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Summary record of the 2943rd meeting

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international law. As such, that obligation must remain in the Convention as an obligation on its own merits and not be stated in the draft articles in favour of migrant workers. Consideration should also be given to the question whether the definition of collective expulsion as the expulsion of a “group of aliens”, as taken from the work of the European Commission on Human Rights, should or should not be further refined. What did the term “group of aliens” mean? Did it reflect a specific number or must it be considered that a group of aliens was one regarded or treated as such by the expelling State? Must it be considered that a State which expelled a large number of persons whose residence permits had expired was carrying out a collective expulsion (even though it applied due process of law and did not contravene the principle of non-discrimination)? The answer to those questions would determine whether the act in question came within the definition of collective expulsion or was an exception to the principle of the prohibition of collective expulsion.

78. The practice of States with regard to expulsion in time of war was mixed. The law of armed conflict did not prohibit the expulsion of aliens from the territory of a belligerent State and he was not in a position to support the Special Rapporteur’s view that the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV) implicitly prohibited such a practice. If it did, a provision to that effect would have been included in that text, as in the case of an occupying Power which proceeded to transfer its own civilian population to the territory it occupied. Nonetheless, such considerations should not prevent the Commission from deciding to prohibit collective expulsion, provided that the rule was accompanied by broader exceptions than those provided for in time of peace. Such exceptions should be applied only in the light of considerations of high national security and after all the other possible options had been exhausted. In conclusion, he was in favour of referring draft articles 3, 4 and 7 to the Drafting Committee. He would like draft articles 5 and 6 to be amended in accordance with the suggestions just made.

The meeting rose at 12.55 p.m.

2943rd MEETING

Thursday, 26 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA congratulated the Special Rapporteur on his highly erudite and instructive third report on the expulsion of aliens (A/CN.4/581), with its emphasis on thorough research and rigorous analysis. The general aim was twofold: first, to strike a balance between the interests of the expelling State and those of the expellees; and secondly, to identify balanced general principles resting on *lex lata*, or *lex ferenda* if necessary—a difficult and sensitive exercise in which the Special Rapporteur had succeeded brilliantly. He broadly endorsed the Special Rapporteur’s views concerning the method of work and the conceptual basis of the draft articles.

2. Draft article 3, paragraph 1, was well founded in international law and practice regarding the right of expulsion, and the content of paragraph 2 was convincingly explained in paragraph 22 of the report. While the wording of that draft article should certainly underscore the need to respect the fundamental principles of international law, the formulation “in accordance with international law” might be sufficient. There was no need to go any further and place particular emphasis on such axiomatic legal principles as good faith and compliance with international obligations.

3. *Prima facie* there was reason to doubt the wisdom of referring to the non-expulsion by a State of its own nationals in the context of the expulsion of aliens, since the terminology could seem vague and contradictory, as was illustrated by the fact that in draft article 4, paragraph 1, the Special Rapporteur had decided to use the terms “*ressortissants*” and “nationals” as synonyms, yet in paragraph 43 of the report he stated that the principle of non-expulsion of nationals should be understood in the broad sense, as applying to “*ressortissants*” of a State. Hence, it would seem that the notion of “*ressortissant*” was wider in scope than that of “national”, which made it all the more vital to determine which categories of persons were covered. The clear and logical explanation set out in paragraph 43 should, however, remove any doubts as to the pertinence of the draft article. In any event, the fact remained that the notion of “alien” could be understood only by reference and in opposition to that of “national”, and that the question of the equal or unequal treatment of aliens as compared with nationals and its implications for expulsion were an underlying element of the Special Rapporteur’s conceptual approach.

4. The uncertainty therefore related to whether draft article 4, paragraph 1, should refer to “its own nationals” or “its own *ressortissants*”. If the term “national” in the strict sense were to be retained, that would leave unresolved the question of the status of a person who had been stripped of his or her nationality but who had not acquired another nationality and who was being expelled from the territory of his or her former national State. On the other hand, if the term “*ressortissant*” were to be retained, that would make it possible to cast a wider net

and to take account not only of nationals *stricto sensu*, but also of persons who had been stripped of their nationality and those with a status similar to that of nationals either under the law of the host State, or by virtue of the ties they had with the latter, a point discussed in paragraph 43 of the report.

5. In draft article 4, paragraph 2, while he could understand and accept the expression “exceptional reasons”, it might give rise to doubts as to the precise nature of the much-cited concepts of national security and public order, whether there might be any other grounds, and how to avoid or reduce the risk of abuses. It would be useful to provide some clarification of those questions in the commentary. Another important practical point was what would happen if the national State were, without due cause, to refuse the right of return.

6. Turning to draft article 5 (Non-expulsion of refugees), he noted that, in paragraph 59 of the report, the Special Rapporteur had drawn a distinction between “refugees” and “territorial asylees” and concluded that the rules applicable to the expulsion of the two categories of persons should be analysed separately. He asked when that would be done. In paragraph 65, a distinction was made between “expulsion” and “repatriation”, but when there was constraint and repatriation was no longer voluntary but forced, the dividing line between the two notions surely became blurred. On the other hand, the differentiation between “temporary protection” and “subsidiary protection” in paragraph 72 was interesting and useful.

7. With reference to draft article 5, paragraph 1, he agreed with the Special Rapporteur that it was not easy to define the exact content and meaning of the notions “endangerment of security” and “threat to or endangerment of public order”. Although the Special Rapporteur had put forward some good reasons why terrorism could possibly be included by way of progressive development, in order to lessen the difficulties that its inclusion would entail, it might be advisable to say no more than “for reasons of national security and/or public order, including terrorism”. The phrase “against him or her” in paragraph 2 of the same article might be sufficient, but if more explicit wording were desired, at the risk of being repetitious, the expression “against such person” could be used.

8. As for draft article 6, in paragraph 86 of the report the Special Rapporteur raised some legitimate points regarding undocumented stateless persons. If, in draft article 6, paragraph 1, the term “lawfully” were retained, that would mean that the Commission was abiding by the letter and spirit of article 31 of the 1954 Convention relating to the Status of Stateless Persons, but that did nothing to address the position of the undocumented stateless person, or answer the question of what legal regime was applicable in that case. An answer would nevertheless have to be found. The crux of the matter was whether it would be advisable to treat undocumented stateless persons differently from refugees. *Prima facie* he would be inclined to delete the word “lawfully” and to leave the possibility open, even though that did not by any means solve all the problems. His comments with respect to the reference to terrorism in draft article 5 also applied to draft article 6.

9. The attempt in paragraph 2 of the same article to engage in progressive development by giving the expelling State a new role seemed to meet a logical and practical need springing from a concern for efficiency, and his initial feeling was that it should be accepted. The moot point concerning the stateless person’s consent was whether or to what extent a host State chosen without the agreement of that person would offer sufficient guarantees of his or her security and peace of mind. For that reason, he would be in favour of retaining the phrase “in agreement with the person” and deleting the square brackets so as to retain the full text.

10. A question of principle had been raised, namely whether draft articles 5 and 6 should be retained, and the view had been expressed that it would be unwise to tamper with the relevant provisions of the 1951 Convention relating to the Status of Refugees or of the 1954 Convention relating to the Status of Stateless Persons, but that, if that had to be done, their integrity should be preserved at all costs. Personally, he did not consider that the contents of the two paragraphs of article 6 as they stood greatly disturbed that integrity, inasmuch as the few changes proposed seemed, on the contrary, to supplement those Conventions in a useful manner. It was hard to see how a general convention on the expulsion of aliens could ignore refugees and stateless persons. All things considered, he would prefer to maintain the current versions of draft articles 5 and 6, subject to a few drafting improvements, but if that could not be done, his preference would be to replicate the content of the relevant provisions of the above-mentioned conventions. Failing that, it would be better to simply refer to the relevant articles of those Conventions. He would, however, support any compromise solution reached by the Commission.

