

Document:-  
**A/CN.4/3216**

**Summary record of the 3216th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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7. The CHAIRPERSON invited the members of the Commission to adopt, one by one, the draft conclusions provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.833.

*Draft conclusion 6. Identification of subsequent agreements and subsequent practice*

*Draft conclusion 6 was adopted.*

*Draft conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation*

*Draft conclusion 7 was adopted.*

*Draft conclusion 8. Weight of subsequent agreements and subsequent practice as a means of interpretation*

*Draft conclusion 8 was adopted.*

*Draft conclusion 9. Agreement of the parties regarding the interpretation of a treaty*

8. Mr. KAMTO said that, in his view, the rule whereby an agreement under article 31, paragraph 3 (a) and (b), was not necessarily legally binding was insufficiently substantiated. In addition, several provisions of the 1969 Vienna Convention were devoted to consent and could be applied to all agreements concluded thereunder. Moreover, if certain agreements specified that they were binding, should it be inferred *a contrario* that agreements which were silent on that matter were not binding? Lastly, since interpretation gave rise to a certain degree of modification of a treaty in one way or another, it was difficult to accept that a State which had been party to a non-binding agreement could then oppose that agreement.

9. Mr. FORTEAU also reiterated his reservations relating to the scope of that rule and said that an agreement under article 31, paragraph 3, was inevitably binding. Moreover, paragraphs 1 and 2 of draft conclusion 9 related to acceptance by the parties, which seemed to reflect the requirement that any agreement had to be based on consent. The commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)<sup>154</sup> did not truly substantiate the said rule. The commentary to draft conclusion 9 should also be more convincing in that regard.

10. Mr. NOLTE (Special Rapporteur) said that, in the Drafting Committee, he had been willing to adopt the proposal made by Mr. Hmoud, which would have enabled the Commission to transcend the debate by stating that an agreement under article 31, paragraph 3, “produced legal effects” and that “to that extent it was binding”. Furthermore, he had cited various sources in support of the possibility that such agreements might not be binding. Following a lengthy discussion, the Drafting Committee had eventually adopted the current wording, which Mr. Kamto and Mr. Forteau might accept until the commentary had convinced them of its pertinence.

11. Mr. KAMTO was not sure that such a substantive issue could be settled in the commentary. Furthermore,

the examples that could be found of non-binding decisions or “gentlemen’s agreements” which did have a legally binding effect had to do with their frequency or the sameness of their content, which did not render them “agreements” in the strict sense of the word. The problem likely stemmed from the use of the term “agreement” when referring to arrangements that did not fall under that category. However, he would await the clarifications provided by the Special Rapporteur in the commentary.

*Draft conclusion 9 was adopted, subject to an editorial amendment in the French text of paragraph 1.*

*Draft conclusion 10. Decisions adopted within the framework of a conference of States parties*

12. The CHAIRPERSON, speaking as a member, said that she approved of the replacement of *sustancial* by *sustantivo* in the Spanish text of paragraph 3, which rendered moot the debate surrounding that term at a previous meeting.

*Draft conclusion 10 was adopted.*

*The report of the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as a whole, as it appeared in document A/CN.4/L.833, was adopted.*

*The meeting rose at 11.05 a.m.*

## 3216th MEETING

*Friday, 6 June 2014, at 10 a.m.*

*Chairperson:* Mr. Shinya MURASE (Vice-Chairperson)

*Present:* Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

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

[Agenda item 2]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles on the expulsion of aliens, as adopted by the Drafting Committee, and as contained in document A/CN.4/L.832, which read:

<sup>154</sup> *Yearbook ... 2013*, vol. II (Part Two), pp. 28–34.

\* Resumed from the 3204th meeting.

## EXPULSION OF ALIENS

## PART ONE

## GENERAL PROVISIONS

*Article 1. Scope*

1. The present draft articles apply to the expulsion by a State of aliens present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

*Article 2. Use of terms*

For the purposes of the present draft articles:

- (a) “expulsion” means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;
- (b) “alien” means an individual who does not have the nationality of the State in whose territory that individual is present.

*Article 3. Right of expulsion*

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.

*Article 4. Requirement for conformity with law*

An alien may be expelled only in pursuance of a decision reached in accordance with law.

*Article 5. Grounds for expulsion*

1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law.
3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.
4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.

