

## Chapter VIII

### EXPULSION OF ALIENS

#### A. Introduction

204. 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.<sup>539</sup> The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic on its agenda.

205. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur.<sup>540</sup>

206. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur<sup>541</sup> and a study prepared by the Secretariat.<sup>542</sup> The Commission decided to consider the second report at its following session, in 2007.<sup>543</sup>

207. At its fifty-ninth session (2007), the Commission considered the second and third<sup>544</sup> reports of the Special Rapporteur and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,<sup>545</sup> and draft articles 3 to 7.<sup>546</sup>

208. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur<sup>547</sup> and decided to establish a Working Group, chaired by Mr. Donald McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.<sup>548</sup>

<sup>539</sup> *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 “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 inclusion of the topic in the long-term programme of work.

<sup>540</sup> *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.

<sup>541</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

<sup>542</sup> A/CN.4/565 and Corr.1 (mimeographed; available from the Commission’s website).

<sup>543</sup> *Yearbook ... 2006*, vol. II (Part Two), para. 252.

<sup>544</sup> *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

<sup>545</sup> *Ibid.*, vol. II (Part Two), footnotes 326–327.

<sup>546</sup> *Ibid.*, footnotes 321–325.

<sup>547</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/594.

<sup>548</sup> *Ibid.*, vol. II (Part Two), p. 125, para. 170.

During the same session, the Commission approved the Working Group’s conclusions and requested the Drafting Committee to take them into consideration in its work.<sup>549</sup>

209. At its sixty-first session (2009), the Commission considered the fifth report of the Special Rapporteur.<sup>550</sup> At the Commission’s request, the Special Rapporteur then presented a new version of the 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.<sup>551</sup> He also submitted a new draft workplan with a view to restructuring the draft articles.<sup>552</sup> The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.<sup>553</sup>

210. At its sixty-second session (2010), the Commission considered the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur,<sup>554</sup> together with chapters I to IV, section C, of the sixth report of the Special Rapporteur.<sup>555</sup> It referred to the Drafting Committee revised draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled;<sup>556</sup> draft articles A and 9,<sup>557</sup> as contained in the sixth report of the Special Rapporteur; draft articles B1 and C1,<sup>558</sup> as contained in the first addendum to the sixth report; as well as draft articles B and A1,<sup>559</sup> as revised by the Special Rapporteur during the sixty-second session.

#### B. Consideration of the topic at the present session

211. At the present session, the Commission had before it chapters IV, section D, to VIII, included in the second addendum to the sixth report of the Special Rapporteur, which it considered at its 3091st to 3094th meetings, from 24 to 27 May 2011; and the Special Rapporteur’s seventh report (A/CN.4/642), which it considered at its

<sup>549</sup> 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 (*ibid.*, para. 171).

<sup>550</sup> *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

<sup>551</sup> *Ibid.*, document A/CN.4/617.

<sup>552</sup> *Ibid.*, document A/CN.4/618.

<sup>553</sup> *Ibid.*, vol. II (Part Two), p. 129, para. 91.

<sup>554</sup> See footnote 551 above.

<sup>555</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

<sup>556</sup> *Ibid.*, vol. II (Part Two), footnotes 1272–1279.

<sup>557</sup> *Ibid.*, footnotes 1285 and 1288.

<sup>558</sup> *Ibid.*, footnotes 1293–1294.

<sup>559</sup> *Ibid.*, footnotes 1290 and 1300.

3098th meeting, on 4 July 2011. The Commission also had before it comments received from Governments.<sup>560</sup>

212. At its 3094th meeting, on 27 May 2011, the Commission decided to refer to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in the second addendum to the sixth report; draft article F1, also contained in the second addendum, as revised by the Special Rapporteur during the session,<sup>561</sup> and draft article 8, in the revised version introduced by the Special Rapporteur during the sixty-second session.<sup>562</sup>

213. At its 3098th meeting, on 4 July 2011, the Commission decided to refer to the Drafting Committee the restructured summary of the draft articles contained in the seventh report of the Special Rapporteur.

214. At its 3126th meeting, on 11 August 2011, the Commission took note of an interim report by the Chairperson of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.

# 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE REMAINING PORTION OF HIS SIXTH REPORT AND OF HIS SEVENTH REPORT

215. The second addendum to the sixth report marked the conclusion of the consideration of expulsion procedures and took up the legal consequences of expulsion. The second addendum also contained the last of the draft articles that the Special Rapporteur intended to propose.

