

Chapter VIII

EXPULSION OF ALIENS

A. Introduction

242. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic of “Expulsion of aliens” for possible inclusion in the Commission’s long-term programme of work,¹⁸⁹ which took place subsequently at the fifty-second session (2000).¹⁹⁰ A brief syllabus describing the possible overall structure of and approach to the topic was annexed to the report of the Commission to the General Assembly on the work carried out at the session.¹⁹¹ In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the decision to include the topic in the long-term programme of work.

243. During its fifty-sixth session, the Commission decided, at its 2830th meeting held on 6 August 2004, to include the topic “Expulsion of aliens” in its current programme of work, and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.¹⁹² The General Assembly, in paragraph 5 of its resolution 59/41, endorsed the decision of the Commission to include the topic in its agenda.

B. Consideration of the topic at the present session

244. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/554). The Commission considered the Special Rapporteur’s report at its 2849th to 2852nd meetings, from 11 to 15 July 2005.

1. INTRODUCTION BY THE SPECIAL RAPPOURTEUR

245. The Special Rapporteur observed that the expulsion of aliens was an old question closely linked to the organization of human societies in the form of States. It remained of current interest because of the paradox between the existence of a globalized world, in terms of technology and economy, and barriers of political sovereignty operating like a filter between those aliens who had the right to stay on the territory of a foreign country and those who did not. The subject raised important questions of international law and, because of the diversity of practices which it had generated on every continent, lent itself to codification. Expulsion of aliens affected all regions of the world and, accordingly, there existed a significant body of national legislation

which made it possible to ascertain general principles. Some such principles had already been incorporated into existing international human rights conventions.

246. It seemed to the Special Rapporteur that a preliminary report was necessary to set out his understanding of the subject to the Commission. Its purpose was simply to provide an overall view of the subject, while highlighting the legal problems which it raised and the methodological difficulties relating to its consideration. The Special Rapporteur proposed a work plan (in annex I of his report) outlining the general plan of his future reports.

247. The report provided a basic sketch of the concept of the expulsion of aliens followed by a basic exposition of the concept of the “right to expel” in international law. In the Special Rapporteur’s view, such customary international law right, inherent in the sovereignty of States, was not in question. The reasons for expulsion, however, could vary and not all were permissible under international law; such expulsion of an alien brought into play rights, particularly fundamental human rights, to the violation of which international law attached legal consequences.

248. In preparing the report, the Special Rapporteur had been confronted with questions of terminology, that is, whether to speak of “expulsion” of aliens, which when looking at national legislation was a term covering a more limited phenomenon than removing aliens. Nevertheless, his tentative preference was to keep the term “expulsion”, even if it had to be defined broadly. Similarly, it remained to be considered whether the reference to “aliens” was sufficiently accurate. In his opinion, it did cover all the categories of persons under consideration.

249. The Special Rapporteur sought guidance on a number of questions of methodology, in particular as to what treatment was to be given to existing conventional rules, found in a number of human rights treaties. His inclination was to formulate a complete regime, bearing in mind that, although treaty law would offer elements which might be included in the draft articles, a number of those rules arose initially from national legislation and also international jurisprudence developed in the context of global and regional human rights judicial instances.

250. The Special Rapporteur further requested that the Secretariat prepare a compilation of applicable national and international instruments, texts and jurisprudence on the topic.

¹⁸⁹ *Yearbook ... 1998*, vol. II (Part Two), para. 554.

¹⁹⁰ *Yearbook ... 2000*, vol. II (Part Two), para. 729.

¹⁹¹ *Ibid.*, annex, p.142.

¹⁹² *Yearbook ... 2004*, vol. II (Part Two), para. 364.

2. SUMMARY OF THE DEBATE

(a) *General comments*

251. The Special Rapporteur was commended for his preliminary report. Several members commented on the importance of the subject, not least because it affected the lives of large numbers of people around the world. It was observed that, as a constant and normal social phenomenon, the movement of people and national restrictions on such movement had important political, economic and social repercussions for international relations. The task for the Commission was to consider carefully all the rules on the topic existing in customary international law, in treaties and international agreements, State practice and internal laws, to develop them further where possible or where appropriate, and to codify them for clearer and better application. Support was further expressed for the Special Rapporteur's formulation of the key issue underlying the topic, that is, how to reconcile the right to expel with the requirements of international law, particularly those relating to the protection of fundamental human rights.

