

Chapter VI

EXPULSION OF ALIENS

A. Introduction

85. At its fifty-sixth session (2004), the Commission decided to include the topic “Expulsion of aliens” in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.⁸²⁷ The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

86. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur.⁸²⁸

87. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur⁸²⁹ and a study prepared by the Secretariat.⁸³⁰ The Commission decided to consider the second report at its subsequent session, in 2007.⁸³¹

88. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur⁸³² and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,⁸³³ and draft articles 3 to 7.⁸³⁴

89. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur.⁸³⁵ At its 2973rd meeting, on 6 June 2008, the Commission decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by

⁸²⁷ *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364. 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 (*Yearbook ... 1998*, vol. II (Part Two), pp. 110–111, para. 554) and at its fifty-second session (2000) it confirmed that decision (*Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729). The annex to the report of the Commission to the General Assembly on the work of that session included a brief syllabus describing the possible overall structure of, and approach to, the topic (*ibid.*, annex, pp. 142–143). 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.

⁸²⁸ *Yearbook ... 2005*, vol. II (Part Two), pp. 54–58, paras. 242–274. See the preliminary report in *ibid.*, vol. II (Part One), document A/CN.4/554.

⁸²⁹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

⁸³⁰ A/CN.4/565 and Corr.1 (mimeographed; available on the Commission’s website).

⁸³¹ *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 252.

⁸³² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

⁸³³ *Ibid.*, vol. II (Part Two), footnotes 326–327.

⁸³⁴ *Ibid.*, footnotes 321–325.

⁸³⁵ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/594.

the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.⁸³⁶

At its 2984th meeting, on 24 July 2008, the Commission approved the conclusions of the Working Group and requested the Drafting Committee to take them into consideration in its work. The conclusions were as follows: (a) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities; and (b) the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals.⁸³⁷

B. Consideration of the topic at the present session

90. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/611), which it considered at its 3002nd to 3006th meetings, on 8 and 12 to 15 May 2009. The Commission also had before it the comments and information received from Governments up to that point (A/CN.4/604).

91. At its 3006th meeting, the Special Rapporteur undertook to present to the Commission a revised and restructured version of draft articles 8 to 14,⁸³⁸ taking into account the plenary debate. The Special Rapporteur then submitted to the Commission a document containing a set of draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). At its 3028th meeting, on 28 July 2009, the Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FIFTH REPORT

92. The fifth report continued the study of the rules of international law limiting the right of expulsion, begun in the third report,⁸³⁹ and dealt with the limits relating to the requirement of respect for fundamental rights.

93. The general obligation to respect human rights, which had been recognized by the ICJ in the *Barcelona*

⁸³⁶ *Ibid.*, vol. II (Part Two), para. 170.

⁸³⁷ *Ibid.*, para. 171.

⁸³⁸ See footnotes 842 to 848 below.

⁸³⁹ See footnote 832 above.

Traction case⁸⁴⁰ and in *Military and Paramilitary Activities in and against Nicaragua*,⁸⁴¹ was all the more imperative when it applied to persons whose legal situation made them vulnerable, as was the case with aliens who were being expelled. That said, it seemed to be realistic and consistent with State practice to limit the rights guaranteed during expulsion to the fundamental human rights and to those rights the implementation of which was required by the specific circumstances of the person being expelled. That was the intent of draft article 8.⁸⁴²

94. In view of the problems and controversies involved in defining what constituted fundamental rights or the “hard core” of such rights, the Special Rapporteur had attempted to identify the “hard core of the hard core”, consisting of the inviolable rights that must be guaranteed for any person being expelled. Those rights had been analysed in the light of universal and regional human rights instruments, international jurisprudence, including that of monitoring bodies and regional human rights tribunals, and certain domestic decisions.

95. Draft article 9⁸⁴³ concerned the first of those rights, the right to life, which could also be understood as an obligation to protect the lives of persons being expelled, both in the expelling State and in relation to the situation in the receiving State. Although under customary law the right to life did not necessarily imply prohibition of the death penalty or of executions, on the basis of case law it could be said that States that had abolished the death penalty had an obligation not to expel a person sentenced to death to a State in which that person might be executed without first obtaining a guarantee that the death penalty would not be carried out.

