

Document:-
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Summary record of the 3006th meeting

Topic:
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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. Candiotti, 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

or preference that had the effect of nullifying a particular right of the person being expelled. Thus, an expulsion that would ordinarily be lawful might incur the responsibility of the expelling State if the *modus operandi* adopted to implement it violated the provisions of international law prohibiting discrimination. He endorsed draft article 14 and suggested that the whole set of draft articles, as amended, should be referred to the Drafting Committee.

6. Mr. PELLET commended the Special Rapporteur for daring to adopt a lucid and laudable personal stance on difficult issues and on specific cases. That independent thinking and humanist perspective imbued the entire report, especially in its treatment of the right to dignity which, while going beyond positive law, was a logical and persuasive demonstration of the progressive development of international law. He strongly favoured the inclusion in the draft articles of a provision on the right to dignity, not simply as part of codification but rather as progressive development. That said, he was more convinced than ever that the topic would have lent itself better to diplomatic negotiation than to progressive development and codification. After having read the report in two sittings—the general rules, through paragraph 50, and then the draft articles and the reasoning behind them—he had been perplexed by the discussion of fundamental rights and “hard-core” rights. It seemed patently obvious to him—as, no doubt, to most members of the Commission—that persons who had been or were being expelled were entitled to respect for their rights in general and for their human rights in particular, like all human beings. Nevertheless, after reading the second part of the report, he had begun to understand better the reasons why the Special Rapporteur had emphasized that distinction. All persons who had been or were being expelled were indisputably entitled to all the rights granted to human beings under general international law and, in certain cases, under the applicable treaty law. He firmly believed, however, that in respect of certain specific rights—the right to life, the right not to be subjected to inhuman and degrading treatment (the adjective “cruel” seemed superfluous), the right to dignity and, no doubt to a lesser extent, the right to private and family life—expelling and receiving States alike were required to provide certain guarantees, expelling States being under an obligation not to expel in particular cases. Along with the rights listed by the Special Rapporteur, he would include the right to a fair trial, which both expelling and receiving States must ensure, thereby preventing expulsion in cases where the receiving State gave no reliable assurances of the holding of a fair trial.

7. In other words, although he did not disagree fundamentally with the Special Rapporteur on substance, he did believe that the structure of the draft articles under consideration needed to be thoroughly re-examined. A new first article should be drafted for that portion of the text, stating that persons who had been or were being expelled were entitled to full respect for their human rights, without conditions or restrictions. A second draft article should specify the situations in which the possibility that the receiving State might fail to respect those rights would preclude expulsion. Such situations included the risk of torture or inhuman treatment, the lack of a fair trial and the danger of receiving the death penalty, where the expelling State itself had abolished it. That, in his

view, fell within the domain of the progressive development of international law, not of existing positive law. As such, it might not be possible to go further in the drafting, although he thought the Special Rapporteur had reconciled his opposition to the death penalty with positive law in a very sensible manner. The risk of violating the dignity of the person, an issue that he fervently hoped the Commission would consent to take up as part of the progressive development of the law, could certainly be included in the second draft article, which might be formulated along the lines of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The two basic draft articles should be supplemented by two other provisions: an article prohibiting all forms of discrimination, modelled on but more tightly worded than draft article 14, and an article expanding on the current draft article 12 to address the protection of vulnerable persons—children, of course, but also persons with disabilities, older persons and women—where their particular situation was not already covered by the provision on non-discrimination. Using those four draft articles, the Commission would have dealt with the issue just as thoroughly as the Special Rapporteur wished, only—in his own opinion—more logically. But that left him facing a dilemma: since he had no objection to the substance of the draft articles, he had no reason to oppose their referral to the Drafting Committee. Yet he firmly believed that they needed to be entirely recast, and that was not the job of the Drafting Committee, which was supposed to improve the wording, not the structure, of a text. He therefore asked whether the Special Rapporteur could agree to draft a conference room paper, restructuring his proposals based on those made during the plenary debate, or, failing that, if an informal working group with the sole task of dealing with the restructuring problem could be established.

