EXPULSION OF ALIENS

[Agenda item 2]

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Ninth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur*

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Multilateral instruments cited in the present report

	Source
Convention fixing the Rules to be observed for the Granting of Asylum (Havana, 20 February 1928)	League of Nations, *Treaty Series*, vol. CXXXII, No. 3046, p. 323.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	*Ibid.*, vol. 606, No. 8791, p. 267.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	*Ibid.*, vol. 360, No. 5158, p. 117.
International Covenant on Civil and Political Rights (New York, 19 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.
Organization of African Unity Convention governing the specific aspects of refugee problems in Africa (Addis Ababa, 10 September 1969)	*Ibid.*, vol. 1001, No. 14691, p. 45.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid.*, vol. 1144, No. 17955, p. 123.

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Introduction

1. At its sixty-fourth session in 2012, the International Law Commission adopted on first reading the text of the draft articles on the expulsion of aliens and the commentaries thereto.[1] The draft articles were discussed extensively during consideration of the report of the Commission on the work of its sixty-fourth session in the Sixth Committee of the General Assembly in November 2012. During the discussions, States expressed widely divergent views on the topic, some continuing to reiterate the positions they had always expressed since the Sixth Committee approved the topic of the expulsion of aliens for inclusion in the Commission's programme of work.

2. In paragraph 43 of its report, the Commission noted that, at its 3155th meeting, on 31 July 2012, it decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments

[1] *Yearbook … 2012*, vol. II (Part Two), para. 46.

and observations be submitted to the Secretary-General by 1 January 2014.[2]

[2] *Ibid*., para. 43.

3. A number of Governments transmitted their comments and observations to the Secretary-General. The Special Rapporteur will first examine those comments and observations before presenting his final observations.

Chapter I

Comments and observations received from States

4. Several Governments spoke on the topic "Expulsion of aliens" during the discussions in the Sixth Committee at the sixty-seventh session of the General Assembly in November 2012.[3] Some later sent written comments and observations, which were forwarded to the Special Rapporteur through the secretariat of the Commission.[4] While some States only made a few general comments, others made article-by-article comments and observations, sometimes accompanied by suggested amendments to specific draft articles and even drafting proposals. These general comments and observations on the topic will be presented first, before those dealing with the draft articles themselves are considered.

A. General comments and observations on the topic

5. Generally speaking, considering both the comments and observations made during the discussions in the Sixth Committee in 2012 and those made subsequently in writing, it appears that States have rather contradictory opinions on the topic. Some States doubt whether the topic is suitable for codification. For example, the Nordic countries

> remained unconvinced of the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, since it was an area of law covered by detailed regional rules.[5]

For one State, "[t]he topic was problematic and raised many difficult and complex issues which intruded directly into the domestic sphere of States."[6] Another State pointed out that, despite the efforts made by the Commission to take into consideration the concerns expressed by States,

> it continued to regard the topic as controversial and had doubts as to whether the draft articles would provide a good basis for a future convention and whether a balance could be found between the mere repetition of State practice and the introduction of a new regime with high human rights standards.[7]

For another State, codification of the topic would raise

> numerous methodological questions, including the extent of its reliance on diverse and specific national and regional jurisprudence and the methods for determining the relevant general rules of international law. … doubts remained as to the basis or need for *lex lata* codification. Equally controversial was the question of whether treatment *de lege ferenda*, as suggested by the Special Rapporteur regarding the current formulation of the provisions on readmission and appeal procedures, was suitable.[8]

6. While the Special Rapporteur is not insensitive to this legitimate observation regarding methodology, such an observation cannot be used to justify the argument that it is impossible or inappropriate for the Commission to consider this topic. If such an argument were to prevail, then all the work of progressive development and codification undertaken by the Commission since its inception would have to be called into question. Indeed, in considering the topic "Expulsion of aliens", the Special Rapporteur did not adopt any new or different approach from the one employed in the past to consider other topics in the Commission's agenda.

7. While the above-mentioned States expressed reservations, other States showed strong support for the topic and the set of draft articles adopted by the Commission on first reading, without prejudice to their comments and observations on any specific draft article. For example, one State felt that "the topic of expulsion of aliens could, with appropriate modifications, be considered ripe for codification".[9] Another State

> welcomed the changes made since the previous session to the draft articles on expulsion of aliens, which reflected the Commission's efforts to achieve a balance between the regulatory power of expelling States and the legitimate rights of aliens subject to expulsion, while at the same time leaving States some room for manoeuvre in enforcing their domestic legislation.[10]

Another State also said that it "felt that the draft articles represented a positive contribution to the codification and progressive development of international law on the topic".[11]

[3] The Governments of the following 36 Member States spoke: Australia, Austria, Belarus, Canada, Chile, China, Congo, Cuba, Czech Republic, Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Iraq, Iran (Islamic Republic of), Israel, Malaysia, Mexico, Netherlands, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland and Zambia. The European Union also made comments on the topic.

[4] Together with those of the European Union, the Special Rapporteur received comments and observations from the following 11 States by 31 January 2014: Australia, Austria, Belgium, Canada, Czech Republic, El Salvador, Germany, Morocco, Netherlands, Republic of Korea and United Kingdom.

[5] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 45.

[6] United Kingdom, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 67. See also the observations of the United Kingdom in document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A.

[7] Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20, para. 50). It should be noted, however, that "[the Hungarian] delegation welcomed the Special Rapporteur's attention to the Return Directive of the European Union (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals), which had harmonized the minimum standards on the matter established under the national laws of more than 30 European States" (*ibid.*).

[8] Israel, *ibid*., para. 35.

[9] Poland, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 72.

[10] China, *ibid*., para. 53.

[11] Mexico, *ibid*., para. 17.

B. Comments, observations and suggestions on the draft articles

8. A number of States made a few general comments before the article-by-article review.

1. General observations

9. On the structure of the draft articles and the balance between the rights at issue, a State said that "the draft articles should achieve a better balance between the rights of aliens and the sovereign rights of the State".[12] As if in response, another State said that it was

> satisfied with the structure of the draft articles on expulsion of aliens, which reflected the Commission's efforts to reconcile the right of States to expel aliens and the limits imposed on that right by international law.[13]

Another State noted that it

> was particularly pleased that the text had been organized in a more logical manner, setting out the basic substantive rules governing the expulsion of aliens and the rights and due process guarantees to which aliens subject to expulsion were entitled. It also welcomed the incorporation of the principles of legality and due process, which were fundamental to protecting the human rights of aliens subject to expulsion. Also to be commended were the cross-cutting mention of such human rights norms as the right to life, the prohibition of torture and the obligation not to discriminate and the specific recognition of the rights of vulnerable persons, refugees and stateless persons, in keeping with the international conventions regarding them. Importantly, the draft articles in their current form clearly distinguished between expulsion of aliens and extradition, thus resolving the confusion that had existed in earlier versions.[14]

In the same vein, another State said that:

> The draft articles on the topic were comprehensive and captured most of the substantive and procedural aspects of the issue of expulsion, including State obligations, such as the obligation of non-refoulement and the obligation to respect the human rights of individuals under expulsion. They also identified the most important and widely recognized rights of aliens subject to expulsion, along with relevant prohibitions placed upon States by international law.[15]

10. Some States expressed doubts about the nature of the rules contained in the draft articles, sometimes suggesting that the draft articles essentially represented progressive development rather than codification.[16] In that connection, one State called for caution in generalizing rules set out in regional or subregional treaties and mechanisms which, in its view, "could not necessarily be taken to be representative of State practice or *opinio juris*".[17] For that State,

> some of the draft articles went beyond both customary and treaty law (*lex lata*) … The Commission tended to overvalue the practice of treaty bodies, such as the Human Rights Committee, in identifying rules, sometimes at the price of overriding the very rule that the treaty in question had meant to establish.[18]

11. On that point, the Special Rapporteur notes that, insofar as there is no recognized rule or method in international law for establishing *opinio juris*, it appears rather difficult to say that a rule arising from general practice does not constitute a customary rule. Only a judge can separate the parties in case of dispute in that regard. Perhaps the outcome of the Commission's ongoing work on custom may help in the future, but that has not happened yet. In any event, that some of the draft articles amount to progressive development of international law on the expulsion of aliens should not come as a surprise, neither in the light of the Commission's statute, nor in that of its settled practice.

12. One State expressed concern that the various human rights recognized in the draft articles

> arose from different international instruments and conventions which might not have received universal acceptance, a situation that could complicate the future application of the draft articles since a State could not be bound by obligations established under treaties or agreements to which it was not a party.[19]

13. To address this concern, suffice it to recall that a State is never bound by obligations established in an international legal instrument to which it has not acceded.