96. Draft article 10⁸⁴⁴ concerned the dignity of the person being expelled, which must be respected in all circumstances regardless of whether the person was legally or illegally present in the expelling State. The concept of human dignity provided the basis for all other rights and had been recognized in a number of judicial decisions.

⁸⁴⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, *I.C.J. Reports 1970*, p. 3, at p. 32, paras. 33–34.

⁸⁴¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at p. 134, para. 267.

⁸⁴² Draft article 8 read as follows:

“General obligation to respect the human rights of persons being expelled

“Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances.”

⁸⁴³ Draft article 9 read as follows:

“Obligation to protect the right to life of persons being expelled

“1. The expelling State shall protect the right to life of a person being expelled.

“2. A State that has abolished the death penalty may not expel a person who has been sentenced to death to a State in which that person may be executed without having previously obtained a guarantee that the death penalty will not be carried out.”

⁸⁴⁴ Draft article 10 read as follows:

“Obligation to respect the dignity of persons being expelled

“1. Human dignity is inviolable.

“2. The human dignity of a person being expelled, whether that person’s status in the expelling State is legal or illegal, must be respected and protected in all circumstances.”

97. Draft article 11⁸⁴⁵ set forth the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment, both in the expelling State and in relation to the situation in the receiving State. That obligation was enshrined in international human rights instruments and was amply supported by case law.

98. Draft article 12⁸⁴⁶ provided specific protection for children being expelled.

99. Draft article 13⁸⁴⁷ concerned the obligation to respect the private and family life of the person being expelled, which was enshrined in the main human rights instruments and supported by abundant judicial precedent, in particular the jurisprudence of the European Court of Human Rights and the Human Rights Committee. The commentary could clarify what was meant by the notion of a “fair balance” between the interests of the expelling State and those of the individual in question, a notion that had been extensively developed in the case law of the European Court of Human Rights.

100. Draft article 14⁸⁴⁸ concerned the principle of non-discrimination, which should apply not only among aliens being expelled but also, with respect to the enjoyment of fundamental rights, between aliens and nationals of the expelling State.

101. In his future reports, the Special Rapporteur intended to discuss the problems of disguised expulsion,

⁸⁴⁵ Draft article 11 read as follows:

“Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment

“1. A State may not, in its territory, subject a person being expelled to torture or to cruel, inhuman or degrading treatment.

“2. A State may not expel a person to another country where there is a serious risk that he or she would be subjected to torture or to cruel, inhuman or degrading treatment.

“3. The provisions of paragraph 2 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity.”

⁸⁴⁶ Draft article 12 read as follows:

“Specific case of the protection of children being expelled

“1. A child being expelled shall be considered, treated and protected as a child, irrespective of his or her immigration status.

“2. Detention in the same conditions as an adult or for a long period shall, in the specific case of children, constitute cruel, inhuman and degrading treatment.

“3. For the purposes of the present article, the term “child” shall have the meaning ascribed to it in article 1 of the Convention on the Rights of the Child of 20 November 1989.”

⁸⁴⁷ Draft article 13 read as follows:

“Obligation to respect the right to private and family life

“1. The expelling State shall respect the right to private and family life of the person being expelled.

“2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by law and shall strike a fair balance between the interests of the State and those of the person in question.”

⁸⁴⁸ Draft article 14 read as follows:

“Obligation not to discriminate

“1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind, on grounds such as race, colour, sex, language, relation, political or other opinion, national or social origin, property, birth or other status.

“2. Such non-discrimination shall also apply to the enjoyment, by a person being expelled, of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.”

expulsion on grounds contrary to the rules of international law, conditions of detention and treatment of persons who have been or are being expelled, before turning to procedural questions.

2. SUMMARY OF THE DEBATE

(a) *General comments*

102. Various members stressed that a fair balance must be maintained between the right of States to expel aliens and the need to respect human rights, taking into account also the situation in the receiving State. Emphasis was also placed on the need to consider, in the context of the topic, contemporary practice in various parts of the world, including the case law of national courts.

