

Chapter VI

EXPULSION OF ALIENS

A. Introduction

184. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic of “Expulsion of aliens” for possible inclusion in the Commission’s long-term programme of work,³⁰⁶ which was subsequently done at the fifty-second session (2000).³⁰⁷ A brief syllabus describing the possible overall structure of and approach to the topic was annexed to the report of the Commission to the General Assembly on the work of that session.³⁰⁸ In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the topic’s inclusion in the long-term programme of work.

185. At its fifty-sixth session, the Commission decided, at its 2830th meeting, on 6 August 2004, to include the topic “Expulsion of aliens” in its current programme of work, and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.³⁰⁹ The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

186. At its fifty-seventh session (2005), the Commission considered, at its 2849th to 2852nd meetings,³¹⁰ the preliminary report of the Special Rapporteur.³¹¹

187. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur³¹² and a study prepared by the Secretariat.³¹³ At that session, the Commission decided to consider the second report at its next session, in 2007.³¹⁴

B. Consideration of the topic at the present session

188. At the present session, the Commission had before it the second and third reports of the Special Rapporteur (A/CN.4/581), which it considered at its 2923rd to 2926th meetings, from 23 to 29 May 2007, and at its 2941st to 2944th meetings, from 24 to 27 July 2007, respectively. At its 2926th meeting, held on 29 May 2007, the Commission decided to refer to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur at that

meeting.³¹⁵ At its 2944th meeting, held on 27 July 2007, the Commission decided to refer to the Drafting Committee draft articles 3 to 7.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SECOND AND THIRD REPORTS

189. The Special Rapporteur recalled that the Commission had endorsed most of the Special Rapporteur’s choices and, broadly speaking, the draft work plan contained in Annex I to the preliminary report.³¹⁶ The States that had spoken at the 2005 session of the Sixth Committee of the General Assembly had expressed support for the general approach proposed by the Special Rapporteur, emphasizing the interest, urgency and complexity of the topic.

190. The topic indisputably lent itself to codification, given the existence of a body of customary rules, numerous treaties, long-standing doctrine and well-established, albeit relatively recent, international and regional jurisprudence. The study of the topic by the Commission was all the more urgent in the light of the increasing tendency among States to carry out expulsions without observing fundamental human rights norms, notably in the context of efforts to combat terrorism and in the face of the rising phenomenon of illegal immigration and refugee flows.

191. The second report,³¹⁷ which embarked on a study of the general rules on expulsion of aliens, addressed the scope of the topic and the definition of its constituent elements, and proposed two draft articles (draft articles 1 and 2).

192. There had appeared to be a consensus, both in the Commission and in the Sixth Committee, that the topic should cover persons residing in the territory of a State of which they did not have nationality, with a distinction being made between persons in a regular situation and those in an irregular situation, including those who had been residing for a long time in the expelling State. Refugees, asylum seekers, stateless persons and migrant workers should also be included. On the other hand, some members and delegations had expressed doubt as to whether the topic should include denial of admission with regard to illegal immigrants, the situation of persons who had changed nationality following a change in the status of the territory where they were resident in the context of decolonization, and the situation of nationals of a State in a situation of armed conflict. In the opinion of the Special

³⁰⁶ *Yearbook ... 1998*, vol. II (Part Two), pp. 110–111, para. 554.

³⁰⁷ *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

³⁰⁸ *Ibid.*, Annex, p. 142.

³⁰⁹ *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

³¹⁰ *Yearbook ... 2005*, vol. II (Part Two), pp. 54–58, paras. 242–274.

³¹¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

³¹² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

³¹³ A/CN.4/565 and Corr.1 (mimeographed; available on the Commission’s website).

³¹⁴ *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 252.

³¹⁵ See footnotes 326 and 327 below.

³¹⁶ See footnote 311 above.

³¹⁷ See footnote 312 above.

Rapporteur, denial of admission and the situation of aliens entitled to privileges and immunities under international law should be excluded from the topic. According to draft article 1,³¹⁸ the topic should include aliens with regular or irregular status, refugees, asylum seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of the expelling State who had lost their nationality or been deprived of it.

193. With regard to the definition of the terms used, which was dealt with in draft article 2,³¹⁹ the Special Rapporteur proposed that the concept of “alien” should be defined in opposition to that of “*ressortissant*”, rather than that of “national”. Despite the variable senses in which the term “*ressortissant*” was used, it could be assigned a broader meaning than that of “national” in order also to cover persons subject to the authority of a State as the result of a particular legal connection, such as refugees, asylum-seekers, stateless persons or persons affiliated with territories under a mandate or protectorate. If necessary, draft article 2, paragraph 2 (d), could be reformulated to make nationality the main legal bond in this context.³²⁰

194. In the preliminary report, the term “expulsion” denoted a unilateral act by which a State compelled an alien to leave its territory. Nevertheless, taking into account the comments made by certain members as well as recent international case law, the Special Rapporteur had come to the conclusion that “expulsion” also covered cases where a State, by its conduct, compelled an individual to leave its territory.