8. The CHAIRPERSON, speaking as a member of the Commission, asked whether he had correctly understood Mr. Pellet to say that a person being expelled could not be expelled to a State where he or she risked being subjected to unlawful treatment, but could be expelled to another State.

9. Mr. PELLET said that it was exactly what he had meant to say.

10. Mr. KAMTO (Special Rapporteur), thanking Mr. Pellet for his specific proposals for restructuring, said that they blurred the distinction between the categories of persons subject to expulsion, between aliens residing lawfully in the territory of the expelling State and those unlawfully present. To stipulate that an expelling State could not expel an alien unlawfully present in its territory was directly to challenge that State's right of admission, from which the right of expulsion was derived. To prohibit a State from expelling a person, including an illegal alien, to a State where he or she might be subjected to ill-treatment, was to undermine the right granted to the State in draft article 2 *et seq.* Even if the wording proposed by Mr. Pellet seemed very logical and rational, account must be taken of the wide variety of situations that existed.

11. Mr. PELLET said that he was disconcerted by the Special Rapporteur's response since, on the one hand, he believed that everyone was entitled to respect for

their rights, irrespective of the manner in which they had entered the territory of a State, and on the other, he saw nothing in the Special Rapporteur's proposals, except perhaps in draft article 12, which protected a child who was being expelled, that alluded to an alien's residence status. As far as he was concerned, draft article 8 was irrefragable: it was sufficient to say that any person who had been or was being expelled was entitled to respect for his or her human rights. Certainly, the specific circumstances that entitled a person subject to expulsion to certain rights could be addressed, but that had no bearing on the restructuring he had proposed.

12. Mr. WAKO said he shared the views expressed by most of the earlier speakers on the topic and would limit himself to a few comments. Despite the fact that the Commission had extensively discussed draft articles 1 to 7, he believed that it would have to reconsider them, if only to take into account some of the issues raised during its consideration of draft articles 8 to 14.

13. He agreed with members who felt that draft article 8 should be reworded, since its reference to "fundamental rights" might cause unnecessary confusion or create a loophole in interpretation. He regarded draft article 8 as a general provision that should simply state that all human rights were applicable to the expulsion process, subject only to such limitations as prescribed by law, provided that the latter was consistent with customary international law or the treaties to which the State was a party. Draft article 8 should be resubmitted to the Drafting Committee, which might be guided by the wording suggested by Mr. Ojo. Once it was acknowledged that all human rights were applicable to the expulsion process, it was important to refer, if only for the sake of emphasis, to some of the rights considered essential in that process. As Mr. Pellet had rightly pointed out, one of the rights that warranted inclusion in a separate provision was the right to access to a competent authority and to the courts. In order for that right to be enjoyed by an alien, it must be protected by the availability of an effective remedy, without which it would be meaningless. Any text the Commission eventually adopted must elaborate on article 13 of the International Covenant on Civil and Political Rights, according to which:

An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

14. Although the Special Rapporteur was opposed to equating legal and illegal aliens, it was his own view that the right to a fair trial and the right to access to a competent authority applied to everyone without distinction. He took solace in the fact that article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁶³ said the same thing.

15. In any event, the draft articles should make explicit reference to access to the courts, taking into account article 4, paragraph 2, of the International Covenant on Civil

and Political Rights, which spelled out the articles that could not be derogated from, even in situations of public emergency that threatened the life of the nation, particularly article 16, according to which "[e]veryone shall have the right to recognition everywhere as a person before the law." Even refugees had the right, under article 16 of the Convention relating to the Status of Refugees, of "free access to the courts of law on the territory of all Contracting States", which supplied further justification for granting aliens a similar right. Having access to a competent authority or to the courts presupposed that aliens possessed certain procedural rights, in accordance with the rules of natural justice. The provision should apply not only to the process culminating in expulsion but also, following expulsion, to the right to institute legal proceedings with a view to returning to the expelling State or to obtain restitution or compensation.