11. The substance of draft article 7 on the prohibition of collective expulsion did not raise any particular difficulties as far as the scope *ratione personae* was concerned. Moreover, it was unnecessary to devote a separate article to migrant workers because the constituent elements of the regime laid out in article 22, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families were to be found in draft article 7, paragraph 1. The expression “reasonable and objective examination” was acceptable, but could possibly be replaced by the words “thorough and objective examination”. As for paragraph 3 of that draft article, the rationale set out in paragraph 134 of the report appeared to be sound, especially as international humanitarian law was silent on the subject. The sticking point in that context was not the legitimacy of the exception to which reference was made, but the way it was worded, especially in respect of the reason for expulsion. That part of paragraph 3 should therefore be reviewed.

12. In concluding, he supported the referral of draft articles 3 to 7 to the Drafting Committee.

13. Mr. NIEHAUS congratulated the Special Rapporteur on his third report on the expulsion of aliens. It would make a very valuable contribution to the Commission’s work on a most important subject which would help to bolster human rights and international humanitarian law in a field where serious violations of human dignity were not a thing of the past, but were still occurring.

14. While the sovereign right of a State to expel an alien from its territory constituted an unquestionable principle of contemporary international law, it had to be exercised in compliance with the general principles of international law, treaty obligations and customary law, and the State must act reasonably and in good faith. Specifically, expulsion must respect the relevant legal instruments, especially in the fields of human rights, humanitarian law, international refugee law and migration law.

15. Article 3, paragraph 1, was perfectly clear in that respect. Paragraph 2 also performed its function, although its wording could be improved and expanded to make it more emphatic. The provision that he found most problematic, however, was draft article 4, although, unlike some members, he considered that the draft articles should deal with the expulsion by a State of its own nationals, a fundamental, absolute and unconditional principle that needed to be highlighted. That principle was set forth in the first paragraph of the article, the force of which was, however, weakened by the contents of the second paragraph, which allowed for exceptions, and by the provisions of the third paragraph. The fact that so many international instruments recognized the right of every person not to be expelled from the State of which he or she was a national confirmed that it was firmly enshrined in contemporary international law.

16. The sole possible exceptions, which had to be based on court decisions, were extradition, accepted by certain countries and, rarer still, the penalty of exile, when freely chosen by the person concerned as an alternative to deprivation of liberty. While such exceptions were disagreeable in that they implied a certain disregard for the fundamental rights of the individual, nonetheless their recognition in the internal law of some States made it necessary to acknowledge their existence, but to consider them as the only admissible exceptions. To that end, he suggested that the second and third paragraphs of draft article 4 should be amended to simply mention those exceptions and to include the vital stipulation that all such cases must be subject to the appropriate judicial procedure.

17. In view of the difficulty of expelling nationals, some States stripped citizens of their nationality in order to rid themselves of persons whose presence was inconvenient or undesirable for political or economic reasons. It was a relatively little known fact that in Latin America during the Second World War, not only had resident German civilians been conscripted or expelled, but in some Central American countries second-generation nationals of German origin had been detained or expelled for the sole purpose of divesting them of their assets. Those persons had been sent to concentration camps in the United States and their assets expropriated or confiscated. They had been stripped of their nationality not by the courts, but by mere executive decree, and German nationality imposed on them in order to declare them enemy belligerents and thereby provide a pretext for robbing them of their property. The lawsuits to settle their claims had dragged on for decades and the amounts of compensation—when any was awarded—had been ridiculously small in proportion to the enormous economic and moral damage inflicted. Yet such blatant human rights violations on the other side of the Atlantic had gone unnoticed. Accordingly, he

supported Mr. Dugard's suggestion to include denationalization in peacetime and time of war in the scope of the topic, since such flagrant violations of human rights and the international legal order could easily take place again.

18. The question of dual nationality and the problems it could cause should also be studied and dealt with in a separate draft article.

19. Draft articles 5 and 6 were similar and, as Mr. Pellet had pointed out, raised the same substantive issues. While he had no objection to them, he was concerned by the fact that they repeated the provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. That being so, he wondered what was the purpose of those two articles and whether it would not be better simply to refer to the relevant articles of the two Conventions.

20. He concurred with the views of several other members with regard to the incorporation of an express mention of terrorism; there was not yet any clear, internationally accepted definition of the term, which had a number of—sometimes contradictory—meanings. Like Mr. Vargas Carreño, he was of the opinion that the terms “national security” and “public order” covered that pernicious problem quite adequately.

21. Draft article 7 on the prohibition of collective expulsion was logical and coherent. The second sentence of paragraph 1 was particularly apt and necessary.

22. Lastly, having regard to the comments made, he was in favour of the draft articles being referred to the Drafting Committee.

23. Ms. XUE said that the third report on the expulsion of aliens rested on well-documented research and provided a historical review of the development of the law together with a conspectus of current international practice and contemporary international law. The Special Rapporteur's balanced, prudent, thought-provoking and far-sighted approach constituted an excellent contribution to the Commission's work. She endorsed the general thrust of the report and agreed that in principle draft articles 3 to 7 could be referred to the Drafting Committee.

24. The Special Rapporteur offered a convincing analysis of States' right of expulsion in paragraphs 15 to 22 of the report, clearly highlighting the two aspects of the principle of sovereignty in relation to the expulsion of aliens. The arguments concerning the inherent nature of the principle were strong and convincing, but those in favour of the progressive development and codification of international law in that field would have been far more cogent if contemporary developments in the international legal order—particularly in regard to human rights protection, development, and traditional and non-traditional threats to peace and security—had been emphasized in the section on the factual background. In other words, it was not only the legal principle of sovereignty as such that intrinsically determined that the right of expulsion was not an absolute right; the current legal order, which had evolved greatly since the end of the Second World War, also imposed certain limits on that right. For that reason, many

of the cases cited in the report were no longer relevant, or no longer regarded as acceptable or applicable in contemporary international law. Draft article 3 would reflect those changes more accurately if the two paragraphs were merged, so that it became clear that the contents of paragraph 2 set out the conditions for the exercise of the right of expulsion proclaimed in paragraph 1.

25. As for draft article 4, she agreed in principle that a State should not expel its nationals. The inclusion of such a principle in the draft articles might, however, open up a whole range of complicated issues relating to nationality. The examples given in the report showed that the Special Rapporteur's conception of expulsion was rather broad. If the involuntary removal of nationals from a State's territory, by means of measures such as surrender, extradition or special political arrangement, was deemed to be an exception to the principle, the consent of the receiving State might not be the only condition that had to be met. Moreover, the right of the nationals expelled in such cases to return to their home country did not necessarily depend on the request of the receiving State, as provided in draft article 4, paragraph 3.

26. As Mr. Gaja had said, expulsion was a harsh measure for a State to impose on an individual. A State should not and, in fact, could not, expel a person unless another State was willing to accept him or her. During and even after the Cold War, the removal of nationals in extraordinary circumstances had often complicated relations between States and had had a significant political impact on the security and public order of the States concerned. In many cases, however, the person concerned might choose to leave his or her home country, as former Liberian President Charles Taylor had done. She therefore welcomed the Special Rapporteur's acknowledgement of political reality and the fact that he had not made the non-expulsion by a State of its nationals a rigid rule. Nevertheless, the draft article, as it stood, required closer examination.

27. Turning to draft articles 5 and 6, she said that, given that draft article 1 explicitly stated that refugees and stateless persons fell within the definition of "aliens" and were thus included within the scope of the draft articles, it would be desirable to incorporate in them draft articles specifically dealing with the non-expulsion of refugees and stateless persons. As the draft articles were meant to be an overarching legal document encompassing various types of acts of expulsion of aliens, choosing to omit refugees and stateless persons would not further the protection of those people. A general reference to existing legal regimes on refugees and stateless persons under the 1951 and 1954 Conventions would address the concerns raised in that respect during the Commission's deliberations.

28. In her view, it was unnecessary to include a reference in the draft articles to terrorism as a separate ground for expelling refugees or stateless persons, as the subject was sufficiently covered by the reference to national security or public order provisions. Current developments in international law as well as international action to combat terrorism had enhanced international cooperation between States in many fields, particularly that of judicial

assistance, but had not led to terrorism being placed in a separate category from threats to national security among the conditions for expelling aliens, particularly refugees and stateless persons.