103. Some members felt that the Commission should look closely at the direction that was being taken with regard to the topic, the structure of the draft articles and the nature and form of the instrument that might ultimately be submitted to the General Assembly.

104. According to some members, it was not necessary to address all human rights obligations of the expelling State but only those that were closely related to expulsion. Such obligations relate to, in particular, the conditions and duration of detention prior to expulsion, certain procedural guarantees and the legal remedies that must be made available to persons facing expulsion. Apart from that, the Commission need only address the conditions under which an expulsion could be considered lawful, drawing a clear distinction between those conditions that must be respected by the expelling State regardless of the situation in the receiving State and those relating to the risk of human rights violations in the receiving State. Among the conditions that must be respected in the expelling State, particular importance was attached to non-discrimination and the conformity of the expulsion decision with the law.

105. It was also proposed to establish, in an initial draft article, the right of persons who had been or were being expelled to full respect for their human rights and to then set out, in a second draft article, the conditions under which the risk that human rights would not be respected in the receiving State should prevent an expulsion. Two additional draft articles could be devoted to the prohibition of discrimination and the protection of vulnerable persons.

106. Reservations were expressed as to the approach taken by the Special Rapporteur, which consisted of drawing up a list of fundamental, or inviolable, rights that must be respected in the case of persons subject to expulsion. Several members felt that the expelling State must respect all human rights of such persons. Some members pointed out that what needed to be ascertained was not whether a right was “fundamental”, but whether it was relevant in a particular situation and whether there were legally valid grounds for restricting it or derogating from it. Furthermore, it was noted that the list of “inviolable” rights drawn up by the Special Rapporteur did not coincide with the lists of non-derogable rights contained in certain human rights treaties.

107. The view was expressed that it would be sufficient to say in the draft articles that the expelling State had a general obligation to respect the human rights of the person expelled and, if necessary, to draw attention in the commentary to certain rights that were particularly relevant in the context of expulsion. According to another view, the draft articles should state a number of rights which were of particular relevance in the context of expulsion, while making it clear that they were only examples.

108. Some members proposed that the list of rights set out in the draft articles should be expanded. Reference was made in that connection to the Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by the General Assembly in its resolution 40/144 of 13 December 1985. More specifically, some members suggested including a draft article establishing the right of persons who had been or were being expelled to have certain procedural guarantees observed, in particular the right to a remedy allowing them to contest the legality of their expulsion, the right to be heard and the right to the assistance of a lawyer. The inclusion of a provision concerning the right to property was also proposed, particularly in connection with the problem of the confiscation of an expelled alien's property. It was further proposed that the right to basic medical care of aliens who were detained prior to expulsion, should also be listed.

109. The inclusion of draft articles governing other questions was also proposed. It was suggested that a provision be included stipulating that unreasonably prolonged expulsion procedures might constitute inhuman or degrading treatment. It was also proposed that a draft article state that the need to respect human rights entailed the prohibition of using expulsion as a countermeasure. Lastly, it was proposed that the draft articles contain a statement to the effect that the proclamation of a state of emergency did not permit any derogation from the rights recognized in the draft articles.

110. The question of remedies in the event of unlawful expulsions (right of return, compensation, etc.) was also raised. The question was raised whether that issue ought to be dealt with in the draft articles or, at the very least, in the commentary.

(b) *Specific comments on the draft articles*

Draft article 8. General obligation to respect the human rights of persons being expelled

111. While some members supported draft article 8, several other members felt that its scope was too limited. They believed that the reference to “fundamental rights” and to rights “the implementation of which is required by [the expelled person's] specific circumstances” should be deleted and that the draft article should be reworded in order to establish the obligation of the expelling State to respect all human rights that were applicable to a person undergoing expulsion, both under treaties binding on the expelling State and under customary international law. Some members pointed out that some rights that the Special Rapporteur did not seem to consider applicable should also be guaranteed to the extent possible.