195. Since expulsion involved leaving the territory of a State by crossing a frontier, draft article 2 also proposed a definition of the terms “frontier” and “territory”.

³¹⁸ Draft article 1 reads as follows:

“Scope

“1. The present draft articles shall apply to any person who is present in a State of which he or she is not a national (*ressortissant*).

“2. They shall apply, in particular, to aliens who are present in the host country, lawfully or with irregular status, to refugees, asylum seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it.”

³¹⁹ Draft article 2 reads as follows:

“Definitions

“For the purposes of the draft articles:

“1. The expulsion of an alien means the act or conduct by which an expelling State compels a *ressortissant* of another State to leave its territory.

“2. (a) An alien means a *ressortissant* of a State other than the territorial or expelling State:

(b) Expulsion means an act or conduct by which the expelling State compels an alien to leave its territory;

(c) Frontier means the zone at the limits of the territory of an expelling State in which the alien no longer enjoys resident status and beyond which the national expulsion procedure is completed;

(d) *Ressortissant* means any person who, by any legal bond including nationality, comes under [the jurisdiction] [the personal jurisdiction] of a State;

(e) Territory means the domain in which the State exercises all the powers deriving from its sovereignty.

³²⁰ The Special Rapporteur proposed the following alternative formulation: “Any person who has the nationality of a State or who, by any other legal bond, comes under [the personal jurisdiction] [the jurisdiction] of a State.”

196. The third report initiated consideration of the general principles relating to the expulsion of aliens, proposing five draft articles (draft articles 3 to 7). A State’s right to expel aliens was presented as a right inherent in State sovereignty, deriving from the territorial competence of each State, rather than a customary right conferred on a State by an “external” rule. However, this right was subject to limits, among which a distinction should be drawn between limits inherent in the international legal order (covered by draft article 3)³²¹ which exist independently of other constraints relating to special areas of international law, and limits deriving from international human rights law. Draft articles 4 to 7 related to the limits *ratione personae* of the right of expulsion.

197. A first limit, which was set out in draft article 4,³²² was the prohibition of expulsion by a State of its own nationals. However, this prohibition, which is well established in contemporary general international law, was subject to certain exceptions or derogations, which were confirmed by practice. Yet the expulsion by a State of one of its nationals was always subject to the requirement of consent by a receiving State; it was nevertheless without prejudice to the right of the person expelled to return to his or her country at the request of the receiving State.

198. Draft articles 5³²³ and 6³²⁴ related to the situation of refugees and stateless persons respectively. They were designed to complement the rules set out in the

³²¹ Draft article 3 reads as follows:

“Right of expulsion

“1. A State has the right to expel an alien from its territory.

“2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations.”

³²² Draft article 4 reads as follows:

“Non-expulsion by a State of its nationals

“1. A State may not expel its own nationals.

“2. However, if, for exceptional reasons, it must take such action, it may do so only with the consent of a receiving State.

“3. A national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State.”

³²³ Draft article 5 reads as follows:

“Non-expulsion of refugees

“1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

“2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person].”

³²⁴ Draft article 6 reads as follows:

“Non-expulsion of stateless persons

“1. A State may not expel a stateless person [lawfully] in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State.

“2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. [However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may [, in agreement with the person,] expel the person to any State which agrees to host him or her.”

relevant provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. In the light of recent developments in efforts to combat terrorism, and also Security Council resolution 1373 (2001) of 28 September 2001, it was possible to explicitly refer to terrorist activities (as well as behaviour intended to facilitate such activities) among the grounds which could justify the expulsion of a refugee or stateless person, even if such activities could be covered by the general ground of expulsion based on “national security”. Where stateless persons were concerned, it was perhaps desirable, in view of their special status, not to make the extent of their protection conditional on whether they were in a regular or irregular situation in the expelling State. Under the heading of progressive development, it was also possible to consider stipulating that the expelling State could be involved in the search for a receiving State in the event that the stateless person had not found one within a reasonable period of time.

199. Draft article 7³²⁵ set out the principle of the prohibition of the collective expulsion of aliens, and for that purpose distinguished between collective expulsions in peacetime and those occurring in wartime.