14. More radically, another State

> encourage[d] the Commission to include a clear statement at the beginning of the draft articles that the articles neither codify existing international law nor reinterpret long-standing and well-understood treaties.[20]

15. In the opinion of the Special Rapporteur, there is no need for such a statement. It would simply be inconsistent with the content of the draft articles, which contain not only provisions reflecting the progressive development of international law on the topic of the expulsion of aliens, but also a considerable number of provisions reflecting the codification of a well-established State practice that has been settled since the second half of the nineteenth century, supplemented by extensive case law. Here, once again, the Commission did nothing new; it simply operated in line with its practice.

16. Some States felt that the word "aliens" in the title of the draft articles had a negative connotation, since it distracted attention from the fact that human beings were involved.[21] One State noted that it was for that reason that its legislation was amended to refer instead to "migrants" or "foreign nationals".[22] While this observation, which is sometimes tied to the painful history of a certain type of political regime, is understandably valid, it seems pointless to dwell on this matter, which did not give rise to much debate, notwithstanding the statements made by these two States. Indeed, the matter had been raised within the Commission prior to the adoption of the draft articles on first reading, but it never gained traction.

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[12] Thailand, *ibid*., para. 38.

[13] Poland, *ibid*., para. 70.

[14] Mexico, *ibid*., para. 17.

[15] Greece, *ibid*., 22nd meeting (A/C.6/67/SR.22), para. 24.

[16] See, *inter alia*, Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A; Republic of Korea, *ibid*; and Netherlands, *ibid*. and *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 25.

[17] Islamic Republic of Iran, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 7.

[18] *Ibid.*

[19] Indonesia, *ibid*., para. 26.

[20] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, para. 1.

[21] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 89; and South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 79.

[22] South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 79.

17. Another State recommended a change in terminology by replacing the words "lawful/unlawful" with the expression "regular/irregular immigration status", and the word "alien" with the expression "alien person" throughout the draft articles.[23] The use of the word "alien" has already been addressed. As for the expression "regular/irregular immigration status", it is not only very vague, but also goes well beyond the scope of this topic by making reference to the phenomenon of migration. The terms "regular/irregular" are also very vague, since there is no basis for affirming in absolute terms that the regularity of a situation necessarily entails its legality.

18. States also expressed a wide variety of views on various aspects of the topic or related thereto. While some criticized the use of regional law in an effort to determine trends in international practice on the topic of the expulsion of aliens,[24] others were pleased that European law on the topic had been taken into consideration.[25] One State suggested that, given their important role in determining the State of destination, readmission agreements should be included in the draft articles.[26] Another State felt that the draft articles, specifically draft articles 11, 12, 30 and 32, should be further elaborated with regard to the protection of the property of expelled aliens.[27] Yet another State

> deem[ed] it appropriate to incorporate an express provision on the right to health of detained persons subject to expulsion. … an inalienable right of every person, which guarantees the enjoyment of the highest attainable standard of physical, mental and social well-being.[28]

19. While the Special Rapporteur cannot deny the merit of these suggestions, he must point out the following: regional law is part of international law and cannot be set aside, especially since the Commission has always referred to it in its work; the issue of readmission agreements was duly considered by the Special Rapporteur in his seventh report[29] and was mentioned in the commentary to draft article 29, but it cannot be the subject of a draft article, because it pertains to the direct—bilateral—relations between States; the issue of protection of the property of an alien subject to expulsion is addressed appropriately in respect of matters pertaining to the general rules of international law on the topic, without prejudice to those pertaining to the domestic laws of States; the Commission discussed the issue of the right to health of an alien subject to expulsion following the fifth report[30] of the Special Rapporteur without finding any basis in international law for greater protection than that set forth currently in the draft articles. In this regard, it is worth recalling that the mandate given to the Commission was not to develop a new instrument for the protection of human rights, but to consider the expulsion of aliens with its attendant legal implications, including in positive international human rights law.

20. One State said that it "object[ed] to any suggestion" that the declaration on the human rights of individuals who are not nationals of the country in which they live[31] "represent[ed] customary international law".[32] The State also wished to know whether the expression "general international law", used, *inter alia*, in the commentaries to the draft articles, "include[d] customary international law and treaty law".[33]

21. The Special Rapporteur can only take note of that State's objection to the customary value of the declaration in question. As for the scope of the expression "general international law", it is worth recalling that it is commonly associated with customary law and is therefore distinct from treaty law. Based on this conception, only customary law can generate obligations *erga omnes*. For example, in the *North Sea Continental Shelf* cases, the International Court of Justice referred to "general or customary law rules and obligations", such as those:

> which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.[34]

That said, the Court's jurisprudence is not always clear as to what "general international law" entails. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the Court used the expression on several occasions interchangeably with the expression "customary international law",[35] while distinguishing it from treaty law.[36] By contrast, in the *Military and Paramilitary Activities in and against Nicaragua* case, the Court referred to the "principles of customary and general international law"[37] as if these were two separate notions. Given this lack of clarity, the Special Rapporteur used the expression "general international law" in its broad sense, as captured in contemporary literature,[38] following Dionisio Anzilotti. According to Georges Abi-Saab, for example, based on an analysis of the judgment rendered in the *North Sea Continental Shelf* cases mentioned above, this expression does not refer to custom alone—supported subsequently and incidentally by general principles of law—as some of the Court's formulations might suggest; there is no reason for it not to include universal treaties, which have a "fundamentally norm-creating character" and could be "regarded as forming the basis of a general rule of law".[39]

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[23] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, paras. 1–2.

[24] See, *inter alia*, statements by the United States in the Sixth Committee.

[25] Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 50.

[26] Greece, *ibid*., 22nd meeting (A/C.6/67/SR.22), para. 25.

[27] Republic of Korea, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 120.

[28] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, para. 3.

[29] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/642.

[30] *Yearbook … 2009*, vol. II (Part One), document A/CN.4/611.

[31] General Assembly resolution 40/144 of 13 December 1985.

[32] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, para. 3.

[33] *Ibid.*, para. 2.

[34] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at para. 63.

[35] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, especially at paras. 110–112, 114, 191 and 230.

[36] *Ibid.*, para. 19.

[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at para. 73.

[38] See, *inter alia*, Abi-Saab, "Cours général de droit international public", especially pp. 197–203; and Buzzini, "La théorie des sources face au droit international général", p. 582. See also Kamto, "La volonté de l'État en droit international", pp. 345–349.

[39] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at para. 72.

2. Comments and suggestions received from States, draft article by draft article

Article 1. Scope

22. Some States deemed it inappropriate to include in the scope of the draft articles both aliens lawfully present in a State's territory and those unlawfully present, on the grounds that the rights accorded to each group with regard to expulsion were too divergent.[40] Since the legal status of the two categories of aliens was different, the expulsion regime applicable to them should also be different.[41] Another State asserted unequivocally that aliens who were present unlawfully in a State's territory should be excluded from the scope of the draft articles.[42] However, according to other States, the draft articles "should cover both aliens who were present lawfully in the territory of a State and those who were present unlawfully".[43] More specifically, while recognizing the merit in considering both categories of aliens,[44] some States were of the view that "more clarity was needed with regard to differentiating the rights and obligations of foreign nationals who were lawfully present from those of foreign nationals who were unlawfully present. For the most part the human rights and procedural rights should be the same."[45] They were also concerned that an approach combining the two categories of aliens "at times leads to a mischaracterization of the distinction between these two categories of alien under international law".[46]

23. In the view of the Special Rapporteur, draft articles on expulsion of aliens that covered the expulsion of only those aliens "lawfully" in the territory of the expelling State would be of extremely limited interest since they would leave outside their scope the largest category of persons affected by expulsion, namely those who require the most attention under the legal regime of expulsion, in view of their status within the expelling State. Furthermore, most States that commented on this point were in general agreement that there is merit in considering the expulsion of both categories of aliens, and the concerns expressed were not generally accompanied by specific proposals. It should be recalled, lastly, that the Commission rightly considers that no distinction should be made between the human rights of an alien who is lawfully in a State's territory and those of an alien who is unlawfully present in the territory, since in both cases the alien in question is a human being whose rights must be protected without discrimination of any kind. For that reason, the draft articles seek to make some distinctions with regard to certain procedural rights, but not with regard to substantive human rights.