## PART TWO

## CASES OF PROHIBITED EXPULSION

*Article 6. Rules relating to the expulsion of refugees*

The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

- (a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;
- (b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Article 7. Rules relating to the expulsion of stateless persons*

The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

*Article 8 [9]. Deprivation of nationality for the purpose of expulsion*

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

*Article 9 [10]. Prohibition of collective expulsion*

1. For the purposes of the present draft article, “collective expulsion” means expulsion of aliens, as a group.
2. The collective expulsion of aliens is prohibited.
3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.
4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

*Article 10 [11]. Prohibition of disguised expulsion*

1. Any form of disguised expulsion of an alien is prohibited.
2. For the purposes of the present draft article, “disguised expulsion” means the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intended to provoke the departure of aliens from its territory other than in accordance with law.

*Article 11 [12]. Prohibition of expulsion for the purpose of confiscation of assets*

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

*Article 12 [13]. Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure*

A State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure.

## PART THREE

## PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

## CHAPTER I

## GENERAL PROVISIONS

*Article 13 [14]. Obligation to respect the human dignity and human rights of aliens subject to expulsion*

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.
2. They are entitled to respect for their human rights, including those set out in the present draft articles.

*Article 14 [15]. Prohibition of discrimination*

The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

*Article 15 [16]. Vulnerable persons*

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

## CHAPTER II

## PROTECTION REQUIRED IN THE EXPELLING STATE

*Article 16 [17]. Obligation to protect the right to life of an alien subject to expulsion*

The expelling State shall protect the right to life of an alien subject to expulsion.

*Article 17 [18]. Prohibition of torture or cruel, inhuman or degrading treatment or punishment*

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

*Article 18 [20]. Obligation to respect the right to family life*

The expelling State shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right.

*Article 19. Detention of an alien for the purpose of expulsion*

1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.

(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

*Article 20 [30]. Protection of the property of an alien subject to expulsion*

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

## CHAPTER III

## PROTECTION IN RELATION TO THE STATE OF DESTINATION

*Article 21. Departure to the State of destination*

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

*Article 22. State of destination of aliens subject to expulsion*

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

*Article 23. Obligation not to expel an alien to a State where his or her life would be threatened*

1. No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not have the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

*Article 24. Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment*

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 cruel, inhuman or degrading treatment or punishment.

## CHAPTER IV

## PROTECTION IN THE TRANSIT STATE

*Article 25. Protection in a transit State of the human rights of an alien subject to expulsion*

A transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

## PART FOUR

## SPECIFIC PROCEDURAL RULES

*Article 26. Procedural rights of aliens subject to expulsion*

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.

*Article 27. Suspensive effect of an appeal against an expulsion decision*

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision when there is a real risk of serious irreversible harm.

*Article 28. International procedures for individual recourse*

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

PART FIVE

LEGAL CONSEQUENCES OF EXPULSION

*Article 29. Readmission to the expelling State*

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

*Article 30 [31]. Responsibility of States in cases of unlawful expulsion*

The expulsion of an alien in violation of the expelling State's obligations set forth in the present draft articles or in any other rule of international law entails the international responsibility of that State.

*Article 31 [32]. Diplomatic protection*

The State of nationality of an alien subject to expulsion may exercise diplomatic protection with respect to the alien in question.

2. The Drafting Committee had held 11 meetings, from 14 to 27 May 2014. It had completed its work on the 31 draft articles and had decided to report to the plenary Commission with the recommendation that they be adopted on second reading.

3. It was a historic day for the Commission: the treatment of aliens had been one of the 14 original topics selected for consideration in 1949,<sup>155</sup> and the item on expulsion of aliens had been on the agenda since 2004.<sup>156</sup>

4. The draft articles were based on the premise that every State had the right to expel aliens, subject to general limitations, as well as specific substantive and procedural requirements. The limitations had been clarified in the arbitral practice before the Second World War, although contemporary human rights law had also had a significant impact on the law relating to the expulsion of aliens. On behalf of the Drafting Committee, he commended the Special Rapporteur, whose mastery of the subject and

efficiency had greatly facilitated the Committee's task. Thanks were also due to the Committee members and to the Secretariat.

5. Draft article 1 pertained to the scope of the draft articles. Paragraph 1 had been adopted as formulated on first reading,<sup>157</sup> with the exception of the words "lawfully or unlawfully", which had been deleted for the sake of clarity and to address the concerns of some Governments. That amendment, as explained in the commentary to the draft article, did not imply any modification as to the scope *ratione personae* of the draft articles, which applied to aliens irrespective of whether their presence in the territory of a State was lawful or unlawful.<sup>158</sup> The amendment was intended to make it clear that every provision of the draft articles did not apply generally to both categories of aliens, however: some provisions distinguished between those two categories, particularly with respect to the rights to which such persons were entitled. In addition, in the French text of paragraph 1, the words *des étrangers* had been replaced with *d'un étranger*, in order to avoid any discrepancy with draft article 10, which prohibited collective expulsion.