29. On draft article 6, she supported the proposal to delete the word "lawfully" from paragraph 1, because the main focus of the draft articles was on expulsion, and the Special Rapporteur's argument in favour of its deletion was quite convincing. Article 31 of the 1954 Convention relating to the Status of Stateless Persons should apply to such people even if they were illegally present in the receiving State.

30. Lastly, on draft article 7, she supported the Special Rapporteur's position that collective expulsion should be prohibited under international law. In his report, he had listed a series of historical instances of collective expulsion but, as a result of more recent developments, it could certainly be held that any collective expulsion of aliens on grounds of race, religion, nationality or political opinion was prohibited under international law. Indeed, the criterion should relate to qualitative rather than quantitative considerations. One exception, however, concerned cases where the national State might request the receiving State to return a group of its nationals who had illegally entered the country, with a view to preventing any recurrence of such illegal action. Expulsions in such circumstances, even if regarded as collective, should not be characterized as such within the meaning of the draft articles.

31. She concurred with those members who believed that migrant workers were a separate issue deserving special treatment in the draft articles in the light of recent developments with regard to their protection.

32. Whether, in times of armed conflict, aliens should be subject to collective expulsion very much depended on the extent of the threat they posed to the security of the State of residence. A hostile attitude, or even hostile activity, might not in itself constitute sufficient grounds for their expulsion. Given the changes in the law on the use of force and the application of humanitarian law in time of armed conflict, the conditions for such expulsions should be spelled out if a provision on that subject were to be retained in draft article 7. Action to protect aliens from a hostile social environment in their country of residence in time of armed conflict should perhaps not be regarded as collective expulsion, but instead termed "temporary removal", a term which carried a positive rather than a negative connotation. Paragraph 3 should in principle be deleted, but if most members preferred to retain it, its subject matter merited separate treatment.

33. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his rigorous legal analysis of the topic and thorough research work. In paragraph 7 of the report, the Special Rapporteur affirmed that the right to expel was a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory, that it was a right inherent in the sovereignty of the State, and that it was not an absolute right, as it had to be exercised within the limits established by international law. Instead of speaking of a "right" to expel, however, he himself would prefer to refer to the "competence" of a State to expel an alien from its territory.

34. State sovereignty was the foundation for a whole set of competences that were intrinsic to the exercise of its functions. Such competences were chiefly territorial, relating to activities carried out within its boundaries, and personal, relating to persons residing or staying in its territory and to its nationals, even when they were outside its territory. The State's competences were exercised fully, exclusively and independently but were limited or conditioned by international law. Obviously, the State had competences with respect to the entry into and residence of aliens in its territory, including the competence to expel an alien from its territory, one which was discretionary but not unlimited. The limits derived from the obligations imposed on the State by international law, especially international human rights law, international humanitarian law, and international law regulating refugees and migration.

35. In the context of inter-State relations, it was perhaps appropriate to speak of a right of a State *vis-à-vis* another State, but in the context of the topic of expulsion of aliens, the antithesis was that between the State and aliens as individuals enjoying the rights accorded them under international law. Consequently, it was perhaps inappropriate to speak of the *right* of a State to expel *vis-à-vis* the rights of such individuals; instead, one should speak of the *competence* of a State to expel, a competence which was nevertheless limited by international law. Accordingly, he suggested that the title of draft article 3 should be "Competence to expel" and that paragraphs 2 and 3 should be reworded in order to express more clearly the general principle that a State had the competence to expel an alien from its territory subject to the obligations imposed by international law, particularly international human rights law.

36. The article should retain the references to the obligation to act in good faith and in compliance with international obligations, in addition to incorporating a direct reference to human rights. The latter was important, since human rights pertained to persons as human beings, irrespective of their status as nationals or aliens *vis-à-vis* a given State, and some human rights were relevant for purposes of assessing the lawfulness and limits of an expulsion. Examples were the likelihood that a person would be tortured or subjected to other violations of human rights in the country to which he or she was being expelled; where the expulsion violated the principle of non-discrimination on grounds of colour, race, sex or religion; or where it violated the principle of legality in respect of the substantive and procedural requirements for lawful expulsion, as set forth, *inter alia*, in article 13 of the International Covenant on Civil and Political Rights. Other relevant rights were family rights, the right of family reunification and the property rights of aliens.

37. Although the Special Rapporteur rightly affirmed that the State's competence to expel was restricted by international law, he himself agreed with other members that it was not useful to apply the distinction between primary and secondary rules. However, the approach of listing the principles relevant for purposes of determining the limits regarding the categories of persons to be expelled, starting with the principle of non-expulsion of nationals, was, in his view, a useful one. In view of

the explicit prohibition on expulsion of nationals in the American Convention on Human Rights: "Pact of San José, Costa Rica", Protocol No. 4 to the European Convention on Human Rights, the Arab Charter on Human Rights and the implicit prohibition in the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, he fully endorsed draft article 4, paragraph 1. As Mr. Caffisch had suggested, however, its title could be improved through the replacement of the expression "non-expulsion" by "prohibition of expulsion".

38. The recent example given in the report of an exception to the principle whereby a State was prohibited from expelling a national was actually an instance of surrender of a person to a court. The distinction between extradition, surrender of a person to a court (both of which could include nationals), and expulsion must be kept in mind.

39. Draft article 4, paragraph 2, should be deleted, since expelling nationals was categorically prohibited. Paragraph 3 should be relocated to the commentary in order to make it clear that while expulsion of nationals was prohibited, if it occurred the State had the obligation to allow the national to return at any time at the request of the receiving State. He supported the suggestion that the Commission should deal with dual and multiple nationality, in the context of expulsion, even though it would seem at first sight that the prohibition of expulsion also applied to such cases. It would also be useful to look at the phenomenon of deprivation of nationality and subsequent expulsion in order to prevent abuses such as those that had occurred in the past, as Mr. Dugard and Mr. Niehaus had urged. It should be kept in mind, however, that the legislation of many countries permitted the cancellation or revocation of naturalization papers granted to an alien, *inter alia*, if he or she obtained them fraudulently, also providing for his or her expulsion.

40. He supported the Special Rapporteur's proposal to include draft article 5 on non-expulsion of refugees, which was consistent with the principle of *non-refoulement*. However, account must of course be taken of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. He also agreed on the need to include a specific article on non-expulsion of stateless persons. The wording of draft articles 5 and 6 could be improved, however.

41. On the Special Rapporteur's idea of including a reference to terrorism in paragraph 1 of those two provisions, it should be noted that the paragraph stated the grounds for lawful or non-arbitrary expulsion, namely national security or public order. The idea was to avoid listing all the grave offences justifying expulsion that a refugee or stateless person might be alleged to have committed. Were terrorism to be included, it should not be linked to the concepts of national security and public order, and it would also be necessary to include the list of the most serious crimes of concern to the international community as a whole under the Rome Statute of the International Criminal Court, namely genocide, crimes against humanity and war crimes. That, of course, was not what was intended.

42. Another even better reason for not including terrorism in the draft articles was that if an alien present in the territory of a State, irrespective of whether he or she was a refugee or stateless person, was suspected of having committed an act of terrorism or genocide, the State in question must not use those allegations as grounds for expelling the person, but must instead bring the person before a court or extradite him or her. Expulsion in such cases would reduce the likelihood of the person concerned being brought to justice and would simply pass the problem on to the receiving State. The obligation set out in the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly in its resolution 51/210 of 17 December 1996 should be understood to mean that States must ensure that applicants for asylum had neither committed nor been accomplices to acts of terrorism and that they must not mistakenly or inadvertently grant refugee status to persons who were not in fact refugees but simply criminals who sought to take advantage of such status. States must obviously also ensure that persons who had already been granted refugee status were brought to justice if they committed or assisted in terrorist acts or other grave offences such as those he had mentioned.

43. It was for those reasons that no reference to terrorism should be included in the draft articles, rather than because negotiations regarding a general convention against terrorism incorporating the definition of terrorism to be found in the 1999 International Convention for the Suppression of the Financing of Terrorism had not yet been concluded.

44. On draft article 7, he endorsed the categorical formulation prohibiting the collective expulsion of aliens both in peacetime and in time of war and emphasizing the need for examination of the particular case of the individual alien. Paragraph 3 should be deleted, however, as it could give rise to abuse. He also favoured the inclusion of an article specifically prohibiting the expulsion of migrant workers and their families, as suggested by Ms. Escarameia.