Article 2. Use of terms

24. In the view of some States, draft article 2 presented a comprehensive definition of "expulsion".[47] Other States requested clarification of certain elements or the addition of other elements that had not been included in the definition. One State considered that

> [e]xtending the definition of the term to encompass a State's conduct and not merely a formal act … was unclear and inappropriate; State conduct was not relevant to the matter of expulsion and should not be included as a self-sufficient element in the definition of the term.[48]

Along the same lines, another State therefore recommended that the phrase "or conduct consisting of an action or omission" should be "removed", because "[i]t would, in particular, contradict draft article 4, which refers to a decision reached in accordance with the law".[49]

25. The observation appears *prima facie* to be well founded. However, it should be recalled, first, that expulsion as conduct consisting of an action or omission attributable to a State is accepted in case law, as indicated in the commentary to draft article 2. Second, the argument that the phrase contradicted draft article 4 cannot prevail: were that to be the case, expulsion as conduct attributable to a State would constitute a violation of law from a procedural point of view, yet would continue to trigger all the legal consequences of a formal expulsion. It should be noted that some States supported the inclusion of conduct attributable to a State in the definition of "expulsion",[50] although a number of precisions or clarifications were requested. For example, one State felt that the term "omission" should be clarified.[51] The Special Rapporteur believes that this term is well established in international law, including in the law on responsibility for internationally wrongful acts, and that there is therefore no need to define it again, since the term is used here with the same meaning. Another State "wishe[d] to emphasize that the scope of 'conduct attributable to a State' should incorporate the same threshold for attribution as described in the draft articles on responsibility of States for internationally wrongful acts".[52] The Special Rapporteur has no objection to this clarification, because it is appropriate that the conduct of a State should be assessed on the basis of the Commission's work on State responsibility. However, he cannot agree with the proposal to delete the term "refugee" at the end of draft article 2, subparagraph (*a*), since that would modify the scope of the draft articles. Lastly, one State considered that the definitions of "collective

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[40] Germany, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 100, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[41] Russian Federation, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 33.

[42] Iraq, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 21.

[43] Indonesia, *ibid*., para. 25.

[44] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[45] South Africa, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 79.

[46] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[47] Chile, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 7; and Denmark (on behalf of the Nordic countries), 18th meeting (A/C.6/67/SR.18), para. 46.

[48] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 98.

[49] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 2; see also the amendment proposed by the United Kingdom to remove the same phrase (*ibid*.).

[50] Germany, *ibid*.; and Canada, *ibid*.

[51] Germany, *ibid*.

[52] Canada, *ibid*.

expulsion" in draft article 10, paragraph 1, and "disguised expulsion" in draft article 11, paragraph 2, should have been included in draft article 2.[53] This proposal cannot be accepted, because the definitions in draft article 2 relate to recurrent terms that apply generally to all the draft articles, whereas those mentioned in the proposal relate to specific cases addressed only in the draft articles in which they are currently found.

Article 3. Right of expulsion

26. Some States were pleased with draft article 3, finding that it "accurately reflected the state of law on the subject".[54] One State proposed that the second sentence of draft article 3 should be amended as follows: "A State may only expel an alien in accordance with its international legal obligations".[55] Such wording is much too vague and does not make clear which of the State's international obligations are in question. Like any international legal instrument, draft articles—which in themselves cannot be imposed on States—have a specific purpose and cannot refer to all obligations under international law.

Article 4. Requirement for conformity with law

27. One State "fully supported the content of draft article 4 (Requirement for conformity with law) as it ensured legal certainty for aliens, regardless of their immigration status".[56] That State's proposal to add "by the State" after the word "decision" seems redundant, since it goes without saying that an expulsion decision can only be taken by a State. Another State, in its observations on draft article 4, indicated that "the draft article should more specifically refer to immigration acts of in-country enforcement".[57] Such a reference would be outside the scope of the draft articles, which in no way address the manner in which States deal with immigration issues in their territories.

Article 5. Grounds for expulsion

28. One State found the wording of draft article 5 to be "unsatisfactory, as it might be read as excluding the unlawful presence of an alien as an authorized ground for expulsion".[58] Such a risk hardly exists, given that paragraph 2 of draft article 5 is worded in such a way that it may authorize expulsion for violation of legislation on the entry and residence of aliens; "the unlawful presence of an alien" would necessarily be contrary to that legislation and would therefore constitute a ground for expulsion. Another State felt that "the draft article should establish the right of the State of nationality and the State of destination of persons subject to expulsion to request additional information about the grounds for expulsion".[59] Such a right is not part of positive international law and State practice provides no indication that it would be recognized. In any event, the grounds for expulsion are not limited to public order and national security, as one State claimed,[60] and the Commission has not sought to draw up an exhaustive list of grounds, as might be suggested by the observations of another State.[61] The Special Rapporteur understands the proposal that "'its obligations under' should be added before 'international law' in order to prevent any ambiguity or competing interpretations of 'contrary to international law'".[62] However, since it goes without saying that, in the international order, a State is never bound other than by its obligations under international law, such a clarification could simply be made in the commentary to draft article 5 if it were deemed necessary. One State suggested limiting the scope of draft article 5, paragraph 3, to "those otherwise lawfully present".[63] However, another State suggested removing the last part of the paragraph, which states that the grounds for expulsion shall be assessed taking into account "the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question".[64] The first proposal is not in line with the approach to the topic adopted by the Commission, which was approved by States in the Sixth Committee, while the second ignores established case law in this area. The Special Rapporteur has no objection to the request that "the commentary to draft article 5 should specify that the grounds for expulsion should be considered at the time of the decision rather than at the time of removal",[65] and suggests that the Commission consider that request favourably.

Article 6. Prohibition of the expulsion of refugees

29. One State indicated that it "did not recognize refugee status, as [it] was not a party to the Convention relating to the Status of Refugees or the Protocol relating to the Status of Refugees".[66] That point can only be noted. Another State indicated that "draft articles 6 and 7, which dealt with refugees and stateless persons respectively, should mention the concept of asylum, since it was relevant to many persons, particularly in [South America]".[67] The Commission had excluded the concept of asylum from the scope of the topic of the expulsion of aliens, because it falls under a legal regime that is much too specific and difficult to incorporate into this topic. It is also a highly political concept, since the grounds for granting asylum depend mainly on the assessment of the applicant's political situation and/or the nature of the relations between the State of refuge and the asylum seeker's State of origin. As the International Court of Justice recalled in its judgment of 13 June 1951 in the *Haya de la Torre Case*,

[53] Congo, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 46.

[54] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 97; see also India, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 17.

[55] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 3.

[56] El Salvador, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 44.

[57] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft articles 2 and 4).

[58] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 98.

[59] Belarus, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 106.

[60] Romania, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 86.

[61] Islamic Republic of Iran, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 9.

[62] *Ibid.*

[63] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 5.

[64] Canada, *ibid*., para. 1.

[65] *Ibid*., para. 2.

[66] Malaysia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 108.

[67] Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 90.

diplomatic asylum, according to the Convention fixing the Rules to be observed for the Granting of Asylum, is "a provisional measure for the temporary protection of political offenders".[68] The various courses by which the asylum may be terminated "are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate";[69] and they lead "to decisions inspired by considerations of convenience or of simple political expediency".[70] Given these circumstances, it would clearly be risky to engage in codification of such a topic.

30. *Paragraph 1*. One State suggested that draft article 6, paragraph 1, should take account of the exceptions contained in article 1, paragraph F, of the Convention relating to the Status of Refugees and that the provisions in question should be incorporated into draft article 6 "in the form of a proviso".[71] Another State indicated that the draft article should

> allow the expulsion of aliens—including individuals recognized by other countries as refugees under the Convention relating to the Status of Refugees—who are found to have committed gross or systematic human rights violations, war crimes or crimes against humanity.[72]

In response to these suggestions, it should be pointed out that the Commission did not wish to repeat, in the context of the draft articles, all the rules relating to the expulsion of refugees and stateless persons, not only because the legal regimes applying to these categories of persons are already embodied in international legal instruments—which it would seem pointless to reproduce *in extenso* here—but also because some of the said instruments have been enhanced at the regional level. It is for that reason that the draft articles, while they set out the broad principles relevant to the issue, contain a type of "without prejudice" clause, spelled out in draft article 8 as follows: "other rules on the expulsion of refugees and stateless persons provided for by law". Furthermore, the commentary to draft article 6 indicates that

> any individual who does not correspond to the definition of refugee within the meaning of the relevant legal instruments is ineligible to enjoy the protection recognized in draft article 6 and can be expelled on grounds other than those stipulated in paragraph 1, including on the sole ground of the unlawfulness of his or her presence in the territory of the expelling State. From that standpoint, paragraph 2 should be interpreted as being without prejudice to the right of a State to expel, for reasons other than those mentioned in draft article 6, an alien whose application for refugee status is manifestly abusive.[73]

However, in order to take into full account the concerns expressed through the suggestions described above, the Special Rapporteur proposes that the commentary to draft article 6 be amended to specify that draft article 6 should be read in conjunction with draft article 8, taking into account, *inter alia*, the provisions of article 1, paragraph F, of the Convention relating to the Status of Refugees.

