articles should go to the Drafting Committee, where all the proposals made in plenary would be adequately addressed.

92. Ms. XUE said that the Special Rapporteur was to be commended for his comprehensive research and in-depth analysis of the topic of expulsion of aliens. The underlying policy guidance seemed clear and sound, and in principle she had no objection to sending the draft articles to the Drafting Committee for technical improvement.

93. The question of whether the Commission was drafting another human rights treaty was a pertinent one, but since the draft articles started with the provision stipulating that a State had the right to expel an alien from its territory, the Commission's premise was definite and clear: while there were limitations on a State's exercise of such a right under international law, the legitimate interests of the State were also recognized by the rule of law. Thus, while the Commission placed emphasis on the importance of the protection of individuals, it must also bear in mind that various interests should be taken into account.

94. She agreed with some of the criticisms of the section of the report dealing with fundamental human rights, but she could also fully appreciate the Special Rapporteur's rationale in reaching out to address the “hard-core” issue. He had apparently not intended or even attempted to define what constituted the hard core or fundamental human rights in general but had asserted the basic rights that must be respected in the case of aliens undergoing expulsion and the conditions that must be observed at all stages of the expulsion process. Domestic legislation governing the expulsion process and law enforcement operations at the national level must comply with those minimum international standards. The scope of those basic rights and conditions was not necessarily identical to that of other international human rights instruments, but those rights were essential to aliens who were undergoing the expulsion process. It was in that context that such rights were regarded as “hard-core” or non-derogable. One might argue that since the aliens being expelled in each case were different persons, the rights that were fundamental for some were not necessarily so for others, given their different circumstances. That argument only proved that the Special Rapporteur was correct in trying to identify the hard-core rights for aliens, irrespective of the specific circumstances of the expulsion. Nevertheless, she agreed that the Special Rapporteur had not made that point clearly enough in the report, although he had subsequently explained it in the course of the discussion.

95. The analysis of fundamental human rights in the report was a bit too broad and could cause confusion for the reader. She welcomed the constructive suggestion that

had been made to have the draft articles or at least the commentary stated explicitly that, notwithstanding the provisions on hard-core rights set out in the draft articles, general international human rights law continued to apply to aliens.

96. Draft articles 9 to 13 spelled out the most relevant and important rights for aliens, and she did not share the doubts expressed about them. In reality, aliens who were being expelled were frequently subject to humiliation and ill-treatment, and their lives could even be placed in danger. For such persons, the right to life, respect for dignity, the prohibition of torture and cruel treatment, special protection for children and preservation of family life were extremely pertinent rights that called for special protection under international law. Respect for dignity was particularly relevant in the context of the treatment to which illegal immigrants were subjected daily during the expulsion process. Thus, the provisions on those rights in the draft articles were not a simple repetition of existing law, but afforded enhanced human rights protection to a special vulnerable group. She agreed that as far as substantive rights were concerned, a major omission was the report's failure to mention property rights. In view of the nature of the expulsion process, procedural human rights guarantees could be even more important under certain circumstances for the aliens concerned.

97. With regard to the specific articles, she thought that draft article 8 was generally clear, but that the phrase “the implementation of which is required by his or her specific circumstances” could be interpreted by expelling States as an excuse for not ensuring the rights of aliens. The inapplicability of such rights should be determined by both law and fact.

98. The right to life was addressed in draft article 9, which focused on capital punishment, with paragraph 2 applying primarily to extradition and judicial assistance in criminal matters. The main issue of the text, then, was not the basic idea of the right to life but the conditions applying to capital punishment. What was unclear was why the issue of capital punishment arose if the alien had not committed a criminal offence under the law of his or her country and whether expulsion should be characterized as legal cooperation between the States concerned or regarded as a unilateral act under international law. In existing human rights instruments, the right to life had a broader interpretation, and that right should also be given a broader scope as it applied to aliens.

99. The application to aliens of article 13, on the right to private life, was likewise not very clear, and the criterion of striking a fair balance would be hard to measure in practice. A large number of grounds relating to the principle of non-discrimination were given in article 14, but further examination was needed in the light of existing human rights instruments to see whether all the necessary grounds for the protection of aliens from discrimination were covered. The second paragraph of that article was somewhat vague: did it mean that aliens were entitled to enjoy the rights and freedoms established in human rights treaties as well as those enjoyed by nationals of the expelling State as long as national law so provided? If that understanding was correct, there were several problems.