6. Draft article 2 was the traditional provision on use of terms. The discussion had focused on whether to add an element of intentionality in the definitions, as suggested by some Governments, and on coherence with the articles on responsibility of States for internationally wrongful acts.<sup>159</sup> The question of the discrepancy between the general definition of expulsion contained in draft article 2 and in other draft articles had also arisen. To meet those concerns, the definition in draft article 2 (a) had been refined and the words "other than a refugee" had been deleted due to the formulation of draft article 6 as a "without prejudice" clause.

7. Draft article 3, on the right of expulsion, was the core provision within the text, balancing the uncontested right of a State to expel an alien with the limitations on that right under international law. Some concerns had been raised about the second sentence, which seemed to imply that the entire set of draft articles reflected applicable rules of international law. The Drafting Committee had accordingly reformulated that sentence along the lines of a "without prejudice" clause.

8. In draft article 5, paragraph 2, it had been decided to delete the explicit reference to the grounds of national security and public order. Although those grounds were the only ones provided for under international instruments, they had been seen as involving exceptional circumstances which it would be better to refer to in the commentary. A similar concern had been expressed regarding paragraph 3, which had been amended along the lines of paragraph 2. Paragraph 4 had been amended to show that a State should not expel an alien on a ground that was contrary to "its obligations under" international law,

<sup>157</sup> *Yearbook ... 2012*, vol. II (Part Two), pp. 15 *et seq.*, para. 45.

<sup>158</sup> *Ibid.*, pp. 18–19, para. 46, commentary to draft article 1.

<sup>159</sup> 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.

<sup>155</sup> *Yearbook ... 1949*, Report to the General Assembly, pp. 277 *et seq.*, at p. 281, para. 16.

<sup>156</sup> See *Yearbook ... 2004*, vol. II (Part Two), pp. 13–14, para. 19.

rather than simply “international law”. The new formulation would also harmonize the language of draft article 5 with that of draft article 25.

9. In Part Two, on cases of prohibited expulsion, it had been suggested by some Governments, as well as in the plenary debate, that all references to refugees be deleted from draft article 6, since the international law regime relating to refugees was extremely complex and the draft articles might not always be consistent with it. The Drafting Committee had considered that refugees were an important category of aliens, who should have a place in the draft articles. In order to address possible discrepancies with the international law and practice on refugees, on the one hand, and to emphasize the special protection against expulsion that refugees enjoyed under international law, on the other, the Committee had decided to adopt a new draft article 6 composed of two parts. The first part of the new article stated, in general terms, that the draft articles were without prejudice to the rules of international law relating to refugees and to any more favourable rules or practice on refugee protection. The commentary would refer in more detail to existing rules that in some cases were more favourable than those set out in the draft articles, but in view of its importance for refugee protection, the Drafting Committee had decided to refer to practice in the text of draft article 6.

10. The second part of draft article 6 was composed of two subparagraphs, which highlighted the specific rules on the international law of refugees of particular importance for the topic. The text of the former draft article 6, paragraph 1, was reproduced in subparagraph (a), and that of the former draft article 6, paragraph 3, in subparagraph (b). The text of subparagraph (b) had been refined to reflect exactly the language of the Convention relating to the Status of Refugees. The text of the former draft article 6, paragraph 2, pertaining to the question of refugees unlawfully present in the territory of a State who had applied for recognition of refugee status,<sup>160</sup> had been deleted: the Drafting Committee had considered it more appropriate to address that question, which was still in the domain of *lex ferenda*, in the commentary. In light of the substantial changes made to draft article 6, its title had been amended to read “Rules relating to the expulsion of refugees”.

11. When examining draft article 7, relating to the question of stateless persons, the Drafting Committee had decided to reformulate the first part as a “without prejudice” clause, in order to avoid possible discrepancies between the draft articles and the existing regime on stateless persons. The second part of draft article 7 elucidated the specific rule prohibiting the expulsion, save on grounds of national security or public order, of a stateless person who was lawfully in the territory of a State. The title had been amended to read “Rules relating to the expulsion of stateless persons”.

12. Former draft article 8<sup>161</sup>—a “without prejudice” clause designed to ensure the application of rules concerning the expulsion of refugees and stateless persons provided for by law, but not mentioned in draft articles 6

and 7—had become redundant in light of the amendments to draft articles 6 and 7, and had therefore been deleted.

13. For reasons of style, the word “sole” had been deleted from the title of what was now draft article 8 relating to deprivation of nationality for the purpose of expulsion.