216. The first question considered, that of the implementation of the expulsion decision, was the subject of draft article D1,<sup>563</sup> which covered both voluntary and forcible expulsion. The reference to the rules of air travel in paragraph 2 was merely illustrative.

217. The next subject addressed in the second addendum was the right to appeal an expulsion decision, something that had already been mentioned briefly in the first addendum in connection with the right to challenge the expulsion decision, set out in draft article C1. While no new draft article on the subject was proposed, consideration was given to the basis of the right to appeal, which could be found in both international and domestic law;

the time frame for reviewing an appeal; the suspensive effect of remedies; and remedies against a judicial expulsion decision.

218. The next subject discussed in the second addendum was the relations between the expelling State and the transit and receiving States, which were governed by two principles: the freedom of a State to receive or to deny entry to an expelled alien, a freedom limited by the right of any person to return to his or her own country; and the freedom, likewise limited, of the expellee to determine his or her State of destination. Mention had also to be made of the “safe country” concept, although it was still evolving and was confined for the time being to European practice. Draft article E1 concerned the identification of the State of destination of expelled aliens.<sup>564</sup>

219. Draft article F1,<sup>565</sup> for which the Special Rapporteur had introduced a revised version<sup>566</sup> during the session, concerned the protection of the human rights of aliens subject to expulsion in the transit State. That provision, reflecting logic more than established practice, specified that the rules that applied in the expelling State to protection of the human rights of aliens subject to expulsion applied *mutatis mutandis* in the transit State. The Special Rapporteur was of the view that the elaboration of a legal framework for transit in the context of the expulsion of aliens would go beyond the scope of the current topic.

220. The next subject examined in the second addendum was the legal consequences of expulsion from the standpoint of the rights of expelled aliens (protection of the property rights and similar interests of expelled aliens, on the one hand, and the right of return in cases of unlawful expulsion, on the other) and of the responsibility of the expelling State.

221. The protection of the property of aliens facing expulsion, the subject of draft article G1,<sup>567</sup> was well established

<sup>564</sup> Draft article E1 read as follows:

“*State of destination of expelled aliens*”

“1. An alien subject to expulsion shall be expelled to his or her State of nationality.

“2. Where the State of nationality has not been identified, or the alien subject to expulsion is at risk of torture or inhuman and degrading treatment in that State, he or she shall be expelled to the State of residence, the passport-issuing State, the State of embarkation, or to any other State willing to accept him or her, whether as a result of a treaty obligation or at the request of the expelling State or, where appropriate, of the alien in question.

“3. An alien may not be expelled to a State that has not consented to admit him or her into its territory or that refuses to do so, unless the State in question is the alien’s State of nationality.”

<sup>565</sup> The original version of draft article F1 read as follows:

“*Protecting the human rights of aliens subject to expulsion in the transit State*”

“The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall also apply in the transit State.”

<sup>566</sup> The revised version of draft article F1 read as follows:

“*Protecting the human rights of aliens subject to expulsion in the transit State*”

“The rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State.”

<sup>567</sup> Draft article G1 read as follows:

“*Protecting the property of aliens facing expulsion*”

<sup>560</sup> *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/604; *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/628 and Add.1.

<sup>561</sup> See footnote 566 below.

<sup>562</sup> See footnote 572 below.

<sup>563</sup> Draft article D1 read as follows:

“*Return to the receiving State of the alien being expelled*”

“1. The expelling State shall encourage the alien being expelled to comply with the expulsion decision voluntarily.

“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 orderly transportation to the receiving State of the alien being expelled, in accordance with the rules of international law, in particular those relating to air travel.

“3. In all cases, the expelling State shall give the alien being expelled appropriate notice to prepare for his/her departure, unless there is reason to believe that the alien in question could abscond during such a period.”

in international law. Paragraph 1 enunciated the prohibition of the expulsion of an alien for the purpose of confiscating his or her assets, while paragraph 2 concerned the protection, free disposal and, where appropriate, return of property. The Special Rapporteur believed that the fate of property belonging to aliens expelled during armed conflict must be examined in the light of *jus in bello*, something that did not fall within the ambit of the present topic.