112. Under another proposal, draft article 8 might be reworded to indicate that a person who had been expelled or was being expelled had the right to respect for his or her fundamental rights, particularly those mentioned in the draft articles. It was also suggested that the reference to fundamental rights should be replaced with a brief list of rights of particular relevance in the context of expulsion, or that a “without prejudice” clause should be included which would refer to the human rights not dealt with in specific draft articles.

113. The view was expressed that the reference in draft article 8, both to persons who had been expelled and to those who were being expelled, recognized an important distinction that should also be reflected in other draft articles. The title of the draft article should also be reworded to cover both those persons who had been expelled and those who were being expelled. It was also pointed out, however, that the expression “being expelled” was somewhat vague.

114. Some members thought that a reference to possible restrictions of human rights in the context of expulsion could be considered, provided that it was specified that such restrictions were subject to several conditions. It was pointed out that such conditions must be provided for by law and be in accordance with treaties binding the expelling State or with customary law. Moreover, they must correspond to a legitimate interest, be proportional and respect certain procedural guarantees.

Draft article 9. Obligation to protect the right to life of persons being expelled

115. Several members supported draft article 9. However, some were of the view that the protection afforded by paragraph 2 should be strengthened, in order to take into account the trend that had been observed, and not only in Europe, towards abolition of the death penalty. It was also suggested that the reference to a “State that has abolished the death penalty” was somewhat unclear, and that the reference ought instead to be to States in which the death penalty did not exist or was not actually applied. It was proposed that the wording which limited the scope of the paragraph to those States that had abolished the death penalty should be deleted, or that paragraph 2 should be reworded to prohibit, not only the expulsion of a person already condemned to death to a State in which he or she might be executed, but also the expulsion of a person to a State in which he or she might face the death penalty. Another view held that it would be difficult to extend the protection provided for in paragraph 2, which already constituted progressive development of international law.

116. Some members felt a need to define more clearly, possibly in the commentary, the conditions whereby a “guarantee” that the death penalty would not be enforced could be considered to be sufficient, the procedures intended to ensure that such a guarantee was respected, and the consequences of any violation of such a guarantee.

117. In addition, a proposal was made to clarify, possibly in the commentary, the extent to which draft article 9 contemplated expulsion and/or extradition.

Draft article 10. Obligation to respect the dignity of persons being expelled

118. Some members supported draft article 10, which was said to constitute a major contribution to the progressive development of international law. However, it was also suggested that only paragraph 2, which dealt specifically with respect for dignity in the context of expulsion, should be retained.

119. Other members did not favour including a draft article that dealt with respect for the dignity of persons being expelled; it was suggested that the question went well beyond the issue of expulsion. A number of members, moreover, felt that human dignity was the foundation of human rights in general, and not a right in itself. Attention was also drawn to the imprecision of the concept of “dignity”, and doubts were expressed as to its legal meaning. Some members proposed that a reference to human dignity should be included in the preamble or in other provisions of the draft articles.

Draft article 11. Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment

120. Several members supported the inclusion of a draft article stating the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment. However, one point of view held that paragraph 1 should be deleted, since it was not specific to the question of expulsion. Some members also considered that the adjective “cruel” was superfluous.

121. Regrets were expressed that the Special Rapporteur had not taken account of the definition of torture contained in article 7 (2) (e) of the Rome Statute of the International Criminal Court, which made no mention of the reasons for the acts in question or of their official or unofficial nature. It was suggested that a reference to that definition should be included in the commentary. It was also proposed that the scope of the entire draft article—and not just paragraph 2 thereof—be extended to situations in which the risk of torture or cruel, inhuman or degrading treatment emanated from persons acting in a private capacity.

122. With regard to paragraph 3, which referred to just such situations, it was proposed that, in the light of the case law of the European Court of Human Rights, its scope should be restricted to cases in which the authorities of the receiving State would be unable to obviate the risk by providing appropriate protection.⁸⁴⁹ According to another viewpoint, paragraph 3 should be deleted because acts committed in a private capacity were not covered by the definitions of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 or the Inter-American Convention to Prevent and Punish Torture of 9 December 1985.