200. The prohibition of collective expulsions in peacetime was absolute in nature and was confirmed by a variety of legal instruments, as well as the case law of regional human rights institutions. However, the expulsion of a group of persons whose cases had each been examined individually did not fall under this ban. In this regard, the first paragraph of draft article 7, which referred to the criterion of “reasonable and objective examination” of the particular case of each of the aliens concerned, drew on the relevant case law of the European Court of Human Rights.

201. The collective expulsion of the nationals (*ressortissants*) of an enemy State in wartime was not governed by either the international law of armed conflict or by international humanitarian law. Practice in this area was variable, and did not give rise either to a general obligation for States to keep the nationals of an enemy State on their territory, or to an obligation to expel them. However, practice and doctrine tended to show that the collective expulsion of the nationals of an enemy State should be confined to aliens who were hostile to the receiving State; in contrast, it would seem that the expulsion of nationals of an enemy State who were behaving peacefully should be prohibited, as the ordinary rules relating to expulsion in peacetime remained applicable to them.

³²⁵ Draft article 7 reads as follows:

“Prohibition of collective expulsion

“1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.

“2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.

“3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.”

2. SUMMARY OF THE DEBATE

(a) *General comments and methodology*

202. The Special Rapporteur was commended on the quality and depth of his second and third reports. Great appreciation was also expressed for the analytical study prepared by the Secretariat, which constituted a very valuable tool for the Commission in addressing the topic.

203. Several members emphasized the importance, urgency and complexity of the topic, taking into account, in particular, the upsurge in the phenomenon of migration, including irregular migration, and the challenges posed by the fight against terrorism.

204. The view was expressed that expulsion of aliens was a topic more suited to political negotiation than to codification by an expert body. However, several members were of the opinion that the topic lent itself to codification, and it was asserted that codification could take the form of draft articles with a view to the adoption of an international convention.

205. Some members were of the view that all the existing rules in different areas, including treaty rules, should be examined in an effort to develop a general regime that would nevertheless preserve the special rules established by certain specific regimes. Others considered that it was not advisable to attempt to elaborate general rules on the issue and that the Commission should instead focus on defining the rules applicable to the various categories of aliens.

206. Several members expressed support for the general approach taken by the Special Rapporteur, emphasizing in particular the need to reconcile the right of a State to expel aliens with the relevant rules of international law, including those relating to the protection of human rights and to the minimum standards for the treatment of aliens. It was also asserted that the Commission should focus on the rights and obligations of States, and not only on the relationship between the expelling State and the expelled individual.

207. It was observed that the issue of expulsion of aliens was mainly governed by national laws, with States having an indisputable right to expel, subject to respect for the relevant rules of international law. Special attention must be given to national jurisprudence, which contributed to the development of certain criteria designed to prevent the arbitrary use of the right to expel. However, several members emphasized the role of the rules of customary international law in the establishment of limits to the right to expel.

(b) *Specific comments*

Article 1. Scope

208. Several members emphasized the need clearly to define the scope of the topic, which was not limited to the *ratione personae* aspect. The debate was concerned with removal measures and with the situations and persons to be covered. Some members suggested simplifying

draft article 1, paragraph 1, as proposed by the Special Rapporteur, by stating that the draft articles applied to the expulsion of aliens. A proposal was made to delete draft article 1, since draft article 2, which dealt with definitions, might suffice to delineate the parameters of the topic.

(i) *Removal measures and situations covered by the topic*

209. While several members supported excluding non-admission of aliens from the scope of the topic, certain members expressed a preference for its inclusion, *inter alia*, to take into account the interests of the situation of the numerous illegal immigrants who were detained for long periods. The view was expressed that the real problem that the Commission should address was not confined to expulsion but concerned more generally the means—including refusal of admission—by which States could control the presence of aliens in their territory. It was also suggested that the topic should include aliens applying for admission to a State while already in the international zone of that State. Furthermore, in some cases, refusal of admission could be incompatible with the principle of *non-refoulement*.

210. A number of members agreed that extradition should be excluded from the scope of the topic. However, it was suggested that the scenario of an expulsion constituting disguised extradition should be addressed. In addition, certain members objected to the Special Rapporteur's proposal to exclude from the scope of the topic extraordinary or extrajudicial transfer (or rendition), which raised serious problems in international law.

211. Conflicting opinions were expressed concerning the possible inclusion in the scope of the topic of expulsions carried out in situations of armed conflict. While some members were of the view that the Commission should deal with this issue, others considered that the Commission should exclude from the draft articles, if necessary by means of an explicit provision, an issue covered by well-established rules of the law of armed conflict, notably concerning expulsions in the context of military occupation. It was also proposed that a "without prejudice" clause should be included in respect of the rules of international humanitarian law.