222. As to the right of return in cases of unlawful expulsion, national practice seemed to be too varied for such a right to be regarded as deriving from a rule of customary law. Still, it would be illogical to say that an alien expelled on the basis of erroneous facts or mistaken grounds as established by the competent authorities of the expelling State did not have the right to re-enter the expelling State on the basis of a ruling annulling the disputed decision. That was why the Special Rapporteur proposed that, in draft article H1,<sup>568</sup> the Commission enunciate a right of return as part of the progressive development of international law.

223. The question of the responsibility of the expelling State in cases of unlawful expulsion was considered in the final part of the second addendum. Draft article I1,<sup>569</sup> which set out the principle of such responsibility, and draft article J1,<sup>570</sup> which addressed the implementation of that responsibility through the mechanism of diplomatic protection, were conceived as clauses merely referring to those legal institutions. The commentary to draft article I1 might mention the emergence of the concept, recognized by the Inter-American Court of Human Rights,<sup>571</sup> of particular damages for the interruption of the life plan.

224. The Special Rapporteur would also like the Commission to take a position on revised draft article 8, entitled "Expulsion in connection with extradition", which he had introduced during the sixty-second session to take into account the comments of a number of members during the debate on the first addendum to the sixth report.<sup>572</sup>

225. The seventh report (A/CN.4/642) gave an overview of recent developments relevant to the topic and contained a restructured summary of the draft articles.

226. The national developments referred to in the seventh report included a popular initiative for the expulsion of foreign criminals adopted by the people and cantons of Switzerland on 28 November 2010, and calling for the automatic expulsion of aliens convicted of certain offences or having fraudulently received social security or social assistance; and draft French legislation on immigration, integration and nationality, rejected by the Senate on 3 February 2011, envisaging the deprivation of French nationality, potentially followed by expulsion, of citizens who had been naturalized for less than 10 years and had caused the death of a public servant.

227. The seventh report then examined the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case,<sup>573</sup> which addressed seven points in relation to expulsion: conformity with the law; obligation to inform aliens detained pending expulsion of the reasons for their arrest; obligation to inform aliens subject to expulsion of the grounds for their expulsion; prohibition of mistreatment of aliens detained pending expulsion; obligation for the competent authorities of the State of residence to inform the consular authorities of the State of origin without delay of the detention of their national with a view to expulsion; obligation to respect the right to property of aliens subject to expulsion; and recognition of the responsibility of the expelling State and the provision by it of compensation. The report highlighted the similarities between the positions of the Court and the developments discussed in the Special Rapporteur's reports.

228. The purpose of the restructured summary of the draft articles in the seventh report was to ensure greater clarity and consistency.

## 2. SUMMARY OF THE DEBATE

### (a) General remarks

229. Several members stressed the complex and sensitive nature of the topic and the diversity of State practice. According to one view, it was important to bear in mind that some States were not convinced by the Commission's choice of the topic. Some doubts were expressed as to whether the Commission would be able to achieve a result that would meet with the general acceptance of States; according to one proposal, the Commission should re-evaluate the topic before embarking on a second reading. Scepticism was expressed about the likelihood that the draft articles could have a real impact on State practice. According to another view, however, the progress made in the treatment of the topic augured well for the submission to the General

<sup>568</sup> "1. The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

<sup>569</sup> "2. The expelling State shall protect the property of any alien facing expulsion, shall allow the alien [to the extent possible] to dispose freely of the said property, even from abroad, and shall return it to the alien at his or her request or that of his or her heirs or beneficiaries."

<sup>570</sup> Draft article H1 read as follows:

"Right of return to the expelling State

"An alien expelled on mistaken grounds or in violation of law or international law shall have the right of return to the expelling State on the basis of the annulment of the expulsion decision, save where his or her return constitutes a threat to public order or public security."

<sup>571</sup> Draft article I1 read as follows:

"The responsibility of States in cases of unlawful expulsion

"The legal consequences of an unlawful [illegal] expulsion are governed by the general regime of the responsibility of States for internationally wrongful acts."

<sup>572</sup> Draft article J1 read as follows:

"Diplomatic protection

"The expelled alien's State of nationality may exercise its diplomatic protection on behalf of the alien in question."

<sup>573</sup> See the judgments cited in paragraph 597 of the sixth report, *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1-2.

<sup>572</sup> Revised draft article 8, reproduced in footnote 1299 of the report of the Commission to the General Assembly on the work of its sixty-second session (*Yearbook ... 2010*, vol. II (Part Two)), read as follows:

"Expulsion in connection with extradition

"Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article]."

