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

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<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)</td>
<td>Ibid., vol. 1465, No. 24841, p. 85.</td>
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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

A. General rules

Draft article 8. 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. 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. 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.

B. Protection required from the expelling State

Draft article 11. 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. 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. 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.

1 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/4618, 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).

2 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.

3 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.

4 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.

5 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.

6 This provision corresponds to former draft article 13.

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.

7 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. 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

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. 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. 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.