31. *Paragraph 2*. Some States took issue with paragraph 2 of draft article 6 on the grounds that "it appeared to represent progressive development rather than codification".[74] One State commented that

> [it] significantly extend[ed] the obligations under article 13 of the International Covenant on Civil and Political Rights and article 32 of the Convention relating to the Status of Refugees, which apply only to aliens lawfully in the territory of the State.[75]

Another State said that

> [i]t would be preferable to adhere to the regime established in the Convention relating to the Status of Refugees and either to delete paragraph 2 of the draft article or, if it was kept, to replace "shall" with "may", leaving the question of whether to accord the two categories of refugees the same treatment to the expelling State's discretion.[76]

32. Concerning the observation that paragraph 2 appeared to represent progressive development rather than codification, the commentary to that paragraph is quite clear. Also, adopting the proposal to adhere to the regime established in the Convention relating to the Status of Refugees would ignore the subsequent practice of States in this regard, which is consistent with the provisions of paragraph 2. Lastly, the replacement of "shall" with "may" in this paragraph would create a right rather than an obligation and thereby render the provision in question irrelevant, since States do not require such a norm to extend the provisions of paragraph 1 to the case envisaged in paragraph 2.

33. One proposed amendment suggested that "paragraph 2 should … refer to 'alien', rather than 'refugee'".[77] As explained in the commentary to paragraph 2 of draft article 6, this proposal cannot be accepted, because

> paragraph 2 concerned only individuals who, while not enjoying the status of refugee in the State in question, did meet the definition of "refugee" within the meaning of the 1951 Convention [relating to the Status of Refugees] or, in some cases, other relevant instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and should therefore be regarded as refugees under international law.[78]

Another proposed amendment suggested a negative formulation of paragraph 2, which would specify that paragraph 1 "shall not apply to any refugee … who has applied for recognition of refugee status for the sole purpose of making such an application, while that application is still pending".[79] Such a formulation would limit considerably the scope of the provision in question and would be far removed from the spirit of the current wording of paragraph 2.

34. *Paragraph 3*. One State "[agreed] with the formulation in draft article 6, paragraph 3".[80] However, another

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[68] *Haya de la Torre Case, Judgment, I.C.J. Reports 1951*, p. 71, at p. 80.

[69] *Ibid.*, p. 79.

[70] *Ibid*., p. 81.

[71] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 6.

[72] Canada, *ibid*., para. 4.

[73] *Yearbook … 2012*, vol. II (Part Two), para. 46, para. (4) of the commentary to draft article 6.

[74] Romania, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 86.

[75] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 6.

[76] Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 10.

[77] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 6.

[78] *Yearbook … 2012*, vol. II (Part Two), para. 46, para. (4) of the commentary to draft article 6.

[79] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 6.

[80] Canada, *ibid*., para. 3 of the comments to draft article 6.

State deemed it inconsistent with article 22, paragraph 8, of the American Convention on Human Rights, as well as with draft articles 23 and 24.[81] The Special Rapporteur does not see how this could be so, nor does he think it advisable to refer explicitly to draft articles 23 and 24 in draft article 6 itself, as some States have suggested,[82] rather than in the commentary thereto, as is currently the case. After all, the draft articles form a whole whose elements are all intertwined.

Article 7. Prohibition of the expulsion of stateless persons

35. One State felt that draft article 7 should mention the concept of asylum, and also include "a safeguard clause of the type set out in draft article 6, paragraph 2 … so that stateless persons who were unlawfully present when they first entered a State had an opportunity to regularize their situation".[83] The arguments made in response to the comments on draft article 6 are equally applicable to the suggestion that the concept of asylum should be mentioned in the draft article. Since the status of stateless persons and that of refugees are determined under different conditions and based on different procedures, the protection accorded in draft article 6, at the end of paragraph 2, should not be automatically applied to stateless persons.

36. Another State considered draft article 7 unnecessary, as the commentary to draft article 2 states that the definition of the term "alien" includes stateless persons.[84] Suffice it to recall that an explanation contained in the commentary cannot replace a normative statement. As to the fact that this State found odd the use of the term "lawfully" on the grounds that "[o]nce an individual is subject to an expulsion, they are no longer lawfully in the country; expulsions must be according to law".[85] Once again, suffice it to recall that the possibility of expelling "a stateless person lawfully in the country" is covered under article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons.

Article 8. Other rules specific to the expulsion of refugees and stateless persons

37. According to one community of States, draft article 8 should make it clear that the other rules on the expulsion of refugees and stateless persons covered by this draft article were those that were more favourable to the person subject to expulsion.[86] The Special Rapporteur is of the view that such a clarification could be made in the commentary to that draft article.

Article 9. Deprivation of nationality for the sole purpose of expulsion

38. One State regretted "the disappearance from the draft articles of the principle whereby a State could not expel its own nationals"; yet "the prohibition on deprivation of nationality for the purpose of expulsion would be negated if the expelling State was no longer prohibited from expelling its nationals". According to the State, there was an "inconsistency" there that should be corrected.[87] The Special Rapporteur did his utmost to convince the Commission and the States of the value of a provision in the draft article to recall this principle, but he was unsuccessful, because both the Commission and the States rightfully considered—on a formal level—that such a provision fell outside the topic "Expulsion of aliens". Given that draft article 9 addresses this concern only very implicitly and in a somewhat imperfect manner, the Special Rapporteur wonders whether the principle of prohibition of expulsion by a State of its own nationals could not be recalled in the commentary to this draft article. The proposed amendment to add to the current wording of draft article 9 the phrase "albeit that the grounds for deprivation may also be grounds for expulsion in their own right"[88] seems unnecessary, since any expulsion is legally valid as long as it is carried out in conformity with law and in compliance with the State's international obligations.

Article 10. Prohibition of collective expulsion

39. Without opposing draft article 10, one group of States requested that the commentary should clarify whether the draft article represented progressive development of international law on the expulsion of aliens.[89] One State was of the view that it did not represent customary law, and recommended that the Commission should "exercise caution in its codification in the draft articles".[90] Overall, however, draft article 10 had the support of the majority of States that expressed views on it. According to one State, the current wording of the draft article "accurately reflected the state of law on the subject";[91] another one saw in it "a general rule applicable to all aliens",[92] even suggesting that a specific group such as migrant workers[93] did not need to be mentioned explicitly; another said that it was "pleased" that draft article 10 "did not provide for any exceptions to the prohibition on collective expulsion".[94]

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[81] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 90.

[82] Denmark (on behalf of the Nordic countries), *ibid*., para. 48; and Iraq, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 22.

[83] Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 90.

[84] Canada (document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 7.

[85] *Ibid.*, para. 2.

[86] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 58; and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 11 and 12.

[87] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 101; see also Morocco, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[88] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 9.

[89] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 47.

[90] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 10.

[91] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 97.

[92] Germany, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 100; and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 10.

[93] *Ibid.*; and the Republic of Korea says that it "would be desirable to delete this paragraph" (document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 10.

[94] Switzerland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 74.

40. Three States proposed amendments to draft article 10. One State proposed reintroducing in paragraph 1 the definition of the term "expulsion".[95] This proposal is pointless, as the term "expulsion" is already defined in draft article 2. The same State requested that the word "concomitantly",[96] used in paragraph 3, should be replaced by "simultaneously", but the two words are synonyms. It also preferred that the paragraph should include the following wording: "provided that the expulsion takes place in accordance with law and on the basis of individual procedure".[97] This phrasing is less precise than the current wording, which is, moreover, based on international jurisprudence. Lastly, the State in question suggested that paragraph 4 should end with the words "armed conflict", and that the phrase "involving the expelling State"[98] should be deleted. Such an amendment cannot be accepted, for it would give far too broad a scope to this paragraph, which does not cover all armed conflict of any type, but only an armed conflict involving the expelling State. A second State proposed an amendment to paragraph 3[99] that in no way improves the current language of the paragraph. A third State proposed the following amendment to paragraph 2: "The collective expulsion of aliens, including migrant workers, is prohibited save in accordance with paragraph 3."[100] The proposed addition of "save in accordance with paragraph 3", if accepted, would make the latter say something that it does not say, namely that collective expulsion would be permitted in certain cases or under certain conditions, whereas, as another State referred to above recalled, paragraph 2 is in fact a general rule.