16. Draft article 10 on the dignity of the person was aimed at protecting one of the most important rights of aliens being expelled, since the way they were treated invariably entailed affronts to their dignity. The right to respect for the dignity of the person had been recognized as a separate right in article 5 of the African Charter on Human and Peoples' Rights. In addition, article 10 of the International Covenant on Civil and Political Rights stated that all persons deprived of their liberty—which was usually the situation of aliens in the process of expulsion—must be "treated with humanity and with respect for the inherent dignity of the human person". Devoting a separate draft article to that right therefore seemed warranted. However, since many members were against it, arguing that any human rights violation was an affront to or a violation of the dignity inherent in a human being and that the obligation to respect such dignity would be better placed in the preamble or at the beginning of the draft articles, draft article 3 could be reworded to include the fundamental principle that the expulsion of an alien must be carried out with respect for his or her dignity.

17. The same applied to draft article 14, since the principle of non-discrimination was too important to be placed at the end of the draft articles. In most of the international and regional human rights instruments, it was mentioned in the first few articles as being essential for the enjoyment of all human rights. That was true of the Universal Declaration of Human Rights,⁶⁴ the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. Non-discrimination was also included among the values and principles recognized in the United Nations Millennium Declaration,⁶⁵ which had been adopted by the United Nations General Assembly and whose importance had recently been reaffirmed during the Durban Review Conference.⁶⁶

18. In conclusion, he proposed that articles 10 to 14 should be referred to the Drafting Committee so that it

⁶⁴ General Assembly resolution 217 A (III) of 10 December 1948.

⁶⁵ General Assembly resolution 55/2 of 8 September 2000.

⁶⁶ Report of the Durban Review Conference, Geneva, 20–24 April 2009 (A/CONF.211/8), Outcome document of the Durban Review Conference, para. 6, p. 1.

⁶³ See footnote 59 above.

could review their wording and placement. He agreed with the suggestions made on refining draft articles 9, 11, 12 and 13 and proposed that they, too, should be referred to the Drafting Committee.

19. The CHAIRPERSON invited the Special Rapporteur on expulsion of aliens to sum up the discussion and present his conclusions.

20. Mr. KAMTO (Special Rapporteur) thanked members for their comments. The discussion had revealed the complexity of the topic of expulsion of aliens, belying its apparent simplicity. In particular, it had highlighted the difficulties the Commission faced in dealing with human rights issues, since certain impassioned, not to say militant, views on those rights seemed to infuse the arguments advanced, occasionally giving rise to the expression of subjective opinions at the expense of objective analysis of existing law and practice, the usual foundation for the codification and progressive development of the law.

21. Some members had stated that they could not see where the consideration of the topic would lead; however, it had been proposed some time ago, and its inclusion in the Commission's long-term programme of work⁶⁷ had been approved by the Sixth Committee.⁶⁸ Representatives of only two States—Portugal and the United Kingdom—had expressed doubts about the timeliness of entrusting the issue of expulsion of aliens to the Commission.⁶⁹ The Commission had held a fruitful debate on the topic without ever considering that it should be abandoned. One was certainly entitled to disagree with the approach he had taken as Special Rapporteur—that was the very essence of debate—but it might be going too far to conclude that the work of the Commission on the topic as a whole had gotten off to a bad start.

22. The approach he had taken in his fifth report had been to elaborate additional rules that seemed to be essential in the context of expulsion of aliens, without prejudice to the exercise of all other human rights. In draft article 8, the phrase “and all other rights the implementation of which is required by his or her specific circumstances” was intended precisely to show that, in addition to a few essential rules, set out in the preceding articles, whose implementation was indispensable because they were most directly related to expulsion, all other rights must also be respected. He had no objection to simply stating that any alien who was to be expelled was entitled to the protection of his or her rights, without distinction or qualification, as the majority of members of the Commission desired. However, it would seem strange for the Commission to disregard all the relevant contemporary legal developments in its drafting work on expulsion of aliens.

⁶⁷ *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729 and annex 4, p. 142, and General Assembly resolution 55/152 of 12 December 2000, para. 8.