252. According to one view, there existed a general problem with the Commission's approach to commencing new topics—not limited to the topic under consideration—which was reminiscent of the collective preparation of a textbook, that is, first defining the scope of the topic as well as the basic expressions and key concepts, followed by a process of identifying existing customary or treaty rules on the matter. While such questions had to be considered, it was necessary first to consider the interests involved in the expulsion of aliens and to identify the values that were affected by the typical cases of such expulsions, in short describing the factual problems arising from the expulsion of aliens. Without such a preliminary consideration, it was difficult to foresee the intended direction of a legislative intervention in the field, resulting in drafts containing excessive generalities.

(b) *The concept of the expulsion of aliens (scope and definitions)*

253. For many members, one of the central questions of the topic concerned the scope of the future study. The issue was considered problematic because of the connections between expulsion and admission of aliens, especially with regard to the return of irregular immigrants. It was maintained that an attempt by the Commission to address questions relating to immigration or emigration policies would negatively affect the prospects of the Commission's work. According to another view, the central area of study was less the issue of expulsion or refusal of entry, and more that of the control that a State exercises over its territory. Expulsion was merely a modality for the exercise of such control.

254. While support existed for taking a broad approach to the topic, specific suggestions were made as to its limits. Hence, a preference was expressed for limiting the scope of the study to those measures which concerned resident aliens, with the possible inclusion of aliens who had stayed irregularly over a certain span of time. It was also suggested that the topic cover the removal of foreign nationals who had entered illegally or whose presence

had become illegal, as well as the removal of foreigners who were lawful in the country. Others preferred the drawing of a distinction between the expulsion of aliens who were legally present in a country and those who were not—a distinction recognized both in State practice and in relevant international agreements.¹⁹³ It was common for States to expel aliens solely on the basis of their illegal entry or presence. It was thus proposed that the topic either should not cover the removal of persons who were not lawfully present or, if it were decided to include such persons, to stipulate clearly that States have the right of expulsion without the need for other justification. It was also observed that account had to be taken of the fact that different categories of aliens existed, and that some such categories enjoyed special status under the law of the foreign State in which they were residing. Reference was also made to the situation of illegal aliens whose presence in the territory of the host State was tolerated.

255. As regards questions to be excluded from the scope of the topic, it was suggested that the issues of refoulement, non-admission of asylum-seekers or refusal of admission for regular aliens should not be considered. Likewise, agreement was expressed with the Special Rapporteur's preference to exclude internally displaced persons and people in transit. It was also suggested that the topic should not cover measures of expulsion taken by a State *vis-à-vis* its own nationals of an ethnic, racial or religious origin which was different from that of the majority of the population.

256. It was queried whether the Special Rapporteur intended to include large-scale population expulsions, particularly in situations of armed conflict. While references in the report seemed to suggest that such mass expulsions were to be covered, doubts were expressed as to the appropriateness of doing so. It was pointed out that the question of expulsion from occupied territories and during periods of armed conflict was covered by international humanitarian law, and it was suggested that a "without prejudice" clause could eventually be included so as to cover the obligations of States under international humanitarian law relating to civilians. Others were of the view that, in the light of their importance, consideration should be given to questions of the forced exit of people in times of armed conflict. It was also suggested that international displacement of people at the outset of the creation of new States or dismemberment of a State or during periods of grave natural calamities should likewise not be considered.

257. General support was expressed for the Special Rapporteur's preference for retaining "expulsion" to be applied in a broad sense. It was noted that the term was commonly used to describe the removal of an alien from the territory of a State, either voluntarily under threat of forced removal or forcibly. Another view was that even as a purely descriptive term, "expulsion" was of limited accuracy because it covered what was, in fact, a large variety of situations.

¹⁹³ See, for example, Convention relating to the Status of Refugees, art. 32, and the International Covenant on Civil and Political Rights, art. 13.

