

Document:-
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Summary record of the 3134th meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
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The Commission decided to include the topic "Formation and evidence of customary international law" in the current programme of work and to appoint Sir Michael Wood as Special Rapporteur for the topic.

83. Mr. NIEHAUS (Chairperson of the Planning Group) announced that the Planning Group would be composed of the following members: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood and Mr. Šturma (Rapporteur, *ex officio*).

The meeting rose at 12.20 p.m.

3133rd MEETING

Friday, 25 May 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*continued*)*

[Agenda item 1]

The CHAIRPERSON said that the Bureau had adopted the programme of work for the following week, which had just been distributed to members. If he heard no objection, he would take it that the Commission approved it. He also wished to draw the attention of members to the provisional programme of work for the second part of the session, stressing that it should be taken to be purely provisional in nature.

The meeting rose at 10.05 a.m.

3134th MEETING

Tuesday, 29 May 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud,

Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/650 and Add.1, sect. B, A/CN.4/651, A/CN.4/L.797)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. HMOUD (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 1 to 32, which constituted the entire set of draft articles on the expulsion of aliens, provisionally adopted on first reading by the Drafting Committee, as contained in document A/CN.4/L.797, which read as follows:

PART ONE

GENERAL PROVISIONS

Draft article 1. Scope

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Draft article 2. Use of terms

For the purposes of the present draft articles:

(a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

Draft article 3. Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Draft article 4. Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Draft article 5. Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.
3. The ground for expulsion shall be assessed in good faith and reasonably, 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 and, where relevant, the current nature of the threat to which the facts give rise.
4. A State shall not expel an alien on a ground that is contrary to international law.

* Resumed from the 3131st meeting.

PART TWO

CASES OF PROHIBITED EXPULSION

Draft article 6. Prohibition of the expulsion of refugees

1. A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.

2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State, who has applied for recognition of refugee status, while such application is pending.

3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, 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 judgement of a particularly serious crime, constitutes a danger to the community of that country.

Draft article 7. Prohibition of the expulsion of stateless persons

A State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

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

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.

Draft article 9. Deprivation of nationality for the sole purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

Draft article 10. Prohibition of collective expulsion

1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.

2. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Draft article 11. Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

Draft article 12. Prohibition of expulsion for purposes of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

Draft article 13. Prohibition of the resort to expulsion in order to circumvent an extradition procedure

A State shall not resort to expulsion in order to circumvent an ongoing extradition procedure.

PART THREE

PROTECTION OF THE RIGHTS OF ALIENS
SUBJECT TO EXPULSION

CHAPTER I

GENERAL PROVISIONS

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

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

Draft article 15. Obligation not to discriminate

1. The State shall exercise its right to expel aliens without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. Such non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles.

Draft article 16. Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

CHAPTER II

PROTECTION REQUIRED IN THE EXPELLING STATE

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

The expelling State shall protect the right to life of an alien subject to expulsion.

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

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

Draft article 19. Detention conditions of an alien subject to expulsion

1. (a) The detention of an alien subject to expulsion shall not be punitive in nature.

(b) An alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2 (a), detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

Draft article 20. Obligation to respect the right to family life

1. The expelling State shall respect the right to family life of an alien subject to expulsion.

2. The expelling State shall not interfere with the exercise of the right to family life, except where provided by law and on the basis of a fair balance between the interests of the State and those of the alien in question.

CHAPTER III

PROTECTION IN RELATION TO
THE STATE OF DESTINATION*Draft article 21. Departure to the State of destination*

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

Draft article 22. State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

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

1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

Draft 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

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

CHAPTER IV

PROTECTION IN THE TRANSIT STATE

Draft article 25. Protection in the transit State of the human rights of an alien subject to expulsion

The transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

PART FOUR

SPECIFIC PROCEDURAL RULES

Draft article 26. Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

Draft article 27. Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

Draft article 28. Procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

PART FIVE

LEGAL CONSEQUENCES OF EXPULSION

Draft article 29. Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

Draft article 30. Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

Draft article 31. Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law engages the international responsibility of the expelling State.

Draft article 32. Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

2. The report covered the entire work of the Drafting Committee on the topic of expulsion of aliens, which it had begun in 2007. The Commission had decided to refer the various draft articles to the Drafting Committee at successive sessions, and the Drafting Committee had decided that those draft articles that had been provisionally elaborated would remain in the Committee until it completed its work on the topic.

3. After providing a brief overview of the origin and development of the draft articles, he noted that the Drafting Committee had held 12 meetings at the current session, during which it had reviewed the entire set of draft articles and had decided to recommend to the plenary Commission that they should be adopted on first reading.

4. He paid a tribute to the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the Drafting Committee's task, and thanked the members of the Committee for their active participation and significant contributions and the secretariat for its valuable assistance.

5. The draft articles were structured into five parts, and he wished to begin his introduction by covering Part One (General provisions) and Part Two (Cases of prohibited expulsion).

6. Draft article 1 was entitled "Scope", as had originally been proposed. In paragraph 1, the phrase "lawfully or unlawfully present" had been introduced in order to signal that the draft articles dealt with a broad range of aliens who might be in the territory of the expelling State, irrespective of the legality of their presence. It reflected the view prevailing in the Commission since the inception of its work on the topic that both categories of aliens should be covered by the draft articles. That being said, not all provisions of the draft articles applied equally to aliens lawfully and those unlawfully present, or treated the two categories equally. Moreover, the inclusion within the scope of the draft articles of aliens unlawfully present was to be understood in conjunction with the exclusion from the scope, enunciated in draft article 2, subparagraph (a), of issues concerning non-admission. That point would be clarified in the commentary.

7. The notion of "expulsion", which determined the scope *ratione materiae* of the draft articles, was defined in draft article 2, subparagraph (a). As to the scope *ratione personae*, the Drafting Committee had discussed at length whether to define the term positively, by listing the various categories of aliens included, as the Special Rapporteur had proposed, or negatively, by mentioning those not included. While some members had expressed a preference for the first option, others were of the view that providing a list of categories of aliens included in the scope *ratione personae* would run the risk, *inter alia*, of omitting other categories that should also be included. The Drafting Committee had ultimately opted for an exclusionary clause.

8. Paragraph 2 of draft article 1 thus excluded from the scope of the draft articles aliens enjoying privileges and immunities under international law. The commentary would clarify that such aliens were those whose departure

from the territory of a State was governed by special rules of international law; they included diplomats, consular or other officials of a foreign State, agents of an international organization, as well as military personnel posted abroad pursuant to a status-of-forces agreement. Even though the scope *ratione personae* of the draft articles was defined negatively in the exclusionary clause contained in paragraph 2, the commentary would enumerate, for purposes of illustration, specific categories of aliens that fell within the scope of the draft articles, in addition to aliens in general. Such categories included refugees, stateless persons and migrant workers and members of their family.

9. Draft article 2 provided definitions of the terms "expulsion" and "alien", which appeared throughout the text. In accordance with the Commission's drafting practice, the Drafting Committee had entitled the draft article "Use of terms" rather than "Definitions", as originally proposed by the Special Rapporteur.⁶⁸

10. Turning to subparagraph (a), which defined the term "expulsion", he noted that after an extensive debate, the Drafting Committee had endorsed the Special Rapporteur's suggestion to adopt a formulation that reflected the distinction between, on the one hand, a formal act of a State compelling an alien to leave its territory and, on the other, conduct attributable to that State that could lead to the same result. It was felt that both should be included in the definition of "expulsion" for the purposes of the draft articles. The Drafting Committee had decided to use the term "formal act" as an English equivalent for the French term "*acte juridique*", rather than the term "legal act", which might lead to confusion if it was understood as referring to the lawful character of the expulsion. Allowing such an ambiguity to persist would have been unfortunate, since draft article 2 was concerned only with the definition of the term "expulsion" and was without prejudice to the question of the lawfulness of a particular expulsion.

11. The explicit statements that the formal act or conduct that might amount to expulsion must be attributable to a State and that such conduct could consist of "an action or omission" were in line with the wording used in the Commission's articles on responsibility of States for internationally wrongful acts⁶⁹ and on the responsibility of international organizations⁷⁰ adopted by the Commission in 2001 and 2011, respectively. The element of coercion as an essential feature of conduct in the context of expulsion, which had been referred to in a separate subparagraph proposed by the Special Rapporteur, would be addressed in the commentary. The commentary would also provide some explanation of possible cases of expulsion "by conduct" and would refer in that connection to the State's "intention" in provoking the alien's departure from its territory. The commentary would also address cases of omission by the State, which might take the form of tolerance of conduct by individuals or private entities directed against an alien.

⁶⁸ *Yearbook ... 2007*, vol. II (Part Two), p. 69, para. 258, footnote 327.

⁶⁹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two) and Corr.1, pp. 26 *et seq.*, paras. 76–77.

⁷⁰ General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles and commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88.

In so doing, it would make reference to the prohibition of disguised expulsion as set out in draft article 11. It should be noted that the Drafting Committee had preferred the passive formulation contained in the first sentence of subparagraph (a) of draft article 2 (“by which an alien is compelled to leave the territory”) to the active formulation contained in the text proposed by the Special Rapporteur, since the former allowed the draft article to cover the case of an expulsion resulting from an omission by the authorities of a State, such as failure to protect an alien against hostile acts by non-State actors.

12. The express exclusion in the second clause of subparagraph (a) of three issues from the draft articles—the extradition of an alien to another State, the surrender of an alien to an international criminal court or tribunal and the non-admission of an alien other than a refugee to a State—appeared to have gained wide support both in the Commission and among States. With regard to the issue of non-admission, the commentary to subparagraph (a) would provide some explanation regarding situations to which the exclusionary clause applied. In particular, it would make it clear that non-admission, which normally took place upon an alien’s arrival at the border, was to be distinguished from the removal of an alien who was already present, albeit unlawfully, in the territory of the State, the latter case falling within the scope of the draft articles.