First, at the international level, aliens were indeed entitled to all rights under human rights law. That point should be made in a general clause, not just in the context of non-discrimination. Secondly, at the national level, once they were involved in expulsion proceedings, aliens might be subject to certain legal constraints that should not be regarded as discrimination.

The meeting rose at 1.05 p.m.

3006th MEETING

Friday, 15 May 2009, at 10 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, Mr. Hmoud, 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, 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. Mr. OJO said that the topic of the expulsion of aliens was extremely difficult, in that it was tempting to fashion a new human rights charter out of the applicable legal regime. That was undoubtedly why, in draft article 8, the Special Rapporteur made a reasoned attempt to set out the expelling State's general obligation under international law to respect the human rights of persons being expelled. The question was whether the draft article needed to reaffirm the well-established notion of international protection for human rights and, in addition, to refer to "all other rights" of persons being expelled. Divergent views had been expressed by previous speakers, merely confusing the situation. Even if the Commission was uncertain which position to adopt, it should not forget that its goal was the codification and progressive development of international law. Although the draft articles specifically addressed the legal aspects of expulsion of aliens and did not purport to constitute a human rights instrument, there was nothing wrong with referring explicitly to the fundamental human rights of persons subject to expulsion, so as to dispel any doubt. To do otherwise would be to shirk the responsibility conferred on the Commission by the United Nations. The Special Rapporteur had concluded

that those rights were the "hard-core" human rights. Naturally, the expelling State must protect all the other rights, and the international community must ensure that it did so, given the *erga omnes* obligation imposed by international law. He therefore proposed that draft article 8 should be reworded to read: "Any person who has been or is being expelled is entitled to respect for his or her fundamental rights, and in particular those rights set out in the present draft articles."

3. Draft article 9 was entirely satisfactory and he would therefore refrain from commenting on it. Draft article 10 did not purport to be a human rights charter any more than did draft article 8. Numerous international and regional human rights instruments, and customary international law as well, established the inviolability of certain categories of human rights, including the right to the dignity of the person. It therefore seemed pointless for paragraph 1 to state explicitly that the right to human dignity was inviolable. If that was to be done, however, the reference should be to the beneficiary of the right, namely the person being expelled. Paragraph 1 might therefore be reworded to read: "The inviolability of human dignity under international law shall apply to a person who has been or is being expelled."

4. The in-depth research that had gone into draft article 11 was praiseworthy. He endorsed the proposed text, which flowed naturally from an analysis of all the relevant international and regional human rights instruments and, in particular, from judicial opinions on the rights that were to be guaranteed. With regard to draft article 12, the Special Rapporteur had given a brilliant exposition of the current jurisprudence, which held that the separation from a family of one of its members was a disruption of the right to privacy and family life. However, in some cases the problem of expulsion of a family that included a child might arise, and there, the best interests of the child must always be given utmost consideration: it must not be assumed that it was systematically in the child's best interests to remain with his or her parents. The principle of the best interests of the child should therefore be included as an opening paragraph that would read: "In all cases of expulsion involving a child, the best interests of the child shall be given the utmost consideration."

5. As to draft article 13, he said that the right to privacy and family life was a fundamental and inviolable right, non-derogable under international law. To subordinate that right to "such cases as may be provided for by law", as in paragraph 2, might be to subject a rule of international law to the vagaries of local legislation that did not always meet the exigencies of international law. In order to strike a fair balance between the interests of the State and those of the person concerned, the laws of the expelling State that might authorize such a derogation needed to be examined. Paragraph 2 might consequently be reformulated to read: "The expelling State may, in giving effect to paragraph 1, strike a fair balance between the interests of the State and those of the person in question." Lastly, with regard to draft article 14, whose importance could hardly be overestimated, he said that although the State did have the right to expel a person, it was not entitled to make distinctions that were unfair, unjustifiable or arbitrary or to impose an exclusion, restriction, privilege