<sup>573</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639.

Assembly, in due course, of a set of draft articles adopted at first reading which would be sufficiently well balanced to meet with general acceptance.

230. While the Special Rapporteur was commended on his careful and systematic use of both older and recent sources from various regions around the world, some doubts were expressed as to the status of the proposed draft articles. According to one view, some of the draft articles could hardly be counted as codification or desirable progressive development of the law; in this regard, the Commission should indicate clearly whether it intended to identify the existing law or to propose new rules to States. More generally, the fact that, in identifying customary norms, due account must be taken of State practice, particularly contemporary practice, was underscored.

231. Some members thought that the Commission should try to strike a balance between the right of a State to expel aliens and the limits imposed on that right by rules protecting the dignity and human rights of aliens. According to one opinion, the Commission should merely elaborate some well-grounded, basic standards and guarantees, leaving a certain latitude for national policies. According to another view, the work of the Commission would be of greater practical relevance if the set of draft articles went beyond the existing rules of general international law and the provisions of conventions that enjoyed virtually universal acceptance, to address sensitive questions such as the propriety of placing aliens awaiting expulsion in detention, the possibility of appealing an expulsion decision and the various aspects of cooperation between States. The point was made that better cooperation between the States concerned, including the State of nationality of the alien, would not only facilitate the expulsion process but also limit the duration of detention.

232. An opinion was expressed that some categories of aliens whose status is regulated by special norms, such as refugees, should not be covered in the draft articles, so as to avoid creating contradictory legal regimes. It was proposed that, with a view to progressive development, the Commission should draw on the rich experience of the European Union. According to another perspective, the practice and precedents derived from special regimes such as European Union law should be treated with caution.

233. As to the form of the final product, some members thought it doubtful that it lent itself to the framing of draft articles that might then be incorporated into a convention; the idea of drawing up draft guidelines or principles enunciating best practices was suggested. According to other members, the Commission should continue to work towards the formulation of draft articles, also given the importance of the topic.

#### (b) *Comments on the draft articles*

234. Some members supported *draft article D1* on return to the receiving State of the alien being expelled. It was said that it achieved a proper balance between the rights of the expelling State and respect for the alien's dignity and human rights. Doubts were expressed, however, as to whether the term "voluntary return" was appropriate when a person was ordered to leave a State's territory. Some

members agreed with the Special Rapporteur that paragraphs 1 and 2 were codification, whereas paragraph 3 constituted progressive development. According to another viewpoint, however, it was doubtful whether paragraphs 1 and 2, which were based only on best practice or regional practice, amounted to codification.

235. Some members considered that paragraph 1 should be recast to prevent it being construed as encouragement to the use of undue pressure on the alien; it was argued that the verb "encourage" lacked legal precision and could pave the way to abuse. It was therefore proposed to specify that the expelling State should take the necessary measures to promote, or make possible, the alien's voluntary return. Another opinion was that it would be preferable to retain the wording proposed by the Special Rapporteur, for the term "measures" did not cover the whole range of means of persuasion that could be deployed to encourage voluntary departure. One suggestion was that the commentary should address the cost of transportation, including the possibility of providing financial assistance for an alien who did not have the means to pay for his or her departure. According to another point of view, paragraph 1 should be reworded to bring out the fact that voluntary departure was only one option, and that there was insufficient practice to make it obligatory for the expelling State to encourage an alien to comply voluntarily with an expulsion decision.

236. Regarding paragraph 2, some members proposed that the phrase "as far as possible" should be deleted, for it could create the mistaken impression that, in some cases, there was no need to abide by international law; at most, mention could be made of the possibility of adopting such coercive measures as were needed to implement the expulsion decision, bearing in mind the behaviour of the person concerned. Another comment was that it would be necessary to examine the criteria for and limits to the use of physical constraint during the forcible implementation of an expulsion decision. Some members suggested the addition of a reference to the obligation to respect the expellee's dignity and human rights; another viewpoint was that it was sufficient to mention that obligation in the commentary, since the rules on the protection of human rights formed the subject of specific draft articles. While some members were in favour of the reference to the rules relating to air travel, others would prefer its deletion and the inclusion of an explanation in the commentary; the comment was made that other means of transport were also used for expulsion purposes, and that the rules on air travel were subsumed under the reference to the rules of international law.