13. The definition of the term “alien” contained in subparagraph (b) corresponded to what had been proposed by the Special Rapporteur, except for the replacement of the term “person” with “individual” in order to make it clear that only natural persons were covered by the draft articles. The Drafting Committee had decided to delete the proviso contained in the Special Rapporteur’s proposed text, in which the definition of “alien” had been qualified by the words “except where the legislation of that State provides otherwise”,⁷¹ as several members had considered it to be unclear. While there was no doubt that a State could grant special protection against expulsion to certain categories of aliens, who could thus be regarded as nationals for the purposes of expulsion, it was decided that the matter was one that should be regulated by domestic law (or special treaty regimes) and that a reference to it in the commentary might suffice. Moreover, it was felt that excluding those categories of individuals from the definition of “aliens” in subparagraph (b) might have the undesirable effect of depriving them of the protection embodied in the draft articles.

14. After a long discussion, the Drafting Committee had decided to delete the definition of the term “territory” contained in subparagraph (d) of the Special Rapporteur’s original text. It was considered that the proposed definition of “territory” as “the domain in which the State exercises all the powers deriving from its sovereignty” might create more problems than it solved, especially in situations in which a State exercised sovereign powers in the territory of another State, such as territories under foreign administration, occupied territories and military bases.

15. The Drafting Committee had also decided to delete the definition of the term “frontier” as it appeared in

subparagraph (e) of the text originally proposed in 2007. It did not see the need to define a term that appeared only in draft article 6, paragraph 3, which, in turn, reproduced the content of article 33, paragraph 1, of the 1951 Convention relating to the Status of Refugees. The Committee was also of the view that the proposed definition of “frontier” as a “zone” would give rise to difficulties. For example, the reference in the original definition to the non-enjoyment of “resident status” within the frontier zone was inappropriate because even aliens lawfully present in the territory of a State might not enjoy such status. Furthermore, defining the frontier as a “zone” could produce the unintended effect of encouraging States to maintain aliens within their jurisdiction while denying them the benefit of their rights.

16. Draft article 3 was entitled “Right of expulsion”. The text provisionally adopted by the Drafting Committee was based largely on a revised version submitted to the Committee by the Special Rapporteur in which paragraphs 1 and 2 of his original text had been merged. Unlike the version of the draft article that had been referred to the Drafting Committee, the current formulation avoided any reference to the “fundamental principles of international law”,⁷² which had been regarded by several members of the Commission as too restrictive, and referred instead to “the present draft articles and other applicable rules of international law”. The draft article specifically mentioned human rights because of their particular relevance in the context of expulsion; however, the Drafting Committee had not deemed it necessary for the draft article to include a reference to good faith.

17. Except for certain minor changes, draft article 4 (Requirement for conformity with law) corresponded to the text originally proposed by the Special Rapporteur in his sixth report,⁷³ which had received broad support in the Commission during the debate at its sixty-second session.⁷⁴

18. The rule that expulsion could be ordered only in pursuance of a decision reached in accordance with law was set out in article 13 of the International Covenant on Civil and Political Rights, which related to the expulsion of aliens lawfully present in the territory of the expelling State. Nonetheless, the Drafting Committee had decided to delete the term “lawfully” from the Special Rapporteur’s text because most Committee members considered that the requirement for conformity with law corresponded to a well-established rule of international law that applied to any expulsion measure, irrespective of the lawfulness of the alien’s presence in the territory of the expelling State. The commentary would emphasize that point, while also recognizing that different rules and procedures might be provided for in domestic laws governing the expulsion of aliens unlawfully present in the State. The commentary would also clarify that the requirement for conformity with law, set out in draft article 4, referred to both formal and substantive

⁷² *Ibid.*, p. 63, para. 196, footnote 321.

⁷³ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2 (draft article B.1).

⁷⁴ *Ibid.*, vol. II (Part Two), para. 144, footnote 1293, and paras. 164–167.

⁷¹ *Yearbook ... 2007*, vol. II (Part Two), p. 69, para. 258, footnote 327.

conditions for expulsion; it therefore had a wider scope than the similar requirement enunciated in draft article 5, paragraph 2, with regard to grounds for expulsion.

19. Draft article 5 was entitled “Grounds for expulsion”, as originally proposed.⁷⁵ Paragraph 1 enunciated the essential requirement, which had been underscored by various members of the Commission, that an expulsion decision must state the ground on which it was based. The English text of the paragraph had been reworded with a view to aligning it with the French text, which remained unchanged.

20. Although in the Drafting Committee’s discussion on the formulation of paragraph 2 it had been recognized that national security and public order were common grounds for expulsion, the general view was that there were also other valid grounds. At the same time, it was generally recognized that a State could expel an alien only on a ground that was provided for in its law, hence the decision to redraft paragraph 2 accordingly. A specific reference to national security and public order had nevertheless been retained in the text, given their particular relevance to the expulsion of aliens. The commentary would clarify that the term “law” in paragraph 2 was to be understood as referring to the domestic law of the expelling State. It would also clarify the notions of “national security” and “public order” as grounds for the expulsion of an alien, while mentioning other grounds—including the violation of immigration law—provided for in domestic laws.

21. Paragraph 3 corresponded, with minor modifications, to the text initially proposed by the Special Rapporteur and set out general criteria for the assessment by the expelling State of the ground for expulsion. In order to reflect the fact that the reference to “the current nature of the threat to which the facts give rise” was relevant only with regard to grounds such as national security and public order, the Drafting Committee had decided to move that element to the end of the paragraph and to qualify it by the words “where relevant”. In addition, a few minor linguistic changes had been made to the English text in order to align it with the French original.

22. The text of paragraph 4 was identical to that originally proposed by the Special Rapporteur and simply indicated that a State must not expel an alien on a ground that was contrary to international law.

23. Turning to Part Two of the draft articles (Cases of prohibited expulsion), containing draft articles 6 to 13, he said that the Drafting Committee had considered it more appropriate to address the definition of the terms “refugee” and “stateless person” in the commentary than in the text of the draft articles. As far as refugees were concerned, the commentary would underline the need to take into account not only the Convention relating to the Status of Refugees but also subsequent developments, including the adoption of regional instruments such as the Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa, adopted in 1969. In that regard, it would indicate that the draft articles were without prejudice to such forms of *lex specialis* as the broader

definition of “refugee” contained in article 1 of the above-mentioned regional Convention.

24. Draft article 6 was now entitled “Prohibition of the expulsion of refugees”. The Drafting Committee had based its work on a text which the Special Rapporteur had revised pursuant to a request made by the Drafting Committee at the Commission’s sixtieth session that the text should follow more closely the content and structure of the relevant provisions of the 1951 Convention relating to the Status of Refugees. It should be recalled that the wording initially proposed by the Special Rapporteur had been criticized by several members of the Commission for seeking to combine articles 32 and 33 of the 1951 Convention without addressing the principle of *non-refoulement*.⁷⁶

25. Paragraph 1 of draft article 6 faithfully reproduced the text of article 32, paragraph 1, of the 1951 Convention relating to the Status of Refugees, except that it replaced the words “the Contracting States” with “a State”. Paragraph 1 applied only to refugees lawfully present in the territory of the expelling State and limited the grounds for the expulsion of such refugees to those of national security or public order. In order to align the text of the paragraph with the 1951 Convention, the words “may not” in the Special Rapporteur’s text had been replaced with “shall not”. Furthermore, in keeping with a preference expressed by several Commission members, the reference to “terrorism” as a separate ground for the expulsion of a refugee had been deleted. Another reference to an additional ground for the expulsion of a refugee (“if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State”) had also been deleted, owing to the fact that no such ground was mentioned in article 32, paragraph 1, of the 1951 Convention. It was proposed that the commentary should indicate that the phrase “refugee lawfully in its territory” meant a refugee who had been granted refugee status in the State concerned.

26. The Drafting Committee had engaged in a lengthy discussion on paragraph 2 of draft article 6, which had no equivalent in the 1951 Convention but had been proposed by the Special Rapporteur on the basis of judicial pronouncements and doctrinal opinion. Paragraph 2 purported to extend the applicability of paragraph 1 to any refugee who, albeit unlawfully present in the territory of a receiving State, had applied for recognition of refugee status while such application was pending. The Committee had discussed whether it was necessary to make provision for an exception to that form of protection, as the Special Rapporteur had initially proposed, in cases in which the manifest intent of an application for refugee status was to thwart a probable expulsion order. After an intense debate, the Drafting Committee had concluded that a provision to that effect was not necessary, since draft article 6 applied only to individuals who met the requirements for the definition of “refugee” under the 1951 Convention or other relevant instruments. Most members considered that if a person

⁷⁵ *Ibid.*, para. 140, footnote 1288 (draft article 9).

⁷⁶ *Yearbook ... 2007*, vol. II (Part Two), para. 198, footnote 323 (draft article 5), and para. 235.

was a genuine refugee, the motives of the application for refugee status should not matter any more than the fact that an application for refugee status purported to avoid an expulsion order. The commentary would clarify that point, while also emphasizing that a person was to be regarded as a refugee if he or she met the requirements set forth in the relevant legal instruments, irrespective of whether that person had been granted refugee status. In contrast, the commentary would indicate that a person who did not meet the requirements of the definition of “refugee” might be expelled for grounds other than those mentioned in paragraph 1, and that draft article 6 was without prejudice to the right of a State to expel an individual whose application for refugee status was manifestly abusive. It had also been suggested that the commentary should indicate that paragraph 2 could be regarded as an exception to the principle according to which the unlawful presence of an alien in the territory of a State could by itself justify the expulsion of that alien.