Article 11. Prohibition of disguised expulsion

41. Apart from one State, which reiterated its position that "expulsions can only be effected through formal governmental acts",[101] the States that expressed views on the draft article generally welcomed it.[102] However, one State noted that it was "unclear,"[103] in particular with regard to its scope; for another, the definition of disguised expulsion left room for "an overly broad interpretation".[104] Like the amendments proposed by some States,[105] these observations are based on national concerns—concerns that may well be valid—and not on international law, or, more specifically, on international jurisprudence, as is the case of the current draft article 11. Lastly, one State requested that: "The commentary to draft article 11 should state that disguised expulsion was not only unlawful but could also entail the international responsibility of the expelling State".[106] Such a statement would be unnecessary since it is recognized that any internationally wrongful act by a State—and disguised expulsion is such an act—entails the State's international responsibility.

Article 12. Prohibition of expulsion for purposes of confiscation of assets

42. Among the States that expressed views on this draft article, one stated that

> [w]hile its underlying aim—namely, to prohibit States from expelling aliens in order to confiscate their property—was justified and deserved support, it could prove difficult in practice to determine a State's intentions. Moreover, there might be situations in which, under the laws of the State in question, offences committed by an alien might be punishable by both expulsion and confiscation of assets. In such cases, non-application of legal provisions on confiscation merely because a person was also subject to expulsion would hardly be justified, since the alien would thus enjoy a more privileged situation than citizens of the State.[107]

The Special Rapporteur is of the view that determining the intention of a State is no more difficult here than in other situations; in law, the intentionality of an act or conduct is always determined following a consideration of the facts rather than a psychological investigation. As for the second observation, it does not fit into the scenario of an "expulsion for purposes of confiscation", as it involves cases that are prescribed expressly by law.

Article 13. Prohibition of resort to expulsion in order to circumvent an extradition procedure

43. Some States maintained their previously held position that "issues relating to extradition should be excluded from the draft articles",[108] or that draft article 13, which one State found "vague", "should be deleted or limited to cases of legal immigrants".[109] However, many States supported the draft article,[110] finding its provisions "convincing"[111] or that it "was an improvement over the text discussed during the previous session".[112] The pro-

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[95] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 7 of the comments on draft article 10.

[96] *Ibid.*, para. 4.

[97] *Ibid.*, para. 7.

[98] *Ibid*., para. 6.

[99] Republic of Korea, *ibid*., para. 1 of the comments on draft article 10.

[100] United Kingdom, *ibid.*, para. 2.

[101] Austria, *ibid*., comments on draft article 11.

[102] Belarus, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 108; Germany, *ibid*., para. 101 and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 11; Iraq, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 23; Romania, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 87.

[103] Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 11.

[104] Germany, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 101, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 11; see also Netherlands, *ibid*.

[105] See those of the Republic of Korea and United Kingdom, *ibid*.

[106] Belarus, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 109.

[107] Russian Federation, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 33.

[108] Poland, *ibid.*, para. 70.

[109] Czech Republic, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 13, and *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 123.

[110] India, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 18; Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60; see also Canada (document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 13; and Chile, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 7.

[111] India, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 18.

[112] Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60.

posal by one State to amend the draft article by adding the phrase "in the absence of a legitimate immigration purpose"[113] would change the nature of the draft article, because this phrase would introduce an exemption that is not allowed based on the current formulation of the draft article. As the Commission showed in its commentary to the draft article, it not only relied on case law on the subject, but also drafted the provision in such a way that it did not constitute an obstacle to a lawful expulsion.

Article 14. Obligation to respect the human dignity and human rights of aliens subject to expulsion

44. Without opposing the draft article, one State felt that the "overarching principles already inherent in the law" set out therein were framed as "substantive obligations", "their precise content might be difficult to articulate".[114] For the same reasons, another State found paragraph 1 of the draft article to be "redundant".[115] Suffice it to recall here that, as shown in the commentary and as indicated by one State that supported the draft article, the "current wording … accurately reflected the state of law on the subject".[116] As for the amendments proposed by two States, they are clearly contradictory: one suggested that paragraph 2 should state that "all human rights of the person subject to expulsion shall be respected, including those set out in the present draft articles",[117] while, for opposite reasons, the other State recommended the removal of the phrase "including those set out in the present draft articles" in paragraph 2 of draft article 14.[118] At this juncture, the Special Rapporteur will simply refer to the commentary to draft article 11.

Article 15. Obligation not to discriminate

45. While it "support[ed] the objective of eliminating unlawful discrimination", one State "ha[d] significant concerns with this draft article, which [wa]s contrary to [its] existing domestic legislation and [its] practice".[119] By contrast, another State considered that draft article 15 helped to prevent "expulsion for xenophobic and discriminatory purposes" and "therefore welcomed the inclusion of draft article 15".[120] Indeed, like all the other provisions concerning the human rights of aliens subject to expulsion, this draft article does not introduce anything that does not already exist in positive international law. The only amendment to the draft article proposed by one State[121] does not add anything new, nor does it improve the draft.

Article 16. Vulnerable persons

46. Answers to the observations made by a few States and one community of States[122] on this draft article can be found in the commentary to the draft article, while the language-related issues raised by one State[123] will be addressed by the language group within the Drafting Committee.

Article 17. Obligation to protect the right to life of an alien subject to expulsion

47. One State found this provision "redundant",[124] while another, although it would not request its removal,

> would not agree to an extended interpretation of this draft article, which would essentially provide an unqualified commitment to provide free health services to illegal migrants or an acceptance that illegal migrants with serious health problems can rely on their continued need for medical treatment as a basis for remaining in [the country] in violation of [its] immigration laws.[125]

These observations, which have no bearing on the relevance of the draft article, can only be noted.

Article 18. Prohibition of torture or cruel, inhuman or degrading treatment or punishment

48. Only one State made an observation on draft article 18, but the observation was not clear, because it is difficult to see how the wording of the draft article "might lead to the conclusion that human rights other than those mentioned here do not apply".[126]

Article 19. Detention conditions of an alien subject to expulsion

49. One State clearly supported draft article 19, considering that its current wording "accurately reflected the state of law on the subject".[127] Another State found that it addressed the concerns of countries "in which expulsion was sometimes applied as an additional penalty to an alien convicted of a criminal offence".[128] Various States[129]

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[113] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 13.

[114] Australia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 3.

[115] Netherlands, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 26, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 14.

[116] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 97.

[117] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 4 of the comments on draft article 14.

[118] Canada, *ibid*.

[119] United Kingdom, *ibid*., para. 2 of the comments on draft article 15.

[120] Cuba, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 40.

[121] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 15.

[122] Morocco, *ibid.*, comments on draft article 16; and European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 60, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 14.

[123] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 16.

[124] Austria, *ibid.*, comments on draft article 17.

[125] United Kingdom, *ibid*.

[126] Austria, *ibid*., comments on draft article 18.

[127] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 97.

[128] China, *ibid*., para. 53.

[129] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Congo, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 46; El Salvador, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 45; Germany, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 102, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 91; and Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19.

made other comments that were aimed mainly at maintaining their national practices or normative preferences, without considering the state of or major trends in international law on the topic.

50. Various amendments to the draft article were also proposed. Once again, most of them expressed normative preferences[130] much more than positions based on the rules of positive international law or trends confirmed by practice. One State proposed inserting into paragraph 2 (*a*), the phrase "in all the circumstances".[131] The Special Rapporteur suggests that this idea be taken up instead in the commentary. The same State suggested that the phrase "or a person authorized to exercise such power in law, subject to judicial review"[132] be added to the end of paragraph 2 (*b*). In the opinion of the Special Rapporteur, it goes without saying that a "person who may perform a judicial function" can only do so under the law; nonetheless, if it were indispensable to add such clarification, he would have no objection to adding the phrase "under the law" at the end of paragraph 2 (*b*). In that connection, the phrase "subject to judicial review" seems redundant, since any jurisdictional authority—be it that of a court or that of an empowered body—is in principle subject to review through the appropriate appeals procedures.

51. One community of States proposed substantial amendments.[133] The first concerned the title of the draft article which, in the view of those States, should be: "Detention of an alien subject to expulsion" rather than "Detention conditions of an alien subject to expulsion". To the extent that the scope of draft article 19 extends beyond detention conditions *stricto sensu*, the Special Rapporteur is not opposed to the adoption of the suggestion as presented. The second proposed amendment was to draft a new paragraph 1, which would read:

> "Detention may only be used if it is necessary to prepare and/or carry out the expulsion process, in particular where there is a risk of absconding or where the alien avoids or hampers expulsion. Detention may only be imposed if less coercive measures cannot be applied effectively in a specific case."

Based on this amendment, the current paragraph 1 (*b*) would be deleted and the current paragraph 2 (*b*) would be amended by adding the phrase "or by an administrative authority, whose decision is subjected to an effective judicial review". While this proposal is seductive in its spirit, it might be exceedingly difficult for the expelling State to implement, because, for each detention case, the State would have to prove that the detention was necessary in order to prepare or carry out the expulsion process, especially where "there is a risk of absconding or where the alien avoids or hampers expulsion". In the opinion of the Special Rapporteur, it is better to allow the State to determine whether or not the alien subject to expulsion should be held in detention for this purpose, without having to fulfil an obligation in that regard.