⁶⁸ General Assembly resolution 59/41 of 2 December 2004, para. 5.

⁶⁹ See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat (A/CN.4/549 and Add.1), available from the Commission's website, documents of the fifty-seventh session, para. 132; see also *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 12th meeting* (A/C.6/60/SR.12), paras. 38–39 (statement by Portugal).

In his own work, he had drawn not only on existing instruments but also on case law, which was useful not only for explaining but also for confirming new texts. The case law in question was that of the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. The African Charter on Human and Peoples' Rights, for its part, did not offer much of a perspective. From those sources, he had chosen to include only those rules that had been developed through practice and whose application had been guided by precedent, in order not to engage exclusively in progressive development. In his view, among the rights linked to the specific circumstances of the alien being expelled, it was those that had been recognized in a convention and confirmed through consistent practice that the Commission should codify. He therefore welcomed the fact that the Commission had agreed to refer draft article 8 to the Drafting Committee, which could reformulate it on the basis of the suggestions made. In that regard, the suggestion by Mr. Ojo, who had proposed wording that might form the basis for a specific provision, seemed a good solution.

23. In draft article 9, he had likewise drawn on examples of judicial interpretation of international instruments. Despite the trend towards abolition of the death penalty in certain parts of the world, the issue of the right to life and the death penalty remained controversial, as explained in paragraphs 53 to 66 of his report. It had been discussed by the General Assembly, precisely in the context of that body's consideration of the draft articles on expulsion of aliens. The declaration of a moratorium did not mean that the death penalty had been abolished, however: there was a distinction between a moratorium established by law and one that was actually implemented. The wording he had proposed took all those factors into account.

24. He welcomed the support expressed for draft article 10, about which he felt very strongly. It was from affronts to their dignity that aliens invariably suffered the most when being expelled. Such offences were not limited to cruel, inhuman or degrading treatment: that was only one aspect. The *Furundžija* judgement was significant precisely in that it constituted one of the first attempts to ascribe to the notion of dignity a meaning that went beyond merely prohibiting cruel, inhuman or degrading treatment. It stated that the general principle of respect for the dignity of human beings was “intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person” [para. 183 of the judgement]. Contempt and insults were aspects of the violation of human dignity, without necessarily constituting cruel, inhuman or degrading treatment. Even though the right to respect for one's dignity was an overarching human right, in a way serving as the foundation for most other human rights, it could still be the subject of a separate provision. Moreover, it was recognized as a separate right in article 1 of the Charter of Fundamental Rights of the European Union, to which several members had frequently referred in substantiating other arguments. Mr. Cafilisch's proposal to delete paragraph 1 of draft article 10 was very much to the point, because it was human dignity in the specific context of expulsion that was important. The placement of the draft

article within the entire text was a minor matter that could be re-examined at a later date.

25. As for draft article 11, paragraph 1, some members had proposed to delete the phrase “in its territory” or to add the words “or in any other territory under its control” at the end of the paragraph. He had no problem with that, but pointed out that the reference was to a logical sequence whereby the State first protected from torture, in its own territory, any person being expelled (para. 1) and then ensured that it did not expose them to the risk of torture elsewhere (para. 2)—in other words, in the territory of the country to which they were being expelled. Doing away with that logical sequence might blur the distinction between the obligations of the expelling State and those of the receiving State. The Drafting Committee would have to review the wording in that light. With regard to the proposal to add “whenever the State cannot itself ensure such protection” at the end of paragraph 3, he said that the phrase nicely rounded out the provision, which applied to exceptional cases when the expelling State could not in its own territory ensure the protection of the person concerned.

26. As to draft article 12, he endorsed the proposals that the best interests of the child should be emphasized, in line with the international instruments on the rights of the child and case law in that field.

27. With regard to draft article 13, he had no objection to deleting the reference to the right to private life, since the most important aspect of that article was respect for the right to family life. Since several members of the Commission considered the phrase “such cases as may be provided for by law” to be ill-advised, he was in favour of replacing it with the words “in accordance with general human rights standards”. With regard to the phrase “a fair balance between the interests of the State and those of the person in question”, he said that the obligation to protect privacy was not of such an absolute nature as to preclude the expelling State from taking into account considerations relating to public order, for example. It should indeed be possible to strike a fair balance by referring to the rules of international law, which would address the concerns expressed by several members.

