Document:-
A/CN.4/3039

Summary record of the 3039th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2010, **vol. I**

that it would be useful to devote more time to such dialogues and was prepared to do so at the next session. Replying to Mr. Hassouna, she said that, clearly, there could be no serious, comprehensive review of international customary law without a consideration of the resolutions of the Security Council and the resolutions and decisions of the General Assembly. Recently, she had tended to leave out the Special Tribunal for Lebanon intentionally, not because of its supposed lack of activity, but because it was often conflated with the other tribunals that had been established to deal with war crimes, crimes against humanity and genocide, whereas the Special Tribunal for Lebanon had been set up specifically to investigate the assassination of Rafiq Hariri and others. With respect to the fact that there had been no tangible activity in the criminal prosecution, it was true that there was no indication of an imminent indictment, although very recently there had been signs of action possibly being taken at the end of 2010 or the beginning of 2011. Irrespective of the lack of tangible activity as such, she stressed, on behalf of the Secretary-General, that the Tribunal, by its very existence, had functioned as a catalyst for the rule of law in Lebanon, a circumstance which its detractors should bear in mind. The United Nations and the Secretary-General respected the independence of the Tribunal and avoided questioning the activity of the prosecutor.

95. With regard to the very difficult and delicate issue of universal jurisdiction, in the course of discussions it had become evident that sensitivities concerned, in particular, the issue in relation to international criminal justice, and especially the fact that the international tribunal prosecuted in jurisdictions with no link to the place of the commission of the offence, which of course was the very principle of universal jurisdiction. It would take some time before a consensus was achieved in the General Assembly on how to move forward with the issue. At the moment, the Secretariat was awaiting input from Member States on how they saw their rights and obligations in the area. In respect of the International Criminal Court, the Office of Legal Affairs was regularly consulted on the difficult issue of what relations the Secretary-General should have with heads of State who were being prosecuted by the Court. Clearly, it was important for the Secretariat not to undermine the Court's activities in any way or give the impression that it was doing so. In the case of Sudan, account must be taken of the pursuit of peace and justice, on the one hand, and the recent re-election of the Head of State and the prospect of a referendum in 2011, on the other; clearly, that was a very difficult issue. However, the Secretary-General was personally very sensitive to those questions, and the international community could have no doubt as to the profound respect which he had for international criminal justice and the work of the International Criminal Court. As for the right to protect and the application of that principle to the *Bhutto* case in particular, she was grateful to Mr. Kamto for raising the question, to which she had given some thought. Given that the principle of the responsibility to protect was at the stage of operationalization, it was difficult to communicate on the issue as long as the situations in which the principle applied had not been clearly identified. Although in retrospect the principle of the responsibility to protect might have applied to the post-election violence in Kenya, she did not think that that was true for the *Bhutto* case, which involved the specific case of the assassination of a former Prime Minister. However, as time went by, if acceptance of the principle of the responsibility to protect progressed in a manner that the Secretariat hoped and was committed to, then the situation of Guinea might become the first case in which the responsibility to protect might be invoked, because the second pillar of the principle was the obligation of States and the international community to assist a State when war crimes, crimes against humanity or genocide were imminent or where there was a risk that they would be committed. The African Union, ECOWAS, regional groups, the Secretariat and other groups concerned had come together and had decided to act. Very quickly, just two weeks after the events, the United Nations had set up a commission of inquiry and, with the help of its partners, had succeeded in restoring a degree of stability, although there had been a high risk that the situation might deteriorate. That said, the Organization was following the situation closely.

96. The policy papers on unconstitutional changes of Government were not available because they served to define the policy of the United Nations and were meant only for officials of the Organization who were working in that area. It was reassuring from a legal perspective that the Legal Counsel took part in those discussions, because it showed that the Secretary-General was convinced that international law must be at the centre of the development of United Nations policy. It was the Secretary-General who had decided that such situations were arising too frequently for the Secretariat not to assess how to respond, for example with regard to accreditation or when the Organization was called upon by States not to recognize a Government, although it was not competent to react. The fact that the Secretariat had a consistent approach could also help ameliorate such situations.

97. The Treaty Section had brought in a consultant to identify problems posed by the use of its website, which the Secretariat would try to improve in the near future.

The meeting rose at 1.15 p.m.

3039th MEETING

Thursday, 6 May 2010, at 10.15 a.m.

