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Summary record of the 3204th meeting

Topic:
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provided to aliens subject to expulsion, and those who considered that the draft articles went beyond the regime provided for by their legislation and the treaties to which they were party. As to the final form of the work, even if the draft articles did not become a convention, their legal force would grow as courts increasingly referred to them in order to interpret international law.

28. The inclusion of aliens unlawfully present in a State's territory within the scope of the draft articles was necessary because those persons obviously had the same fundamental rights as those lawfully present; it should be borne in mind, however, that a separate status with regard to immigration regulations entailed separate safeguards and that differences in treatment were therefore acceptable if they were reasonable and proportional. However, the inclusion of refugees and stateless persons was perhaps not warranted, as Mr. Forteau and Mr. Murphy had observed, because draft articles 6, 7 and 8 added nothing to what was already provided for by the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.

29. Draft articles 23 and 24 were fundamental inasmuch as they confirmed that the *non-refoulement* principle was absolute and applied to any person regardless of his or her migratory status. No derogation was permitted from that principle on the basis of such considerations as national security or an alien's situation with regard to criminal law. Similarly, the existence of a distinction between the risk of torture and the risk of cruel, inhuman or degrading treatment or punishment had not been confirmed by international jurisprudence.

30. He shared the Special Rapporteur's view regarding the usefulness of recalling, at least in the commentary to draft article 9, the principle whereby a State could not expel its own nationals. He also agreed with the idea of splitting draft article 19, since, like Mr. Forteau, he considered that recourse to detention and the conditions of detention should be dealt with in separate articles. Emphasis should also be placed on the fact that detention must on no account be arbitrary. In paragraph 2 (a), the words "excessive duration" were too vague and the phrase "reasonably necessary" should be defined in the commentary. With regard to paragraph 3 (b), in order to avoid creating legal uncertainty, it should be made clear that the attribution to the alien of the reasons preventing his expulsion must be objective and that the length of the continued duration must be commensurate with those reasons. With regard to the rights set forth in draft article 26, the proposal by the European Union to notify the alien in writing of the expulsion decision and of the remedies available warranted consideration.⁶⁵ Lastly, rather than making the suspensive effect of an appeal provided for in draft article 27 subject to the existence of a risk of irreparable harm, as had been proposed, he suggested adding a paragraph to the draft article in order to grant the alien the right to request provisional measures when the implementation of the expulsion decision might entail irreparable harm and when no effective remedy was available.

⁶⁵ *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee, 18th meeting (A/C.6/67/SR.18)*, para. 66.

31. Mr. VÁZQUEZ-BERMÚDEZ said that, at the stage of second reading, it was important to preserve the balance that the Commission had struck, after lengthy debate, between the rights of sovereign States and those of aliens subject to expulsion. The observations of States should be reflected in the commentary or through drafting amendments so that this balance would not be significantly disrupted. Similarly, at the current stage, the text should keep the form of draft articles, irrespective of what the General Assembly might decide subsequently. As with all the Commission's previous work and in accordance with its mandate, the draft articles on expulsion of aliens constituted both codification and progressive development of international law, even though it was indeed not always possible to distinguish between the two aspects.

32. With regard to the draft articles themselves, he wished to mention a terminology issue. The distinction made in draft article 1 between aliens who were lawfully present in the territory of a State and those who were unlawfully present was crucial, but it was more appropriate to refer to "regular" or "irregular" presence rather than "lawful" or "unlawful" presence.

33. In conclusion, he noted that a large number of States had welcomed the draft articles, the adoption of which would represent an important step towards the humanization of international law that had been going on for half a century.

The meeting rose at 1.05 p.m.

3204th MEETING

Wednesday, 14 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, in keeping with the established practice, he would offer an overview of the activities of the Office of Legal Affairs, focusing on particularly noteworthy legal developments in the past year.