28. On the subject of draft article 14, Mr. Galicki had pointed out that the obligation of non-discrimination was not necessarily a separate principle, but was linked to the realization of other human rights. Although that was no doubt a correct observation, it was more in keeping with the general notion of respect for human rights as defined, for example, in the European Convention on Human Rights. In his own view, irrespective of whether one referred to it as a rule or a principle rather than an obligation, what was essential was the specific content of the provision that laid down an individual principle or rule clearly enunciating a prohibition of discrimination between aliens—and not solely between nationals and aliens—in expulsion matters.

29. He had no objection whatsoever to the idea put forward by some members to add to the body of rules the right to a fair trial, viewed as a substantive rather than a procedural right. However, the placement of such a

provision within the draft articles was problematic: he had envisioned it as an introductory article in the part relating to expulsion procedures, but he was not at all opposed to including it as an introductory article in the part relating to the general protection of expelled persons. Likewise, he was in favour of the proposal to extend the protection provided for in the draft articles to persons with disabilities. On the other hand, as far as women were concerned, such protection should be extended only to pregnant women and not to women in general. As to protection for older persons, the difficulty would lie in determining the age beyond which a person was deemed to be an older person. Lastly, the proposal to add a general provision stating that no one could be expelled to a country where there might be a threat to his or her life owing to the person’s race, sex, etc., risked meeting with opposition in the Sixth Committee unless a distinction was drawn between persons residing lawfully in a country and those with irregular status—a distinction made, it might be added, in article 13 of the International Covenant on Civil and Political Rights, cited by Mr. Wako. Persons with irregular status whose life would be at serious risk if they were expelled always had the option of applying for asylum.

30. In conclusion, he requested the Commission to refer the draft articles to the Drafting Committee.

31. Ms. ESCARAMEIA said that she was not in favour of referring the draft articles, particularly draft article 8, to the Drafting Committee after reformulation by the Special Rapporteur. Draft article 8 raised fundamental issues that could not be resolved by the Drafting Committee. Such issues included possible restrictions of the human rights of persons being expelled, to which many members were opposed.

32. Mr. KAMTO (Special Rapporteur) said that his intention had been to reformulate certain draft articles, in particular draft article 8, in keeping with the wishes of the majority of members of the Commission. He would therefore not propose a provision incorporating any restrictions on limiting the human rights of persons being expelled.

33. Mr. GAJA said he would have preferred for the Commission to set up a working group to consider the issue rather than to refer the draft articles to the Drafting Committee. That said, he was not opposed to doing so, provided the Drafting Committee was given a broader mandate than usual in order to examine certain points, in particular the distinction between the rights that expelling States must respect in general and those linked to particular circumstances in the receiving State.

34. Mr. NIEHAUS said that he was opposed to referring the draft articles to the Drafting Committee because substantive changes had been proposed. Those should be discussed in a plenary meeting before the Drafting Committee took them up, since its mandate was limited to making drafting changes.

35. Sir Michael WOOD said that, given the Special Rapporteur’s demonstrated flexibility with regard to fundamental aspects of the draft articles, he would support his proposal to refer them to the Drafting Committee, provided that certain conditions were met. First, draft

article 8 should be reformulated so as to cover all human rights; second, specific rights should be listed merely as examples of the most relevant rights in the context of expulsion. Third, the right to dignity should be seen as an overall right and should consequently be the subject of a separate draft article to be placed earlier in the text, perhaps together with a draft article on non-discrimination. Fourth, the various restructuring proposals could be considered by the Drafting Committee as long as they did not affect the substance of the draft articles.

36. Mr. SABOIA said he supported Mr. Gaja's proposal to broaden the mandate of the Drafting Committee in order to take into consideration members' comments such as those on categories of vulnerable persons. If that was done, he would be in favour of referring the draft articles to the Drafting Committee.