14. In draft article 9, two editorial corrections had been made to the definition of collective expulsion in paragraph 1. Paragraph 2, as adopted on first reading, had referred expressly to the prohibition of the collective expulsion of migrant workers and members of their families.<sup>162</sup> The Drafting Committee had considered it preferable not to mention that category of aliens. The new text, which set out more directly the principle of the prohibition of collective expulsion, was more in line with the texts of the relevant regional instruments. The amendment did not mean, however, that the specific prohibition of the collective expulsion of migrant workers and members of their families had been excluded from the scope of the draft article; that aspect would be elaborated on in the commentary.

15. Paragraph 3 specified the conditions under which the members of a group of aliens might be expelled concomitantly, without such a measure being regarded as collective expulsion within the meaning of the draft articles. The original text of paragraph 3 had specified a reasonable and objective examination of the particular case of each individual member of the group as a basis for expulsion. Since that criterion might introduce a discrepancy with the other draft articles dealing with the review of a decision on expulsion by national authorities, however, it had been decided to remove the reference to the criterion and to refer in more general terms to “an assessment of the particular case of each individual member of the group in accordance with the present draft articles”.

16. In draft article 10, the definition of disguised expulsion contained in paragraph 2 had been refined with a view to presenting more clearly the main elements, namely that an alien had been forced to leave the territory of a State as the intentional result of an action or omission attributable to the State. The definition also shed light on the specific case when the expulsion was the result of unlawful acts committed by the nationals of the State or other persons, and it stated explicitly that the prohibition covered only actions and omissions intended to provoke the departure of an alien in any way other than in accordance with law.

17. Some minor editorial amendments had been made to draft article 12: the word “ongoing” had been added to the title, to align it with the text, and in the text, the words “of an alien” had been added after the word “expulsion”. It had been suggested that it would be useful to refer in the commentary to the Commission’s work on the responsibility of international organizations,<sup>163</sup> in order to explain the use of the term “circumvent” in draft article 12.

<sup>162</sup> *Ibid.* (draft article 10).

<sup>163</sup> 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.

<sup>160</sup> *Yearbook ... 2012*, vol. II (Part Two), p. 16 (draft article 6).

<sup>161</sup> *Ibid.* (draft article 8).

18. With regard to draft article 14, contained in Part Three on protection of the rights of aliens subject to expulsion, some Governments had expressed concern about the very general prohibition against discrimination set out in paragraph 1 of the draft article adopted on first reading.<sup>164</sup> According to the case law of international courts and tribunals on which the draft article was based, the expelling State was entitled to establish different rules for different categories of people, but it had the obligation to respect the rights of the alien subject to expulsion without discrimination of any kind. The Drafting Committee had decided to recast draft article 14 as a single paragraph in order to encapsulate that rule more directly. The title of the draft article had been amended to read “Prohibition of discrimination”.

19. Draft article 18, paragraph 2, of the original text, which had recognized that the right to family life might be subject to limitations, had not received the full support of Governments. Acknowledging that the text adopted in 2012 was too close to the text of the European Convention on Human Rights (art. 8), the Drafting Committee had considered it more appropriate to merge paragraphs 1 and 2 and to redraft the text using the terms of article 17 of the International Covenant on Civil and Political Rights, which were also used in the regional human rights instruments. Draft article 18 now stated that the expelling State should not interfere arbitrarily or unlawfully with the exercise of the right to family life.

20. Draft article 19 set out the specific rules relating to the detention of an alien for the purpose of expulsion. Paragraph 1 (*a*) had been refined in order to clarify the principle that the detention of an alien subject to expulsion must not be punitive when such detention was for the purpose of expulsion, and not for other purposes. The prohibition in paragraph 1 (*a*) had also needed to be supplemented in order to cover not only punitive but also arbitrary detention of an alien for the purpose of expulsion. In view of the fact that the obligation set out in paragraph 1 (*b*) might be understood by States as a general obligation to detain all aliens subject to expulsion separately from other detainees, the wording had been amended in order to indicate explicitly that the obligation of separate detention applied solely to persons detained for the purpose of expulsion.

21. The wording of the first sentence of paragraph 2 (*a*) was so general as to make that sentence redundant; it had therefore been deleted. Paragraph 2 (*b*) had been amended in order to reflect better the principle that a decision to extend the duration of detention could be taken only by a court or by another authority subject to judicial review. The new formulation, which addressed concerns expressed by several States where such a decision could also be taken by an administrative authority, confirmed the principle recognized in international jurisprudence that, in such cases, the extension decision had to be reviewable.