2. One of the Secretary-General's top priorities was to combat impunity and build an age of accountability. The Office of Legal Affairs accordingly dedicated much time

and energy to matters related to international criminal justice and to supporting the work of international tribunals and the International Criminal Court.

3. Since 1999, and with increasing frequency, the Security Council had been authorizing peacekeepers to use force not only for self-defence, but also to protect civilians threatened with imminent physical violence. A case in point was the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), which the Security Council had recently tasked with carrying out offensive operations.⁶⁶ That was the first time such a mandate had been accorded, and it raised a host of legal questions. In what circumstances would United Nations peacekeeping forces become a party to the conflict in the Democratic Republic of the Congo? What would be the consequences in law if they did? How should members of a peacekeeping force treat members of armed groups that might be captured? How should allegations that members of a peacekeeping force had violated international humanitarian law or committed war crimes be dealt with?

4. International humanitarian law, international human rights law and international criminal law had evolved substantially over the last half-century, especially with respect to situations of non-international armed conflict. The Office of Legal Affairs had therefore prepared practical guidance for military commanders on how to apply certain fundamental principles of international humanitarian law when launching attacks on armed groups and had developed state-of-the-art procedures for dealing with members of armed groups who were captured during offensive operations.

5. In South Sudan, an internal split within the army had led to a new outbreak of conflict and the displacement of many civilians: 85,000 had sought refuge in the compounds of the United Nations Mission in South Sudan. That had strained the Mission's resources and raised a number of complex issues concerning the interpretation of the Mission's mandate. What could the United Nations do to maintain order among such a large number of civilians who might be supporting opposing political groups? What could the United Nations do to ensure the security of its own personnel and property? How should it handle cases of individuals wanted by local law enforcement agencies for offences committed either outside or inside the United Nations compounds? Those problems were especially acute in South Sudan, where Government institutions were weak, with limited capacity to deliver criminal justice complying with international standards of due process, yet with the power to impose the death penalty.

6. Following a series of landmark decisions in a decade of operations, the Special Court for Sierra Leone had concluded its work with the appeal judgment in the case against former Liberian President Charles Taylor, who was now in the United Kingdom serving a 50-year sentence.⁶⁷ In the first occasion in modern international

criminal justice when a new, independent institution had taken over from a predecessor, the Residual Special Court for Sierra Leone had commenced operations on 1 January 2014. The staff of the new institution was already engaged in the essential work of witness protection, archive management and preservation and sentence enforcement. The Office of Legal Affairs was supporting that work, and he hoped that the international community would do likewise, particularly by ensuring that the Court was on a secure financial footing. The trial in the *Ayyash et al.* case, relating to the attack in February 2005 on Rafiq Hariri, the former Primer Minister of Lebanon, had commenced in January 2014 at the Special Tribunal for Lebanon. The proceedings against the accused were being held *in absentia*. In November 2013, the United Nations Legal Counsel had signed the Headquarters Agreement for the Arusha branch of the International Residual Mechanism for Criminal Tribunals,⁶⁸ and in early 2014 he had visited the Extraordinary Chambers in the Courts of Cambodia.

7. One of the most significant challenges facing international criminal tribunals was their reliance on voluntary funding. Although the General Assembly had recently agreed to allow the Secretary-General to commit funds in 2014 in the event of voluntary funding falling short of the approved budget of the Extraordinary Chambers in the Courts of Cambodia,⁶⁹ the onus remained on the international community to ensure that the Chambers had enough funds to complete its judicial mandate. Many commentators held that it was conducting what was currently the world's most significant international criminal trial. Its premature collapse due to a lack of funds would be a tragedy for the victims and the people of Cambodia. The Extraordinary Chambers in the Courts of Cambodia had contributed to the development of international criminal justice through its system of civil party participation. Because it had a mixed team of international and national judges and prosecutors, it could well leave a lasting legacy of increased judicial capacity and greater respect for the rule of law.