37. Mr. VARGAS CARREÑO, supported by Mr. WISNUMURTI, suggested that the Special Rapporteur should draft a new version of the draft articles that had elicited reservations, taking into account members' comments, for subsequent referral to the Drafting Committee for consideration.

38. Mr. CAFLISCH said he supported Sir Michael Wood's proposal to refer the draft articles to the Drafting Committee, under the conditions he had enumerated.

39. The CHAIRPERSON, speaking as a member of the Commission, said that he was inclined to favour Sir Michael Wood's compromise proposal. In addition, he pointed out that Mr. Vargas Carreño's proposal, which was supported by Mr. Wisnumurti, required the Special Rapporteur's prior consent.

40. Mr. KAMTO (Special Rapporteur) said he could accept the proposal made by Mr. Vargas Carreño, which took up the one made earlier by Mr. Pellet, who had suggested either that he (the Special Rapporteur) should restructure the draft articles himself or that an informal group or a working group should undertake to do so. As a matter of principle, he was firmly opposed to appointing working groups because they were all too often made up of those who espoused the minority viewpoint, which then paradoxically became the majority viewpoint. He therefore agreed to submit to the Commission a new version of the draft articles that took into account the discussion held and the concerns expressed.

41. Mr. HASSOUNA said he had considered suggesting that the Commission should accept Sir Michael Wood's proposal to refer the draft articles to the Drafting Committee and to expand the Committee's usual role but also request the Special Rapporteur to submit a working paper to the Drafting Committee. He would certainly be open to the proposal just made by the Special Rapporteur, however.

42. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to accept the Special Rapporteur's proposal to submit to it a new set of draft articles, to be based on the views of the majority of members.

It was so decided.

Responsibility of international organizations (continued)* (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

43. The CHAIRPERSON invited the Special Rapporteur to conclude the introduction of his seventh report (A/CN.4/610).

44. Mr. GAJA (Special Rapporteur), referring to the section of his seventh report on content of international responsibility (paras. 93–101 of the report), said that the discussion in the Sixth Committee had mainly centred on draft article 43 (see paragraphs 95–98 of the report), for which the Commission had presented two alternatives, one to be placed in the text and the other in a footnote. The majority of the States that had expressed views on the subject had endorsed the first alternative, which read: "The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation under this chapter." In paragraph 97 of his report, and following a suggestion by some States, he proposed to add a second paragraph to article 43, to read: "The preceding paragraph does not imply that members acquire towards the injured State or international organization any obligation to make reparation." The purpose of that addition was merely to clarify a point that was already touched on in draft article 29; no substantive changes were introduced.

45. The section of the seventh report on implementation of international responsibility (paras. 102–119) contained no proposals for change. The reason was that draft articles 46 to 53 had been adopted by the Commission only the previous year, and their consideration had been arranged for the sixty-third session of the General Assembly, where they had met with general approval (see paragraph 102 of the report). The Commission might nevertheless wish to reconsider draft article 55, which did not seem to convey well enough the restrictive attitude that the Commission intended to adopt in stating a residual rule concerning resort to countermeasures by a State or international organization against an international organization of which it was a member. A view similar to the one he had advanced in paragraph 116 of his report had found support in the plenary Commission's recent debate on draft article 19, paragraph 2, a new text proposed in paragraph 66 of his seventh report that addressed the opposite case: countermeasures taken by an international organization against one of its member States or international organizations. Since draft article 19, paragraph 2, was modelled on draft article 55, the two texts should be considered together. If the Commission decided to review draft article 55 in an effort to find more appropriate wording or, using a residual rule, to restrict resort to countermeasures by the members of an international organization, that would address some of the concerns expressed at the meeting on responsibility of international organizations with legal advisers of international organizations.

* Resumed from the 3002nd meeting.