237. Several members supported paragraph 3, at least in the context of progressive development. Some members nevertheless proposed the deletion of the reference to the expelling State's freedom to shorten the period of notice if there was reason to believe that the alien in question could abscond during that period; the vague, subjective nature of that freedom seemed to weaken paragraph 3. According to another view, while paragraph 3 undoubtedly reflected good practice, it should not perhaps be elevated to the status of a rule of law.

238. It was further proposed, with regard to the implementation of an expulsion decision, that the Commission consider not only the length of detention pending

expulsion but also the very idea of placing an alien in detention, at least when there were no real grounds of public order or national security. The formulation of a provision restricting placement in detention to situations where the alien did not comply voluntarily with the expulsion order might be contemplated.

239. While some members supported *draft article E1* on the State of destination of expelled aliens, others thought that it should be reconsidered in the light of State practice. The reversal of the order of paragraphs 2 and 3 was also suggested, because paragraphs 1 and 3 were closely linked.

240. With respect to paragraph 1, some members felt strongly that the State of nationality should take priority as the expelled alien's State of destination and stressed the importance of each person's right to return to his or her own country. Other members considered that the wording of paragraph 1 was too restrictive, since the idea that an alien could be expelled to a State other than the State of nationality, even when the latter could be identified, was acceptable. It was therefore proposed that a first paragraph be added, setting forth the right of an alien facing expulsion to be sent to the State of his or her choice, if that State was prepared to admit the alien, unless the expelling State had compelling reasons for refusing that choice. The suggestion was likewise made that a rule or guideline concerning the burden of proof and certain procedural guarantees when determining nationality be included. The case of stateless persons was also mentioned, since they had no State of nationality that was obliged to admit them.

241. The advisability of listing States of destination in paragraph 2 was questioned, and it was suggested that the list should not be formulated restrictively. Some members thought that it should be made clear that no State other than the expellee's State of nationality—such as the State of residence, the passport-issuing State and the State of embarkation mentioned in paragraph 2—was under any obligation to admit the expellee to its territory. Another proposal was to recast paragraph 2 to give priority to the alien's wishes as to the chosen State of destination. Support was also voiced for a reference in the draft article to the notion of a "safe country", as some members considered it necessary to make it plain that the prohibition to expel an alien to a State where he or she might be subjected to torture or to other cruel, inhuman or degrading treatment extended to any State of destination and was not confined to the State of nationality. Another view was that it was superfluous to refer to that prohibition, since it was the subject of specific draft articles; a reference in the commentary would suffice. Another question raised was what might happen if an alien being expelled ran a real risk of his or her fundamental rights being violated in his or her State of nationality and if no other State agreed to admit him or her.

242. With regard to the formulation of paragraph 3, the significance and practical usefulness of the distinction drawn between a State "that has not consented" and a State "that refuses" to admit the alien were queried.

243. Some members supported *revised draft article F1*, which aimed at extending to the transit State the protection of the human rights of aliens subject to expulsion. It

was, however, suggested that that provision be reworded to refer to the rules of *international law* on the protection of human rights and to make it plain that the transit State was not obliged to repeat the whole expulsion procedure. Other members considered that the wording of draft article F1 lacked clarity: on the one hand, by creating the false impression that the transit State was bound by rules of international law that were incumbent only upon the expelling State; on the other, by not specifying whether the obligations it envisaged were imposed on the expelling State, the transit State, or both. Some members endorsed the Special Rapporteur's opinion that the elaboration of a legal framework for transit arrangements for expelled aliens would go beyond the scope of the topic.

244. Several members supported *draft article G1* on protecting the property of aliens facing expulsion. It was suggested that reference be made to the protection of the *property rights* of aliens. It was further suggested that protection be widened to take in nationals who were unlawfully regarded by the expelling State as aliens. The possibility of distinguishing, in the context of protecting property, between aliens lawfully or unlawfully present in the territory of the expelling State was mentioned. In addition, it was proposed that an exception be made for cases where a court had found, after a fair trial, that certain property had been acquired illegally.

245. While some members considered that the content of paragraph 1, in which expulsion for the purpose of confiscation was prohibited, could be moved to the section of the draft articles concerning cases of prohibited expulsion, others preferred to deal with that aspect in draft article G1, even if it meant putting paragraph 2 first. According to one view, paragraph 1 was *lex ferenda*. According to another opinion, paragraph 1 should perhaps not be included, given the difficulty of assessing the expelling State's real intentions objectively.