8. In 2014, the Division for Ocean Affairs and the Law of the Sea would organize a number of activities to celebrate the twentieth anniversary of the adoption of the United Nations Convention on the Law of the Sea, to which 166 parties had acceded to date. The Office of Legal Affairs discharged depositary functions in relation to the implementation of the Convention and serviced the Meetings of States Parties to the Convention⁷⁰ and of the Commission on the Limits of the Continental Shelf.⁷¹ The Commission on the Limits of the Continental Shelf had received a total of 71 submissions pertaining to the delineation of the outer limit of the continental shelf beyond 200 nautical miles from the baseline and had adopted 20

⁶⁶ Security Council resolution 2098 (2013) of 28 March 2013, para. 12 (b).

⁶⁷ See *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment of 26 September 2013, Appeals Chamber, Special Court for Sierra Leone, para. 646.

⁶⁸ Agreement between the United Nations and the Government of the United Republic of Tanzania concerning the headquarters of the International residual mechanism for criminal tribunals, signed at Dar es Salaam on 26 November 2013, United Nations, *Treaty Series*, No. 51602.

⁶⁹ General Assembly resolution 68/247 B, of 9 April 2014, para. 7.

⁷⁰ Information on Meetings of States Parties to the 1982 United Nations Convention on the Law of the Sea is available from: www.un.org/depts/los/meeting_states_parties/meeting_states_parties.htm#contact.

⁷¹ Information on the meetings of the Commission on the Limits of the Continental Shelf is available from: www.un.org/depts/los/clcs_new/clcs_home.htm.

recommendations on the subject. The General Assembly had continued to address the issues of the conservation and sustainable use of marine biological resources beyond national jurisdiction, the establishment of a regular process for global reporting and assessment of the state of the marine environment, including socioeconomic aspects and sustainable fisheries. The next meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea would discuss the role of seafood in global food security.

9. In the past year, two treaties, the Minamata Convention on Mercury and the Intergovernmental Agreement on Dry Ports, had been deposited with the Secretary-General. The Treaty Event in 2013 had been the occasion for 60 signatures and 49 consents to be bound by treaties.⁷² In 2014, the Treaty Event would highlight 40 treaties on subjects such as human rights, terrorism, criminal law and the environment. The Treaty Section regularly responded to queries from States and international organizations with regard to final clauses of treaties or intergovernmental processes to draft or amend treaties.

10. In his work as head of the Office of Legal Affairs, he was continually reminded of the relevance of the Commission's work, which was as rigorous as it was thorough, enabling it to carry out its statutory mission productively and efficiently. He assured the Commission that it had, in his Office, a friend and an advocate.

11. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement and invited members to ask him questions.

12. Mr. MURPHY asked whether the United Nations Legal Counsel could encourage Governments to provide comments on the Commission's approach to the topics it was considering. He also wished to know whether it would be useful for the Commission to devise guidelines for peacekeepers or to provide guidance on the basic rules underpinning the practice of administrative tribunals of international organizations. Perhaps the Commission could promote greater interaction with the Sixth Committee by holding one half-session per quinquennium in New York.

13. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that in his bilateral conversations with representatives of Member States, he tried to encourage them to submit more comments on the Commission's work.

14. He would be interested to hear the Commission's thinking on the legal issues raised by the "robust" peacekeeping mandates being accorded by the Security Council and on their consequences in terms of international humanitarian law. Given that there were some theoretical and conceptual flaws in the case law of the internal justice system of the United Nations, the Commission could also help in filling the gaps in that system.

15. His preliminary research indicated that holding half of the Commission's session in New York once every five

years was not feasible owing to lack of availability of conference services there during the usual dates of the Commission's sessions.

16. Mr. PETRIČ pointed out that the lack of financial support for Special Rapporteurs made it hard for members from developing countries to propose their services in that capacity. Would the adoption of the Kampala amendments to the Rome Statute of the International Criminal Court⁷³ lead to greater interaction between the Security Council and the Court and promote the Statute's universal application? It might be useful for the Office of the Legal Counsel to look into the international legal situation in the Arctic.

17. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the entry into force of the Kampala amendments would help to turn the International Criminal Court into a truly jurisdictional institution, strengthen its independence and increase its powers. There was, however, still a long way to go before the amendments entered into force, and it was by no means certain that they would promote the Statute's universal application. His Office rarely dealt with matters concerning the Arctic. Lastly, concerning financial support for Special Rapporteurs, he said that the Organization had to operate within the financial resources granted to it by Member States.

18. Mr. HMOUD said that the authorization to use force outside the scope of self-defence might have practical negative consequences for the protection of peacekeepers under international law and international humanitarian law. The Security Council should therefore be careful when making such authorizations, such as the authorization to use force given to the Intervention Brigade⁷⁴ that was part of MONUSCO. One key issue was the distinction between the Brigade, whose members were considered combatants under international humanitarian law, and the other personnel of MONUSCO who, as peacekeepers and non-combatants, retained protection under the law.

19. On another matter, he inquired about the opinion of the United Nations Legal Counsel on the idea that the United Nations established "national courts" in areas of conflict or in the so-called "failed States" to assume the responsibility of adjudication for crimes that fell below the level of international crimes.

20. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the logical consequence of mandates authorizing the use of force by peacekeeping forces was that they were subject to international humanitarian law and could themselves be considered legitimate targets of military action. However, in his personal view, "robust" mandates were nonetheless a positive development, since they were vital in enabling peacekeeping forces to operate effectively.

⁷³ Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010, United Nations, *Treaty Series*, No. 38544.

⁷⁴ See Security Council resolution 2098 (2013) of 28 March 2013, para. 9.

⁷² "Treaty Event 2013: Towards Universal Participation and Implementation", available from: <https://treaties.un.org>, *Treaty Events*.

21. As to the prosecution of grave international crimes, it was certainly unreasonable to expect failed States to be able to establish special criminal courts to deal with such complex proceedings. However, other means were available to achieve the objective of prosecuting such crimes, such as the fight against impunity.

22. Responding to a question from Mr. GÓMEZ ROBLEDÓ, he said that no consideration was currently being given to updating the 1999 guidelines on observance by United Nations forces of international humanitarian law.⁷⁵

23. Mr. KITTICHAISAREE asked whether the United Nations Legal Counsel could foresee the Office of Legal Affairs playing a more constructive role with respect to the situation in the Syrian Arab Republic. In light of the recent failure of diplomatic efforts in the Syrian crisis, he wondered whether it would be possible for the Office to elaborate a road map of the actions permissible under international law.

24. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Office of Legal Affairs had recently been accused of a lack of flexibility in its interpretation of the need for the consent of the Government of the Syrian Arab Republic to allow the delivery of humanitarian assistance within its territory. In the current state of development of international law, however, such consent was required even in the event of grave violations of international humanitarian law, however regrettable that might be. It was difficult to adopt a progressive approach to international law while at the same time respecting established doctrine.

25. Responding to a question from Mr. CANDIOTI, he said that no actions were at present being undertaken to promote awareness, among the depositaries of treaties and national legal advisers, of the Guide to Practice on Reservations to Treaties.⁷⁶

26. The CHAIRPERSON thanked the United Nations Legal Counsel for his informative and interesting statement and his replies.

Expulsion of aliens (*continued*) (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

27. The CHAIRPERSON invited the Commission to resume its consideration of the ninth report on the expulsion of aliens (A/CN.4/670).

28. Mr. WISNUMURTI said that, from the comments and observations made in the Sixth Committee in 2012 and those submitted in writing, States appeared to have

⁷⁵ Secretary-General's bulletin, ST/SGB/1999/13.

⁷⁶ General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2, pp. 37 *et seq.*

rather contradictory opinions on the topic. That was no surprise, as it touched on a number of sensitive issues.