Chairperson: Ms. Hanqin XUE

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

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*) AND DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPORTEUR[68] (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the expulsion of aliens.

2. Mr. GAJA said that he appreciated the considerable amount of work done by the Special Rapporteur to advance the Commission's consideration of the topic. His sixth report (A/CN.4/625 and Add.1–2) was rich in references to practice and offered much food for thought. While he agreed with many of the Special Rapporteur's statements, he was still concerned about a few methodological issues.

3. He requested clarification of the numbering of the draft articles in the various documents under consideration. For example, according to the new draft workplan,[69] which the Special Rapporteur had submitted with a view to structuring the draft articles, draft article 8 covered the prohibition of disguised expulsion, whereas the text proposed for that article in paragraph 42 of the sixth report was headed "draft article A". According to the document that contained the revised and restructured draft articles on protection of the human rights of persons who had been or were being expelled, draft article 8 dealt with the general obligation to respect human rights during the expulsion procedure. He was also confused by the fact that the obligation to protect family life formed the subject of draft article 12 in that document, but was covered by draft article 14 in the new draft workplan. It would therefore be useful to have a document that reproduced those draft articles that had been provisionally adopted by the Drafting Committee along with other draft articles proposed by the Special Rapporteur in the sequence that the Special Rapporteur deemed appropriate.

4. He suggested that the draft articles might be reorganized in the following manner: the first part should determine the scope of the draft articles and provide a definition of expulsion; it could include draft article A, on the prohibition of disguised expulsion, since it appeared to deal with one aspect of the definition of expulsion.

5. A second part might set forth the substantive conditions that would have to be met if expulsion were to be lawful under international law. It should cover permissible grounds, the principle of non-discrimination and the expelling State's obligation to consider the risks facing the person to be expelled in the country of destination, and it should strike a balance between a State's right to expel and the alien's right to family life. The Commission should express its views about the requirements of international law; the reference in draft article 9, paragraph 3, to a "ground that is contrary to international law" (A/CN.4/625, para. 210) was too nebulous in the context of expulsion. The second part of the draft articles could also encompass the additional protection that should be given to refugees and stateless persons.

6. A third part should cover procedural matters, such as the need for compliance with the procedural rules of the expelling State, the need to supply reasons, the issue of remedies, the question of disguised extradition and the need to respect the human rights of the person being expelled, especially with regard to the length and conditions of detention. The third part could also examine the issue of collective expulsion.

7. A fourth part might contain provisions concerning the property of expelled persons, a subject which the Special Rapporteur wished to include. Lastly, a fifth part could identify the obligations of the States of transit and destination.

8. Generally speaking, he sympathized with the Special Rapporteur's wish to enhance the protection that aliens had against expulsion. Expulsion was usually a harsh measure which deprived the aliens subjected to it of their personal relations and source of income, and it would therefore be strange if the Commission did not aim to enhance that protection.

9. If the Commission had been drafting a human rights instrument, it could have envisaged a high level of protection for individuals, and States would have been free to accept or reject such an instrument. A more cautious approach had to be adopted when the Commission was engaged in codifying principles of international law that were supposed to bind States, irrespective of whether they accepted a particular instrument.

10. For example, in a human rights instrument, expulsion could be prohibited when it constituted a disguised extradition—the conclusion drawn by the Special Rapporteur. Yet despite the plentiful reference to practice in the sixth report, and in particular to the judgement of the European Court of Human Rights in *Bozano v. France*, practice only partly supported that conclusion. The European Court had found that France was in breach of article 5 of the European Convention on Human Rights because French policemen had forcibly deported Mr. Bozano to Switzerland, whence he was likely to be extradited to Italy, where he had been sentenced for the murder of a Swiss teenager. Since the French courts had refused extradition to Italy, the Court had emphasized the breach of procedural rules. It would be difficult to contend that, according to the European Court of Human Rights, disguised extradition was categorically prohibited when an alien faced a criminal trial in the State of destination. As the Special Rapporteur noted in paragraph 60 of his sixth report, the same Court had denied the existence of such a prohibition in *Öcalan* v. *Turkey*. In fact, only one of the judgements mentioned in paragraphs 62 to 69 held that disguised extradition would be inconsistent with international law. Hence to state that disguised extradition was prohibited by international law would be progressive development.

[68] See footnote 19 above.

[69] See footnote 24 above.