246. Some members proposed the deletion, in paragraph 2, of the phrase "to the extent possible", which might overly weaken protection; it might be better, if need be, to stipulate which restrictions could be imposed on the property rights of the expelled alien. The scope of the reference to the obligation to return property was to be examined in order to ascertain whether it covered return by way of reparation for an unlawful act, or whether it dealt more specifically with return of expropriated property. According to one view, the obligation of return, as set forth in paragraph 2, conflicted with the right of any State to expropriate the property of aliens providing that certain conditions were met, in particular the payment of compensation. Attention was drawn to the fact that forms of reparation other than return could be involved when the alien's property had been lost or destroyed.

247. The view was expressed that the right of return to the expelling State in the event of unlawful expulsion, as set forth in *draft article H1*, stemmed from the principles of State responsibility for wrongful acts; another view was that the proclamation of that right constituted progressive development. Some members considered that the expression "right of readmission" was more suitable, for the word "return" seemed to apply more adequately to situations when a person was expelled from his or her own

country. According to one proposal, it should be explicitly stated that the right of return meant that the expelling State was under an obligation to grant an alien the same status under immigration law that he or she had before expulsion. It was further noted that the right of return did not mean recognition of an acquired right to stay or reside in a country.

248. Some members considered that draft article H1 offered a balance between the right of an unlawfully expelled alien to return to the expelling State and the latter's legitimate interest in preserving public order and national security. It was suggested, however, that the notion of "mistaken grounds", which was not really legal terminology, be clarified by stating that the grounds in question were either attributable to an error of fact or of law, or baseless.

249. Other members considered that draft article H1 was formulated too broadly. It was suggested that its scope be restricted to cases where an expulsion decision was annulled on substantive grounds, and not because of a procedural error. Some members also considered that the right of return could be recognized only where expulsion was contrary to a substantive rule of international law. Lastly, it was stated that only aliens legally present in the territory of the expelling State could benefit from the right of return in the event of unlawful expulsion.

250. Support was expressed for *draft article II* on the responsibility of States in cases of unlawful expulsion. The use of the expression "unlawful expulsion" was preferred over that of "illegal expulsion", so as to align the text with the wording of the articles on responsibility of States for internationally wrongful acts.<sup>574</sup> It was proposed that it be made clear that a State could be held responsible under draft article II only for violating a rule of international law. It was pointed out that, even if an expulsion decision was itself lawful, an expelling State could incur responsibility for acts such as ill-treatment of an alien when the decision was enforced. The view was expressed that the concept of particular damages for the interruption of the life plan should be treated with caution.

251. Some members supported *draft article J1* referring to diplomatic protection. It was nevertheless suggested that it should be specified that the provision applied only to expulsions that were unlawful under international law. It was proposed that reference be made to the right set forth in article 8 of the articles on diplomatic protection, as adopted by the Commission on second reading,<sup>575</sup> of a State to exercise diplomatic protection in respect of a stateless person or a refugee who is lawfully and habitually resident in its territory. According to another opinion, draft article J1 was not necessary: it would suffice to refer to diplomatic protection in the commentary to draft article II, especially since draft article J1 disregarded the recommended practice for the exercise of diplomatic protection set out in article 19 of the above-mentioned articles on diplomatic protection.<sup>576</sup> In addition, some

members suggested making reference, either in a separate draft article or in a "without prejudice" clause of draft article J1, to the individual complaint mechanisms available to expelled aliens under treaties on the protection of human rights; alternatively, it was suggested, this point could be dealt with in the commentary.

252. Some members supported *revised draft article 8* on expulsion in connection with extradition, subject to possible drafting amendments. Other members felt that the wording should be reviewed and clarified. Regret was expressed that the proposed text set forth no more than an obligation to respect ordinary conditions of expulsion, even though, in the situations it covered, an alien would be sent to a State with a view to serving out a sentence or undergoing trial there. Additional guarantees—of a fair trial in the requesting State, for example—should thus be identified. According to another point of view, the provision did not belong in the current set of draft articles, because it had more to do with extradition than with expulsion.