212. It was suggested that the Commission should study the issue of ethnic cleansing aimed at aliens, as well as deprivation of nationality followed by expulsion, as its conformity with international law was questionable. It was considered necessary for the topic to cover the situation of persons who became aliens following the creation of a new State.

(ii) *Categories of persons covered by the topic*

213. Several members considered that the draft articles should apply to aliens physically present in the territory of the expelling State, whether legally or illegally. However, a legal regime governing expulsion must take account of the distinction between these two categories of aliens. It was also proposed that it should be specified that the draft articles applied only to natural persons, not to legal persons.

214. While some members emphasized the usefulness of draft article 1, paragraph 2, which contained a list of categories of aliens to be covered, others considered that this paragraph was unnecessary and that the examples cited should at the very most be included in the commentary. It was also suggested that paragraphs 1 and 2 of the draft article should be combined, deleting the words "in particular" in paragraph 2. Another view was that the current scope of the draft articles was too broad and that the Commission should limit its work to certain categories of aliens, which should be defined.

215. While certain members clearly supported excluding individuals entitled to privileges and immunities under international law from the scope of the topic, conflicting opinions were expressed concerning the possible inclusion of migrant workers. Some members suggested excluding refugees and stateless persons, since their status with regard to expulsion was well established and covered by a body of existing rules, including treaty rules. On the other hand, other members considered that refugees and stateless persons should be covered by the draft articles, at least insofar as there remained gaps or shortcomings in the rules applicable to these categories of persons. In this regard, it was suggested that the Commission should take into account the recommendations of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees. It was also suggested that a "without prejudice" clause should be included in the draft articles in respect of the rules relating to refugees.

Article 2. Definitions

216. While certain members emphasized the importance of clarifying the key concepts of the topic at this stage and ensuring consistent use of the terms (including "expelling State", "receiving State" or "territorial State") in the draft articles, others were of the view that the Commission should advance with its work before deciding on definitions.

(i) *The concept of "alien"*

217. Several members questioned the Special Rapporteur's approach, which consisted in defining the concept of "alien" in opposition to that of "*ressortissant*", rather than that of "national". In particular, it was pointed out that the definition of "*ressortissant*" proposed by the Special Rapporteur was too broad and created confusion, and that the term in question could not be translated, for example, into English and Spanish; accordingly, the criterion of nationality alone should be used. Likewise, certain members proposed amending the language of draft article 2, paragraph 2 (a), by defining "alien" as a person who was not a national of the expelling State, without making any reference to the ties the individual concerned might have with another State. It was also suggested that the Commission should look into the issue of dual nationality in the light of the rule whereby expulsion of nationals ought to be prohibited; in addition, it should be specified that the definition of "aliens" included stateless persons.

218. It was observed that certain categories of aliens, such as "refugees", "asylum seekers" and "migrant workers", needed to be defined. It was suggested that a broad definition should be retained for the term "refugee", taking into account recent developments that had affected this concept.

(ii) *The concept of “expulsion”*

219. Several members agreed with the Special Rapporteur’s broad definition of the concept of “expulsion”, contained in draft article 2, paragraph 2 (b), which was based on the element of “compulsion”, exercised by means of a legal act or conduct by the expelling State. However, it was considered necessary to indicate that this definition did not cover extradition (with the possible exception of an expulsion constituting a disguised form of extradition). In addition, the need to elaborate criteria for determining whether the conduct of a State should be qualified as expulsion was emphasized. In this vein, it was suggested that the draft articles should specify that the said conduct must involve compulsion that left the alien no option but to leave the territory of the State. Another view was that expulsion should be defined as an “act”, “conduct” by the State being relevant mainly in the context of responsibility for an internationally wrongful act. The view was also expressed that a definition should be devised covering the entire process of effecting the expulsion of an alien.

(iii) *The concepts of “territory” and “frontier”*

220. Certain reservations were expressed concerning the definitions contained in draft article 2, paragraphs 2 (c) and 2 (e). In addition, it was asserted that the Commission should consider the legal implications of the presence of an alien in the territorial sea, internal waters or archipelagic waters of a State.

221. Doubts were expressed as to the relevance of the concept of “residence”, alluded to in draft article 2, paragraph 2 (c), in defining State frontiers. It was emphasized that, in airport zones, States must respect all their international obligations, including the right to consular assistance. In addition, certain members were of the view that a proper definition of the concept of “territory” would make it unnecessary to define the term “frontier”.