45. Lastly, he was in favour of the referral of the draft articles to the Drafting Committee.

46. Ms. JACOBSSON said she wished to add her voice to those of members who had praised the Special Rapporteur's well-researched and balanced report, which offered the Commission a range of possible choices both on matters of principle and on more detailed substantive matters.

47. In paragraph 4 of the report, the Special Rapporteur contrasted the principle of sovereignty and the fundamental principles underpinning the legal order and basic human rights. The implication appeared to be that there was a dichotomy between sovereignty and human rights, a view she did not share. Others had expressed similar concerns. It was true that the implementation of human rights had formerly been seen as primarily an internal affair, but that view no longer prevailed—and rightly so.

48. Mr. Vasciannie had questioned the underlying assumption in the report that the right of expulsion flowed from the concept of sovereignty, instead citing the

suggestion by Guy Goodwin-Gill that the right of expulsion stemmed from customary law and that accordingly it was subject to modification, development and restraints in the same manner as any other part of customary law.²⁹³ Sovereignty and the duty of States to protect human rights were now seen as two sides of the same coin. Embodied in the privilege of being a sovereign State was the duty of that State to respect human rights and protect its people. Hence, the obligation of States to respect and ensure respect for human rights could be seen as an intrinsic element of the privilege of sovereignty. Irrespective of whether one shared Mr. Vasciannie's point of view or that of the Special Rapporteur, the assumption that sovereignty implied a duty of the State to respect and protect human rights should be made unambiguously clear in the wording of the draft articles.

49. Turning to draft article 3 on the right of expulsion, she endorsed its basic underlying assumption that a State had the right to expel an alien and that this right was not unlimited. Like others, however, she felt that the wording did not properly reflect that postulation. The Special Rapporteur stated in his report that the traditional view that the right of expulsion was an absolute right had been completely abandoned and that for almost two centuries that freedom had been subject to limits. He demonstrated his point through evidence of extensive State practice and treaty law, and other members of the Commission had given more modern examples. While she welcomed that clear position, it was for that very reason that she thought draft article 3 should be reworded and that paragraph 1 should not stand alone but be combined with a clear stipulation that the right of expulsion was indeed subject to limitations. It was not enough to refer to "fundamental principles of international law" in a separate paragraph. The word "however" should be deleted and the limitations should be seen as part of the concept of the right to expel aliens, not separate from it. Perhaps that was what Mr. Vasciannie had meant when he had said that the right of expulsion was a part of customary law, rather than an outflow of the principle of sovereignty.

50. Did article 3, paragraph 2, state the obvious, as Mr. Pellet claimed? The answer was certainly in the affirmative. One could not foresee any situation in which a State had the right to act contrary to the principles of international law, good faith or its international obligations. However, that must not lead to the conclusion that there was no need for a reference to the parameters of international law. The problem was that the draft article did not go far enough in stating the obvious, since it entailed the slight risk that an *a contrario* conclusion would be drawn. She therefore supported Mr. McRae's suggestion that a reference to international law should be included in order to show that the right of expulsion was not absolute—although that would still not make it entirely clear that what was meant was restrictions in the context of human rights, as Mr. Nolte had pointed out. The two paragraphs of draft article 3 should be merged into one, to read: "A State has the right to expel an alien from its territory. Such a right of expulsion is not unlimited. It must be carried out in compliance with international law, in particular, human rights obligations." As procedures

²⁹³ Goodwin-Gill, *op. cit.* (see footnote 291 above).

and procedural guarantees were to be discussed in future reports, she would simply note that those in the International Covenant on Civil and Political Rights were of particular interest, as Mr. Vasciannie had mentioned.

51. On draft article 4 on non-expulsion by a State of its nationals, she did not think the reference in paragraph 24 of the report to Hart's distinction between primary and secondary rules²⁹⁴ made the text confusing. She saw it rather as a tool to help members of the Commission understand the thinking behind the Special Rapporteur's desire to make a distinction between substantive and procedural rules, and as a way of justifying addressing both those facets in the report. The Commission did not have to subscribe to Hart's thinking: the ideas expressed in the report neither commenced nor ended with his structural analysis.

52. Draft article 4 was a major source of concern to her, as it was to many other members. The prohibition against a State's expelling its own nationals was, and should be, absolute. State practice was in fact more reliable than the report tended to indicate. Paragraph 2 of the draft article was too imprecise. Not only did it indicate that there were exceptions to the rule, but it also attempted to cover cases of extradition, rather than expulsion. She was in favour of either improving the drafting or else deleting the article altogether.

53. On draft articles 5 and 6, while she was not opposed to their inclusion, she agreed with many other members that they needed to be more carefully worded. If they were retained, special attention should be given to dual nationality, migrant workers and denationalization. Terrorism, on the other hand, should not be included, not because of the lack of a definition of terrorism, but because of the great risk that States might bypass other legal requirements, particularly those connected with the obligation to legislate and institute juridical procedures relating to suspected, tried or convicted terrorists. The real test of whether a State was governed by the rule of law was that it treated its criminals, including terrorists and war criminals, in accordance with accepted legal standards.

54. Although terrorism could rightly be seen as being covered by grounds of national security or public order, some members had called for it to be listed and treated separately. She failed to see what would be gained thereby. It was indeed a heinous crime, as had been recognized by the international community. However, States had adopted a number of conventions on terrorism, most of which imposed clear obligations on States to legislate and either prosecute or extradite individuals who had committed such crimes. That body of law should be strengthened, not undermined.

55. In grey areas, for example, where there was not enough evidence to convict a suspected terrorist for planning a crime of terrorism, the State could expel an alien by reference to national security or public order, but the starting point was the legal procedure applied in the individual case. Including terrorism might, as Mr. Perera had said, create more problems than it solved. Like Mr. Saboia, she would like to see a clear reference to the principle of *non-refoulement*.

²⁹⁴ Hart, *op. cit.* (see footnote 284 above).

56. She would defer commenting on draft article 6 for the present. In discussing draft article 7, the Special Rapporteur made a distinction between situations of armed conflict and other situations. While she agreed with others that collective expulsion was prohibited in peacetime, the situation in time of armed conflict was less clear. The Special Rapporteur was right to claim that despite the lack of clear guidance in international humanitarian law, which had not developed in accordance with modern standards, citizens of an enemy State enjoyed basic human rights protection in times of armed conflict. If international humanitarian law was silent on the matter, there was room for provisions aimed at preventing the abuse of any right there might be of collective expulsion. In an attempt to broaden the protection under international humanitarian law, the Special Rapporteur had placed conditions on the right of expulsion in armed conflict, which some members of the Commission had claimed did not go far enough. The situation in armed conflict needed more thorough discussion if an acceptable and enduring end product was to be achieved: the problem was mentioned nowhere in the study of customary law by the ICRC.²⁹⁵

57. In conclusion, she said that draft articles 3, 4 and 7 could be referred to the Drafting Committee, whereas draft articles 5 and 6 needed more attention.

58. Mr. PELLET said that Mr. Vasciannie's position was not necessarily incompatible with an attempt to identify the basis for the competence to expel. It was certainly rooted in customary rules, but that did not preclude analysing why a State had the right to expel, and within what limits. That said, after listening to Ms. Jacobsson and others, he remained of the view that the Special Rapporteur's attempt to draw a distinction between a right of expulsion that was based on sovereignty and the limits on that right, anchored in the ideology of human rights, was not only wrong but even dangerous. The PCIJ, in the *SS "Wimbledon"* case, had said in essence that in protecting human rights, States were not limiting their sovereignty but fulfilling obligations inherent in that sovereignty. The idea that its sovereignty put a State above the law was indefensible. Consequently, he was surprised that some members of the Commission attached so much importance to including a reference to international law in draft article 3, since it was impossible to envisage a State being permitted to exercise a right without taking into account international law. All that was necessary—indeed, indispensable—was to make it clear that the limits to the right of expulsion were clearly indicated in subsequent articles of the draft.