29. In his view, the draft articles reflected the balance between the sovereign rights of a State and the rights of aliens present in its territory. However, the Commission should take into account the views of States on certain draft articles. For example, several States had observed that draft articles 6, 23 and 24 had expanded the scope of *non-refoulement* obligations, in effect unduly limiting State sovereignty and thus deviating from the provisions of widely accepted human rights treaties, national laws and case law. The Commission should review those draft articles and the commentaries thereto to see whether any adjustments and further clarification were in order.

30. As mentioned in paragraph 10 of the ninth report, some States held the view that the draft articles essentially represented progressive development rather than codification. In his opinion, that was an overstatement of the issue. He endorsed the Special Rapporteur's statement in paragraph 15 that the draft articles contained not only provisions reflecting the progressive development of international law on the topic, but also a considerable number of provisions reflecting the codification of well-established State practice. That approach was consistent with the Commission's mandate under its statute.

31. Since only a limited number of States had expressed their position as to the final form the draft articles should take, he agreed that it would be premature and misleading to indicate any prevailing trend. His preference was for a convention, since from the beginning of its mandate the Commission had been preparing draft articles well-suited for that purpose. Furthermore, the Commission's annual reports to the Sixth Committee had led to the gradual improvement of the draft articles, and he did not have the impression that States had expressed any objection to their general thrust.

32. The Commission must now make every effort to accommodate the relevant comments and suggestions made by States, make amendments to the draft articles and provide clarification in the commentaries, as necessary, in order to ensure that the draft articles to be adopted on second reading were even more acceptable to States.

33. Sir Michael WOOD said that the number and detail of the comments made in the Sixth Committee and submitted in writing bore witness to the great interest in what was a sensitive topic that continually gave rise to practical difficulties, requiring States constantly to review and change their legislation.

34. A major purpose of a second reading was to take account of the views of States and to allow Commission members to reconsider their positions. The Commission should aim to do everything to ensure States' widespread acceptance of its work by taking account of their comments, as far as possible, in the draft articles and commentaries.

35. Regarding the form of the Commission's output on the topic, he agreed that what mattered was not so much the label—draft articles, guiding principles—as the

nature of the text. The Commission owed it to States and to all those who would use its text in the years to come to indicate clearly the status of the rules being formulated, through a general statement or specific statements on specific articles, for two reasons.

36. First, all States had detailed laws and regulations on expulsion; if a rule the Commission articulated was not actually reflected in national laws, then it should say so, or its reasoning might be criticized. Second, the issues at stake frequently came before national and regional courts that were not necessarily specialists in international law and needed to know what constituted *lex lata* and what was *lex ferenda*.

37. One possibility would be to explain such matters in a short general commentary, preceding the commentaries to the draft articles. Its purpose would be to introduce the draft articles, describe the Commission's methodology and explain its view on the status of the rules being advanced. Such a general commentary could explain that the Commission was aware of existing, detailed national laws on the topic, but that its work drew on a range of sources, including universal and regional treaties, as well as case law, in an effort to establish an international framework to guide States. It could also explain that the current form of the draft articles carried no implications for the final form—that would be decided by States. The general commentary could also emphasize that it had not been exclusively a codification exercise, and that the outcome of the topic was not necessarily intended to reflect existing rules of law; it aimed to assist States in adopting sound provisions that might be used in domestic law in order fully to respect the inherent dignity of the human being.

38. As to the wealth of comments and suggestions received from States and the European Union, he agreed with quite a number of them and hoped that members would be open to making appropriate changes to the draft articles and including clarifications in the commentaries. He welcomed the Special Rapporteur's emphasis on the importance of the commentaries and the fact that the draft articles needed to be read and interpreted together with them.