Article 3. Right of expulsion

222. A number of members considered that draft article 3 established a fair balance between the right of the State to expel aliens and the guarantees which should be granted to expellees. Others considered that draft article 3 suffered from the defect of omitting any direct reference to the rights of the expellee and reflected a questionable approach whereby only the rules considered by the Special Rapporteur as inherent in the international legal order because they derived from sovereignty placed limits on the right of expulsion, as opposed to other rules—such as those relating to human rights—which limited only its exercise. A preference was also expressed for recognition that the right of expulsion was not “inherent”, in the words of the Special Rapporteur, but customary in nature.

223. Several members endorsed draft article 3, paragraph 1, which set out the right of a State to expel an alien. However, some members suggested combining paragraphs 1 and 2, adding to the present paragraph 1 a reference to the limits imposed by international law on the right of expulsion, including those stemming from the international protection of human rights.

224. It was pointed out that in its present form, paragraph 2 of draft article 3 was either unnecessary or incomplete. One view was that it was preferable to stipulate that the right to expel aliens was subject to the provisions of the present draft articles and to the special obligations arising from the treaties by which the expelling State was bound, while other members were of the view that a reference to the obligation to respect international law could suffice. Some members considered that the reference to the “fundamental principles of international law” was too narrow. It was also suggested that a reference should be included to *jus cogens* as well as to certain rules specific to expulsion, such as those set out in article 13 of the International Covenant on Civil and Political Rights.

225. Conflicting views were expressed on the need for an explicit reference to the principle of good faith. It was also stated that deciding on the content of paragraph 2, and in particular whether a reference to the provisions of the present draft articles could suffice, would depend on how exhaustive the articles were to be.

Article 4. Non-expulsion by a State of its nationals

226. A large number of members approved the inclusion in the draft articles of a provision relating to expulsion of nationals. However, it was suggested that draft article 4 should be deleted and the problem of expulsion of nationals addressed in the commentary on draft article 3. Others considered that only deprivation of nationality as a possible preliminary to expulsion fell within the framework of the present topic.

227. It was observed that the issue of the expulsion of persons having two or more nationalities should be studied in more detail and resolved within draft article 4, or in a separate draft article. In particular, it was necessary to consider whether the criterion of effectiveness ought to play a role. Others considered that it was not appropriate to address this topic in this context, especially if the Commission’s intention was to help strengthen the rule prohibiting the expulsion of nationals. It was also observed that the issue of deprivation of nationality, which was sometimes used as a preliminary to expulsion, deserved thorough study. In that regard, it was suggested that steps of that kind should be prohibited. It was also suggested that a reference to “banning” should be included in draft article 4.

228. Several members supported the prohibition on the expulsion of nationals as set out in draft article 4, paragraph 1. It was also suggested that such protection should be extended to individuals deprived of their nationality and to certain categories of aliens who had particularly close ties with the expelling State.

229. Some members underlined the unconditional and absolute nature of the prohibition on the expulsion of nationals, in the light of various international instruments. In that context, it was suggested that paragraph 2 of draft article 4, which recognized the possibility of exceptions to the principle of non-expulsion, should be deleted. In particular, it was held that certain examples which the Special Rapporteur had cited in support of such exceptions were of purely historical interest, or involved cases of extradition rather than expulsion. Expulsion of nationals

could at best be justified, in extreme cases, in terms of a state of necessity. Another proposal was that paragraphs 2 and 3 should be modified so as to highlight the fact that extradition or exile imposed by a judicial authority as an alternative to prison were the only lawful measures by means of which nationals could be removed.

230. It was suggested that the wording of the exceptions in paragraph 2 of draft article 4 should be tightened up and that the concept of “exceptional reasons” which could be used to justify the expulsion of a national should be clarified. The question was also raised of whether such reasons should not in any case be set out in the law.

231. It was suggested that draft article 4 should include a reference to the procedural safeguards that should be granted to expelled individuals. Emphasis was also placed on the importance of acknowledging that expelled nationals had the right to return to their own country when the reasons which had led to their expulsion had ceased to exist, or when, as a result of the emergence of new elements, the expulsion was no longer justified.

232. It was asked whether the issue of collective expulsion of nationals was covered in draft article 4. Moreover, it was necessary to clarify that that provision was without prejudice to the extradition of nationals, which was authorized under international law.

Article 5. Non-expulsion of stateless persons

Article 6. Non-expulsion of refugees

233. While some members expressed opposition to draft articles on refugees and stateless persons which went beyond a reference to the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons, other members were in favour, provided that the content of such draft articles did not give rise to contradictions with the treaty regimes currently in force. A briefing session by an expert from the Office of the United Nations High Commissioner for Refugees was also suggested.

