

## EXPULSION OF ALIENS

[Agenda item 6]

DOCUMENT A/CN.4/617

### **Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session**

[Original: French]  
[21 July 2009]

#### **Multilateral instruments cited in the present document**

*Source*

Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, No. 973, p. 287.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Final Act of the Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
Agreement relating to Refugee Seamen (The Hague, 23 November 1957)	<i>Ibid.</i> , vol. 506, No. 7384, p. 125.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
OUA Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969)	<i>Ibid.</i> , vol. 1001, No. 14691, p. 45.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
Arab Charter on Human Rights (Tunis, 22 May 2004)	CHR/NONE/2004/Rev.1.

1. When the fifth report on the expulsion of aliens (document A/CN.4/611, reproduced in the present volume) was considered during the first part of the sixty-first session of the International Law Commission, in 2009, it appeared that a large majority of the members of the Commission did not understand what the Special Rapporteur meant to say about protection of the human rights of persons who had been or were being expelled as a limitation on the State's right of expulsion. Most members wanted the principle of full protection of the rights of persons who had been or were being expelled to be clearly stated in the context of the expulsion of aliens and therefore requested that draft article 8 should be reformulated in that sense.

2. Following the same logic, the Commission also requested a restructuring of draft articles 9 to 14 to take into account the changes proposed to some of those draft articles during the debate, so that the set of draft articles 8 to 14 contained in the fifth report could be referred to the Drafting Committee.

3. The present document represents an effort to respond to the concerns expressed. The set of draft articles has been restructured into four sections dealing, respectively, with "General rules", "Protection required from the expelling State", "Protection in relation to the risk of violation of human rights in the receiving State" and "Protection in the transit State".

## CHAPTER 4

**Protection of the human rights of persons who have been or are being expelled<sup>1</sup>****A. General rules**

*Draft article 8.<sup>2</sup> General obligation to respect the human rights of persons who have been or are being expelled*

Any person who has been or is being expelled is entitled to respect for his or her human rights, *in particular those mentioned in the present draft articles.*

*Draft article 9.<sup>3</sup> Obligation to respect the dignity of persons who have been or are being expelled*

The dignity of a person who has been or is being expelled must be respected and protected in all circumstances.

*Draft article 10.<sup>4</sup> Obligation not to discriminate [Non-discrimination rule]*

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, religion, political or other opinion, national or social origin, property, birth or other status.

2. Such non-discrimination among persons who have been or are being expelled shall also apply to the enjoyment of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.

<sup>1</sup> The numbering and title of chapter 4 are taken from the new work-plan for the entire topic of the expulsion of aliens as proposed by the Special Rapporteur in document A/CN.4/618, reproduced in the present volume. Chapter 4 therefore replaces the text entitled, "Limits relating to the requirement of respect for fundamental human rights", contained in the fifth report (document A/CN.4/611, reproduced in the present volume).

<sup>2</sup> Draft article 8 incorporates the following changes proposed during the discussions in the plenary meetings of the Commission: the term "fundamental rights" has been replaced by the broader and non-limitative term "human rights"; the phrase "in particular those mentioned in the present draft articles" was inspired by the plenary debate; the purpose is to emphasize not only that there is no intention to establish a hierarchy among the human rights to be respected in the context of expulsion but also that the rights specifically mentioned in the draft articles are neither exhaustive nor exclusive.

<sup>3</sup> This provision corresponds to former draft article 10 but has been moved forward into section A, "General rules", relating to the protection of the human rights of persons who have been or are being expelled, in order to emphasize that it is general in scope.

Paragraph 1 of former draft article 10 setting forth the general rule that human dignity is inviolable has been eliminated in order to indicate that the right to dignity is being considered here in the specific context of expulsion rather than in a general context.

<sup>4</sup> This provision corresponds to former draft article 14. It has also been moved forward into section A, "General rules", in order to emphasize that it is general in scope.

In paragraph 2, the words "among persons who have been or are being expelled" have been added to take into account the comments of several Commission members who stressed that in the context the discrimination prohibited was discrimination among the aliens subject to expulsion, not discrimination between such aliens and the nationals of the expelling State.

**B. Protection required from the expelling State**

*Draft article 11.<sup>5</sup> Obligation to protect the lives of persons who have been or are being expelled*

1. The expelling State shall protect the right to life of a person *who has been or is being expelled.*

2. A State may not, in its territory *or in a territory under its jurisdiction*, subject a person who has been or is being expelled to torture or to inhuman or degrading treatment.

*Draft article 12.<sup>6</sup> Obligation to respect the right to family life*

1. The expelling State shall respect the right to family life of a person who has been or is 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 *international law* and shall strike a fair balance between the interests of the State and those of the person in question.

*Draft article 13.<sup>7</sup> Specific case of vulnerable persons*

1. Children, older persons, *persons with disabilities and pregnant women* who have been or are being expelled shall be considered, treated and protected as such, irrespective of their immigration status.

2. In particular, any measure concerning a child who has been or is being expelled must be taken in the best interests of the child.

<sup>5</sup> This draft article combines paragraph 1 of former draft article 9 and paragraph 1 (which here becomes paragraph 2) of former draft article 11. This rearrangement is in response to the strongly expressed desire of some Commission members to differentiate the obligations of the expelling State from those of the receiving State.

The phrase "in a territory under its jurisdiction" has been added in paragraph 2 in order to take into account the concerns expressed by other Commission members.

<sup>6</sup> This provision corresponds to former draft article 13.