59. Mr. DUGARD reminded members that the distinction between primary and secondary rules traditionally observed by the Commission had been developed by Mr. Roberto Ago, its second Special Rapporteur on the topic of State responsibility.²⁹⁶ The issue had also come up in the context of the topic of diplomatic protection. Interestingly enough, Mr. Ago had devised his scheme without any reference to Herbert Hart's writings, yet some

²⁹⁵ Henckaerts and Doswald-Beck, *op. cit.* (see footnote 283 above).

²⁹⁶ See *Yearbook ... 1970*, vol. II, document A/CN.4/233, p. 179, para. 11, for the proposal of Special Rapporteur Ago, revisited by the Commission in *Yearbook ... 1973*, vol. II, document A/9010/Rev.1, chap. II, pp. 169–170, para. 40.

members were now attributing the distinction solely to Mr. Hart. That was incorrect from a historical standpoint.

60. The CHAIRPERSON, speaking as a member of the Commission, said he could confirm those remarks, having long ago attended the first lecture given by Herbert Hart upon his assumption of the chair of jurisprudence at Oxford University, in the course of which he had expounded his theory of primary and secondary rules by drawing an analogy with a cricket match.

61. In the report before the Commission, the Special Rapporteur did a good job of providing the necessary background material, but while the foundations were good, there were problems with the superstructure—the draft articles themselves. The first was the major inconsistency between draft article 3 and draft article 7, the latter being much more liberal, although both articles actually dealt with the same subject matter, as collective expulsion was nevertheless expulsion. However, the proviso in draft article 7, paragraph 1, that collective expulsion could be carried out only “on the basis of a reasonable and objective examination of the particular case of each individual alien of the group” posed a problem: one could imagine people forming clubs in order to enjoy the benefits of collective expulsion, because a higher level of legal protection was afforded under draft article 7 than under draft article 3.

62. He very much agreed with Mr. Pellet that the historical background to the subject did not square with the fashionable perspectives now being advanced. In the nineteenth century, the question of expulsion of aliens had been part of the larger problem of the presence of aliens and the incorporation of their interests and economic activities into the life of sovereign States. The human rights aspect of expulsion was important, but there were two other important aspects: the economic control exercised by a State within its territory, and the question of security, obviously including the problem of terrorism. The category of expulsion of aliens was part and parcel of the old problem of the international minimum standard for the treatment of aliens, including conditions for the presence of aliens in State territory, their subjection to taxation regimes and the like, a part of the law that ran in parallel to norms relating to human rights.

63. The essence of the subject, however, was the control that a State had over its territory. Broadly speaking, it was a question of public order, and the wording of draft articles 5 and 6 acknowledged as much. The question of sovereignty and control had several facets. It connoted not only a power to control but various duties to control. There was no polarity between human rights concerns and the question of control. The report seemed to miss the point that control often involved positive elements, even from a human rights perspective. Article 1 of the European Convention on Human Rights read: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Many other similarly important duties under customary law could be listed, such as the duty to control the activities of armed bands, which had been a major issue in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*

case. The topic involved the protection of human rights in general and the security of foreign nationals and their property on the territory of a State, but it was the individual’s nationality and presence in the territory that were the dominant issues.

64. The question of expulsion could be approached in two ways: under draft article 3 through the formulation of a right to expel and a reference to the legal standards governing that right; and under draft article 7 subject to the requirements of a monitoring procedure for each individual concerned. Those two approaches were obviously inconsistent, and it was to be hoped that in the Drafting Committee the Special Rapporteur could make the choice between them clearer. He agreed with Mr. Vasciannie that customary law should provide the basis for determining which was the appropriate standard. The basis of the legal standards was the control of State territory and the power and the duty to maintain public order and protect national security. Incidentally, national security was as much a matter of human rights as of any other domain: there was no polarity between human rights and other legal values. Those premises were not inimical to the rights of individuals or groups, and provided the most appropriate basis for approaching some of the problems raised by the topic.

65. Draft article 4 was being characterized as posing a problem of scope, but he viewed things slightly differently. In the first place, the Special Rapporteur’s assertion in paragraph 33 of the report that nationality was a matter that fell within the competence of the State was incorrect. The confusion arose because individual States had the power to remove and confer nationality, but their decision to do so came within the framework of public international law. A useful analogy had been drawn in the *Nottebohm* case: only a State could create its own territorial sea, but it could not do so except within the framework of public international law. The same applied to the baselines of the territorial sea created by Norway in the *Fisheries* case. The problem of dual and multiple nationalities would also have to be dealt with somehow, possibly in the commentary.

66. Second, the non-expulsion of nationals was not so much an independent rule as a lack of competence of the State. Third, cases of negotiated transfers, such as that of Charles Taylor, were not really relevant. As the Special Rapporteur recognized in paragraph 55 of the report, a State could not expel its nationals without the express consent of a receiving State.

67. He was not sure what should be done with draft article 4. It could perhaps be deleted and the issues it raised mentioned in the commentary to draft article 3. The problem with draft article 4 was that a provision couched in the form of a negative exhortation often created a normative possibility even when that was not the intention. Persons faced with the exhortation “do not dump rubbish here” could be relied upon to dump rubbish somewhere else.

68. With regard to draft article 5, he endorsed Mr. Pellet’s comment concerning the risks of incorporating the language of existing multilateral standard-setting treaties. Some members were in favour of deleting the draft article. However, his own preference would be to include a

“without prejudice” clause along the lines of draft article 5, together with an explicit indication that a person who failed to obtain refugee status retained a residual status as a person present within the territory of a State who was thus subject to expulsion in accordance with the normal principles of international law.

69. Turning to draft article 6, to which Mr. Pellet’s comment also applied, he said that the non-expulsion of stateless persons was analogous to that of nationals and consequently came under the competence of the State concerned. The status of stateless persons arose from their presence, lawful or otherwise, on the territory of the State; their presence afforded them some level of legal protection.

70. He was deeply sceptical about the concept of collective expulsion, taken up in draft article 7, except as a useful political shorthand to describe certain situations. The concept lacked precision, and the need for a special provision was not self-evident. It would be more logical to have a provision on discriminatory expulsion, but in principle that was covered by draft article 3.

71. He agreed with Mr. Gaja and other members that the proviso in draft article 3, paragraph 2, should form part of paragraph 1. He also agreed that the reference to “the fundamental principles of international law” was inappropriate. He suggested it should be replaced by a proviso to the effect that the exercise of the right must be compatible with the principles of general international law. It might perhaps still be useful to refer draft article 3 to the Drafting Committee so that the problems it posed could be thrashed out there. He had some doubts, however, concerning draft articles 5 and 6, which seemed to be shared by other members of the Commission.

72. On the whole, he was reluctant to refer the draft articles to the Drafting Committee for a number of reasons. First, there were too few provisions dealing directly with the expulsion of aliens: draft articles 4, 5 and 6 dealt with issues on the boundaries of the topic. Secondly, draft article 3 needed some refinement: not enough emphasis had been laid on the question of nationality. Thirdly, the relationship between draft articles 3 and 7 required clarification. It might also be appropriate to have an additional draft article on migrant workers; it seemed odd to deal with the matter under draft article 7. Lastly, it was important to include a provision along the lines of draft article 5 on the beneficiaries of treaties of friendship, commerce and navigation, which also covered the status and conditions of aliens.

73. Ms. JACOBSSON said that the Chairperson had been rather unjust in saying that members failed to see the topic in its historical perspective, namely as an offshoot of the question of the international minimum standard for the treatment of aliens. Most members saw that very clearly; however, given the fact that the historical background had been very thoroughly examined by the Special Rapporteur, they had preferred to focus on new developments.

74. As for Mr. Pellet’s comments, she had carefully avoided suggesting that the different approaches followed by the Special Rapporteur and Mr. Vasciannie were

contradictory. Instead, she had said that they approached the situation from different angles. Different approaches could lead to the same result, and were not necessarily incompatible.

Cooperation with other bodies (*continued*)*

[Agenda item 10]

STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

75. The CHAIRPERSON welcomed Mr. Herdocia Sacasa, Chairperson of the Inter-American Juridical Committee and a former member of the Commission, and invited him to address the Commission.