11. It might be possible to incorporate in a human rights instrument the restrictions on the concept of "public policy" that had been established by the Court of Justice of the European Communities as grounds for expulsion, as the Special Rapporteur suggested in paragraph 116. It should be noted, however, that those restrictions applied only to the expulsion of nationals of member States and did not reflect the policies and practices of member States in relation to nationals of third countries. When expounding a principle of international law, it was necessary to bear in mind the wide range of reasons for expulsion that were admissible in State practice, which were discussed extensively in paragraphs 119 to 206.

12. The forthcoming judgement in *Ahmadou Sadio Diallo* would no doubt provide significant guidance on how far the Commission could go in enhancing the protection against expulsion which international law afforded to aliens. While there was no reason to postpone the consideration of reports on the topic or the work of the Drafting Committee, the Commission would be wise to take the views of the ICJ into account before concluding its first reading of the draft articles.

13. Mr. NOLTE said that he would confine his remarks to the draft articles on protection of the human rights of persons who had been or were being expelled, which were contained in the restructured draft articles. He commended the Special Rapporteur for taking account of members' comments in his preparation of that text.

14. With regard to draft article 9, on the obligation to respect the dignity of persons who had been or were being expelled, he welcomed the fact that the Special Rapporteur had moved the reference to human dignity into the general part of the draft articles in order to indicate that human dignity was not merely one among several other human rights. However, he was concerned that the formulation of the draft article might be misleading. Human dignity was a general principle from which all human rights flowed; it could not be treated simply as a specific human right. That was a basic notion underpinning international human rights law.

15. The preamble of the Charter of the United Nations spoke in general terms of "the dignity and worth of the human person", while the preamble to the Universal Declaration of Human Rights[70] referred to the "inherent dignity … of all members of the human family". Moreover, the idea that human dignity was more a source of rights than a right itself was spelled out in the International Covenant on Civil and Political Rights, whose preamble recognized that those rights "derive from the inherent dignity of the human person". Human dignity was possessed by every human being, and care should be taken not to create the mistaken impression that it meant honour or reflected individual perceptions of pride or dignity. That was why the drafters of international human rights treaties rarely used the term "human dignity" when defining specific rights, and when they did so, they took care to make it clear that what was meant was inherent human dignity. In fact, the only provision of the Covenant which referred explicitly to human dignity was article 10, which read: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." That article could be used as a model for reformulating draft article 9, which would then read: "All persons who have been or are being expelled shall be treated with humanity and with respect for the inherent dignity of the human person."

16. His lesser concerns pertained to the subsequent draft articles. For example, he did not fully understand article 10, paragraph 2, and was unsure whether it allowed for the possibility of treating nationals and aliens differently with respect to expulsion, or reflected the fact that there might be legitimate grounds for differentiating between various categories of aliens, such as citizens of States belonging to the European Union and citizens of non-member States. For example, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders provided for special procedures for aliens who were defined as "any person other than a national of a Member State of the European Communities" (art. 1). Readmission agreements might provide other legitimate grounds for treating different groups of aliens differently in the context of expulsion.

17. Turning to draft article 11, he suggested that, in accordance with human rights case law, the text should ensure that the obligation to respect the right to life was not limited to areas where States exercised territorial jurisdiction.

18. Lastly, the phrase "may be provided for" in draft article 12, paragraph 2, was somewhat misleading—what was probably meant was "as authorized by". In that connection, he shared Mr. Gaja's concern that the reference to international law was too vague.

19. Mr. SABOIA drew attention to the restructured draft articles and thanked the Special Rapporteur for ensuring that they addressed the concerns expressed in plenary at the previous session.

20. He agreed with the alternative wording of draft article 9 proposed by Mr. Nolte. The concept of dignity was very important in the context of expulsion. Failure to respect the dignity of a person or group of persons did not stem directly from the violation of a specific right but from the subjection of such persons to repeated humiliating treatment which amounted to an offence against their dignity.

21. He suggested that the assurance that the death penalty would not be carried out, mentioned in draft article 14, paragraph 2, should be required also in cases where a person had not yet been sentenced but there was a risk that the death sentence might be imposed. That was the principle applied by the Supreme Court of Brazil when it heard extradition cases.

22. Turning to the Special Rapporteur's sixth report (A/CN.4/625 and Add.1–2), he congratulated the Special Rapporteur on his thorough research and his concise oral introduction of the report. The methodology suggested

[70] See footnote 22 above.

by Mr. Gaja would improve the clarity and coherence of work on the topic.