234. Several members were against the inclusion of an express reference to “terrorism” among the grounds for the expulsion of a refugee or stateless person. In that regard, it was stated that there was no universal definition of terrorism, that “national security” grounds already covered measures of expulsion on grounds of terrorism and that the problem was not one specific to refugees and stateless persons. Furthermore, expulsion on grounds of terrorism could give rise to problems in terms of the application of the principle of *aut dedere aut judicare*. Some Commission members, however, favoured a reference to terrorism as a ground for expulsion of refugees and stateless persons. In particular, it was suggested that terrorism should be included by linking it to the concept of “national security”, or that of “*ordre public*”, and that the commentary should note recent trends in State practice aimed at combating abuse of refugee status by terrorists. As an alternative, it was suggested that reference should be made to specific offences, such as those defined in widely accepted multilateral instruments intended to combat terrorism.

235. With specific reference to refugees, the grounds for expulsion set out in draft article 5, paragraph 1, were said to be too broad; on this point, article 33 of the 1951 Convention relating to the Status of Refugees, which set forth the principle of *non-refoulement*, was more restrictive. Criticism was also voiced of the fact that only part of the rules contained in the Convention had been taken up, and of the Special Rapporteur’s attempt to combine articles 32 and 33 of that Convention. Lastly, it was suggested that a reference should be included to the principle of *non-refoulement*, as well as to the situation of persons who were waiting to be granted refugee status or who had been denied such status, who should enjoy a degree of protection.

236. Where stateless persons were concerned, some members opposed the Special Rapporteur’s suggestion for a draft article which, in contrast to article 31 of the 1954 Convention relating to the Status of Stateless Persons, would protect both stateless persons who were in a regular situation and those who were in an irregular situation, so as to avoid creating potentially contradictory legal regimes. Others, on the other hand, said that even stateless persons in an irregular situation should be granted protection.

237. Paragraph 2 of draft article 6, and in particular the reference to intervention by the host State in the search for a receiving State, was described as an important contribution to progressive development which was designed to fill a gap in the law.

Article 7. Prohibition of collective expulsion

238. Several members expressed support for the inclusion in the draft articles of a provision on collective expulsion. Others considered that the concept of “collective expulsion” was unclear and that it was therefore preferable to focus on the issue of discriminatory expulsions. It was also stated that the issue of collective expulsions in time of armed conflict should not be addressed in the present draft articles, since it fell under international humanitarian law.

239. Several members expressed support for paragraph 1 of draft article 7, considering that the collective expulsion of aliens was prohibited by contemporary international law, at least in peacetime. Others considered that there was no universal rule prohibiting the collective expulsion of aliens, but only an emerging principle, based on regional practice, which recognized a prohibition subject to exceptions; in addition, the non-arbitrary expulsion of a group of persons was not unlawful as long as all the persons concerned enjoyed procedural safeguards.

240. A number of members expressed agreement with the definition of “collective expulsion” set out in paragraph 2 of draft article 7. Some members considered, however, that the definition should be refined and that a number of issues remained open, such as the criteria underlying the definition of a “group” and the question of the number of persons expelled. On the latter point, it was stated that the key element was not quantitative but qualitative; in particular, it was important to know whether the expulsion was based on discriminatory grounds or whether each of the persons concerned had benefited from procedural safeguards.

241. One view was that it was not appropriate to draw a distinction between collective expulsions in peacetime and those carried out in wartime, as both were prohibited by the principal international legal instruments. In that context, it was suggested that paragraph 3 of draft article 7 should be deleted, or that it should set forth the right of each person, even in time of armed conflict, to have his or her case examined individually. Another view was that the proposed provision ran counter to the practice and present state of international law, which recognized the lawfulness of collective expulsions of enemy nationals in time of armed conflict.

242. It was contended that international humanitarian law did not contain a rule which prohibited expulsions of the nationals (*ressortissants*) of an enemy State in time of armed conflict. It was suggested that it should be made clear that paragraph 3 of draft article 7 applied solely to individuals who were nationals of a State engaged in an armed conflict with the expelling State. Moreover, the terminology used in paragraph 3 was too vague; in particular, the right of collective expulsion of enemy nationals should be limited to situations in which the latter demonstrated “serious” or “grave” hostility towards the expelling State, or to cases of persons who had “clearly acted” in a hostile manner. Provision could also be made for an exception based on extreme considerations of national security. In addition, it was suggested that it should be made clear that a State retained the right to expel the nationals of an enemy State if that was necessary to protect them from a revenge-seeking local population. In that context, measures taken in order to protect aliens from a hostile environment should, it was suggested, be described as “temporary removal” rather than “expulsion”.

243. Some members suggested adding a separate article on migrant workers having regard to their particular vulnerability, but other members were opposed.