22. Paragraph 3 (*b*) had been amended in order to take account of concerns expressed by Governments about its excessively broad scope. It now established clearly that, if expulsion could not be carried out, the detention must be

ended, but only where such detention was for the purpose of expulsion, and not for any other reason.

23. The title of draft article 19 had been amended to read “Detention of an alien for the purpose of expulsion”.

24. The text of draft article 20 had been transposed from Part Five, on the legal consequences of expulsion, to the end of chapter II, on protection required in the expelling State. The text and title of draft article 20 had been adopted without amendment.

25. In chapter III, entitled “Protection in relation to the State of destination”, the prohibition set out in draft article 23, paragraph 1, had been the source of concerns expressed by Governments about any extension of the scope of the Convention relating to the Status of Refugees to cover situations in which not only the life but also the freedom of an alien was threatened. The Drafting Committee had accordingly decided not to engage in the development of international law in that area, and the reference to “freedom” had been deleted both from the title of the draft article and from paragraph 1. Paragraph 2 had been reworded to bring it into line with the standard set by the relevant case law and now indicated that an expelling State that did not have the death penalty must not expel an alien to a State where he or she had been sentenced to the death penalty or where there was a real risk that he or she would be sentenced to death. The title of draft article 23, as amended, read “Obligation not to expel an alien to a State where his or her life would be threatened”.

26. Draft article 24 required the expelling State not to expel an alien to a State where he or she might be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Concerns had been expressed about the extension of the prohibition contained in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which referred exclusively to torture, and not to cruel, inhuman or degrading treatment. However, in view of the concurring views on that matter of several universal and regional judicial bodies, the Drafting Committee had considered it preferable not to amend the draft article, on the understanding that the restrictive approach of the Convention and its corresponding treaty body would be properly reflected in the commentary.

27. In chapter IV, “Protection in the transit State”, draft article 25 had been adopted with a minor editorial amendment.

28. Part Four of the draft articles set out the specific procedural rules applicable in the context of the expulsion of an alien.

29. Draft article 26, paragraph 1 (*b*), concerned the right to challenge an expulsion decision. However, article 13 of the International Covenant on Civil and Political Rights provided for an exception to that right, where compelling reasons of national security otherwise required. For the sake of consistency with the Covenant, the Drafting Committee had therefore included a similar limitation in the new wording of paragraph 1 (*b*).

<sup>164</sup> *Yearbook ... 2012*, vol. II (Part Two), p. 16 (draft article 15).

30. Paragraph 4 took the form of a “without prejudice” clause with reference to the legislation of an expelling State concerning the expulsion of aliens who had been unlawfully present in its territory for a period of less than six months. That rule, in particular the six-month threshold, was an exercise in progressive development. It had been suggested that such a threshold could appear arbitrary and that the rule could face difficulties of implementation when the precise length of time an alien had been unlawfully present in the territory of a State had not been clearly established. The Drafting Committee had therefore considered it appropriate to replace the six-month threshold with a more flexible formulation, “a brief duration”.

31. Given the many comments from Governments that disagreed with the broad scope of draft article 27,<sup>165</sup> which constituted progressive development of international law, the text had been amended to indicate that an appeal by an alien had suspensive effect on an expulsion decision not in all cases, but exclusively when there was a real risk of serious irreversible harm.

32. The purpose of draft article 28 was to make it clear that aliens subject to expulsion might, in some cases, be entitled to individual recourse to a competent international body. Its title had been modified to avoid giving the misleading impression that the draft article concerned domestic procedures, and it now read “International procedures for individual recourse”.

33. In Part Five, on the legal consequences of expulsion, the wording of draft article 30 had been refined to refer to the international responsibility entailed by the violation,

<sup>165</sup> See A/CN.4/669 and Add.1.

by the expelling State, of its obligations “set forth in” the draft articles, rather than “under” the draft articles.

34. In conclusion, he expressed the hope that the plenary Commission would be in a position to adopt the draft articles on the expulsion of aliens, as contained in document A/CN.4/L.832.

35. The CHAIRPERSON invited the Commission to adopt the titles and texts of the draft articles on the expulsion of aliens, as contained in document A/CN.4/L.832, on second reading.

*Draft articles 1 to 31 were adopted, subject to minor editorial amendments to the French text of draft article 19.*

36. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries on the draft articles for inclusion in the Commission’s report to the General Assembly on the work of its sixty-sixth session.

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

[Agenda item 1]

37. After the customary exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-sixth session closed.

*The meeting rose at 11.20 a.m.*

\* Resumed from the 3210th meeting.