52. The same community of States proposed the addition of a draft article 19 *bis*, entitled "Conditions of detention of aliens subject to expulsion",[134] setting out a series of rights that the alien subject to expulsion should enjoy. Those States forget, however, that those rights are derived from European practice; they are clearly not enshrined in positive law and State practice on the topic is so varied and contradictory that it is difficult to discern a trend that may underpin progressive development of the law on this matter. It is hard to find a basis for the rule whereby "[a]liens detained pending expulsion should normally be accommodated in facilities specifically designated for that purpose", which should be "clean and … offer[…] sufficient living space for the numbers involved" (para. 1); or the detainee's right to have access to "doctors [and] non-governmental organizations" (para. 3); the right of children to "education" and "a right to engage in play and recreational activities appropriate to their age" (para. 6); or the right of separated children to "be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age" (para. 6).

Article 20. Obligation to respect the right to family life

53. A clear answer to both the question of whether draft article 20 amounts to codification or progressive development of law[135] and the recommendation by one State that the draft article be amended "to better reflect the rights and obligations contained in universal instruments"[136] can be found in the commentary to the draft article. The call for caution by one State[137] in respect of the draft article and the request by another State[138] that it be rejected are based on national considerations and not on arguments from positive international law or trends confirmed by practice. The same is true for the proposed amendment by one State to replace the phrase "on the basis of a fair balance between the interests of the State and those of the alien in question" with:

> "where necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[139]

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[130] Belgium, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Canada, *ibid*.; El Salvador, *ibid*.; and Netherlands, *ibid*.

[131] United Kingdom, *ibid*., para. 4.

[132] *Ibid.*

[133] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 61, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 18.

[134] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 62, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 18.

[135] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 47.

[136] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 20.

[137] Canada, *ibid*.

[138] Malaysia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 109.

[139] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 7 of the comments on draft article 20.

It was also proposed that, for the sake of coherence, draft article 20 should come before draft article 19. In the opinion of the Special Rapporteur, the two draft articles may be placed in any order without affecting the coherence of the set of draft articles.

Article 21. Departure to the State of destination

54. Some States[140] expressed clear support for draft article 21. Others, while approving it, expressed various points of view or preferences that did not amount to proposed amendments.[141] However, one State[142] rejected the draft article outright, even as an exercise in progressive development of law, finding that it raised "significant concerns" for national political reasons. Indeed, it wished "to preserve the flexibility to enforce removal with the restrictions that it imposes to ensure such individuals could not lawfully return [to the country]".[143] This wish is noted. Nonetheless, the fact that the State in question "does not consider that there is a clear basis for this draft article in existing international law"[144] does not mean that the draft article has no basis in that legal order, as the Commission showed in its commentary to the draft article. The proposed amendment to the draft article to prefer[145] or "to promote voluntary departure more clearly"[146] not only seems to lose sight of the wording of paragraph 1, but would also have the draft article do things that are incumbent on States, since each State can act in this area based on its domestic policy and law.

Article 22. State of destination of aliens subject to expulsion

55. Draft article 22 was deemed "useful and legally correct" by one group of States.[147] A number of other States also made comments about the draft article, although none of them was substantial or likely to call into question the draft article. For example, it was suggested that the provisions of the draft article should be "explicitly subject to the conditions set forth in draft articles 6 …, 23 … and 24".[148] This suggestion is redundant because, as stated previously in response to a similar observation, the draft articles represent a whole and must be interpreted as such. Some States also criticized draft article 22 for not "refer[ring] to the financial implications of transportation or specify[ing] which party would bear the cost of expulsion",[149] forgetting that there are domestic practices on the subject and that, in any event, the draft articles could not govern these types of issues, which fall under the purview of each State. A suggestion was also made to delete the expression "where appropriate", in paragraph 1, with regard to the choice of State of destination, because the alien's request should "always be taken into consideration".[150] This ignores practice that shows that the expulsion process may be paralyzed if the alien's choice or request should be the overriding consideration in all circumstances. It was also argued that the consent of the State of destination should always be required:[151] such a requirement could, in certain cases, constitute a veritable roadblock to expulsion. The suggestion that the commentary should make clear "that paragraph 2 does not establish a legal obligation to admit an alien"[152] is already reflected therein, as this position had already been expressed within the Commission during consideration of the draft articles on first reading. Lastly, the amendment proposed by one community of States to add in paragraph 1 the terms "and readmitted by" after "expelled to" and before "his or her State of nationality"[153] does not appear suitable, because the obligation to admit—and hence to readmit—is contained in article 12, paragraph 4, of the International Covenant on Civil and Political Rights, which states that "No one shall be arbitrarily deprived of the right to enter his own country". Furthermore, the commentary to paragraph 1 of draft article 22 recalls that the State of nationality "has an obligation to receive [its] alien under international law".[154]

Article 23. Obligation not to expel an alien to a State where his or her life or freedom would be threatened

56. States that made comments on this draft article expressed widely divergent views without any dominant position emerging. One State called for restraint in extending the *non-refoulement* obligation to expelled aliens;[155] while another criticized an extended definition of States that did not apply the death penalty, which "might unnecessarily restrict the State's right of expulsion".[156] Other States felt that the rules set out in paragraph 1[157] and paragraph 2[158] had no basis in international law; yet another said that this rule constitutes progressive development of

[140] Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 51; Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60; Russian Federation, *ibid*., para. 34; see also Australia, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 3, which nonetheless prefers the provision to only "serve as a guide for domestic laws and policies".

[141] Greece, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), para. 25; and Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 92.

[142] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 21.

[143] *Ibid.*

[144] *Ibid*.

[145] Netherlands, *ibid*.

[146] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 63, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 21.

[147] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 46.

[148] South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 80.

[149] Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 93.

[150] South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 80.

[151] South Africa, *ibid.*; see also Cuba, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 41.

[152] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 22.

[153] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 64.

[154] *Yearbook … 2012*, vol. II (Part Two), para. 46.

[155] Australia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 2, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 23.

[156] Republic of Korea, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 121.

[157] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 23.

[158] Singapore, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 104.

law;[159] and one group of States proposed its deletion.[160] One State, on the other hand, felt that the draft article's wording "was not sufficient to safeguard the life of the expelled person, as the State in question might not abide by the assurance given", and that the "draft article should aim to establish an international obligation and responsibility for failure to fulfil that obligation".[161] Another community of States, which was not opposed to draft article 23, simply suggested that paragraph 2 thereof should be rendered more precise "so as to avoid the impression that expulsions to countries exercising the death penalty were generally banned".[162] However, one member State of that community recommended that paragraph 1 of draft article 23 should be harmonized with draft article 6.[163] The Special Rapporteur proposes that the Drafting Committee look into the harmonization of the two draft articles.

57. One proposed amendment recommended adding to the end of paragraph 1 the following phrase:

> "unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".[164]

This amendment would obliterate the protection accorded by paragraph 1, which does not entail any general prohibition of expulsion, even in the cases listed, because the State may always expel someone even in this case, albeit only to a State where there is no risk that the alien would be subjected to one of the grounds listed. Moreover, most of the concerns expressed by States in respect of draft article 23 have been discussed extensively in the Commission and have been addressed in the commentary.

Article 24. Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

58. Some States clearly supported draft article 24,[165] one State finding that it was an improvement over the previous version,[166] and another suggesting that consideration should be given to the possibility of applying the provision to persons or groups acting in a private capacity.[167] One State, on the other hand, opposed the extension of the *non-refoulement* obligation to situations where there was a real risk of "degrading" treatment, because it would amount to an excessively broad interpretation of that obligation.[168] The commentary to draft article 24 explains the reasons and legal basis of this extension. Lastly, one State noted that there was a difference in wording between draft article 24 and draft article 6, in that unlike draft article 6, draft article 24 assumed the existence of "substantial grounds for believing"; the State wondered whether there was any reason for that difference.[169] As in the case of draft article 23, the Special Rapporteur proposes that the Drafting Committee look into the coherence of these two draft articles.