39. In conclusion, he invited the Commission to bear in mind the words of a former Commission member, Mr. Christian Tomuschat, who in a recent article had pointed out that the Commission was "not confining itself to codifying the content of the customary rules already in existence, but endeavouring to lay down additional rules in the discharge of the second limb of its general mandate, namely to promote progressive development of the law". In one respect, Mr. Tomuschat noted, the Commission had gone to the outer limits of what, under current political conditions, might be acceptable to the States subject to immigration pressure.⁷⁷

40. Mr. CANDIOTI said that, generally speaking, he endorsed the Special Rapporteur's analysis of the comments and observations received from States. The Commission's overall approach to the topic thus far had

involved two main players: the expelling State and the person being expelled. However, it had not considered the role of international cooperation for the States (expelling, transit, destination and of origin) affected by expulsion of aliens. It was through international cooperation that States would find acceptable solutions to the legislative, political, human rights and social problems arising from expulsion. Such matters should be addressed either in a commentary, or better still in a preamble to the draft articles, which would clarify their rationale, purpose and meaning, irrespective of the final form they would take.

41. Regarding the use of terms, although it was too late to change anything, he considered that the title of the topic was outdated and drew attention to the fact that current legislation, especially in the European Union, used less emotive terms, such as *éloignement* (removal).

42. The Commission seemed too concerned about the form of its work on the topic, when what was more important, particularly for international tribunals, was the quality. In that connection, he suggested that the Commission be guided not only by article 20 of its statute, which referred to the preparation of drafts in the form of articles to be submitted to the General Assembly, but also by article 22, which referred to the preparation of a final draft and explanatory report to be submitted with recommendations to the General Assembly, as well as by article 23, setting out what such recommendations might entail.

43. Mr. GÓMEZ ROBLEDÓ said that, throughout his work on the topic, the Special Rapporteur had maintained a balance between the sovereign rights of States and the requisite protection for persons subject to expulsion. The outcome of the work, to be decided by the General Assembly, would provide greater certainty with regard to expulsion procedures and ensure observance of minimum standards of protection. He endorsed the view expressed by the Special Rapporteur in paragraph 23 of his ninth report that both aliens lawfully present and unlawfully present in a State's territory should be included in the scope of the draft articles. However, as some States had commented, while the rights and obligations of aliens in terms of expulsion procedures differed, the minimum standards of protection provided should be the same. In that connection, he drew attention to Advisory Opinion OC-18/03 of the Inter-American Court of Human Rights, on the *Juridical Condition and Rights of Undocumented Migrants*, in which that Court stated that "the regular situation of a person in a State [was] not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination" (para. 118). The Court also acknowledged, as did the Special Rapporteur in his ninth report, that the State was empowered to accord different treatment to persons lawfully and unlawfully present in its territory, provided that it upheld the principle of equality and non-discrimination. The Special Rapporteur had quite rightly explained that the only distinctions that could be made related to procedural rights but not to substantive human rights.

44. However, the inclusion of specific articles on the prohibition of the expulsion of refugees and stateless persons could pose problems for those States that did not recognize refugee status under the Convention relating

⁷⁷ C. Tomuschat, "Expulsion of aliens: the International Law Commission's draft articles", in G. Jochum, W. Fritzemeyer and M. Kau (eds.), *Grenzüberschreitendes Recht—Crossing Frontiers: Festschrift für Kay Hailbronner*, Heidelberg, C. F. Müller, 2013, p. 646.

to the Status of Refugees or other relevant instruments. In his view, the prohibition of the expulsion of refugees and stateless persons could be assimilated to *lex specialis* in relation to the general rules governing the expulsion of aliens. One possible way of reconciling the different positions of States on the matter might be the inclusion of a “without prejudice” clause. Although draft article 8 contained a clause along those lines, the *lex specialis* character of the legal instruments relating to refugees and stateless persons should be underlined.

45. The protection required in the expelling State had been dealt with well in the draft articles, which brought together the minimum standards under the different human rights systems. Although paragraph (1) of the commentary to draft article 26 explained that the procedural rights listed in paragraphs 1 to 3 of that draft article were applicable both to persons lawfully and unlawfully present in the territory of the expelling State, that should also be made clear in the text of the draft article. He therefore suggested that a sentence should be added to draft article 26 along the lines of the first sentence of draft article 1 on scope.