258. As regards the tentative definition of “expulsion” in paragraph 13 of the report,¹⁹⁴ the view was expressed that it was too narrow since it did not include stateless persons and because it implied that expulsion consisted in a formal measure aimed at turning an individual out of a territory. Reference was made to existing case-law recognizing the fact that an “expulsion” might be considered to have taken place even in exceptional cases where the alien leaves a country without being directly and immediately forced or officially ordered to do so.¹⁹⁵ It was also noted that many of the legitimate actions resulting in the transfer of a foreign national out of the jurisdiction of the receiving State were taken under laws relating to immigration or laws for temporary entry for business or tourist purposes. It was further suggested that the term “expulsion” should be viewed broadly so as to cover the situation of aliens being prevented from entering within the jurisdictional control of the State concerned, for example on the high seas or on board an aircraft of the expelling State in a third State without necessarily having physically crossed the border.

259. According to another view, the definition of “expulsion” in paragraph 13 was too broad in that it could be read to include the transfer of an alien to the authorities of another Government for law enforcement purposes, such as extradition for the purpose of prosecution, as well as the expulsion of diplomatic personnel. A preference was expressed for excluding such actions from the scope of the topic since transfers for law enforcement purposes involved an entirely different set of issues, legal norms and policy considerations. Similarly, diplomatic personnel were already adequately covered by their own laws and institutions.

260. Concerning the term “alien”, it was pointed out that there existed a number of distinct categories of persons residing in territories other than that of their nationality and subject to different legal regimes. These included political refugees (whose status in Latin America was governed by the 1954 Convention on Territorial Asylum), asylum-seekers and refugees (regulated by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol), migrant workers (whose rights were protected by the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), and stateless persons (covered by the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness).

(c) *The right to expel*

261. With regard to the question of the sovereign “right” of the State to expel aliens, it was observed that such right was generally recognized under international law, albeit subject to certain limits, mostly in the context of human rights law (as discussed in the next section). The view was expressed that such right gave rise to many questions, including whether it is an inalienable right of the State, and whether it could be resorted to only

in certain situations (such as for purposes of national security, or for the maintenance of public order). The key was how to reconcile such right with the limits imposed on it by international law. At the same time, it was noted that any such limitations on the right of the State should be clearly defined in line with existing limits arising from treaties and custom universally recognized in times of war and peace.

262. Others expressed doubts as to the approach in the report of giving such *a priori* status to States’ right to expel, while putting human rights standards into the perspective. It was conceded that there existed situations where the State might be justified in expelling aliens, but there was still no reason to describe such right in as forceful a way as was done in the report. A preference was further expressed for not using qualifiers, such as “absolute” or “discretionary”, when referring to the State’s “right” to expel.

(d) *Grounds for expulsion*

263. It was observed that the right of a State to expel was necessary as a means of protecting the rights of the society which existed within the territory of the State. However, while a State had a wide discretion in exercising its rights to expel aliens, this discretion was not absolute and had to be balanced against existing fundamental human rights protections, including, for example, article 13 of the International Covenant on Civil and Political Rights, which provided, *inter alia*, that “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ...”. Similarly, customary international law demanded that the State must not abuse its rights by acting arbitrarily in taking its decision to expel an alien, nor act unreasonably in carrying out the expulsion. The State of nationality of an expelled alien could assert the right to inquire into the reasons for his expulsion.¹⁹⁶ The reasons for the expulsion would have to be stated before an international tribunal when the occasion demanded it. Expulsion was not to be carried out with hardship or violence or unnecessary harm to the alien involved. Compulsion and detention of an alien under an expulsion order had to be avoided, except in cases where the alien refused to leave or tried to escape from control of the State authorities. The alien had also to be given a reasonable time to settle his or her personal affairs before leaving the country,¹⁹⁷ and to be allowed to choose the country to which he or she wished to apply for admission.

264. At the same time, it was conceded that the position under customary international law remained uncertain, since many municipal systems provided that the authorities of a country could deport aliens without having to provide reasons. Doubts were also expressed as to the requirement, mentioned in the Special Rapporteur’s report, that “the State resorting to expulsion is bound to invoke the grounds used to justify it” (para. 16). It was not clear that, in the absence of a dispute or of another State or

¹⁹⁴ “[A] legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory”.