(c) *Comments on other issues*

244. It was maintained that article 13 of the International Covenant on Civil and Political Rights reflected universally accepted principles that could constitute an appropriate basis for the Commission’s work. Provisions of certain regional human rights instruments were also mentioned, including Protocols Nos. 4 and 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights: “Pact of San José, Costa Rica”, the African Charter on Human and Peoples’ Rights, and the Arab Charter on Human Rights (new version of 2004).

245. It was suggested that the draft articles should contain a provision on migrant workers and members of their families, taking as a basis article 22 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and also a provision on the beneficiaries of treaties on friendship, commerce and navigation.

246. It was suggested that the Commission consider the possible grounds for the illegality of an expulsion, as well as looking into the lawfulness of the expropriation or confiscation measures that sometimes accompanied the

expulsion of an alien. However, it was pointed out that a detailed analysis of the regulations relating to expropriation was not within the Commission’s purview.

247. The question of whether and to what extent the expelling State must give the expelled alien the possibility of choosing the State of destination was mentioned. In this context, it was particularly important to determine nationality since, in principle, only the national State had the obligation to accept an expelled person.

248. In addition, it was maintained that the prohibition of *refoulement* was a rule of *jus cogens*.

3. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

249. The Special Rapporteur thanked the Commission members for their comments and observations, to which he had listened very closely. Certain comments, however, concerned aspects which had already been debated by the Commission and on which the Commission had already given the Special Rapporteur guidance approved by the General Assembly. The Special Rapporteur remained of the view that the topic lent itself to codification by an expert body, it being understood that States could subsequently initiate political negotiation on the fruits of the Commission’s work.

250. In response to certain comments on methodology, the Special Rapporteur reiterated his preference—endorsed by the Commission—for a study of the general rules on the issue, to be followed by a consideration of the rules applicable to specific categories of aliens. The legal consequences of an expulsion, as well as its potential effects on an alien’s property, would not be overlooked in subsequent reports; there was no need, however, to refer to those issues in draft article 1, which dealt with the scope of the topic.

251. The Special Rapporteur supported the proposal to specify, in the commentary to draft article 1, that the draft articles applied only to natural persons. Responding to members who had expressed support for the exclusion of refugees and stateless persons from the scope of the topic, the Special Rapporteur pointed out that the existing legal instruments did not establish a comprehensive regime for the expulsion of these categories of persons. The Commission should therefore examine the rules applicable to these persons—including *non-refoulement* of refugees—keeping in mind contemporary law and practice. The same comment applied to the expulsion of enemy aliens, which was not governed by international humanitarian law instruments.

252. In the Special Rapporteur’s opinion, the enumeration of the various categories of aliens in draft article 1, paragraph 2, was necessary. Deleting this paragraph, as had been proposed by certain members, would unduly expand the *ratione personae* scope of the draft articles to any category of aliens, including, for example, those entitled to privileges and immunities under international law.

253. The Commission and almost all the States that had spoken in the Sixth Committee had expressed a preference for excluding non-admission from the scope of the

topic. The Special Rapporteur continued to share this view, since an alien could not be expelled before being admitted and the right to admit was inherent to the sovereignty of each State. Nevertheless, in international zones, States must respect all the relevant rules of international law, including those relating to the fundamental rights of the human being.

254. The issue of extradition disguised as expulsion would be addressed in a subsequent report. On the other hand, the Special Rapporteur did not support the proposal to include in the topic the issue of transfers of criminals, which came under international criminal law. Making such transfers subject to the rules on expulsion of aliens would risk compromising efficient cooperation between States in the fight against crime, including terrorism.

255. The Special Rapporteur took note of the reservations expressed by several Commission members concerning the use of the term “*ressortissant*”. It would be used henceforth as a synonym for “national”. However, the concepts of “non-national” and “alien” were not always equivalent, since certain categories of “non-nationals” were not considered aliens for the purposes of expulsion under the law of certain States. The problem of dual nationality would be discussed in subsequent reports.

256. The Special Rapporteur agreed that it was necessary to define the compulsion that the conduct of a State must involve in order for it to be qualified as “expulsion”.

257. With regard to the concepts of “territory” and “frontier”, the Special Rapporteur insisted on keeping the proposed definitions. The definition of “territory” corresponded to the unanimously accepted one, which included, in particular, internal waters and the territorial sea. A specific definition should be given for the concept of “frontier” in the context of the present topic. For the purposes of immigration, the frontier was a zone (for example, a port, airport or customs zone), rather than a line.