27. Paragraph 3, which dealt with the issue of *non-refoulement*, was a combination of paragraphs 1 and 2 of article 33 of the 1951 Convention. Its wording reproduced that of the 1951 Convention, save for the addition of the words “to a State” in the second line in order to cover all cases of expulsion and not only the situation of *refoulement* in the strict sense of the term. The commentary would indicate that paragraph 3 applied both to refugees lawfully present and to those unlawfully present in the territory of a State.

28. The Drafting Committee had discussed whether draft article 6 should also cover other legal aspects of the expulsion of refugees, including by reproducing *in extenso* the content of article 32 of the 1951 Convention. After careful consideration, the Committee had concluded that it was preferable to address such aspects through the “without prejudice” clause contained in draft article 8 (Other rules specific to the expulsion of refugees and stateless persons).

29. Draft article 7 (Prohibition of the expulsion of stateless persons) consisted of a single paragraph. A number of changes had been introduced by the Drafting Committee in order to align the original text with the wording of article 31, paragraph 1, of the 1954 Convention relating to the Status of Stateless Persons. Thus, the verb “may” at the beginning of the paragraph had been replaced by the verb “shall”, and, at the suggestion of several members of the Commission, the term “lawfully”, which had appeared in brackets in the Special Rapporteur’s text,⁷⁷ had been retained as it appeared in the 1954 Convention. Furthermore, as in draft article 6, the reference to “terrorism” as a possible ground for the expulsion of a stateless person had been deleted. Moreover, as it had done in respect of refugees in draft article 6, the Drafting Committee had decided to delete the reference to an additional ground for the expulsion of a stateless person, included in the Special Rapporteur’s original text but not mentioned in article 31, paragraph 1, of the 1954 Convention, namely “if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State”.

30. The Drafting Committee had discussed whether a provision on *non-refoulement* similar to that retained in draft article 6, paragraph 3, should be included in draft article 7. The Committee had finally decided to omit such a provision, with the understanding that stateless persons enjoyed the protection recognized in draft articles 23 and 24, which applied to aliens in general. Furthermore, as in draft article 6, the Drafting Committee had decided that other matters relating to the expulsion of stateless persons would be covered by the “without prejudice” clause contained in draft article 8.

31. Draft article 8 (Other rules specific to the expulsion of refugees and stateless persons), which was new, contained a “without prejudice” clause ensuring the application of other rules on the expulsion of refugees and stateless persons that were provided for by law but not mentioned in draft articles 6 and 7. The term “law” in the draft article was intended to refer to the rules contained in the relevant international instruments dealing with refugees and stateless persons, as well as any internal rules of the expelling State, to the extent that they were not incompatible with that State’s obligations under international law.

32. The “without prejudice” clause concerned in particular the rules relating to the procedural requirements for the expulsion of a refugee or of a stateless person, which were stated, respectively, in article 32, paragraph 2, of the 1951 Convention relating to the Status of Refugees and in article 31, paragraph 2, of the 1954 Convention relating to the Status of Stateless Persons. It also concerned the provisions of article 32, paragraph 3, of the 1951 Convention and article 31, paragraph 3, of the 1954 Convention, under which the expelling State was required to allow a refugee or a stateless person subject to expulsion a reasonable period within which to seek legal admission into another country and reserved the right to apply during that period such internal measures as the expelling State might deem necessary.

33. With regard to the issue of the expulsion of nationals, he recalled that the Special Rapporteur, in his third report,⁷⁸ had proposed a draft article 4 entitled “Non-expulsion by a State of its own nationals”, which the Commission had referred to the Drafting Committee.⁷⁹ That draft article had given rise to an intense debate in the Drafting Committee: while some members would have favoured the inclusion in the draft articles of a provision on the prohibition of the expulsion by a State of its own nationals, other members had questioned the need and even the appropriateness of such a provision, which would deal with a category of individuals who ought not to fall within the scope of the present topic. Moreover, divergent views had been expressed regarding the content of the proposed draft article. Some members had been of the opinion that no exceptions could be recognized to the principle prohibiting the expulsion of nationals and had therefore been opposed to the text initially proposed by the Special Rapporteur, which contemplated possible exceptions. Others, meanwhile, had expressed the view that no absolute prohibition of the expulsion of nationals existed under current international law. After careful

⁷⁷ *Ibid.*, para. 198, footnote 324 (draft article 6).

⁷⁸ *Ibid.*, vol. II (Part One), document A/CN.4/581.

⁷⁹ *Ibid.*, vol. II (Part Two), para. 188. See also para. 197, footnote 322.

consideration, the Drafting Committee had come to the conclusion that, since nationals fell outside the scope of the topic as determined by draft article 1, it would not be appropriate to include a provision on the expulsion of nationals in the draft articles.

34. Turning to draft article 9 (Deprivation of nationality for the sole purpose of expulsion), he said that the Drafting Committee had nevertheless discussed the advisability of including in the draft articles a provision dealing with cases of deprivation of nationality in connection with expulsion. The Committee had been mindful of the Commission's approval of the conclusions of the Working Group on the topic established at the sixtieth session to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.⁸⁰ One of those conclusions, which the Drafting Committee had been requested to take into consideration in its work, was that the commentary to the draft articles should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals.⁸¹ However, the Drafting Committee had considered that since no prohibition of the expulsion of nationals was provided for in the draft articles, it would not be appropriate to address therein the question of the circumvention of such a prohibition. A more radical view had also been expressed in the Committee that no provision should be included that would touch upon the sensitive area of nationality, in which States enjoyed a wide margin of discretion.

35. All things considered, the majority of the members of the Drafting Committee had deemed it useful to address the specific case in which a State deprived a national of his or her nationality, thereby making that national an alien, for the sole purpose of expelling him or her. In that regard, it had been found that such deprivation of nationality, insofar as it had no other justification than the State's wish to expel the individual, would be abusive and possibly also arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.⁸² The commentary would emphasize that draft article 9 was not intended to interfere with the normal operation of nationality laws or to affect a State's right to denationalize an individual on a ground provided for in its legislation.

36. Draft article 10 retained the originally proposed title "Prohibition of collective expulsion". A discussion had taken place in the Drafting Committee on whether a definition of collective expulsion was necessary or appropriate in the draft articles, and the Committee had eventually decided to include such a definition in paragraph 1 of draft article 10. However, contrary to the original proposal by the Special Rapporteur, the definition retained by the Drafting Committee addressed only the collective element and did not replicate the general elements of the definition of expulsion set out in draft article 2, subparagraph (a). Thus, collective expulsion was defined in paragraph 1 as the "expulsion of aliens as a group".

37. Paragraph 2, which provided for the prohibition of collective expulsion, corresponded to the first sentence of paragraph 1 of the text originally proposed by the Special Rapporteur.⁸³ The prohibition was to be read in conjunction with paragraph 3 of the draft article.

38. Paragraph 3 of draft article 10 was based on the wording of the second sentence of paragraph 1 of the text initially proposed by the Special Rapporteur. It indicated that a State might expel concomitantly the members of a group of aliens, provided that the expulsion took place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group. The commentary would indicate that the criterion of "reasonable and objective examination" had been drawn from the case law of the European Court of Human Rights.

39. Paragraph 4 contained a "without prejudice" clause referring to situations of armed conflict. He recalled that the original draft article on collective expulsion that had been proposed by the Special Rapporteur and referred to the Drafting Committee had contained a paragraph that allowed the collective expulsion of aliens, under certain conditions, in times of armed conflict. Subsequently, in order to address concerns expressed by several members of the Commission, the Special Rapporteur had submitted to the Drafting Committee a revised version of that paragraph, which provided for further limitations of the right of a State to expel aliens collectively in the event of an armed conflict. During the debate in the Drafting Committee, some members had expressed the view that a possible exception, in times of armed conflict, to the prohibition of collective expulsion would apply only in respect of aliens who were nationals of a State engaged in an armed conflict with the State in which they were present, and not to all aliens in the territory of a State engaged in an armed conflict. The view had also been expressed that such aliens might be subject to measures of collective expulsion only if they were engaged as a group in activities that endangered the security of the State. According to a different view, current international law would not impose such limitations on the right of a State to expel aliens who were nationals of another State with which it was engaged in an armed conflict. Furthermore, the point had been made that the issue of expulsion in times of armed conflict was a complex one and that the Commission should not take the risk of elaborating a draft article that would not be entirely compatible with international humanitarian law. In the light of those difficulties, the Committee eventually opted for a "without prejudice" clause, formulated broadly so as to cover any rules of international law that might be applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

40. Draft article 11 retained the originally proposed title "Prohibition of disguised expulsion". During the plenary debate at the Commission's sixty-second session, some members had suggested alternative wording such as "constructive" or "*de facto*" expulsion in order to

⁸⁰ *Yearbook ... 2008*, vol. II (Part Two), para. 170.

⁸¹ *Ibid.*, para. 171.

⁸² General Assembly resolution 217 A (III) of 10 December 1948.

⁸³ *Yearbook ... 2007*, vol. II (Part Two), para. 199, footnote 325 (draft article 7).

characterize the situations referred to in draft article 11.⁸⁴ However, the Drafting Committee had decided to retain the term “disguised expulsion” proposed by the Special Rapporteur. The terminology had been deemed appropriate, since it adequately reflected the main purpose of the draft article, which was to indicate that a State should not utilize disguised means or techniques in order to provoke the same result as that of an expulsion decision, namely the forcible departure of an alien from its territory. Furthermore, the point had been made in the Drafting Committee that the term “constructive expulsion” might have an undesired positive connotation, and it would be difficult to find a satisfactory equivalent to that term in French.