46. The section on general provisions (paras. 120–134) covered issues relating to the international responsibility of international organizations as well as questions relating to the international responsibility of a State for the internationally wrongful act of an international organization. This section would be placed in the last part of the draft articles. Draft article 61 (*Lex specialis*) reflected the residual nature of the draft articles in the preceding parts: special rules could supplement or replace the rules set forth in those parts. Special rules also applied to State responsibility, but they were likely to take on particular importance in the case of international organizations, given the wide variety of international organizations and the variety of relations they could establish with their members. One group of special rules that particularly deserved attention was the rules of the organization as they applied to the relations between the organization and its members. Many provisions in the draft articles could be made subject to the rules of the organization. Draft article 61, which placed particular emphasis on the rules of the organization as *lex specialis*, was a general provision designed to avoid repeating the same idea in some 20 draft articles.

47. As in the draft articles on the responsibility of States for internationally wrongful acts,⁷⁰ it seemed appropriate to state in a general provision that matters of international responsibility were covered by the current draft articles only to the extent that they were regulated by them. That seemed obvious, particularly with regard to matters that lay outside the scope of the draft articles, but it should be borne in mind that the draft articles covered some matters only partially. The main purpose of the provision was to convey that the draft did not address all the issues of international law that might be relevant in establishing the responsibility of an international organization. One of those issues was whether an international organization possessed legal personality under international law. The draft articles did not address that question: it was assumed that the responsibility of an international organization would arise only where it had legal personality.

48. Draft article 63 (Individual responsibility) was a “without prejudice” clause that replicated the one in draft article 58 of the text on State responsibility.⁷¹ Its main purpose was to establish that the international responsibility of an international organization or a State had no implications whatsoever with regard to the individual responsibility of a person. Thus, the fact that an individual acted as an agent of an international organization did not necessarily exclude his or her international criminal responsibility. Nor could one say that the international responsibility of an international organization necessarily entailed the responsibility of an individual who acted as an agent of the organization. Those matters were not regulated in the draft articles, or, for that matter, in the draft articles on State responsibility. Given the description of the scope of the draft articles in article 1, article 63 might appear to be superfluous—but the same could be said of the parallel provision in the draft articles on State responsibility.

⁷⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

⁷¹ *Ibid.*, pp. 142–143.

49. Draft article 64 (Charter of the United Nations) reproduced the text of draft article 59 on State responsibility.⁷² The position of international organizations with regard to the Charter was more problematic than that of States. In draft article 64, the reference to the Charter of the United Nations was not limited to the principles embodied therein, which were binding on international organizations by virtue of general international law. Rather, it concerned Security Council resolutions, which could affect the international responsibility of a State, but also of an international organization, in a variety of ways.

50. The CHAIRPERSON invited members of the Commission to offer comments and observations.

51. Mr. OJO said that he welcomed the Special Rapporteur’s proposal concerning the section entitled “Scope of the articles, use of terms and general principles” (paras. 7–21). The proposed rearrangement suggested in paragraph 21 of his report was especially instructive; however, simply moving article 4, paragraph 4, to article 2, as a new paragraph, would create some drafting problems, given that article 4, paragraph 4, and article 2, both began with the phrase “For the purposes of the present draft articles”. In order to avoid that repetition, he suggested that the new draft article 2 should read: “For the purposes of the present draft articles, the term (a) ‘International organization’ [...]; (b) ‘Rules of the organization’ [...]”

52. In the section on attribution of conduct (paras. 22–38), the Special Rapporteur had suggested, based on the advisory opinion of the ICJ in *Reparation for Injuries*, that the phrase “when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions” should be added at the end of the definition of the term “agent”. In his view, the additional text was not necessary because, as an international legal person, an international organization could only act through its organs, and once an act was carried out on the instruction of such an organ, it was attributable to the organization. That was the principle of *qui facit per alium facit per se*.