⁸⁴⁹ See *H.L.R. v. France*, Application No. 24573/94, Judgement (merits) of 29 April 1997, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 1997-III*, p. 745, at p. 758, para. 40.

123. Some members proposed that the words “in its territory” should be deleted from the first paragraph, or that the phrase should be supplemented by a reference to territories or places under the jurisdiction or control of the expelling State. It was also suggested that a reference should be made to territories under foreign occupation.

124. With regard to the risk of torture or ill-treatment in the receiving State, some members were of the view that the notion of “serious risk”, mentioned in paragraph 2, set too high a standard and that it should be replaced with the notion of “real risk”, which was embodied in the case law of the European Court of Human Rights. A reference was also made to General Comment No. 20 of the Human Rights Committee, according to which States parties to the International Covenant on Civil and Political Rights “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.⁸⁵⁰ A further proposal had been to extend that protection to the risk of violation of other rights, including the right to a fair trial. It was also suggested that the receiving State should be required to guarantee that expelled persons would not be subjected to torture or ill-treatment.

125. It was suggested that the draft article, or the commentary thereto, should reaffirm that the prohibition of torture or other forms of ill-treatment could not be suspended in emergencies such as armed conflicts, natural disasters or situations that might threaten State security, and that this prohibition should take precedence over any national law that provided otherwise.

Draft article 12. Specific case of the protection of children being expelled

126. Several members supported draft article 12, although the suggestion was made that the provision should be reworded to indicate that a minor being expelled must be treated and protected in accordance with his or her legal status as a child. The view was expressed that the meaning and content of the special protection to be granted to children who were being expelled should be clarified further. The proposal was made to add a reference to the “extreme vulnerability” of children, something which the European Court of Human Rights had underscored in its judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*.⁸⁵¹ Another suggestion was to specify that in any case of expulsion involving a child, the best interests of the child must prevail. A proposal was made to recast paragraph 2 to state that in certain cases the child’s best interests might require that he or she should not be separated from adults during detention pending expulsion.

127. Some members suggested that provision should be made, possibly in a separate draft article, for the specific protection of other categories of vulnerable persons, such

as the elderly, the physically or mentally disabled, and women, especially pregnant women.

Draft article 13. Obligation to respect the right to private and family life

128. Several members supported the inclusion of a draft article on the right to private and family life, which was especially important in the context of expulsion. Another view held that no specific article should be devoted to that right, the scope of which transcended the issue of expulsion.

129. A proposal was put forward to add a new paragraph between existing paragraphs 1 and 2, which would stipulate that before a State expelled an alien, it should consider the individual’s family ties to persons residing in the expelling State and the length of time the alien had resided in that State. It was noted, however, that protection of family life in the context of expulsion was afforded only under the European Convention on Human Rights and that the case law of the European Court of Human Rights had interpreted that protection restrictively.

130. It was suggested that the commentary should spell out the implications of the right to private life in the context of expulsion. According to another point of view, it would be preferable to delete the reference to private life from draft article 13, since it did not necessarily have a direct bearing on the question of expulsion.

131. Some members thought that the scope of paragraph 2 was too broad, since it recognized possible derogations in cases “provided for by law”, whereas a reference to cases “provided for by international law” seemed to be more appropriate. It was likewise argued that the criterion of a “fair balance” would be hard to apply.

Draft article 14. Obligation not to discriminate

132. Various members supported draft article 14. However, another view held that it was unnecessary to include a draft article on the obligation not to discriminate whose scope extended far beyond the issue of expulsion.

133. In view of the general nature of the principle of non-discrimination, some members felt that draft article 14 should be moved to the beginning of the chapter on respect for human rights—for example, after draft article 8. Another suggestion was that the title of draft article 14 should be “rule” or “principle” rather than “obligation” not to discriminate.

134. Some members considered that only non-discrimination among aliens was pertinent in the context of expulsion. Others held that any expulsion based on discrimination against aliens *vis-à-vis* the rest of the population of the expelling State should be prohibited. Doubts were expressed as to whether the principle of non-discrimination existed independently of the enjoyment of specific rights. It was also noted that in some cases there might be legitimate grounds for differentiating between categories of aliens when it came to expulsion, for example between nationals of States belonging to the European Union and nationals of non-member States, or in the context of readmission agreements.