23. As the Special Rapporteur stated in paragraph 41 of his report, disguised expulsion was contrary to international law, since it violated the rights of expelled persons by depriving them of the opportunity to present their defence to a competent authority. Unfortunately, that practice had often been used in "renditions", which exposed expelled persons to the risk of being sent to places where they might be subjected to torture.

24. Although draft article A contained a good definition of disguised expulsion, a sentence should be added to indicate that the prohibition of disguised expulsion applied also to countries of destination or transit.

25. He supported the Special Rapporteur's reasoning with regard to disguised extradition and thus supported his proposed draft article 8. Some years earlier, the Supreme Court of Brazil, in its judgement in the *Oviedo* case, in which Paraguay had sought the extradition of a former general accused of a crime, had refused extradition on the grounds that it was politically motivated, and it had expressly prohibited the expulsion of Mr. Oviedo to another country, as that would have constituted disguised extradition.

26. The Special Rapporteur had thoroughly researched the grounds for expulsion and had rightly concluded that the reasons given by States for expulsions were too numerous to list exhaustively. States had wide discretion when expelling aliens. While public order and national security were the most substantial grounds for expulsion, it was important that the grounds for any expulsion be specified. Furthermore, such grounds must not contradict international law and they must be determined in good faith. Proportionality and the conduct of the person being expelled were further vital considerations.

27. The chapter devoted to the conditions of detention of persons awaiting expulsion contained some shocking examples. Unfortunately, such conditions existed, not only in the countries named in the report, but were widespread, and he felt compelled to admit that such conditions existed in his own country. He therefore welcomed the fact that the revised version of draft article B dealt, not only with conditions of detention, but also with the serious problem of prolonged or unlimited detention, and that it established some procedural rules that ought to offer a detained foreigner greater certainty.

28. He was in agreement with referring the restructured draft articles and the draft articles contained in the Special Rapporteur's sixth report (A/CN.4/625 and Add.1–2) to the Drafting Committee.

29. Mr. DUGARD drew attention to paragraph 42 of the sixth report and said that the term "disguised expulsion" used in draft article A was incorrect; what the Special Rapporteur meant was "informal" or "constructive" expulsion. As was clear from paragraph 37 of the report, the cases to which he referred were instances of constructive expulsion because the expelling State had not disguised the expulsion or adopted a formal measure, but its conduct had been such that the individual had had no option but to leave the country.

30. Before discussing the formulation of the draft article, he wished to draw attention to the fact that the Declaration of Principles of International Law on Mass Expulsion had been adopted by the International Law Association and not by the International Law Commission, as stated in paragraph 40 of the English version of the report.

31. Although he would support referral of draft article A to the Drafting Committee, he would prefer that the term "constructive expulsion" be used. He was also unsure whether it was correct to speak of the "forcible departure of an alien", since the alien might not be subjected to any force; what happened in practice was that aliens were compelled to leave as a result of the conduct of the expelling State.

32. The term "disguised extradition" had been used correctly in the report to mean the use of another procedure to achieve the purpose of extradition. In most cases, States resorted to deportation to achieve that purpose. With regard to the legal consequences of expulsion and disguised extradition, he wished to know whether the Special Rapporteur intended to deal with the principle of *male captus, bene detentus*. The courts were divided on the question of whether it was appropriate to exercise jurisdiction over a person who had been improperly extradited as a result of disguised extradition. The English courts had held that it amounted to an abuse of process and that the courts could not exercise jurisdiction, whereas the United States Supreme Court had upheld that principle.

33. He noted that although the Special Rapporteur had referred to cases of public order and public security that might allow for expulsion, he had made no particular reference to cases of suspected involvement in terrorist activities, although in paragraphs 61 and 62 of the sixth report he had suggested that the courts tended to adopt a generous approach towards disguised extradition and expulsions when a person was suspected of terrorist activities. It was an interesting issue that warranted the Commission's attention during its consideration of the topic.

34. The CHAIRPERSON recalled that the substantive aspects of the draft articles on the protection of the human rights of persons expelled or being expelled had been thoroughly discussed at the sixty-first session and that those articles had been redrafted by the Special Rapporteur in the light of comments made by Commission members in plenary meeting. In order to expedite the proceedings, she suggested that the Commission focus its attention on the referral of those draft articles to the Drafting Committee.