41. Paragraph 1 of draft article 11, which provided for the prohibition of any form of disguised expulsion, corresponded to the text originally proposed by the Special Rapporteur in his sixth report.⁸⁵ Paragraph 2 was also based on the text that had been proposed by the Special Rapporteur. However, the Drafting Committee had introduced some changes to that text with a view to clarifying the definition of “disguised expulsion”. It had been felt in particular that the notion of “disguised expulsion” must be circumscribed more precisely in order to avoid possible overlaps with the general definition of “expulsion” in draft article 2, subparagraph (a). After careful consideration, the Drafting Committee had agreed on the inclusion of the word “indirectly” in the second line of paragraph 2, so as to capture the specificity of “disguised expulsion”. That specificity lay in the fact that the expelling State, while not having adopted an expulsion decision, produced by its actions or omissions the same result, namely the forcible departure of an alien from its territory. In order to make it clearer that the provision referred only to situations in which the forcible departure was the intended result of actions or omissions of the State concerned, the Drafting Committee had decided to replace, at the end of paragraph 2, the words “with a view to provoking the departure” by the more explicit formulation “with the intention of provoking the departure”.

42. Some concerns had been expressed in the Drafting Committee about the reference in paragraph 2 to situations in which the State supported or tolerated acts committed by private persons. Some Committee members had considered that it would be problematic to regard such support or tolerance as possibly amounting to a disguised expulsion prohibited by international law. However, the majority of members had been of the view that a mention of such situations could be retained, provided it was made clear, through the insertion of the word “including”, that reference was made only to support or tolerance that could be regarded as “actions or omissions of the State ... with the intention of provoking the departure of aliens from its territory”. In other words, the element relating to the specific intent of the expelling State, enunciated at the end of the paragraph, referred also to the case of support or tolerance of acts committed by private persons. It had been suggested that the commentary should indicate that a high threshold should be applied in order to regard situations

of “tolerance” by the State as disguised expulsion. That being said, the Drafting Committee had been of the view that the scenario relating to “support” or “tolerance” could also encompass situations in which the acts supported or tolerated by the expelling State were committed by aliens acting in its territory. Therefore, contrary to the text originally proposed by the Special Rapporteur, in which only acts of the citizens of the expelling State had been mentioned, the draft article provisionally adopted by the Drafting Committee referred, in more general terms, to “acts committed by its nationals or other persons”. The commentary would indicate that the term “persons” was intended to cover both natural and legal persons.

43. Draft article 12 (Prohibition of expulsion for purposes of confiscation of assets) corresponded to paragraph 1 of the originally proposed draft article on protecting the property of aliens facing expulsion. The Drafting Committee had not changed the wording of that provision. However, following a suggestion made by some Commission members at the previous session, the Drafting Committee had decided to address the issue of confiscatory expulsions in a separate draft article and to place it in Part Two, given that it dealt with a specific case of prohibited expulsion.

44. Draft article 13 had been retitled “Prohibition of the resort to expulsion in order to circumvent an extradition procedure”. Commission members would recall that, in his sixth report, submitted to the Commission at its sixty-second session in 2010, the Special Rapporteur had proposed a draft article entitled “Prohibition of extradition disguised as expulsion”.⁸⁶ In an attempt to address the concerns raised by some members, who regarded the proposed draft article as being too broad, the Special Rapporteur had submitted to the Commission at the same session a revised draft article entitled “Expulsion in connection with extradition”, which the Commission had referred to the Drafting Committee at the sixty-third session. The revised draft article had read as follows:

Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions for expulsion are met in accordance with international law [or with the provisions of the present draft article].⁸⁷

A discussion had taken place in the Drafting Committee on the usefulness of such a proposition. Several members had considered that the proposed draft article failed to address the main issue at stake, namely the use of expulsion as a means to circumvent the conditions for extradition. It had therefore been proposed that the draft article should be recast so as to focus on the issue of circumvention. That proposal had been received favourably in the Committee.

45. The precise wording and content of draft article 13 had given rise to an intense debate in the Drafting Committee. Some members had been of the view that the enunciation of the prohibition of expulsion in order to circumvent extradition should have been complemented by an additional paragraph stating that no expulsion of a person whose extradition had been requested might

⁸⁴ *Yearbook ... 2010*, vol. II (Part Two), paras. 150–154. See also para. 137, footnote 1285 (draft article A).

⁸⁵ *Ibid.*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

⁸⁶ *Ibid.*, vol. II (Part Two), para. 138, footnote 1286 (draft article 8).

⁸⁷ *Ibid.*, para. 176, footnote 1299.

take place, either to the requesting State or to a third State with an interest in the extradition of the person to the requesting State, as long as the extradition process had not been completed, except for reasons of national security or public order. Other members had felt that such a formulation was too absolute. In particular, the point had been made that national security and public order were not the only grounds that allowed a State to expel a person in respect of whom a request for extradition had been made; other reasons, such as breach of immigration law, had been mentioned in that context. The view had been expressed that it would be difficult to formulate a provision that went beyond the general proposition that circumvention was more likely to occur in situations where an extradition process was ongoing. Also, following a proposal made in the Sixth Committee during the debate on the Commission's report on the work of its sixty-third session (A/CN.4/650 and Add.1, para. 19), the possibility of addressing the issue through a "without prejudice" clause had been raised in the Drafting Committee.

46. Bearing those difficulties in mind, the Drafting Committee had eventually decided to retain a general formulation indicating that a State should not resort to expulsion in order to circumvent an ongoing extradition procedure. The commentary would provide illustrations relating to that prohibition and emphasize that it applied only while an extradition procedure was ongoing. Reference would also be made in the commentary to relevant case law, as appropriate.

47. Part Three, which included draft articles 14 to 25, was entitled "Protection of the rights of aliens subject to expulsion". The draft articles had been provisionally adopted by the Drafting Committee at the Commission's sixty-second session and had been referred to the Drafting Committee⁸⁸ after having been revised by the Special Rapporteur in the light of debates in plenary.⁸⁹

48. Before introducing the individual draft articles, he wished to draw attention to a terminological point. Some discussion had taken place in the Drafting Committee concerning the phrase, relating to a person or alien, "who has been or is being expelled", which had appeared in several draft articles proposed by the Special Rapporteur. Some members of the Committee had considered that formulation to be ambiguous. The observation had been made that it was unclear at which point an alien would have to be regarded as having been expelled: Was it when he received notice of an expulsion decision or when the expulsion decision was implemented through the forcible departure of the alien from the territory of the expelling State? After careful consideration, the Drafting Committee had opted to use the phrase "subject to expulsion" with reference to aliens, which was regarded as encompassing both expulsion as a formal act, namely the adoption of the expulsion decision as such, and expulsion as a process that included all steps that might be taken to adopt and enforce an expulsion decision.

49. Chapter I of Part Three (General provisions) consisted of draft articles 14 to 16. Draft article 14 (Obligation

to respect the human dignity and human rights of aliens subject to expulsion) was the result of the merging of revised draft articles 8 and 9 that had been proposed by the Special Rapporteur.⁹⁰

50. Paragraph 1 of draft article 14 stated that all aliens subject to expulsion should be treated with humanity and respect for the inherent dignity of the human person at all stages of the expulsion process. Some members of the Drafting Committee had felt that human dignity should not have been referred to in a draft article, since it was not a human right entailing specific obligations for States, but rather the source of inspiration for human rights in general. Other members, including the Special Rapporteur, had considered that it was important to state in a draft article the obligation to respect the human dignity of persons subject to expulsion. It had been observed that in the course of the expulsion process aliens were often subjected to humiliating treatment that, without necessarily amounting to cruel, inhuman or degrading treatment, was offensive to their dignity as human beings.

51. The Drafting Committee had eventually decided to address the issue of respect for human dignity in draft article 14. However, the general reference to the "dignity of a person" in the text proposed by the Special Rapporteur had been replaced by a more specific reference to "the inherent dignity of the human person", a phrase that had been taken from article 10 of the International Covenant on Civil and Political Rights, which addressed the situation of persons deprived of their liberty. The wording retained by the Drafting Committee was intended to make it clear that the dignity referred to in draft article 14 should be understood as an attribute inherent in every human person, as opposed to a subjective notion of dignity.

52. The text of paragraph 2 of draft article 14, which recalled that aliens subject to expulsion were entitled to respect for their human rights, largely corresponded to the text of revised draft article 8 proposed by the Special Rapporteur. The words "in particular" that preceded the reference to the rights mentioned in the draft articles had been replaced by the word "including", which had been viewed as more neutral, since it avoided conveying the erroneous impression that the rights set out in the draft articles should be regarded as more important than the other human rights that an alien subject to expulsion enjoyed.

53. The wording of draft article 15 (Obligation not to discriminate) was based largely on the text of revised draft article 10 proposed by the Special Rapporteur.⁹¹ Paragraph 1 stated the principle of non-discrimination in relation to expulsion. The Drafting Committee had slightly amended the beginning of the paragraph to read "[t]he State shall exercise its right to expel aliens without discrimination", in order to bring it closer to the wording of draft article 3. The content of the non-exhaustive list of prohibited discriminatory grounds had been the subject of discussion in the Committee. In the text that had been referred to it, the

⁸⁸ *Ibid.*, para. 114.

⁸⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617.