⁸⁵⁰ Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI A, para. 9.

⁸⁵¹ *Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgement of 12 October 2006, European Court of Human Rights, *Reports of Judgments and Decisions 2006-XI*, para. 103.

135. Various members proposed that the list of prohibited grounds of discrimination should be expanded to include, in particular, age, disability and sexual orientation.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

136. The Special Rapporteur explained that the purpose of his fifth report was to identify some essential human rights that States must respect when aliens were being expelled, without prejudice to the respect of human rights in general.

137. Draft article 8 must be viewed from that perspective; it referred not only to “fundamental rights” but also to States’ obligation to respect other rights “the implementation of which is required by [the] specific circumstances [of the person who has been or is being expelled]”. However, the Special Rapporteur did not have anything against incorporating a broader reference to human rights in general in that draft article, provided that other draft articles were then devoted to certain specific rights whose respect was of particular importance in the context of expulsion and whose content had been elucidated by case law.

138. The Special Rapporteur noted that the death penalty was still controversial, despite the trend towards its abolition in some regions of the world. It therefore seemed difficult to broaden protection beyond what was established in draft article 9, paragraph 2.

139. The Special Rapporteur was keen to retain draft article 10, which set forth the requirement that the dignity of a person being expelled must be respected, even if that meant relocating that provision. The right to dignity, which had been established in several international instruments and in judicial precedent, signified much more than a ban on cruel, inhuman or degrading treatment. He did not, however, have any objection to retaining only paragraph 2, which referred specifically to expulsion.

140. The purpose of the reference in draft article 11, paragraph 1, to the territory of the expelling State, was to draw a distinction between that paragraph and paragraph 2 of the same article, which addressed the risk of torture or ill-treatment in the receiving State. In view of the concerns expressed by some members, he nevertheless agreed to delete the phrase “in its territory” or to insert a reference to territories under the jurisdiction of the expelling State. With regard to paragraph 3, concerning situations where the risk of ill-treatment emanated from persons or groups of persons acting in a private capacity, he was in favour of the proposal to limit the scope of that paragraph, in the

light of the case law of the European Court of Human Rights, to cases in which the receiving State was unable to obviate that risk by providing appropriate protection.

141. He accepted the proposal to include a reference in draft article 12 to the notion of the “best interests of the child”, which was established in various international instruments and judicial precedent.

142. He agreed to delete the reference to private life in draft article 13, given that drawing a distinction between private and family life might give rise to difficulties and that the aim of the provision was to highlight the particular relevance of the right to respect for family life in the context of expulsion. He took note of the observations of certain members that the reference in paragraph 2 to “such cases as may be provided for by law” might give domestic law too much latitude and that the reference should either be deleted or replaced with a reference to the rules of international law. On the other hand, the notion of a “fair balance” ought to be retained, because it appropriately reflected the idea that restrictions could be placed on the right to family life, even in the context of expulsion, in order to protect certain interests of the expelling State.

143. With regard to draft article 14, he believed that an independent principle prohibiting discrimination amongst aliens by States did exist in the sphere of expulsion.

144. He was in favour of the proposals made by certain members to state in the draft articles that it was necessary to grant special protection in the event of expulsion not only to children—as had been done in draft article 12—but also to other categories of vulnerable persons such as disabled persons or pregnant women.

145. As for the right to a fair trial, he had contemplated setting forth that right in a provision at the beginning of the chapter of the draft articles dealing with the procedural rules applicable in the event of expulsion. He had, however, come around to the view of certain members who considered that this was a principle of substantive law, and he saw no fundamental objection to its inclusion among the limits to the right to expel that derived from international human rights protection.

146. In conclusion, the Special Rapporteur considered that the establishment of a general rule prohibiting the expulsion of a person to a State in which his or her life would be in jeopardy was likely to meet with opposition from States if no distinction was drawn between lawfully and unlawfully present aliens.