46. Lastly, regarding the final form of the Commission’s work, he agreed with the Special Rapporteur that the Commission worked for the States and that they should decide on the future of the draft articles, but he did not agree with the statement in paragraph 71 of the ninth report that some of the suggestions received from States would diminish the scope of the final outcome of the Commission’s work on an important and sensitive topic in a globalized world.

47. Mr. SINGH said that the draft articles adopted on first reading maintained a balance between the sovereignty of States and the protection of aliens based on international law and practice in a number of countries. Of particular importance was the requirement to apply minimum standards for the treatment of aliens and the prohibition of the use of expulsion in order to circumvent extradition procedures.

48. It was necessary to maintain the balance achieved following lengthy discussions, while taking into account the sometimes divergent views of States on various aspects of the topic. He supported the Special Rapporteur’s position that the draft articles contained provisions reflecting not only the progressive development of international law but also the codification of well-established State practice. That was in line with the Commission’s mandate, and it was not necessary to identify which articles represented codification and which progressive development. As to the form of the outcome of work on the topic, he agreed that it would be premature to take a decision at that stage and that States should have the last word.

49. Mr. PETRIČ expressed support for Mr. Candioti’s suggestion that the need for cooperation among States involved in expelling an alien should be highlighted in a preamble to the draft articles.

50. Mr. KITTICHAISAREE said that in South-East Asia, only four States had ratified the Convention relating to the Status of Refugees. Although Thailand was not a signatory, for many years it had been harbouring asylum seekers from neighbouring countries, known as “illegal

entrants”, but had never recognized them as refugees. It had also allowed the Office of the United Nations High Commissioner for Refugees to set up a regional office. When the Commission reviewed the draft articles in light of comments from certain countries in South-East Asia, it should therefore be aware that there was some flexibility that made it possible to accommodate refugees. Perhaps the Commission should simply acknowledge that although refugee law was not recognized by several States, it was by a majority of States, and leave it at that. If its intention was for the outcome of work on the topic to take the form of a convention, it was unlikely that States that did not recognize refugee law would become parties to the instrument.

51. Mr. KAMTO (Special Rapporteur), summing up the debate on his ninth report, said that nearly all the members of the Commission had found the draft articles to be useful and ready for referral to the Drafting Committee. One member had suggested inserting an introductory note to state that certain articles represented progressive development and others, codification of international law, and that the absence of any such indication regarding a particular article did not imply that this article constituted codification. He was unable to follow that suggestion, however. To do so would be extremely harmful, not only to the current draft articles, but also to all the past and future work of the Commission: any text that did not include such an indication would leave States and other users perplexed as to whether it reflected positive law, and which elements represented codification and which, progressive development.

52. Another member had suggested including an introductory statement to the effect that the Commission did not mean to suggest that the draft articles reflected or constituted the existing rules of law on the expulsion of aliens. Something similar had been done in the draft articles on the responsibility of international organizations,⁷⁸ but the Commission’s decision in that case had been an exception to its usual practice and should remain so. In the present instance, the Commission was acting in accordance with its authoritative methodology and to do otherwise would be to send the wrong signal to States and other users of the Commission’s work. Nevertheless, he was prepared to draft an opening general commentary setting out the aims of the draft articles, along the lines of the one contained in the articles on the responsibility of States for internationally wrongful acts.⁷⁹

53. As to the suggestion regarding the inclusion of a general “without prejudice” clause, similar to the ones found in international human rights instruments, he was not opposed in principle. It was his understanding that Mr. Forteau, who had made the suggestion, was thinking of a clause similar to article 4 of the International