(c) *The question of appeals against an expulsion decision*

253. Some members agreed with the Special Rapporteur that it was unnecessary to formulate an additional draft article on appeals against an expulsion decision; draft article C1 set out the right to challenge an expulsion decision, which seemed sufficient. The view was also expressed that considerable variations in national legislation and practice, as well as divergences among treaties, raised doubts as to whether customary rules governing appeals against an expulsion decision existed.

254. According to other members, as long as there appeared to be a customary basis for the right to appeal against an expulsion decision, a specific draft article on that subject should be formulated, albeit without mentioning particular legal remedies but instead describing in the commentary variations in State practice. It was maintained that, although international law did not recognize the right of judicial remedy, the right to an effective remedy derives from State practice and from human rights guarantees. It was further proposed that the Commission recommend that States grant the right to appeal against expulsion decisions also to those aliens who were unlawfully present in their territory, thereby going beyond what was required under article 13 of the International Covenant on Civil and Political Rights. Mention was made of the risk of abuse associated with the invocation of the grounds of public order or national security to deny an alien the benefit of an appeal. Lastly, it was suggested that further thought be given to the distinction between an appeal against an expulsion decision and an appeal against expulsion itself.

255. Some members shared the Special Rapporteur's view that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. It was pointed out that to do so would be to hamper the effective exercise of the right of expulsion, and it was suggested that the Commission should work on better defining the notion of "safe country" rather than on formulating a rule on suspensive effect. It was also asserted that acknowledging

<sup>574</sup> See footnote 43 above.

<sup>575</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 35. Articles subsequently annexed to General Assembly resolution 62/67 of 6 December 2007.

<sup>576</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 53.

suspensive effect entailed certain drawbacks in terms of legal uncertainty resulting from procedural delays.

256. According to other members, the Commission should formulate a draft article, if only as part of progressive development, envisaging the suspensive effect of an appeal against an expulsion decision, provided that there was no conflict with compelling reasons of national security. At the very least, the alien's right to seek a stay of the expulsion decision should be articulated, drawing on article 22, paragraph 4, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Some members pointed out that an appeal against an expulsion decision lacking suspensive effect would not be effective, since aliens who had had to leave the country were likely to encounter economic obstacles to their return to the expelling State in the event that their appeal was successful. According to a more nuanced viewpoint, the Commission should find a formulation that offered the best compromise between the rights and interests of the expelling State and those of the expelled alien.

257. While recognizing the absence of a customary rule broadly providing for the suspensive effect of an appeal against an expulsion decision, the view was expressed that the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of torture or ill-treatment in the State of destination. In response to this proposal, it was pointed out that the obligation not to return a person to a State where he or she was exposed to such a risk existed in any event, irrespective of whether an appeal had been made against the expulsion decision and whether the appeal had suspensive effect.

### 3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

258. The Special Rapporteur was surprised to see that, even now, some members were still questioning the nature of the work to be undertaken by the Commission, specifically whether the topic lent itself to an exercise of codification and progressive development. That seemed all the

more surprising given the abundance of State practice, as well as treaties and case law, both international and regional, on the subject of expulsion of aliens. Although it was premature to speculate on the form that the final product should take, the Special Rapporteur had a clear preference for the development of a set of draft articles rather than draft guidelines or guiding principles.

259. The Special Rapporteur had taken note of the proposed amendments to the draft articles, some of which could, if necessary, be dealt with by the Drafting Committee.

260. The Special Rapporteur remained convinced of the usefulness of draft article J1 on diplomatic protection, the scope of which had now been expanded to include the international protection of human rights, as demonstrated by the recent judgment rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case.<sup>577</sup> Draft article J1 was, of course, without prejudice to any individual complaint mechanism to which an alien might have recourse before an international body for the protection of his or her human rights.

261. The Special Rapporteur also remained convinced of the usefulness of a draft article on expulsion in connection with extradition. Without impinging on the subject of extradition, it was a matter of settling an issue that was on the dividing line between expulsion and extradition.

262. The Special Rapporteur maintained his belief that State practice had not converged sufficiently to warrant the formulation, if only as progressive development, of a provision on the suspensive effect of an appeal against an expulsion decision. That being so, the Commission was free to do so as a policy matter.

263. Lastly, it was hardly necessary to devote a draft article to cooperation, since it underpinned the whole of inter-State relations in time of peace.

<sup>577</sup> *Ahmadou Sadio Diallo, Merits, Judgment* (see footnote 573 above).