76. Mr. HERDOCIA SACASA (Chairperson of the Inter-American Juridical Committee) said that in 2006, the Inter-American Juridical Committee had held its centenary celebrations in Rio de Janeiro, Brazil, where its predecessor, the Permanent Commission of Jurisconsults of Rio de Janeiro, had first met in 1906. The centenary had provided an opportunity to assess the invaluable contribution of the Latin American and Caribbean region and the inter-American system to many aspects of international law, including the very concept of its codification. It had also provided the opportunity to highlight the role played by the Committee in the development of the Inter-American Peace System, and notably the American Treaty on Pacific Settlement (“Pact of Bogotá”), which ensured that conflicts were resolved promptly. The importance of that Treaty in dealing with and preventing conflicts among States in the Americas was not always sufficiently emphasized. When conflicts did break out, however, they were usually of an internal nature and served as a warning of need to strengthen democracy and the rule of law and as a reminder of the relevance of the Inter-American Democratic Charter.

77. Other achievements recalled during the centenary celebrations had included the Inter-American Juridical Committee’s contribution to the development of the principle of non-intervention under the 1933 Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States, originally promoted by José Gustavo Guerrero, a Central American citizen of world renown who had enjoyed the distinction of presiding over both the PCIJ and the ICJ. Also worthy of note had been the Committee’s role in establishing legal equality among States and the exclusion of the power of veto from all procedures in the inter-American system.

78. In 1947, the Inter-American Juridical Committee had drafted a declaration on the international rights and duties of man, which had later become the American Declaration on the Rights and Duties of Man, adopted at the Ninth International Conference of American States, held in Bogota in 1948,²⁹⁷ preceding by a few months the

* Resumed from the 2933rd meeting.

²⁹⁷ *International Conferences of American States, Second Supplement, 1942–1954*, Washington, D.C., Pan American Union, 1958, p. 262.

adoption of the Universal Declaration of Human Rights.²⁹⁸ From the outset, the Committee had been committed to promoting social rights, as was borne out by its drafting of the 1948 Inter-American Charter of Social Guarantees.²⁹⁹ That year, the Ninth International Conference of American States had requested the Committee to prepare a draft statute for an inter-American court in order to protect human rights. It was to become the cornerstone of human rights in the Americas, in the form of the American Convention on Human Rights: “Pact of San José, Costa Rica”.

79. The Inter-American Juridical Committee had made useful contributions on other important legal issues such as the right of asylum, diplomatic protection, the continental shelf, economic integration and exclusive economic zones. In March 1971, its Rapporteur on the law of the sea, Mr. Vargas Carreño, had proposed the idea of the patrimonial sea. That idea had influenced national legislation and the discussions that had taken place in the United Nations on the exclusive economic zone during the Third United Nations Conference on the Law of the Sea.

80. Equally laudable had been the Inter-American Juridical Committee’s contribution to representative democracy. It had declared that all States in the inter-American system were obliged to exercise effectively representative democracy in their systems and political organizations; further, it had declared the principle of non-intervention and the right of each State of the system to choose its political, economic and social system without any outside interference and to organize itself in the most appropriate manner, subject to the obligation to exercise effectively representative democracy.

81. The Inter-American Juridical Committee had also delivered a number of courageous opinions on various sensitive issues, such as the extraterritoriality of laws and limits to the exercise of jurisdiction, for instance with respect to the Helms-Burton Act,³⁰⁰ which might well be of relevance to the Commission’s new topic of extraterritorial jurisdiction. Its opinion in the case of Carlos Tünnermann Bernheim, Nicaragua’s Ambassador to the United States who had also been Permanent Representative to the OAS—had had implications regarding the headquarters agreements of international organizations and their regulations governing the dismissal of representatives. With regard to the *United States v. Alvarez-Machain* case, the Inter-American Juridical Committee had affirmed the violation of sovereignty and territorial integrity of one State and the duty of another to repatriate the person who had been abducted.

82. In its efforts to combat corruption, the Inter-American Juridical Committee had drawn extensively on the Commission’s work in the area of diplomatic protection, and in particular the basic principle that nationality must be acquired in a manner that did not contradict international law. At its sixty-sixth Regular Session in 2005, the Committee had issued an opinion proposing, by way of

progressive development, the need for a regulation to combat corruption. Pursuant to that opinion, in the event of a conflict of nationality, if the nationality of the requesting State was the dominant or predominant nationality, or the genuine and effective link, extradition should not be refused on the sole basis of nationality; when nationality was acquired or invoked fraudulently or unlawfully, extradition should not be refused solely on the basis of nationality. That clearly tied in with the topic of the obligation to extradite or prosecute, currently being considered by the Commission, and was reflected in many inter-American instruments, including the Inter-American Convention against Corruption.

83. Turning to the future work of the Inter-American Juridical Committee and the challenges that lay ahead, he stressed the importance of forging international law in a spirit of cooperation and responsibility and with a sense of humanity. Like the Commission, the Inter-American Juridical Committee considered that it need not confine itself to traditional topics, but could also deal with new issues arising under international law and the urgent concerns of the international community.

84. On the occasion of its centenary, the Inter-American Juridical Committee had reflected on the most significant developments in contemporary society. The first was the increasingly broader scope of international law, which now covered areas that had formerly fallen exclusively within the jurisdiction of States. As the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law could attest,³⁰¹ in the last 50 years the scope of international law had broadened to such an extent as to encompass virtually all areas of international affairs, ranging from trade to protection of the environment.

85. The second development was the demise of State monopolies, which opened the way for new subjects of international law and other emerging partners to take their place alongside the once-powerful State leviathan. The concept of security had also changed radically: the new threats posed were complex and transnational, calling for greater collective efforts and a legal framework of regional scope. That change was accompanied by an increasing interdependence of national legal systems and international law, which made it easier for subjects of international law to move from one system to another, and for individuals to come under the jurisdiction of international law, especially in the areas of human rights and community law.

86. The last development was the rise of a new body of law of universal application reflected in norms of *jus cogens* or *erga omnes* obligations and, above all, in regional and subregional regulations established to protect collective interests essential to the group of States concerned. A case in point was the inter-American regulations governing representative democracy and human rights that constituted a system of inter-American public order norms that the Commission would refer to as *erga omnes partes*.

²⁹⁸ General Assembly resolution 217 (III) of 10 December 1948.

²⁹⁹ *International Conferences of American States, Second Supplement, 1942–1954*, Washington D.C., Pan American Union, 1958, Ninth International Conference of American States, Final Act, p. 254.

³⁰⁰ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), Pub. L. No. 104-114 (1996).

³⁰¹ See the conclusions of the work of the Study Group on this topic in *Yearbook ... 2006*, vol. II (Part Two), para. 251. The full report of the Study Group (A/CN.4/L.682 [and Corr. 1] and Add. 1) is available on the Commission’s website (see footnote 28 above).

87. Such norms did not only give rise to collective obligations, but also entailed a joint and several responsibility to respond to grave violations of those obligations. Legal solidarity was an inter-American principle that went beyond mere cooperation between States and signified the capacity of States that were not directly affected by violations to defend the very values, principles and regulations that had led to the establishment of the OAS. Such solidarity was in keeping with the spirit of the Commission's own draft articles on responsibility of States for internationally wrongful acts.³⁰²

88. All those developments were taking place in a world undergoing a transition which ushered in a new era. Hence the Inter-American Juridical Committee's insistence on the need to secure those vital human values that would avert the risk of the world being dragged into a century of dehumanization. International law was at the heart of efforts towards the consolidation of a *jus gentium* with new social dimensions. In a recent study addressing the legal aspects of the interdependence of democracy, comprehensive development and the fight against poverty, the Committee had noted the importance of upholding the human rights underpinning democracy and development, implementation of which, despite their being enshrined in relevant international and inter-American instruments, was weak.