⁹⁰ *Ibid.*, and for the examination of these draft articles by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), paras. 117–118, footnotes 1272–1273.

⁹¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and for the examination of this draft article by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), para. 119, footnote 1274.

Special Rapporteur had proposed a list based on article 2, paragraph 1, of the International Covenant on Civil and Political Rights. During the discussions, some Committee members had suggested the inclusion of certain additional grounds such as sexual orientation or membership of a minority. Other members had held that paragraph 1 of draft article 15 should have simply reproduced the non-exhaustive list of the Covenant, without mentioning any other specific grounds, particularly when such grounds were still controversial. The point had also been made that the addition of any ground to the list set out in the Covenant might be interpreted as an implicit exclusion of other grounds not mentioned. The compromise solution that had eventually been reached in the Drafting Committee had been to retain the list of grounds contained in the Covenant, as proposed by the Special Rapporteur, with the sole addition of the ground “ethnic origin”, which appeared to be particularly relevant in the context of expulsion, and to complement that list with a general reference to “any other ground impermissible under international law”. That solution had the advantage of capturing legal developments that would have gone beyond the Covenant while retaining the possibility of reference to special legal regimes that allowed for certain differentiations between aliens, such as European Union law.

54. Although some members of the Committee had proposed that the commentary should explicitly state that discrimination on the grounds of “sexual orientation” was prohibited and should contain a reference to the relevant case law on the matter, others had maintained that the issue was controversial and that such a prohibition was not universally recognized. The existence of possible exceptions to the prohibition of discrimination based on nationality, in particular in the context of associations of States, such as the European Union, whose citizens enjoyed freedom of movement, would be mentioned in the commentary.

55. The wording of paragraph 2 had been much debated. Some members had felt that the reference to “international human rights law”, originally proposed by the Special Rapporteur, was imprecise and too doctrinal. The Committee had therefore decided to refer more simply to “the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles”.

56. The title of draft article 16 had been shortened to “Vulnerable persons”. The text of the article was based largely on the revised draft article submitted by the Special Rapporteur with a view to extending the special protection afforded to children in the original draft article to other categories of vulnerable persons. The Committee had wondered how to phrase the requirement that special protection must be afforded to vulnerable persons, as some members had maintained that the original wording—“shall be considered, treated and protected as such”⁹²—lacked clarity. It had ultimately agreed on the phrase “considered as such and treated and protected with due regard for their vulnerabilities”, which emphasized that such persons’

vulnerabilities must be duly recognized by the expelling State as a basis for affording them the requisite treatment and protection. The Committee had also discussed the advisability of retaining the phrase “irrespective of their immigration status”. While the point had been made that immigration status might have some relevance in certain cases, it had been held that such a phrase might convey the erroneous impression that draft article 16 was the only one of the articles dealing with protection of rights that applied to aliens unlawfully present in the territory of the expelling State. For that reason, the Drafting Committee had decided, after some hesitation, to delete the phrase.

57. The Drafting Committee had also discussed the scope of draft article 16. Some members had observed that there might be other categories of vulnerable persons, such as persons suffering from incurable diseases, who might need special protection in the context of expulsion. The Committee had therefore decided to supplement the list of vulnerable persons proposed by the Special Rapporteur with the phrase “and other vulnerable persons”. The commentary would elaborate on that point by providing examples of other categories of vulnerable persons who might enjoy the special protection afforded by draft article 16.

58. Paragraph 2 of the draft article, which dealt specifically with children, referred to the concept of “the best interests of the child”, which had been drawn from article 3, paragraph 1, of the Convention on the rights of the child. Some members of the Drafting Committee had expressed concern that the wording proposed by the Special Rapporteur was too restrictive, as the best interests of the child could not be the sole criterion to be applied in matters of expulsion. The Committee had finally opted for a formulation based more closely on the above-mentioned article of the Convention on the rights of the child, namely, “in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration”.

59. Turning to chapter II of Part Three (Protection required in the expelling State), which consisted of draft articles 17 to 20, he explained that draft article 17 (Obligation to protect the right to life of an alien subject to expulsion) corresponded, with some minor editorial changes, to revised draft article 11, paragraph 1, proposed by the Special Rapporteur.⁹³ Draft article 18 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment) was largely based on paragraph 2 of the same revised draft article. The Drafting Committee had, however, slightly modified its text. For example, the reference to “torture or to inhuman or degrading treatment” had been replaced with a more complete reference to “torture or to cruel, inhuman or degrading treatment or punishment”. The Committee had also discussed the appropriateness of the words “in its territory or in a territory under its jurisdiction”, which had appeared in the Special Rapporteur’s proposed text. The suggestion put forward by some members that reference should be made to persons under the jurisdiction or control of the expelling State had met with opposition

⁹² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and for the examination of this draft article by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), para. 122, footnote 1277.

⁹³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and for the examination of this draft article by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), para. 120, footnote 1275.

from others who had been of the view that the notion of jurisdiction was wide enough to cover the situations addressed in that draft article. In the absence of agreement on that point, the Committee had decided to omit any reference in the draft article to the notions of “territory”, “jurisdiction” or “control”, as the territorial aspect was already covered by the definition of “expulsion” in draft article 2, subparagraph (a). It had been felt that the question of acts committed outside the territory of the expelling State in relation to the expulsion of an alien would be better dealt with in the commentary.

60. The new title of draft article 19 was “Detention conditions of an alien subject to expulsion”. While the initial proposal for the draft article had been contained in the Special Rapporteur’s sixth report,⁹⁴ the text referred to the Drafting Committee had been a revised version that the Special Rapporteur had submitted to the Commission during the debate at the sixty-second session.⁹⁵

61. The Drafting Committee had arrived at the conclusion that the reference in the text proposed by the Special Rapporteur to the obligation to respect the human rights of aliens being detained pending expulsion could be omitted, from both the text and the title, in order to avoid duplication with the content of draft article 14.

62. The Committee had reversed the order of paragraphs 1 (a) and 1 (b) as they had appeared in the text proposed by the Special Rapporteur, as it had been deemed preferable to begin the article by setting out the general principle that the detention of an alien subject to expulsion must not be punitive in nature. What had become paragraph 1 (b) should be seen as a consequence of that general principle. During the debate in plenary, some members of the Commission had maintained that draft article B proposed by the Special Rapporteur was too rigid, especially with regard to the requirement that the detention of an alien pending expulsion must be carried out in a place other than a facility in which persons serving a prison sentence were detained. In an attempt to respond to these concerns, the Committee had agreed to reformulate paragraph 1 (b) in such a way as to avoid conveying the impression that the expelling State would be under an obligation to provide special facilities for the detention of aliens subject to expulsion. What really mattered in that connection was that an alien subject to expulsion should be detained separately from persons sentenced to penalties involving deprivation of liberty, irrespective of whether detention took place in a separate facility or in different sections of the same facility. Moreover, the Committee had decided to qualify the requirement set out in paragraph 1 (b) by inserting the proviso “save in exceptional circumstances”, which appeared in article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights and which established the right of accused persons to be segregated from persons convicted of a criminal offence and to be subject to separate treatment appropriate to their status as unconvicted persons. For the sake of clarity, the commentary would emphasize that

paragraph 1 (b) referred only to detention with a view to ensuring the implementation of an expulsion decision and that it was without prejudice to the case of aliens who had been sentenced or were being prosecuted for a criminal offence, including situations in which the expulsion of an alien might be ordered as an additional penalty or as an alternative to prison.

63. Paragraph 2 of draft article 19, concerning the duration of detention, also comprised two subparagraphs. The Drafting Committee had retained the text of paragraph 2 (a) proposed by the Special Rapporteur, merely replacing the words “may” and “must” by the word “shall” in the English version of the first two sentences of the subparagraph. The Drafting Committee had debated whether the words “reasonably necessary” should be retained in the second sentence; some members had argued that the prohibition of excessive duration in the third sentence was sufficient and that there was thus no need to introduce a subjective element of reasonableness. However, the majority of the members had been in favour of retaining the words “reasonably necessary”, as those words would provide a judicial authority with an adequate standard for determining how long detention could last.

64. Paragraph 2 (b) stated that the extension of the duration of the detention might be decided only by a court or a person authorized to exercise judicial power. Notwithstanding the doubts raised by some members of the Drafting Committee as to the applicability of such a requirement in the context of immigration law, the Committee had decided to retain the subparagraph in the form proposed by the Special Rapporteur on the grounds that the requirement set forth therein was intended to prevent possible abuses by the administrative authorities when determining how long an alien subject to expulsion could be detained.

65. The text of paragraph 3 (a), establishing the requirement that the detention of an alien subject to expulsion must be reviewed and specifying the modalities for doing so, had been slightly modified by the Drafting Committee in order to make it clear that the object of such a review was the continuing detention of the alien in question, and not the initial decision on his or her detention. In the Committee’s view, the original phrase “periodically at given intervals” was tautological, and it had therefore been replaced by the words “at regular intervals”. While the point had been made that paragraph 3 (a) was to be regarded as a recommendation *de lege ferenda*, it had also been suggested that its inclusion was justified in the light of the principles of contemporary human rights law and also of the non-punitive nature of the detention of an alien pending his or her expulsion.

66. In the context of paragraph 3 (b), some members had endorsed the idea that the detention of an alien subject to expulsion must not end when the expulsion decision could not be carried out for a reason that was attributable to the alien concerned. Others had contended that the detention of the alien must end as soon as it became apparent that his or her expulsion had become impossible for any reason. The formulation finally retained made the relationship between the rule and the exception more explicit and followed the text proposed by the Special Rapporteur,

⁹⁴ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2 (draft article B); or *ibid.*, vol. II (Part Two), para. 141, footnote 1289.