53. With regard to breach of an international obligation (paras. 39–44), he noted that the current version of draft article 8, paragraph 2, stated that paragraph 1 also applied to the breach of an obligation under international law established by a rule of an international organization. Given the very nature of relations between States in an international organization, there was no doubt that, *prima facie*, the rules of international organizations were rules of international law. That was all the more true in that, by their rules—which applied to the majority of members of the international community—many international organizations had shaped the development of international law. As currently worded, however, draft article 8, paragraph 2, appeared to rest on the premise that the rules of international organizations were not rules of international law except in certain isolated cases, which were construed as exceptions. He therefore endorsed the Special Rapporteur’s proposed new version of paragraph 2, which stated that a breach of the rules of an organization was,

⁷² *Ibid.*

in principle, a breach of an international obligation. The phrase “in principle” appropriately conveyed the idea that the general rule allowed for certain exceptions, depending on the particular circumstances of each case.

54. As to responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54), draft article 15, paragraph 1, stated that an international organization incurred international responsibility if it adopted a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the organization itself. According to the Special Rapporteur, that article was designed to prevent an international organization from successfully circumventing one of its international obligations by availing itself of the separate legal personality of its members, whether they were States or other international organizations. It followed from paragraph 1 that a decision that bound a member of an international organization to commit an internationally wrongful act was manifestly an illegal decision. By the same token, an international organization that bound one of its members to commit such an act incurred international responsibility. However, the text did not address the case of a member State which, knowing that such a decision was a breach of international law, refrained from carrying out the required act. Such disobedience was likely to incur the wrath of the international organization, and the member in question would need to be protected from punishment by the organization. To that end, a new paragraph could be inserted immediately following the current draft article 15, paragraph 1, and could read: “No member of an international organization shall be subjected to proceedings under the rules of the international organization by reason only of non-compliance with or non-implementation of the decisions referred to in paragraph 1 of this article.”

55. The Special Rapporteur had suggested the creation of a new article 15 *bis* in order to fill in the gaps in chapter V of the draft articles, which contained no provision relating to the possibility that an international organization might incur responsibility as a member of another international organization (para. 52 of the report). The new article 15 *bis* would read: “Responsibility of an international organization that is a member of another international organization may arise in relation to the act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization.” However, the Special Rapporteur had conceded that international organizations were not frequently members of other international organizations. His proposal therefore did not seem to be sufficiently justified by practice, custom or judicial decision. In his own opinion, the isolated comment of the representative of the Netherlands⁷³ cited by the Special Rapporteur (para. 52) did not justify the insertion of a new draft article.

56. With regard to the circumstances precluding wrongfulness (paras. 55–72), he agreed with the numerous comments that “self-defence was, by its very nature,

applicable only to the actions of a State”. He therefore supported the proposal of the Special Rapporteur to delete draft article 18 on self-defence from the circumstances precluding wrongfulness.

57. With regard to the content of international responsibility (paras. 93–101), he noted that in paragraph 97 of his report, the Special Rapporteur had suggested adding a second paragraph to article 43 in order to clarify that when it stated that the members of a responsible international organization were required to take appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under chapter VIII, article 43 was not implying that member States had an obligation to provide reparation to the injured State or international organization. In his opinion, such a clarification would merely make the text of article 43 verbose. As the Special Rapporteur had acknowledged, “the current text does not appear to convey that there would be an obligation for members towards the injured entity”. Draft article 43 as it stood clearly showed that the primary and, in fact, only obligation fell on the international organization, not on its members.

58. As to the current wording of draft article 43, reference should be made to the fact that it was not in all cases that the rules of an international organization required member States or entities to take the measures envisaged in the draft article. Where such a gap existed in the rules of an international organization, it was likely to give member States an escape valve to evade international responsibility. Consequently, the obligation envisaged should not be dependent on the rules of the international organization concerned. That appeared to be the reason why New Zealand had warned that the reference to the rules of the organization “should not be interpreted as justifying inaction by the members of an organization in the absence of suitable rules”. The phrase “in accordance with the rules of the organization” should thus be deleted.

59. Lastly, Mr. Ojo endorsed the text of draft articles 44 to 64 as proposed by the Special Rapporteur.

The meeting rose at 1 p.m.

3007th MEETING

Tuesday, 19 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

⁷³ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee, 14th meeting (A/C.6/61/SR.14)*, para. 20.