89. The purpose of the Inter-American Juridical Committee's reflection on those significant developments was to draw up an agenda for the future consisting of topics of direct relevance to the public. They included the consumer protection, access to public information, the right to an identity, the protection of migrant workers and their families and combating all contemporary forms of discrimination. The Committee also intended to enhance its role as an independent consultative body and to make greater use of its specialist skills in selecting more far-reaching and challenging issues for inclusion on its agenda. In that regard, he paid tribute to the valuable role played by the Commission's own Planning Group in providing guidance to organizations such as his own in identifying areas ripe for codification or progressive development. The Inter-American Juridical Committee could break new ground by responding boldly and imaginatively to the challenges facing it. Among the new topical issues on its agenda were legal cooperation with Haiti and strengthening of jurisdictional mechanisms available in the OAS. The inclusion of the latter was perhaps prompted by the need to consider the reasons for the low rate of ratification of treaties such as the American Treaty on Pacific Settlement ("Pact of Bogotá") and the large number of reservations regarding the compulsory jurisdiction of the ICJ, as well as to ensure that the powers conferred by the Inter-American Democratic Charter relating to constitutional remedies could be exercised by all State bodies and not only by the executive.

90. As for measures to combat all forms of discrimination and intolerance, the central question was whether an additional, regional instrument was needed to complement the International Convention on the Elimination of

All Forms of Racial Discrimination. The Inter-American Juridical Committee had delivered an opinion in which it had found that the relevant regional instruments such as the Charter of the Organization of American States and the American Declaration on the Rights and Duties of Man explicitly or implicitly covered all forms of existing and potential discrimination. It had concluded that the value of a new instrument would reside in its coverage of new and contemporary forms of discrimination not contemplated in earlier instruments.

91. The Inter-American Juridical Committee had discussed the possibility of drafting a new inter-American instrument on the right to information. In that connection, Mr. Herdocia Sacasa drew attention to the judgement of the Inter-American Court of Human Rights in the *Claude Reyes et al. v. Chile* case concerning Chile's alleged violation of article 13 of the American Convention on Human Rights ("Pact of San José, Costa Rica") by refusing access to public information in connection with the environmental impact of a foreign investment contract. The Court had found that, by expressly stipulating the right to "seek" and "receive" "information", article 13 of the Convention protected the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Furthermore, such restrictions must have been established by law, be enacted for reasons of general interest, respond to a purpose allowed by the Convention, and be necessary in a democratic society and proportionate to the interest justifying them. The Court's contribution to the presumption that all public information should in principle be accessible to individuals must be recognized. The Commission's draft articles on prevention of transboundary harm from hazardous activities were also relevant to the issue of access to public information. Also important was the existence of effective legal remedies to guarantee the right of access to public information. A related aspect of the question currently being considered by the Committee was the need to separate the issue of access to public information from that of the protection of information and personal data, including transboundary transfers of data.

92. Another important issue under consideration by the Inter-American Juridical Committee was the legal situation of migrant workers and their families under international law. The legal aspects of human mobility, especially with regard to human rights, should be properly reflected in legislation on migrant workers. Some progress had already been made with the entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the advisory opinions of the Inter-American Court of Human Rights, the judgments of the ICJ, especially in the *Avena* case, the mandates stemming from the Summit of the Americas and the adoption of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families.

93. With regard to the International Criminal Court, the OAS sought to encourage ratification of the Rome Statute of the International Criminal Court and had mandated the Inter-American Juridical Committee to promote cooperation with the Court. On the basis of an exchange of

³⁰² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

information with 17 States, it had provided States not parties to the Statute with information on the mechanisms available to overcome constitutional and legal obstacles to ratification. The Committee had used questionnaires as a very useful source of information on best practices regarding the incorporation of crimes under the Statute into national legislation, and on ways of amending that legislation so as to promote cooperation with the Court.

94. The Inter-American Juridical Committee had also been considering the issue of the right to identity. In response to a request for its opinion on the scope of that right, the Committee had, in March 2007, held an extraordinary session on children, the right to identity and citizenship. Its deliberations were continuing, but it had found that there was no consistent position on the question. Although in some cases and under some constitutions it was seen as an autonomous right, it was generally seen as interrelated with or stemming from other rights, such as the right to be registered, the right to a name, the right to nationality or the right to legal personality. Accordingly, the Inter-American Court of Human Rights had found that, in accordance with doctrine and jurisprudence, the right to identity was both autonomous and an expression of other rights, providing the means to their enjoyment. In order to secure universal realization of the right to civil identity in the Americas, it was, in the Committee's view, vital that all persons should carry an identification document officially confirming that identity.

95. The Inter-American Juridical Committee was engaged in the planning of the seventh Inter-American Specialized Conference on Private International Law. The theme of the Conference, on which two special rapporteurs specializing in the topic were working, was to be consumer protection.

96. Closer cooperation and dialogue between the Inter-American Juridical Committee and the Commission would be of great benefit to both parties. The Commission should consider sending a representative to the Committee's next regular session in Rio de Janeiro. At a time when international law was in a transitional stage between two epochs, an exchange of information between the two bodies was crucial. Mr. Herdocia Sacasa also suggested that the Commission's forthcoming sixtieth anniversary could be marked by a campaign, using the framework of the Committee's structures and, in particular, its annual courses on international law, to raise regional awareness of the immense volume of work done by the Commission on providing a structure for a new vision of international law on the part of the international community.

97. Mr. VARGAS CARREÑO, after thanking Mr. Herdocia Sacasa for his exhaustive presentation of the Inter-American Juridical Committee's work, said that among the many conclusions that might be drawn from his statement was the urgent need for continual dialogue between the Commission and the Committee, which would enrich the work of both. The two bodies had similar functions, despite their differences. The Commission's primary mandate was the codification and progressive development of international law, whereas the Committee, which had also had such a function in the past, had narrowed its range. Globalization had resulted in a new universality

in international law, so a regional body had to be cautious in its codification work and should focus rather on specific problems relating to its region. In the framework of its Specialized Conferences on Private International Law, the Inter-American Juridical Committee had been instrumental in the adoption of a number of fundamental instruments in that area, including the Inter-American Convention against Corruption, which had been the first such convention in the world. It had also made significant contributions, at an international level, for example on the law of the sea, through its important work on exclusive economic zones and the continental shelf. The Committee also played a vital role as a dispute settlement body. He recalled the case concerning Carlos Tünnermann Bernheim, who, as Ambassador of Nicaragua to the United States of America, had been declared *persona non grata* by the latter country, but who was also Ambassador to OAS. The resulting dispute had been settled within the inter-American system. The Inter-American Juridical Committee had also been involved in dealing with the extraterritorial repercussions of legislation such as the Helms-Burton Act. The Committee should not duplicate efforts at international level, but should make specific regional contributions, as it was doing in areas such as the promotion of democracy, and the new draft social charter of the Americas, which deserved the Commission's support. He therefore endorsed Mr. Herdocia Sacasa's suggestion that the Committee should take advantage of the Commission's forthcoming sixtieth anniversary to promote awareness of its work.

98. Mr. PELLET said that, although links existed between the Commission and regional bodies such as the Inter-American Juridical Committee, they were, by and large, extraordinarily formal and had no real practical consequences. He therefore wondered whether Mr. Herdocia Sacasa had any practical suggestions for improving the situation, particularly in the context of the Commission's forthcoming sixtieth anniversary celebrations. The Commission would also welcome suggestions on how to improve the process for selection of topics, given most States' extreme reluctance to offer any guidance in that regard. The Commission would welcome suggestions on topics from regional bodies, *inter alia* from an American perspective.

99. Mr. NIEHAUS said that the parallel nature of the work undertaken by the Commission and the Inter-American Juridical Committee underlined the crucial need for closer cooperation between the two. The Committee focused on areas such as the legal issues relating to the integration of the developing countries of the continent and the scope for harmonizing their legislation. It was thus clear that the Committee played a vital role in defending democracy in the continent. In that connection, he asked whether, in the context of the realization of the right to information, the Committee had encountered any instances of legislation incompatible with that right, and, if so, what steps it could take to rectify the situation.

100. Mr. SABOIA welcomed Mr. Herdocia Sacasa's suggestion that cooperation between the Commission and the Inter-American Juridical Committee should be strengthened. Against the background of the Committee's recent centenary, it should be borne in mind that the two

themes of legal equality and the principle of non-intervention had been discussed as long ago as 1906 and at the Second International Peace Conference at The Hague in 1907 but still had resonance for the Americas and the world. Curiously, the American continent, though not a model of democracy, had remained faithful to international law and its principles. In that connection, he asked how the Committee viewed the new threats to security, including terrorism, and their impact on human rights and democracy. It was a topic that deserved special consideration, given the difficulty that many international organizations, including the United Nations, had in striking a balance between measures to combat terrorism and respect for human rights.