258. In the light of these considerations, the Special Rapporteur submitted to the Commission a revised version of draft articles 1³²⁶ and 2.³²⁷

³²⁶ Draft article 1 as revised reads as follows:

“*Scope*”

“1. The present draft articles shall apply to the expulsion of aliens, as enumerated in paragraph 2 of this article, who are present in the territory of the expelling State.”

or:

“1. The present draft articles shall apply to the expulsion by a State of those aliens enumerated in paragraph 2 of this article who are present in its territory.

“2. They shall apply to aliens who are lawfully or unlawfully present in the expelling State, refugees, asylum seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of the expelling State who have lost their nationality or been deprived of it.”

³²⁷ Draft article 2 as revised reads as follows:

“*Definitions*”

“For the purposes of the draft articles:

“(a) *expulsion* means a legal act or a conduct by which a State compels an alien to leave its territory;

“(b) *alien* means a person who does not have the nationality of the State in whose territory he or she is present, except where the legislation of that State provides otherwise;

259. Concerning the five draft articles proposed in the third report, the members had made conflicting observations which were sometimes based on personal preferences, losing sight of current practice and the applicable law.

260. The Special Rapporteur was not opposed to the suggestion that paragraphs 1 and 2 of draft article 3 should be combined. Bearing in mind the proposals made and the various views expressed, it might be stipulated that expulsion should take place “in a context of respect for the relevant rules of international law, in particular the fundamental rights of the human person, and the present draft articles”.

261. The Special Rapporteur continued to believe that draft article 4 should be retained, if only to emphasize the prohibition on expulsion of nationals. Possible exceptions to the prohibition had been observed in practice, and the examples mentioned in the third report were indeed cases of expulsion and not cases of extradition. The Special Rapporteur supported the proposal that the “exceptional circumstances” which might justify the expulsion of a national should be clarified. It was not desirable to deal with the issue of dual nationals in connection with draft article 4, as protection from expulsion should be provided in respect of any State of which a person was a national. That issue could, however, have an impact in the context of the exercise of diplomatic protection in cases of unlawful expulsion. In order to respond to the questions posed by several members, the Special Rapporteur planned to analyse further the issue of expulsion of dual nationals in a forthcoming report; he also planned to study, with the help of the Secretariat, the question of deprivation of nationality as a prelude to expulsion. On the other hand, it was not necessary to introduce a reference to “banning”, which was already covered by the concept of “expulsion” as adopted.

262. Concerning draft articles 5 and 6, the Special Rapporteur continued to believe that efforts should be made to improve the protection granted to refugees and stateless persons under existing international conventions. It was not so much a question of modifying the current rules as of complementing them by setting forth the prohibition of expulsion and dealing in particular with the temporary protection and the residual rights of *de facto* refugees or persons who had been denied refugee status. Moreover, any incompatibility which might arise between different rules would not be insurmountable, since international law offered the tools needed to resolve such cases. Considering the divergent views which had been expressed on that issue, it was important for the Commission to provide the Special Rapporteur with clear indications as to how to address the issue of refugees and stateless persons. Since almost all the members were opposed to including an explicit reference to terrorism as a ground for expelling a refugee or stateless person, it was desirable to specify in

“(c) *conduct* means any act by the authorities of the expelling State against which the alien has no remedy and which leaves him or her no choice but to leave the territory of that State;

“(d) *territory* means the domain in which the State exercises all the powers deriving from its sovereignty;

“(e) *frontier* means the zone at the limits of the territory of an expelling State in which the alien does not enjoy resident status and beyond which the expulsion procedure is completed.”

the commentary that terrorism could constitute a justification for expulsion on grounds of “national security”.

263. Concerning draft article 7 on the prohibition of collective expulsions, the Special Rapporteur did not believe it was necessary to insert a specific provision relating to migrant workers, since they were covered by the prohibition on collective expulsion of aliens in general.

264. Concerning the expulsion of nationals of an enemy State in time of armed conflict, the Special Rapporteur reiterated his view that the issue was not clearly regulated in international humanitarian law. Whereas the individual expulsion of a national of an enemy State should fall under the ordinary regime of expulsion of aliens, practice as regards collective expulsion in time of armed conflict

varied, with a tendency to be tolerant towards individuals who did not display a hostile attitude. Taking into account the proposals made by a number of members concerning the scope and wording of draft article 7, paragraph 3, the Special Rapporteur suggested the following wording: “Foreign nationals of a State engaged in armed conflict with the receiving State shall not be subject to measures of collective expulsion unless, taken collectively as a group, they are victims of hostile acts or are engaged in activities hostile to the receiving State.”

265. Lastly, the Special Rapporteur indicated that other matters raised during the discussions, such as the principle of *non-refoulement* or the problem of discriminatory expulsions, would be dealt with during the consideration of the limits *ratione materiae* of the right of expulsion.