⁷⁸ See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

⁷⁹ General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

Covenant on Civil and Political Rights and article 15, paragraph 1, of the European Convention on Human Rights. He therefore proposed adding a paragraph 2 to draft article 3, to read:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, any State may take measures derogating from its obligations under the present draft articles to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

54. The commentary could make it clear that the situation envisaged was that of a war or similar exceptional threat.

55. With regard to the comments concerning draft article 15 on non-discrimination, he pointed out that it had to be considered in conjunction with draft article 3 (Right of expulsion) and draft article 4 (Requirement for conformity with law). For example, in the case of the expulsion of an alien by a State for violating the terms of a short-stay visa, draft article 15 could not be invoked, since the basis for expulsion was breach of conditions for admission. True, from the domain of expulsion, one then slipped into admission conditions; the rules on the two, although they were sometimes interrelated, were quite different.

56. Regarding draft article 24, one member had expressed the view that the Special Rapporteur had not understood a Government's comments on the Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, he reaffirmed and reinforced his previous statements on the matter. Article 1 of the Convention only defined the term “torture” and gave no definition of the terms “cruel, inhuman or degrading treatment”. Furthermore, no separate definitions of torture and cruel, inhuman or degrading treatment were to be found in any other legal instrument or in case law.

57. It had been further suggested that he had been critical of the comments by the United States to the effect that draft article 24 was based solely on jurisprudence of the European Court of Human Rights (*Selmouni v. France*) and a recommendation of the Committee on the Elimination of Racial Discrimination.⁸⁰ However, a global approach that made no distinction between torture and other cruel, inhuman or degrading treatment was not confined to European jurisprudence. For example, at the universal level, General comment No. 20 of the Human Rights Committee indicated that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*”.⁸¹ At the regional level, the Inter-American Court of Human Rights in its judgment of 25 November 2004 in *Lori Berenson-Mejía v. Peru*, had said that “[t]he prohibition of torture and cruel, inhuman or

degrading punishment or treatment is absolute and non-derogable” (para. 100 of the judgment). Furthermore, it was clear from the Convention against torture and other cruel, inhuman or degrading treatment or punishment that torture was necessarily an act of cruel, inhuman and degrading treatment, even though all acts of cruel, inhuman and degrading treatment were not necessarily torture, as article 16 of the Convention indicated.

58. Consequently, it was for the Commission to determine whether, notwithstanding consistent international and regional jurisprudence, it wished to reconsider the decision it had made in 2012 in order to capture the nuance arising from article 16 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. If it did so wish, then new wording could be inserted in draft article 24, which would then read:

“A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to [equivalent] cruel, inhuman or degrading treatment or punishment [deemed to constitute torture].”

59. As to the final form of the Commission's work on the topic, he had a strong preference for draft articles. Indeed, it was that form which had guided his work and that of the Commission from the outset.

60. In conclusion, he requested the Commission to refer the draft articles to the Drafting Committee for the preparation of a final text to be transmitted to the General Assembly for consideration at its next session.

61. Mr. MURPHY thanked the Special Rapporteur for his accurate summary of the debate and said he wished to clarify the practice of the United States concerning the *non-refoulement* provision in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

62. Mr. KAMTO (Special Rapporteur) said that it was not the Commission's practice to reopen discussion following the summary of the debate by the Special Rapporteur.

63. The CHAIRPERSON said that he took it that the Commission wished to refer draft articles 1 to 32 to the Drafting Committee to take into account the comments and observations made during the debate.

It was so decided.

64. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of expulsion of aliens was composed of Mr. Candioti, Mr. Forteau, Mr. Gómez Robledo, Mr. Hmoud, Mr. Kitichaisaree, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Mr. Wako and Sir Michael Wood, together with Mr. Kamto (Special Rapporteur) and Mr. Tladi (*ex officio*).

The meeting rose at 1.05 p.m.

⁸⁰ General recommendation No. 30 (2004) on discrimination against non-citizens, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18 (A/59/18)*, chap. VIII.

⁸¹ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 9.