⁹⁵ *Ibid.*, vol. II (Part Two), para. 141, footnote 1290.

with the insertion, however, of the proviso “subject to paragraph 2 (a)” as a reminder that all excessively long detention was prohibited.

67. Draft article 20 (Obligation to respect the right to family life) was based largely on the revised draft article submitted by the Special Rapporteur. The reference to private life, which had appeared in the draft article originally proposed by the Special Rapporteur in his fifth report,⁹⁶ had been omitted in the text subsequently referred to the Drafting Committee.⁹⁷ The text of draft article 20, paragraph 1, setting forth the obligation of the expelling State to respect the right to family life of an alien subject to expulsion, echoed the text originally proposed by the Special Rapporteur, with some minor editorial changes.

68. Paragraph 2 clarified the conditions under which limitations could be placed on the right to family life of an alien subject to expulsion. The Drafting Committee had concluded that the verb “derogate”, which had appeared in the text proposed by the Special Rapporteur, was inappropriate in the context of a limitation clause because that term had a specific legal meaning, namely that of derogations from human rights obligations that could be allowed, on certain conditions, in a time of public emergency (as in article 4 of the International Covenant on Civil and Political Rights, for example). For that reason, the words “derogate from” had been replaced with the words “interfere in the exercise of”, terminology which was consistent with that used in the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

69. Paragraph 2 set out two cumulative requirements that had to be met in order to justify interference in the exercise of the right to family life by an alien subject to expulsion. It first specified that such interference could take place only in cases “provided by law”. In response to a suggestion made by some members of the Commission at the sixty-first session, the revised version of the draft article proposed by the Special Rapporteur had contained a reference to “international law” rather than simply “law”. However, the Drafting Committee had concluded that what the provision really meant was that interference by the expelling State in the exercise of an alien’s right to family life must have an appropriate basis in the domestic legislation of the expelling State. The Committee had therefore restored the reference to “law” as it had appeared in the Special Rapporteur’s fifth report. The second requirement was that interference in the exercise of the right to family life could be permitted only on the basis of a fair balance between the interests of the State and those of the alien in question. Thus the Committee had preferred the words “on the basis of a fair balance” to the initial formulation, which had spoken of the need to “strike” a fair balance between the interests of the State and those of the individual in question. The commentary would include a reference to the case law of the European Court of Human Rights, where the criterion

of a “fair balance” had been applied in order to assess the lawfulness of interference in the exercise of the right to family life in the light of article 8 of the European Convention on Human Rights.

70. Chapter III of Part Three (Protection in relation to the State of destination) consisted of draft articles 21 to 24.

71. Draft article 21 had been retitled “Departure to the State of destination”; the word “return” had been changed to “departure” because the State of destination might well be a State in which the alien had never been before.

72. Much of the substance of paragraph 1, as provisionally adopted by the Drafting Committee, mirrored the original wording proposed by the Special Rapporteur. During the debate at the sixty-third session, some members of the Commission had suggested that the paragraph should be recast to prevent it from being construed as encouragement to exercise undue pressure on aliens.⁹⁸ It had been argued in particular that the verb “encourage” lacked legal precision and could pave the way to abuse. In response to those concerns, the Drafting Committee had revised paragraph 1, the current version of which stated that the expelling State must take “appropriate measures” to “facilitate the voluntary departure” of an alien subject to expulsion.

73. The Drafting Committee had retained nearly all of the text of paragraph 2 originally proposed by the Special Rapporteur. It had, however, deleted the reference to the rules of international law relating to air travel, as had been proposed by certain members of the Commission and by a number of States during the debate in the Sixth Committee, and had replaced the term “orderly transportation” with “safe transportation” in the English text. Although it recognized the particular relevance of air transport in the implementation of an expulsion decision, as well as the existence of an extensive body of international law relating to air travel, the Drafting Committee had been of the opinion that a reference to that law in the commentary would suffice, especially as other means of transportation were also used in carrying out expulsions. The commentary to the draft article would likewise elucidate the scope and meaning of the phrase “safe transportation ... in accordance with the rules of international law” by explaining that it encompassed not only the need to ensure the safety of other passengers on an aeroplane but also the protection of the human rights of the alien being expelled, as well as the avoidance of the excessive use of force.

74. A few changes had been introduced to the text of paragraph 3 as proposed by the Special Rapporteur. In keeping with a suggestion made by several States, the phrase “appropriate notice” had been replaced with “reasonable period of time”. Furthermore, the Committee had thought that the exception originally contemplated in that context, namely a situation in which there was reason to believe that an alien might abscond, was too narrow and failed to reflect other possible factors that had to be taken into account when a State determined how much time an alien should be given to prepare for

⁹⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611 (draft article 13).

⁹⁷ *Yearbook ... 2010*, vol. II (Part Two), para. 121, footnote 1276 (draft article 12).

⁹⁸ *Yearbook ... 2011*, vol. II (Part Two), para. 235; draft article D1 is reproduced at *ibid.*, para. 216, footnote 563.

his or her departure. The Committee had thus opted for simple wording to indicate that the decision concerning the time period must be taken “having regard to all circumstances”. The commentary would make it clear that the risk of the alien’s absconding was a factor that the expelling State might well take into consideration in that context. Lastly, the Committee had considered that the introductory phrase “in all cases”, which had appeared in the original version of paragraph 3, was unnecessary and possibly misleading. It had therefore deleted that phrase, on the understanding that the commentary would explain that paragraph 3 covered both voluntary departure and forcible implementation of an expulsion decision, the two situations contemplated in paragraphs 1 and 2 of the draft article, respectively.

75. The Drafting Committee had introduced a number of changes to the original text of draft article 22 (State of destination of aliens subject to expulsion). Some of those changes were of a substantive nature and were intended to respond to concerns expressed by Commission members during the debate at the sixty-third session in 2011.⁹⁹ Some members had supported the priority given in the original text to the State of nationality as the “natural” State of destination of an alien subject to expulsion, while others had considered that there was no reason why the possibility of expelling an alien to a State other than his or her State of nationality should be limited to situations in which that State could not be identified. Furthermore, some members of the Commission had been of the opinion that the alien’s choice should play a greater role in determining the State of destination, notwithstanding the fact that only the State of nationality had an obligation to receive a person expelled from another State. The Committee had ultimately agreed on a compromise text comprising two paragraphs.

76. The current version of paragraph 1 referred to other potential States of destination in addition to the State of nationality, although the State of nationality was still listed first, as it indisputably had an obligation to receive the alien under international law. However, the Drafting Committee had inclined to the view that other options could be envisaged, including the alien’s preference wherever feasible. For that reason, paragraph 1 also mentioned, as possible States of destination, any State (other than the State of nationality) that had the obligation to receive the alien under international law and any State willing to accept the alien at the request of the expelling State or, where appropriate, of the alien concerned. That new formulation also incorporated the essence of the original paragraph 3 by retaining the principle that the expulsion of an alien to a State was subject to that State’s consent, except where the State was required to receive the alien under international law. The commentary would explain what was meant by the phrase “any other State that has the obligation to receive the alien under international law”. A reference would be made, in that context, to the position adopted by the Human Rights Committee in relation to article 12, paragraph 4, of the International Covenant on Civil and Political Rights, which stipulates that “no one shall be arbitrarily deprived of the right to

enter his own country”. In its general comment No. 27 on freedom of movement, the Human Rights Committee had stated that the term “his own country” was broader than the “country of nationality” and “embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien”.¹⁰⁰ According to the Human Rights Committee, that would be the case of individuals who had been stripped of their nationality in violation of international law, individuals whose country of nationality had been incorporated into or transferred to another national entity and whose nationality had then been denied to them, and, possibly, “other categories of long-term residents”.¹⁰¹

77. Paragraph 2 of draft article 22 addressed the situation in which neither the State of nationality nor any other State with an obligation to receive the alien under international law had been identified, and no other State was willing to receive that alien. In such a case, the alien might be expelled to any State where he or she had a right of entry or stay or, where applicable, “to the State from where he or she had entered the expelling State”. While that last phrase should be understood as referring primarily to the State of embarkation, it was broad enough to cover situations in which the alien had entered the expelling State by means other than air transport. The formulation and content of paragraph 2 had been the subject of intense debate in the Drafting Committee. According to one point of view, if no State of destination could be identified pursuant to paragraph 1, the expelling State should then allow the alien to remain in its territory, as no other State could be compelled to receive him or her. It had proved impossible to bridge the divergence of views among Drafting Committee members as to whether certain States, such as the State that had issued a travel document or a permit of entry or stay, or the State of embarkation, would have an obligation to receive the alien under international law. It had been argued that reasons of national security or public order could be cited by a State as legitimate grounds for refusing the return of an alien to whom a permit of entry or stay had been issued and who, in the meantime, had been expelled from another State. The members of the Drafting Committee had also held a variety of views regarding the position of the State of embarkation: while some had contended that the expulsion of an alien to the State of embarkation was common practice and should thus be mentioned as a possibility, others had argued that the State of embarkation had no legal obligation to receive the alien.

78. The reference in paragraph 2 as originally proposed by the Special Rapporteur to a situation where there was a risk of torture or cruel or other inhuman or degrading treatment in the State of nationality of the alien subject to expulsion had been omitted in the text provisionally adopted by the Drafting Committee, since the obligation not to expel an alien to a State where he or she would face such a risk applied to any State of destination and was already established in draft article 24.

⁹⁹ *Ibid.*, paras. 239–242; draft article E1 is reproduced at *ibid.*, para. 218, footnote 564.