35. Sir Michael WOOD said that he had no problem with referring the restructured draft articles to the Drafting Committee, provided that the Committee would have some degree of flexibility in the matter. Like Mr. Nolte, he considered that there were still some fairly substantive issues to be addressed.

36. The CHAIRPERSON said she took it that the Commission wished to refer to the Drafting Committee revised draft articles 8 to 15 and the additional draft article 16,

which were contained in draft articles restructured in the light of the plenary debate during the first part of the sixty-first session.

37. Mr. GAJA said that he had no objection to referring revised draft articles 8 to 15 to the Drafting Committee. However, since draft article 16 was new and the question of transit States warranted further consideration, he proposed that it be held in abeyance.

38. Ms. JACOBSSON endorsed the comments made by Mr. Gaja and Sir Michael Wood. Moreover, she had understood that the Commission had two additional plenary meetings in which to discuss the draft articles. She certainly had views to express on the restructured draft articles as well as on the sixth report (A/CN.4/625 and Add.1–2). She could therefore only endorse the Chairperson's suggestion with the proviso posited by Sir Michael that the Drafting Committee have some flexibility in the matter.

39. The CHAIRPERSON said that the Drafting Committee would take those factors into account.

40. Mr. HMOUD said that the problem with regard to the numbering of the draft articles cited earlier by Mr. Gaja would have to be rectified: both the restructured draft articles and the sixth report (A/CN.4/625 and Add.1–2) contained draft articles 8 and 9, but they dealt with different subjects.

41. Mr. PETRIČ asked whether it really was necessary to take a decision on the referral of the draft articles to the Drafting Committee at the current meeting. He, too, had been under the impression that there would be two further plenary meetings at which the Commission could consider both the restructured draft articles and the sixth report, and that the first meeting of the Drafting Committee would not take place until the following week.

42. The CHAIRPERSON said that members would indeed have an opportunity to discuss the topic in subsequent plenary meetings. The intent of her suggestion had been merely to gauge the Commission's views on the draft articles, given that they had been discussed extensively during the sixty-first session and redrafted by the Special Rapporteur in the light of comments made at that time. However, if the Commission did not feel ready to refer the draft articles to the Drafting Committee, she would not press the matter.

43. Mr. CANDIOTI said that he could endorse the suggestion to refer the restructured draft articles to the Drafting Committee with the provisos and comments made by other members, in particular by Sir Michael. He understood, however, that some members still wished to express their views on the topic. Perhaps the Commission could make optimum use of the remainder of the morning by discussing the structure of the draft articles, as suggested by Mr. Gaja, either in informal consultations or in the Drafting Committee.

44. Mr. KAMTO (Special Rapporteur) recalled that the restructured draft articles had been submitted to the Commission at the sixty-first session but had not been considered then owing to his absence during the second part of the session. On the opening day of the current session he had introduced the draft articles and his sixth report separately so as to make it quite clear that they should be considered separately by the Commission (see the 3036th meeting above, paras. 21–43). He had expected that at the present juncture members would make comments or suggestions on the draft articles, along the lines of Mr. Nolte's proposed drafting amendment. However, if the Commission did not feel ready to refer the draft articles to the Drafting Committee because it considered that there were still some substantive issues to be resolved, then it should not do so. Likewise, it should not refer material to the Drafting Committee in the interests of time management; that was not how the Commission should operate. He was willing to be flexible, but he did not wish to spend an inordinate amount of time on the matter. Members must be clear about what they wanted. If they were still not satisfied with the basic thrust of the draft articles, which he had revised in the light of their comments, then they should be given the opportunity to state their views in plenary.

45. Mr. McRAE said that as one of the members who had been quite critical of the original draft articles, he believed that their revision was very important, and he commended the Special Rapporteur on his work. He welcomed the suggestion to refer the restructured draft articles to the Drafting Committee and endorsed Mr. Nolte's proposed amendment to draft article 9. He considered that his own concerns could be dealt with in the Drafting Committee, too.

46. In the interest of expediting the Commission's work, he suggested that members who had not had an opportunity to express their views on the draft articles in plenary meetings of the Commission should be allowed to do so in the Drafting Committee. If it became apparent that the matters raised there were substantive, they could be referred back to the plenary Commission, as had been done in the past. As Chairperson of the Drafting Committee, he did not foresee that such a procedure would pose any problems.