Article 26. Procedural rights of aliens subject to expulsion

59. While a number of States made comments critical of the fact that some of the provisions of draft article 26 were not enshrined in international law and that other provisions represented progressive development more than anything else, it is striking to note that most of the observations and proposed amendments to the procedural rights contained in this draft article were *de lege ferenda*. For example, one community of States proposed that the draft article should be amended to specify that the right to receive notice referred to "written notice", and to add therein the right to receive "information about the available legal remedies".[170] Another State proposed adding the following to the end of paragraph 1 (*d*): ", including the option to request a provisional measure in the form of an injunction preventing the alien's expulsion pending the outcome of the proceedings".[171] None of those States provided a basis in international law for their criticisms or proposed amendments. For another State, the draft article should make clear that the list of procedural rights of aliens subject to expulsion in paragraph 1 "should be understood to be the minimum rights to which an alien was entitled".[172] Such a formulation would have no legal basis; however, the idea that these rights are without prejudice to other similar rights is contained in paragraph 2 of the draft article. While States were quick to recall that the admission of aliens fell under the exclusive sovereignty of the State and that the legal regime for the expulsion of aliens should not be an obstacle for the expulsion of migrants who are unlawfully present in the territory of the State, it is striking that some States found it "unacceptable that an alien unlawfully present in a State for six months—a period fixed arbitrarily—should not enjoy any procedural rights".[173] While agreeing that "the expel-

[159] China, *ibid.*, para. 54.

[160] Denmark (on behalf of the Nordic countries), *ibid*., 18th meeting (A/C.6/67/SR.18), para. 50.

[161] Peru, *ibid*., para. 94.

[162] European Union, *ibid*., para. 65, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 24.

[163] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 101.

[164] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of comments on draft article 23.

[165] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 95; Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60; and Spain, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 115.

[166] Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60.

[167] Spain, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 115.

[168] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 24.

[169] Austria, *ibid.*

[170] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 66, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 25–29.

[171] Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 26.

[172] Chile, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 9.

[173] France, *ibid.*, para. 99. See in that same vein, Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 26; and Switzerland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 76. See also Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 26.

ling State should respect certain minimum procedural rights regardless of the alien's situation",[174] it should be explained that, in the opinion of the Commission, an alien who has been unlawfully present in the territory of a State for less than six months does not fall under the expulsion regime, but under that of admission or non-admission.

60. Some comments and observations of States were more reflective of domestic preferences than positive international law or even trends derived from practice, as exemplified by the request to delete paragraph 1 (*f*) on the ground that "the provision of an interpreter free of charge would imply far-reaching budgetary consequences",[175] and the proposed stipulation that a person "must be permitted to be represented before a competent authority in all cases but that there is no right to be so represented".[176] The comments of some States[177] regarding the consular rights of an alien subject to expulsion were not convincing, as the concerns expressed in that regard had been duly taken into consideration in the commentary to paragraph 3 of draft article 26. This was indeed acknowledged by one State,[178] which would have preferred to see those concerns reflected in the draft article itself.

61. One State suggested that, in draft article 26, a structural distinction should be made between procedural rights "relating to the administrative phase of expulsion and those relating to the judicial phase".[179] While that suggestion is seductive from a theoretical standpoint, in practice, the administrative and judicial phases are not always clearly distinguishable. An act in the administrative phase could give rise to a judicial procedure, without prejudice to the recourses that the alien subject to expulsion may have on the merits, including the ground for expulsion. Another State suggested that the commentary to paragraph 1 (*c*), of this draft article, which is devoted to the right to be heard by a competent person, should be clarified to indicate that that right referred to "the ability to present arguments during written or oral proceedings before or after a decision is taken".[180] The Special Rapporteur is not opposed to the introduction of such a clarification in the commentary as indicated. It should also be noted, in the commentary to paragraph 1 (*a*), that the notice of the expulsion decision must be in writing, in order to allay the concerns expressed by some States[181] on this point.

Article 27. Suspensive effect of an appeal against an expulsion decision

62. Some States rejected outright the provisions of draft article 27 and requested its deletion.[182] The grounds for this rejection are quite varied: "could unduly limit State sovereignty";[183] "would make it virtually impossible to remove aliens";[184] one community of States said that the suspensive effect was not contemplated in its legal order and that the recognition of such an effect "could be seen as an incentive to abuse appeal procedures";[185] and another State found that it "was also unacceptable because it constituted progressive development without a minimum basis in uniform or convergent State practice".[186] Other States also expressed their dissatisfaction with the draft article, but in a more qualified manner. For example, they felt that the suspensive effect "could not be allowed systematically" and that it "could not apply in certain highly sensitive situations, especially where expulsion was justified on grounds of national security";[187] that "[t]o extend a requirement for suspensive effect to all appeals against expulsion decisions is disproportionate";[188] that "the complexity of the issue and the disparities between the regulations and practices of different States gave rise to doubts as to whether there was a sufficient legal basis for retaining the draft article";[189] and that "domestic legal practice in the matter varied, and [that] the question should therefore be treated with caution; State practice should be studied carefully and a general assessment of the legal character of the proposed norm undertaken".[190] In short, the common argument is that State practice in this area is insufficient.[191]

63. In response to these rejections of the draft article or some of the reservations that it has generated, suffice it to recall that the Commission made it very clear in its commentary that the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State is progressive development of the law on the topic.

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[174] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 99.

[175] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 26.

[176] United Kingdom, *ibid*., para. 6.

[177] Austria, *ibid*.; Cuba, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 41; and Peru, *ibid.*, 18th meeting (A/C.6/67/SR.18), para. 96.

[178] Austria, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 82.

[179] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 99.

[180] Belgium, document A/CN.4/699 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 26.

[181] Austria, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 82; European Union, *ibid*., para. 66, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 25–29; and Spain, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6.67/SR.18), para. 114.

[182] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 67, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 30–32; Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 11; Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27; and Republic of Korea, *ibid*.

[183] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27.

[184] Netherlands, *ibid.*

[185] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 67, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 30–32; see in the same vein, Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27.

[186] Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 11.

[187] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 100.

[188] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 3 of the comments on draft article 27.

[189] Spain, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 113.

[190] Poland, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 71.

[191] India, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 18.

64. For the other States that expressed an opinion on draft article 27, the suspensive effect is a principle for which exceptions should be contemplated: for example, in order to respect the principle of *non-refoulement*,[192] or "for appeals lodged by aliens who could reasonably invoke a risk to their life or liberty or a risk of ill-treatment in the State of destination",[193] or "if public order or safety are at risk".[194] In short, it was felt that the draft article should "be amended to include certain exceptions, provided that such exceptions respected every person's right to an effective remedy".[195]

65. The other observations concerned issues which various States would have liked to see in the draft article: clarification on the suspensive effect before an international court;[196] possibility of a third party lodging an appeal on behalf of an alien subject to expulsion;[197] or granting the benefit of the suspensive effect of an appeal only to aliens lawfully present in the territory of the expelling State.[198] As the Commission indicated in its commentary to this draft article, it did not go as far as some States would have liked, or as far as the practice of some States could have suggested; it confined itself to what appeared to be reasonable as an exercise in the progressive development of international law, having regard to current trends in international law and to some national laws.

66. Two amendments were proposed. The first was to add to the end of draft article 27 the following phrase: "where execution of the decision could cause irreparable harm or harm that would not be easily redressed by the final decision".[199] This proposal could be examined closely by the Commission; in this case, the Special Rapporteur is of the opinion that the text to be considered should stop after "irreparable harm". The second proposed amendment was designed to mitigate the legal force of the rule of the suspensive effect by stating that an appeal lodged against an expulsion decision "may suspend an expulsion decision, as provided by law".[200] Such an amendment would strip the rule of any international impact by reducing the draft article to a mere clause referring strictly to international law.

Article 29. Readmission to the expelling State

67. One State found the wording of draft article 29 too broad, as it included "a 'right of return' in every case in which it is established by a competent authority that the expulsion was unlawful".[201] But as the content of the commentary to this draft article shows, this "right of return" is circumscribed by a plethora of conditions and strict limitations. Another State noted that, in international law, an alien whose expulsion has been deemed unlawful has no right of admission,[202] something which the Commission was well aware of, since it indicated clearly in its commentary to the draft article that this is an exercise in progressive development of international law. The same response applies to the State that felt that State practice in this area—as in that covered by draft article 27—was insufficient,[203] because had there been sufficient or clearly established practice, the issue would have been one of codification rather than progressive development. In a rather puzzling move, one State recommended that the application of draft article 29 should be limited "to aliens lawfully present in the territory of the State in question",[204] but also that the draft article should be deleted on the grounds that "[i]t is the sovereign right of a State whether to allow expelled aliens to be readmitted to its territory, even if it is established by a competent authority that the expulsion was unlawful".[205] The Special Rapporteur recalls that States are compelled to comply with their international obligations. As for limiting the application of the draft article to aliens legally present in the territory of the expelling State, this is precisely what is indicated in paragraph (2) of the commentary to the draft article. Lastly, one proposed amendment suggested that, in paragraph 1, the words "by a competent authority" should be followed by "of that State".[206] Such a suggestion would drastically limit the authorities concerned, thereby violating the spirit of the provision, which includes international courts among the competent authorities on the topic, as pointed out in the commentary to the draft article.