¹⁰⁰ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI, general comment concerning article 12, para. 20.

¹⁰¹ *Ibid.*

79. Draft article 23 was now entitled “Obligation not to expel an alien to a State where his or her life or freedom would be threatened”. The Drafting Committee had opted for the new title to make it clear that the provision enunciated an obligation not to expel to certain States. In paragraph 1, the phrase “where his life or freedom would be threatened” was taken from article 33 of the Convention relating to the Status of Refugees, which established the prohibition against *refoulement*. It replaced the Special Rapporteur’s original wording, which had referred to a State “where his or her right to life or personal liberty is in danger of being violated”.¹⁰²

80. Paragraph 1 of draft article 23 set out the prohibition against expelling a person to a State where his or her life or freedom would be threatened on any of the grounds mentioned in draft article 15. Such grounds included those listed in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of “ethnic origin” and “any other ground impermissible under international law”. The Drafting Committee had been of the view that there was no reason why the list of discriminatory grounds in draft article 23 should be different from the list contained in draft article 15. The text referred to the Drafting Committee, which had mentioned only the discriminatory grounds listed in article 33 of the 1951 Convention relating to the Status of Refugees, had been regarded as too narrow, given the broader scope of draft article 23, which applied to aliens in general and to a variety of situations.

81. As for draft article 15, the Drafting Committee had discussed at length whether or not sexual orientation should also be listed among the prohibited grounds of discrimination. Since divergent views had been expressed, the Committee had adopted a compromise solution whereby sexual orientation would not be mentioned in the text of the draft article but addressed in the commentary thereto, which would reflect in a balanced manner the members’ different positions. The commentary to draft article 23 would also note that the list of discriminatory grounds it contained was identical to the list in draft article 15.

82. Paragraph 2 of draft article 23 addressed the situation in which the life of an alien subject to expulsion would be threatened with the death penalty in the State of destination. During the debate in plenary, some members of the Commission had suggested that the protection afforded in the original draft article should be strengthened. In particular, it had been observed that the wording proposed by the Special Rapporteur was too restrictive in that it stated an obligation not to expel only for those States that had abolished the death penalty. It had been noted that in various States where the death penalty had not yet been abolished the penalty was not applied. Furthermore, it had been proposed that such protection should be extended to cover situations where, although the alien subject to expulsion was not under a death sentence in the State of destination, there was a risk that he or she might be sentenced to death in that State. Those concerns had been reiterated by some members in the Drafting Committee, where it had also been suggested that the obligation set forth in paragraph 2

could be made applicable to States in general, as a matter of progressive development.

83. In an effort to address some of those concerns, the Drafting Committee had modified the wording of paragraph 2 in order to render the obligation it set forth applicable to “a State that did not apply the death penalty”. The second part of the sentence had also been reformulated to cover both cases in which the death penalty had already been imposed in the State of destination and cases in which there was a risk that it might be imposed.

84. In accordance with a proposal made in the Drafting Committee, the Commission should also consider the possibility of including in the draft articles the obligation not to expel a person to a State where he or she would be at risk of being imprisoned without the right to parole.

85. The text of draft article 23 that had been submitted to the Drafting Committee had contained a third paragraph stating that the protection afforded in paragraphs 1 and 2 was also applicable to the expulsion of stateless persons. During the plenary debate at the sixty-second session, some doubts had been expressed regarding the need for such an additional paragraph. After discussion, the Drafting Committee had concluded that such a third paragraph was unnecessary and that it would be sufficient to specify in the commentary that draft article 23 applied also to stateless persons, who were in any event covered by the definition of the term “alien” contained in draft article 2, subparagraph (b). It had also been felt that a specific reference to stateless persons in draft article 23 might give the erroneous impression that stateless persons were not covered by other draft articles.

86. Draft 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) as provisionally adopted by the Drafting Committee consisted of a single paragraph. While the formulation retained was based largely on paragraph 1 of a revised text proposed by the Special Rapporteur,¹⁰³ the Drafting Committee had introduced a number of amendments. Some had been made in order to align the wording with that of article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Thus, the Drafting Committee had replaced the reference to torture and inhuman or degrading treatment in the text proposed by the Special Rapporteur by a more complete reference: “torture or ... cruel, inhuman or degrading treatment or punishment”. Also, the words “where there is a real risk that he or she would be subjected to” had been replaced by the phrase “where there are substantial grounds for believing that he or she would be in danger of being subjected to”. Furthermore, the words “to another country” had been replaced by the words “to a State” and, in order to ensure consistency with other draft articles stating a prohibition, the words “may not” had been replaced by “shall not” at the beginning of the article.

87. The original text of the draft article proposed by the Special Rapporteur in 2009,¹⁰⁴ together with the revised

¹⁰² *Yearbook ... 2010*, vol. II (Part Two), para. 124, footnote 1278 (draft article 14 revised).

¹⁰³ *Ibid.*, para. 126, footnote 1279 (draft article 15 revised).

¹⁰⁴ *Yearbook ... 2009*, vol. II (Part Two), para. 97, footnote 845 (draft article 11).

version, had contained a paragraph 2 dealing with situations in which the risk of torture or other cruel, inhuman or degrading treatment would emanate from persons or groups of persons acting in a private capacity. However, in plenary debates at previous sessions some Commission members had expressed concerns regarding the initial formulation of that paragraph.¹⁰⁵ Some of those concerns had been reiterated during the debate on the revised text in 2010. In particular, the view had been expressed that the formulation of paragraph 2 remained too broad¹⁰⁶ despite the addition by the Special Rapporteur of a caveat concerning the inability of the receiving State to obviate the risk of ill-treatment by providing appropriate protection.

88. Several members of the Drafting Committee had been of the view that it was not necessary for draft article 24 to address questions relating to the scope of the prohibition of torture and other forms of ill-treatment, matters that were often better left for interpretation by courts and tribunals. After careful consideration, then, the Drafting Committee had decided to delete paragraph 2, on the understanding that the commentary would discuss the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law, including factors that needed to be taken into consideration in assessing the risk of torture or other forms of ill-treatment in the State of destination (specifically addressed in article 3, paragraph 2, of the Convention against torture) and situations in which such a risk could emanate from persons or groups of persons acting in a private capacity. On that last point, reference would be made to relevant case law, including that of the European Court of Human Rights.

89. Chapter IV of Part Three (Protection in the transit State) comprised only one draft article, namely draft article 25 (Protection in the transit State of the human rights of an alien subject to expulsion). The text of that draft article as provisionally adopted by the Drafting Committee was a reformulation of the text originally proposed by the Special Rapporteur, which had sought to extend to the transit State the protection of the human rights of aliens subject to expulsion.¹⁰⁷ While several members of the Commission had supported the inclusion of a draft article on the human rights obligations of the transit State, some members had been of the view that the draft article should be reworded to avoid conveying the erroneous impression that the transit State would be required to comply with human rights rules that were binding only upon the expelling State. The same point had been raised in the Drafting Committee, and in order to address that concern the Committee had reformulated the draft article so that it referred specifically to the obligations of the transit State under international law. It would be made clear in the commentary that the phrase was intended to cover obligations arising either from a treaty to which the transit State was a party or from a rule of general international law.

90. Part Four (Specific procedural rules) comprised draft articles 26 to 28. Draft article 26 was entitled “Procedural rights of aliens subject to expulsion”. In his sixth

report,¹⁰⁸ the Special Rapporteur had originally proposed in draft articles A1 and C1 that a list of procedural rights applicable to the expulsion of aliens lawfully present in the territory of the expelling State should be drawn up, but that it should be left to the discretion of the expelling State whether to grant some or all of those procedural rights to aliens unlawfully present in its territory. At the sixty-second session, several members of the Commission had expressed the view that some procedural rights should also be recognized in respect of aliens unlawfully present in the territory of the expelling State.¹⁰⁹ The Special Rapporteur endeavoured to address those concerns by submitting at the same session a revised version of draft article A1¹¹⁰ providing for the applicability of certain procedural rights to aliens who, albeit unlawfully present, enjoyed a special status in the expelling State or had been residing in that State for a certain period of time, for example, six months. The Commission had then referred draft article C1, together with the revised draft article A1, to the Drafting Committee.

91. The Drafting Committee had considered thoroughly the question of the procedural rights of aliens subject to expulsion. A preliminary discussion had taken place on a question of terminology, namely whether the draft articles should refer to procedural rights or to procedural guarantees. Some members of the Drafting Committee had noted that in some legal systems a distinction was drawn between procedural rights *stricto sensu* and other procedural guarantees. Ultimately, the Committee had decided to retain the term “procedural rights” in a generic sense in draft article 26. Moreover, following an extensive discussion on the general approach to be followed with regard to the enunciation of procedural rights, the majority of Committee members had favoured the inclusion, in paragraph 1 of the draft article, of a single list of procedural rights that applied both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State, with the possible exception—aliens who had been unlawfully present for less than six months—specified in paragraph 4.

92. With regard to the various rights listed in paragraph 1, he said that the Drafting Committee had considered that the “right to be heard by a competent authority”, set forth in paragraph 1 (c), was essential for the exercise of the alien’s right to challenge the expulsion decision, as enunciated in paragraph 1 (b), and that that point should be emphasized in the commentary. There had been some discussion regarding the content and exact formulation of the right to be heard. The English text of the subparagraph originally referred to the Drafting Committee had used the phrase “right to a hearing”; however, the Drafting Committee had noted that that wording could be interpreted as implying a right to an oral hearing, a right not necessarily recognized by international law in the context of expulsion proceedings. It had therefore chosen the more neutral formulation “right to be heard”, thereby aligning the English text with the original French, which used the expression “*droit d’être*

¹⁰⁵ *Ibid.*, paras. 120–125.