47. Mr. HASSOUNA endorsed Mr. McRae's suggestion.

48. The CHAIRPERSON said that while the Commission seemed to be generally in favour of referring revised draft articles 8 to 15 to the Drafting Committee, she had taken note of the comments made regarding the programme of work for the topic. She therefore suggested that all members wishing to comment on the restructured draft articles have an opportunity to do so in plenary meeting before the draft articles were referred to the Drafting Committee. She further suggested that an informal group be established without further delay, led by Mr. Gaja, to discuss the structure of the draft articles before their referral to the Drafting Committee.

49. Mr. NOLTE said that he could endorse the Chairperson's suggestions on the understanding that all members wishing to comment on the restructured draft articles must do so at the next plenary meeting so that the Drafting Committee could commence its work immediately thereafter.

50. The CHAIRPERSON said she took it that the Commission agreed to her suggested course of action, subject to Mr. Nolte's clarification.

It was so decided.

Organization of the work of the session (*continued*)

[Agenda item 1]

51. Mr. McRAE (Chairperson of the Study Group on the most-favoured-nation clause) announced that he would chair the Study Group, which would be composed of the same members as during the sixty-first session, as well as any other members wishing to participate, and Mr. Vasciannie, Rapporteur, *ex officio*.

The meeting rose at 11.20 a.m.

3040th MEETING

Friday, 7 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

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

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*) AND DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPORTEUR[71] (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the agenda item on expulsion of aliens.

2. Mr. PETRIČ said that the draft articles on protection of the human rights of persons who had been or were being expelled, revised and restructured by the Special Rapporteur in the light of the plenary debate during the first part of the sixty-first session, had been greatly improved, and he was in favour of their referral to the Drafting Committee. He nevertheless wished to make a few comments on the text.

3. Draft article 8 was not problematic. As for draft article 9, he shared the view expressed by Mr. Nolte at the previous meeting, namely that human dignity was the source of all rights; that was why it was essential for that principle to be one of the general rules, as it now was. With regard to draft article 10, in particular the phrase "or other status" at the end of paragraph 1, he drew the Special Rapporteur's attention to the situation of European Union nationals. They enjoyed freedom of movement—a special situation that should be mentioned, if not in the draft article itself, then at least in the commentary. Concerning paragraph 2 of the draft article, it was important to bear in mind the fundamental difference between legal and illegal immigrants, since the procedures applicable to each group could be different.

4. Draft articles 11, 12 and 13 did not raise any particular problems. As for draft article 14, he did not see the need for the third paragraph, since the first paragraph expressly stated that "[n]o one may be expelled". With regard to draft article 15, he said that the wording of paragraph 2 left something to be desired and should be examined carefully by the Drafting Committee. He had no problems with draft article 16.

5. Turning to the Special Rapporteur's sixth report (A/CN.4/625 and Add.1–2), he said that the diverse and contradictory views expressed by States during the debate in the Sixth Committee were well summarized in the introduction, which showed the difficult nature of the topic. The Commission should take that into account in its work, in particular if, with some draft articles, it envisaged moving from strict codification to the progressive development of international law. Failure to balance the legal aspects of expulsion, the interests of the State carrying out expulsion and those of the person being expelled would be unacceptable for States. They still had the sovereign right to decide who, besides their nationals, could stay in the territory under their sovereignty or jurisdiction and to establish the applicable rules. The limitations placed on their decision basically related to respect for human rights as embodied in international law, their constitutions and domestic legislation.

6. That said, the Commission should also not lose sight of the realities of expulsion. In practice, and in most States, the expulsion of aliens who were legally in their territory was relatively rare and was normally dealt with in keeping with legal rules and procedures and human rights standards. Furthermore, when violations did occur, they were generally taken up by national courts, at least in countries governed by rule of law, and sometimes also by international courts, including regional courts and human rights institutions.

7. On the other hand, many States currently faced serious problems with illegal immigration. As a result, illegal immigrants were expelled frequently and in large numbers, and such expulsions were rarely supervised by the courts: the decision to expel an alien was generally taken by administrative bodies, and sometimes even by the police. The procedures intended to protect the rights of illegal immigrants were often cursory and perfunctory. He wondered whether those important and real differences between the expulsion of aliens who were legally present

[71] See footnote 19 above.