101. Ms. ESCARAMEIA, referring to Mr. Herdocia Sacasa's suggestion that dialogue between the two bodies should be enhanced, said it would be a good idea for a representative of the Commission to participate actively in the Inter-American Juridical Committee's sessions and report on the Commission's work. As for the idea of involving the Commission in the Committee's annual courses on international law, she wholeheartedly endorsed that suggestion. It would be most helpful if the Committee could occasionally devote a meeting to discussing topics on the Commission's agenda. She also wished to echo Mr. Pellet's request that the Committee suggest topics for consideration by the Commission. Such suggestions would be particularly valuable in view of the Committee's tendency to regard the law as a tool for social change in areas such as democracy and development, an approach that differed from that of the Commission. With regard to efforts to promote wider acceptance of the compulsory jurisdiction of the ICJ, she wondered whether the Inter-American Juridical Committee was examining specific declarations or reservations on the matter, or whether it was simply engaging in political lobbying to urge more countries to accept the Court's jurisdiction.

102. Mr. VASCIANNIE concurred with the view that the Commission and the Inter-American Juridical Committee should work towards greater collaboration. He also supported the suggestion that representatives of the Commission should give lectures during the Committee's annual courses on international law, which were respected throughout Latin America and the Caribbean for their outstanding quality. He asked how the Committee chose topics for its agenda and whether there was any tension between questions that were seen as largely political and those that were perceived as largely legal. He wondered how the Committee reconciled the two conflicting demands in deciding what should go on its agenda.

103. Mr. HERDOCIA SACASA (Chairperson of the Inter-American Juridical Committee) said he welcomed the evident support within the Commission for a strengthening of ties with the Committee. Specific steps that could be taken included the presence of a representative of the Commission at the Committee's sessions and those of its bureau, which would lead to a mutually beneficial exchange of information and a greater understanding of how the topics under consideration by the two bodies interrelated. Another useful step would be to forge closer links between the rapporteurs of the two bodies:

much expertise could be shared and time saved, with benefit to both rapporteurs and to both bodies. Thirdly, as he had suggested, a representative of the Commission could take part in the international law courses organized by the Committee, and could explain the Commission's work and show how it overlapped with that of the Committee. A further possibility would be to establish a forum that would provide a focus for the discussion of the new challenges generated by the modern world. Such a forum could, perhaps, be held during the international law courses.

104. The Inter-American Juridical Committee's topics were chosen for a variety of reasons. For example, a member of the Inter-American Court of Human Rights attending the Committee's meetings as an observer might request the Committee to take up the question of non-compliance with the Court's judgments in a given area. Officials of the Court or of international organizations might ask the Committee to include specific items on its agenda, either because legislation had shortcomings to be addressed or simply because greater knowledge needed to be built up on a specific topic.

105. With regard to Mr. Niehaus's question concerning the right to information, he said that there were undoubtedly glaring deficiencies. The *Claude Reyes et al. v. Chile* case had drawn attention to a problem that was not confined to Chile. Judicial mechanisms were not flexible enough to accommodate requests relating to violations of the right to information. Some States restricted the procedure to information on the administrative sector, despite the fact that the American Convention on Human Rights: "Pact of San José, Costa Rica" contained provisions guaranteeing access to information. Much remained to be done to bring national legislation into line with the Convention.

106. On the question regarding security, he said that the Inter-American Juridical Committee conducted its work in the context of the Bridgetown Declaration of Principles of 10 May 1997 and the Declaration on Security in the Americas, adopted by the OAS Special Conference on Security held in Mexico City in October 2003.³⁰³ Those Declarations were not, however, reflected in national legislation, which continued to ignore the social, cultural, human and democratic dimensions of security. As for the question regarding acceptance of the compulsory jurisdiction of the ICJ, he confirmed that the Committee had for some time been seeking how to promote wider acceptance of the Court's jurisdiction by virtue of accession to instruments such as the American Treaty on Pacific Settlement ("Pact of Bogota"). As for Mr. Vasciannie's question, some items were placed on the Committee's agenda because they raised important topical legal issues. Others emanated from the OAS General Assembly, and might be of a more political nature, but the Committee restricted itself to the legal aspects of a given topic. Often, however, the legal and the political overlapped.

107. The CHAIRPERSON thanked the Chairperson of the Inter-American Juridical Committee for his statement.

³⁰³ OEA/Ser.K/XXXVIII-CES/DEC. 1/03 rev.1 (available at www.oas.org).

Organization of the work of the session (concluded)*

[Agenda item 1]

108. Mr. YAMADA (Chairperson of the Drafting Committee) announced that the Drafting Committee for the topic of expulsion of aliens would be composed of the following members: Mr. Kamto (Special Rapporteur), Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Mr. Petrič (*ex officio*).

The meeting rose at 1.10 p.m.

2944th MEETING

Friday, 27 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (continued) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the members of the Commission to continue and complete their consideration of the third report of the Special Rapporteur on the expulsion of aliens (A/CN.4/581).

2. Mr. KOLODKIN commended the Special Rapporteur on the quality of his report, which had given rise to an in-depth debate in the Commission. He endorsed unreservedly the right of expulsion provided for in draft article 3, paragraph 1, which stemmed directly from State sovereignty and reflected an objective reality, with the limitations imposed on its exercise by international law. The wording of paragraph 2, however, was not entirely felicitous. It probably depended on the definition of the scope of the draft articles and, in particular, the question whether the scope should cover all categories of aliens. If that was the case, it should be made clear that the right to expel aliens must be exercised in conformity with the provisions of the current draft articles. If not, the reference

to the draft articles was insufficient. The words “fundamental rules of international law” should be deleted and he supported the idea of merging the two paragraphs of draft article 3.

3. He had no objection if the draft articles strengthened the rules prohibiting the State from expelling its nationals, although, strictly speaking, the draft articles related only to the expulsion of aliens. He noted that the Constitution of the Russian Federation prohibited the expulsion of nationals. The reference in draft article 4, paragraph 2, to exceptions to that principle could be retained.

4. He did, however, have serious reservations about the inclusion of refugees and stateless persons in the draft articles because the regime applicable to those categories of persons was defined in the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. By adopting provisions on refugees and stateless persons which differed from those set out in the two Conventions, the Commission might cause a fragmentation of the legal regime. Moreover, the draft articles introduced by the Special Rapporteur were different from the corresponding provisions of those two instruments, and not only in form.

5. For example, draft article 5 linked articles 32 and 33 of the 1951 Convention relating to the Status of Refugees, although they dealt with different points. Article 32 covered the expulsion of refugees who were lawfully in the territory of a State, whereas article 33 prohibited the expulsion or *refoulement* of all refugees, regardless of whether they were in a lawful or unlawful situation. Article 32, paragraphs 2 and 3, provided substantial guarantees with regard to the rights of refugees, whereas article 33 did not. He thus did not see how the two articles could be linked, as the Special Rapporteur had proposed.

6. The Commission must come to an agreement on the principles. It must decide whether refugees and stateless persons should be included in the scope of the draft articles and, if so, whether the relevant provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons should be reviewed. He was opposed to such a decision in both cases, but the adoption of a “without prejudice” clause should not be ruled out.

7. He agreed with the idea in draft article 7 of prohibiting the collective expulsion of aliens, although more details and substantive changes were needed, but the question should not be considered in the draft articles because it was a matter of humanitarian law. If the Commission decided to include it, however, it should be made clear that the draft article should apply only in the context of an international armed conflict and that the question of the expulsion of hostile or enemy aliens must be the subject of separate provisions in the draft articles. Otherwise it might be thought that the Commission was applying the general regime applicable to aliens to such persons and the impression would be given that the tendency was to apply the basic provisions of the regime applicable in time of peace to the expulsion of aliens in time of armed conflict. He was not convinced that this was justified. The prevailing opinion in the doctrine was that States had

* Resumed from the 2933rd meeting.