¹⁰⁶ *Yearbook ... 2010*, vol. II (Part Two), para. 134.

¹⁰⁷ *Yearbook ... 2011*, vol. II (Part Two), para. 219, footnote 565.

¹⁰⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

¹⁰⁹ *Ibid.*, vol. II (Part Two), paras. 163–164; the draft articles A1 and C1 are reproduced at *ibid.*, paras. 143 and 145, footnotes 1292 and 1294.

¹¹⁰ *Ibid.*, para. 179, footnote 1300.

entendu". The commentary would indicate that under international law the "right to be heard" did not necessarily imply a right to an oral hearing, as State practice was not uniform in that regard.

93. Turning to paragraph 1 (*d*), on the right of access to effective remedies to challenge the expulsion decision, he said that the Drafting Committee had considered that the reference to the principle of non-discrimination contained in the text initially proposed by the Special Rapporteur could be omitted from the text of the draft article and alluded to, as appropriate, in the commentary.

94. Paragraph 1 (*e*) referred to the right to be represented before the competent authority. The Drafting Committee had opted for that general wording, instead of the term "the right to counsel", originally proposed by the Special Rapporteur, since it had held that in the context of expulsion proceedings the right to be represented did not entail, under international law, a right to be represented by a lawyer. Moreover, the wording chosen by the Committee was in line with that of article 13 of the International Covenant on Civil and Political Rights.

95. Several members of the Drafting Committee had been of the view that an alien's right to the free assistance of an interpreter (para. 1 (*f*)) if he or she could not understand or speak the language used by the competent authority was an essential element of the right to be heard (para. 1 (*c*)) and was also relevant in connection with the procedural rights set out in paragraphs 1 (*a*) and 1 (*b*). The wording chosen for paragraph 1 (*f*) corresponded to that used in connection with criminal proceedings in article 14, paragraph 3 (*f*), of the International Covenant on Civil and Political Rights. The Committee had been of the opinion that, in the case contemplated in paragraph 1 (*f*), the provision of interpretation should be free so as to ensure the effective exercise by the alien concerned of the other procedural rights to which he or she was entitled. In that context, the alien should indicate to the competent authorities the language or languages that he or she understood. According to the Drafting Committee, an alien's right to the free assistance of an interpreter should not be construed as entailing a right to receive the written translation of potentially voluminous documents. All those matters would be alluded to in the relevant commentary.

96. The Drafting Committee had considered carefully the Special Rapporteur's proposal to include a right to legal aid within the list of procedural rights. Some Committee members had pointed to the fact that only certain domestic laws provided for such a right and that the existence of that right would in fact depend on requirements established in the relevant legislation. The Drafting Committee had thus decided to delete the subparagraph on legal aid, on the understanding that a reference to the possible existence of such a right in the domestic legislation of the expelling State would be included in the commentary to paragraph 2 of the draft article.

97. Paragraph 2 of draft article 26 stated that the list of procedural rights contained in paragraph 1 was without prejudice to other procedural rights or guarantees provided by law. The commentary would indicate that, although the "without prejudice" clause referred mainly

to procedural rights recognized under the domestic law of the expelling State, it also covered any other procedural right that might be recognized under applicable rules of international law.

98. Paragraph 3 of the draft article addressed the question of consular assistance. In the draft article originally proposed by the Special Rapporteur, a "right to consular protection" had appeared in the list of procedural rights enjoyed by an alien subject to expulsion. However, the Drafting Committee had considered that it would be preferable to deal with that issue in a separate paragraph in order to spell out its legal implications, while recognizing the function of consular assistance as a guarantee for the respect of other rights.

99. The exact wording of paragraph 3 had been the subject of discussions in the Drafting Committee. Some members had expressed the view that the original reference to a "right to consular protection" was inappropriate because such a right was not recognized under international law. The point had been made that, although a right to consular protection or assistance was recognized under certain domestic legal systems, the State of nationality of an alien subject to expulsion remained free under international law to decide on the provision of any protection or assistance to that alien. At the same time, some members had noted that under article 36 of the 1963 Vienna Convention on Consular Relations, an alien subject to expulsion enjoyed certain rights in relation to communication with and access to consular officers of his or her State of nationality. With those considerations in mind, the Drafting Committee had decided to rephrase paragraph 3 so as to mention both the alien's right "to seek consular assistance" and the obligation of the expelling State not to impede the exercise of that right and, as appropriate, the provision of such assistance. The term "consular assistance" in paragraph 3 was to be understood as referring to any assistance that the State of nationality of the alien subject to expulsion might wish to provide to that alien in accordance with the rules of international law governing consular relations. The commentary would refer to the relevant provisions of the 1963 Vienna Convention on Consular Relations, notably article 5 on the definition of consular functions and article 36 on communication and contact with nationals of the sending State. Specific reference would also be made to the case of aliens being detained, covered in article 36, paragraphs 1 (*b*) and 1 (*c*), of the 1963 Vienna Convention on Consular Relations. The commentary would also indicate that the draft article did not contemplate any right to consular assistance that an alien subject to expulsion might invoke *vis-à-vis* his or her State of nationality under the internal law of that State.

100. Paragraph 4 of draft article 26 addressed the special case of aliens unlawfully present in the territory of the expelling State for less than six months. It was formulated as a "without prejudice" clause that made possible the application in such cases of any legislation of the expelling State concerning the expulsion of those aliens. Some members of the Drafting Committee had questioned the advisability of setting a time limit in that context, and the view had also been expressed that a minimum core of procedural rights should apply to all aliens without exception. It had further been suggested

that the alien's level of integration at various levels (social, economic, professional or family) could also be taken into account in considering the extent to which the expelling State was required to grant certain procedural rights during the expulsion process to aliens unlawfully present in its territory. However, the Drafting Committee had ultimately considered that a criterion referring to the level of integration would have been difficult to implement, and it had therefore opted for an objective time limit for the duration of the alien's presence in the territory of the expelling State. A period of six months had been deemed reasonable, not least since such a time limit was to be found in procedural rules governing the expulsion process contained in the legislation of some States.

101. Turning to draft article 27 (Suspensive effect of an appeal against an expulsion decision), he recalled that the Special Rapporteur had originally refrained from proposing a draft article on the subject, as he had felt that State practice had not sufficiently converged to warrant the formulation, if only as progressive development, of such a provision. During the plenary debate at the sixty-third session,¹¹¹ some members of the Commission had shared the Special Rapporteur's view that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. Other members, however, thought that the Commission should formulate, if only in the context of progressive development, a draft article that contemplated the suspensive effect of an appeal against an expulsion decision, unless compelling reasons of national security dictated otherwise. Some members had pointed out that an appeal against an expulsion decision that lacked suspensive effect would not be effective, since an alien who had to leave the country was likely to encounter economic obstacles to his or her return to the expelling State. According to another view, the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of being subjected to torture or ill-treatment in the State of destination.

102. In response to some of those concerns, the Special Rapporteur had submitted to the Drafting Committee, as an exercise of progressive development, a new draft article dealing with the suspensive effect of an appeal against an expulsion decision. In that text, a distinction had been made between the situation of an alien lawfully present in the territory of the expelling State and that of an alien unlawfully present. According to that proposal, the suspensive effect would be recognized in respect of an appeal lodged by an alien lawfully present in the territory of the expelling State, and possibly also by an alien unlawfully present who met certain additional requirements, such as minimum length of stay or minimum degree of social integration in the territory of the expelling State.

103. After a prolonged discussion, the Committee had opted for a draft article that recognized the suspensive effect only in respect of an appeal lodged by an alien lawfully present in the territory of the expelling State. The commentary would indicate that, even in such cases, the suspensive effect was recognized in the draft articles as a

matter of progressive development, since State practice was neither consistent nor uniform in that respect. The commentary would also mention that some members of the Commission would have preferred that the draft article should provide the same guarantee for certain categories of aliens who, albeit unlawfully present in the territory of the expelling State, had been there for a certain period of time or met other conditions to be defined.

104. Draft article 28 (Procedures for individual recourse) was new. During the debate at the sixty-third session on the draft article on diplomatic protection proposed by the Special Rapporteur, several members had suggested that some reference should be made to the individual complaint mechanisms available to aliens subject to expulsion under treaties on the protection of human rights, either in a separate draft article or in a "without prejudice" clause to be inserted in the draft article proposed.¹¹² In response, the Special Rapporteur had submitted to the Drafting Committee the text of a "without prejudice" clause as a proposed additional paragraph to the draft article on diplomatic protection. During the discussions in the Drafting Committee, two options had emerged: a single draft article covering, in two separate paragraphs, diplomatic protection and individual recourse to a competent international body; and two separate draft articles, each dealing with one of those two questions. After careful consideration, the Drafting Committee had opted for the second option, deciding that there should be a specific draft article on the question of individual recourse to a competent international body and that it should be placed at the end of Part Four, dealing with procedural rules. Furthermore, the Drafting Committee had deemed it preferable to draft the article not as a "without prejudice" clause but as a reminder that an alien subject to expulsion should have access to any available procedure involving individual recourse to a competent international body.

105. The CHAIRPERSON said that the Commission would conclude its consideration of the report of the Drafting Committee at the next plenary meeting.

The meeting rose at 1 p.m.

3135th MEETING

Tuesday, 29 May 2012, at 3 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

¹¹¹ *Yearbook ... 2011*, vol. II (Part Two), paras. 255–257.

¹¹² *Ibid.*, paras. 251–252; draft article J1 is reproduced at *ibid.*, para. 223, footnote 570.