Article 30. Protection of the property of an alien subject to expulsion

68. Three States made observations on this draft article: one clearly supported it;[207] another requested that, even though the commentary explains the purpose of the draft article, the "draft article itself should reflect this purpose";[208] while another State proposed an amendment to insert into the draft article the phrase "to ensure that aliens subject to expulsion are not arbitrarily deprived of their lawfully held personal property" in place of the current formulation "to protect the property of an alien subject to expulsion", which is more concise and broader in scope.[209] Neither suggestion is acceptable.

Article 31. Responsibility of States in cases of unlawful expulsion

69. Among the four States that made comments concerning draft article 31, two found it redundant,[210] one

[192] Austria, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 83; and Switzerland, *ibid*., para. 77.

[193] Switzerland, *ibid*.

[194] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27.

[195] Germany, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 103.

[196] Belarus, *ibid*., para. 110.

[197] Chile, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 9.

[198] Romania, *ibid*., para. 88.

[199] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 8 of the comments on draft article 27.

[200] Canada, *ibid*.

[201] Germany, *ibid*., comments on draft article 29.

[202] Canada, *ibid*.

[203] India, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 18.

[204] Republic of Korea, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 119.

[205] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 29.

[206] Netherlands, *ibid.*

[207] Morocco, *ibid*., comments on draft article 30.

[208] Canada, *ibid*.

[209] United Kingdom, *ibid*., para. 3.

[210] Austria, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 84,

supported it without reservation,[211] and one approved it "[t]o the extent that any of the draft articles represent existing international legal obligations".[212] Note has been taken of these different positions, which have no bearing on the rule set forth in the draft article and whose existence in positive international law is uncontested.

Article 32. Diplomatic protection

70. As in the case of draft article 31, some States found the draft article on diplomatic protection redundant, or unnecessary, in the context of the draft articles on the expulsion of aliens.[213] However, one State clearly supported the draft article.[214] Another State did not oppose it, but suggested that it should be reformulated to indicate that "[t]he exercise of diplomatic protection in respect of an alien subject to expulsion would necessarily be dependent on an existing right of the relevant State to exercise diplomatic protection in respect of the subject."[215] Such a formulation would be redundant, because it cannot be otherwise. Another State noted that "it was important to consider a provision on the settlement of disputes arising from the interpretation and implementation of the draft article and to emphasize in that regard the role of the International Court of Justice".[216] Such a clause on dispute settlement appears redundant—indeed irrelevant—in the specific context of the present draft articles.

and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 31; South Africa, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 81.

[211] Poland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 71.

[212] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 31.

[213] Austria, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 84 and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 32; Germany, *ibid.*; Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 51; and South Africa, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 81.

[214] Poland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 71.

[215] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 32.

[216] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 97.

Chapter II

Final remarks of the Special Rapporteur

71. Several States expressed a position as to the final form of the outcome of the work of the Commission on the expulsion of aliens. A few States clearly supported the form of a convention,[217] while another suggested the form of a "declaration of general principles or a framework convention".[218] By contrast, other States favoured the form of a non-binding document, which could be a set of guidelines,[219] guidelines or (guiding) principles,[220] guiding (framework) principles,[221] a "general framework of principles",[222] "best practices or policy guidelines",[223] "guidelines or best practices"[224] or "guidance".[225] A few States felt that the final form of the Commission's work on the topic should be determined at a later stage,[226] even though one of them expressed a preference for "[w]ell-established guidelines reflecting the best practices of States".[227] This novel terminology is particularly inventive in diminishing the scope of the final outcome of the Commission's work on this important and sensitive topic in our globalized world, yet it does not lack merit. Nonetheless, it should not cause the Commission or even States to shift attention away from what is a crucial reality of contemporary international society, where financial flows are limitless and no effort is spared to encourage the movement of goods, yet where physical or legal barriers are being erected to hamper and even stop the movement of people.

72. The Commission works for the States. That is why it values their opinions and positions on its work and does its utmost to take them into consideration. Nonetheless, it should be borne in mind that the Commission is also a body of experts in international law whose mission is stated quite clearly in article 1, paragraph 1, of its statute: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

73. It is therefore in this light that the work that the Commission submits to the General Assembly should be

[217] Belarus, *ibid.*, para. 111; Congo, *ibid.*, 20th meeting (A/C.6/67/SR.20), para. 48; and Peru, *ibid.*, 18th meeting (A/C.6/67/SR.18), para. 98.

[218] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B.

[219] Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 11; Romania, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 88; and Thailand, *ibid.*, para. 38.

[220] Australia, *ibid.*, 20th meeting (A/C.6/67/SR.20), para. 4; Canada, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 16; Czech Republic, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B; Denmark (on behalf of the Nordic countries), *ibid.*, 18th meeting (A/C.6/67/SR.18), para. 51; Germany, *ibid.*, para. 99, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B; and Spain, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 116.

[221] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 68; and Singapore, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 105.

[222] Portugal, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 60.

[223] Netherlands, *ibid.*, para. 28, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B.

[224] Greece, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), para. 26.

[225] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B.

[226] Israel, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 37; and Malaysia, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 108.

[227] Israel, *ibid.*, 20th meeting (A/C.6/67/SR.20), para. 37.

assessed. Regrettably, many of the observations that States made in respect of the draft articles adopted by the Commission on first reading give the impression that they did not read the commentaries to the draft articles, which address clearly and comprehensively almost all of the often legitimate concerns raised by the States. The Special Rapporteur would like to draw attention to the importance of the commentaries, which are an essential means of interpreting the various draft articles and an indispensable methodological tool for understanding the Commission's approach and verifying the legal basis of each draft article.

74. Very few topics in the Commission's agenda have such a solid grounding in international law as does the expulsion of aliens. State practice on various aspects of the topic has been evolving since the end of the nineteenth century and a number of international treaties contain provisions relating to various aspects of the topic. Much of the case law that served as the basis for codifying the responsibility of States for internationally wrongful acts, on the one hand, and diplomatic protection, on the other, concern cases involving the expulsion of aliens. More recently, the International Court of Justice issued a judgment on 30 November 2010, in the *Diallo* case, reaffirming this jurisprudential foundation and clarifying the positive law on various points.[228]

75. That some Governments would have reservations about the topic for their own national reasons is understandable. Nonetheless, that cannot be used as grounds for insinuating—indeed affirming—that the draft articles have no basis in international law. Several States stressed that the draft articles must be based on State practice. This opinion is widely shared within the Commission, which has always based its work on State practice while retaining the option, when necessary, to engage in the progressive development of international law. In its consideration of the present topic, the Commission made it clear that some provisions of the draft articles amounted to progressive development rather than codification *stricto sensu*, all things that are fully in keeping with its mission, as recalled above.

76. The draft articles adopted on first reading are based on a balance between the right of States, whose sovereignty over the admission and expulsion of aliens is reaffirmed in the draft articles, and the rights of aliens subject to expulsion, who are accorded greater protection in the draft articles based essentially on international law and the dominant trends in the practice of a number of States. In the opinion of the Special Rapporteur, it is highly desirable to maintain this balance—which was achieved following lengthy discussions within the Commission—and to take into account the convergent views expressed by States on various aspects of the topic. In this connection, the Commission can be pleased with the positive assessment made of its work by an eminent representative of contemporary doctrine in international law, who wrote that

> The draft articles on expulsion of aliens have succeeded in setting out the relevant legal regime with all its implications in a sober and well-balanced manner. The [Commission] has neither adopted a purely conservative approach, nor has it brushed aside all the traditional elements of States sovereignty. On the whole, the Draft is permeated by a spirit of enlightened modernism which takes the rule of law and human rights seriously, without placing them ahead of any other consideration of public interest. Accordingly, its chances of getting the final mark of approval from the international community can be deemed to be extremely good.[229]

77. In any event, the Special Rapporteur would like the Commission to complete its work on the topic by adopting the draft articles on the expulsion of aliens on second reading, subject to any amendments it proposes to make to the draft articles, including to the commentaries thereto, following comments and observations received from States. In this connection, far be it from the Special Rapporteur to prejudge the form that the General Assembly would want to give to the draft articles. The States have the last word on this topic, as they do on the final outcome of any work submitted by the Commission. Accordingly, as a representative of one State noted during the discussion in the Sixth Committee, in November 2012, it is better to "leave all options open",[230] although the Special Rapporteur has a preference for the form of a convention.

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[228] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639.

[229] Tomuschat, "Expulsion of aliens: the International Law Commission draft articles", p. 662.

[230] Singapore, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 105.