The phrase "to private life" has been eliminated from the title and from paragraph 1 of the draft article, as some Commission members wished; moreover, in paragraph 2 the words "by law" have been changed to read "by international law", as other Commission members requested.

<sup>7</sup> This provision is taken from former draft article 12 on the "specific case of the protection of children being expelled". It has now been expanded to all "vulnerable persons", as the title indicates.

Paragraph 1 specifies what persons are meant. Paragraph 2, on the other hand, is a new provision, which replaces paragraph 2 of the former draft article. It stresses that where a child is involved in expulsion the child's best interests must prevail; in some cases the child's best interests may require the child to be detained in the same conditions as an adult so that the child is not separated from the adult.

*Draft article (X). Conditions of detention and treatment of persons who have been or are being expelled*

[To be formulated.]

### C. Protection in relation to the risk of violation of human rights in the receiving State

*Draft article 14.<sup>8</sup> Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled*

<sup>8</sup> This draft article is a reformulation of former draft article 9, particularly paragraph 1 thereof. The new formulation seeks to take into account the desire expressed by some Commission members to extend the scope of protection of the right to life to all expelled persons. This provision of general scope also covers the situation of asylum seekers, which therefore does not require special treatment.

(1) Some Commission members would prefer to generalize the principle of *non-refoulement* so that the protection thus afforded would be extended to all persons who have been or are being expelled, whether or not they are lawfully present.

On this point, it should be recalled that the principle of *non-refoulement* is a fundamental principle of international refugee law. Since the Convention relating to the Status of Refugees, it has been incorporated in many conventions and declarations of principle at both the universal and regional levels (such as the Final Act of the Convention relating to the Status of Stateless Persons of 23 September 1954; article 10 of the Agreement relating to Refugee Seamen of 23 November 1957; article III, paragraph 3, of the Principles concerning Treatment of Refugees adopted in 1966 by the Asian-African Legal Consultative Committee (*Yearbook ... 1967*, vol. II, p. 331); resolution (67) 14 on asylum to persons in danger of persecution adopted by the Committee of Ministers of the Council of Europe; article 3 of the United Nations Declaration on Territorial Asylum adopted by the General Assembly on 14 December 1967; article II, paragraph 3, of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969; the many conclusions announced by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) Programme since 1977; and the Cartagena Declaration on Refugees of 22 November 1984, which sought "to reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees" (conclusion 5).

However, the principle of *non-refoulement* has passed beyond the bounds of international refugee law and has become part of international humanitarian law (see article 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949); it is also deemed to be an integral part of international human rights protection.

With specific reference to human rights, the principle was introduced through a number of international instruments, notably in article 22, paragraph 8, of the American Convention on Human Rights of 22 November 1969 and in article 3, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

However, only the provisions of the American Convention on Human Rights expressly accord the principle of *non-refoulement* general scope with respect to human rights. Article 22, paragraph 8, of the Convention provides: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." This provision echoes article 3 of the Universal Declaration of Human Rights, which states: "Everyone has the right to life, liberty and security of person." That provision has been taken up, with differences or nuances of formulation, in a variety of international human rights instruments both universal and regional (article 6 of the International Covenant on Civil and Political Rights; art. 2, para. 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights); art. 4 of the African Charter on Human and

1. No one may be expelled or returned (*refoulé*) to a State where his or her right to life or personal liberty is in danger of being violated because of his or her race, religion, nationality, membership of a particular social group or political opinions.

2. A State that has abolished the death penalty may not expel an alien who is under a death sentence to a State in which that person may be executed without having previously obtained an assurance that the death penalty will not be carried out.

3. The provisions of paragraphs 1 and 2 of this article shall also apply to the expulsion of a stateless person who is in the territory of the expelling State.

*Draft article 15.<sup>9</sup> Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment*

1. A State may not expel a person to another country where there is a real risk that he or she would be subjected to torture or to inhuman or degrading treatment.

2. The provisions of paragraph 1 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

### D. Protection in the transit State

*Draft article 16.<sup>10</sup> Application of the provisions of this chapter in the transit State*

*The provisions of this chapter shall also apply in the transit State to a person who has been or is being expelled.*

Peoples' Rights; see also the Arab Charter on Human Rights). The arguments drawn from universal instruments and convergent regional rights offer a sufficient basis for codifying this rule in the context of the law on the expulsion of aliens.

(2) The Special Rapporteur, while noting the preference expressed by some Commission members for a formulation tending towards abolition of the death penalty, did not believe that he should make changes in that sense to the provision now contained in paragraph 2 of draft article 14 for the reasons explained in paragraph 58 of his fifth report (document A/CN.4/611 of the present volume).

(3) The Special Rapporteur added paragraph 3 to address a concern expressed by the Drafting Committee when it considered draft article 6 on non-expulsion of stateless persons.

<sup>9</sup> Draft article 15 corresponds to former draft article 11, which has been divided in two because of the need, strongly expressed by some Commission members, to draw a distinction, when restructuring former draft articles 8 to 14, between the protection of the human rights of an alien who has been or is being expelled required in the expelling State and the protection required in the receiving State.

The present draft article 15 draws on paragraphs 2 and 3 of former draft article 11. To former paragraph 3 have been added the words "and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection", in order to reflect the jurisprudence of the European Court of Human Rights in the case of *H.L.R. v. France* (Reports 1997–III, fasc. 36, para. 40).

<sup>10</sup> The Special Rapporteur has added this provision to complete the set of provisions governing the rights of the expelled person during the entire process and the whole of the journey from the expelling State to the receiving State.