¹⁹⁵ See *International Technical Products Corporation v. The Government of the Islamic Republic of Iran* (1985), *Iran-United States Claims Tribunal Reports*, vol. 9, p. 10.

¹⁹⁶ See *Boffolo* (1903), UNRIIAA, vol. X (Sales No. 1960.V.4), p. 528.

¹⁹⁷ See *Kenneth P. Yeager v. The Islamic Republic of Iran*, *Iran-United States Claims Tribunal Reports* (1987), vol. 17, p. 92; see also *International Law Reports*, vol. 82 (1990), p. 179, at pp. 196–197.

institution's raising issues, the territorial sovereign had an original duty to invoke grounds of justification.

265. It was further suggested that the study should consider a set of issues, other than the absence of admissible motives, which equally related to the question as to whether a given expulsion was consistent with international law. These included: (a) taking into account provisions in international human rights conventions requiring a decision on expulsion to be taken "in accordance with law",¹⁹⁸ which covered not only procedure but also the conditions for expulsion, (b) the application of the principle of non-discrimination so as to invalidate, as a matter of international law, decisions on expulsion taken on a discriminatory basis,¹⁹⁹ (c) balancing a State's interest in expelling with the individual's right to private and family life,²⁰⁰ and (d) considering the question of the risk that an individual's rights might be infringed in the State of destination.²⁰¹ According to another suggestion, consideration could also be given to the situation where the alien had been awarded the right of residence, or was otherwise domiciled, as another limitation on expulsion.

(e) *Rights related to expulsion*

266. It was noted that contemporary international law recognized the rights of individuals to just and fair procedures for expulsion and placed requirements and obligations on the State to ensure such procedures.²⁰² It was suggested that the act of expulsion must be formal in order for the person concerned to be afforded an opportunity to appeal. It was also suggested that particular consideration be given to procedural guarantees with regard to individual expulsions, including remedies, especially those remedies capable of preventing expulsion, since it would be difficult for an alien who had been expelled to a distant country to resort effectively to an available remedy and to have such an expulsion measure effectively repealed. Other suggestions included: specifying that such fundamental guarantees applied to the entire process of expulsion, and not only to the procedure for the examination of individual cases; specifying the obligation of the expelling State to notify the alien concerned of the decision to expel and granting the alien the right to appeal against such decision; requiring that the implementation of the decision

¹⁹⁸ International Covenant on Civil and Political Rights, art. 13; American Convention on Human Rights: "Pact of San José, Costa Rica", art. 22, para. 6; and the African Charter on Human and Peoples' Rights, art. 12, para. 4.

¹⁹⁹ See *Shirin Aumeeruddy-Cziffra and 19 other women of Mauritius v. Mauritius*, decision of 9 April 1981, *Official Records of the General Assembly, Thirty-Sixth Session, Supplement No. 40 (A/36/40)*, annex XIII.

²⁰⁰ See, for example, *Berrehab v. The Netherlands*, Application no. 10730/84, ECHR, Judgment of 21 June 1988, *Series A: Judgments and Decisions*, vol. 138, p. 3; and *Slivenko v. Latvia*, Application no. 48321/99, ECHR, Judgment of 9 October 2003, *Reports of Judgments and Decisions, 2003-X*, p. 229, at pp. 263–264, para. 113.

²⁰¹ See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; and the American Convention on Human Rights: "Pact of San José, Costa Rica", art. 22, para. 8.

²⁰² See, for example, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. See also the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, art. 7, General Assembly resolution 40/144 of 13 December 1985.

to expel not be inhumane, degrading or humiliating for the person being expelled; requiring the establishment of procedures applicable to all decisions of expulsion relating, *inter alia*, to: due process of law, non-discriminative access to justice, access to legal aid for those who need it, protection of personal property, protection of investments and respect for applicable international obligations. It was also noted that the lawfulness of the expulsion was to be measured against the degree to which it complied with the procedures laid down under the domestic law of the expelling State, although it was not clear whether a sufficient number of States did regulate, through their national legislation, the procedures used for expelling aliens.

267. Opposition was expressed as to the existence of the "right" of collective expulsion. It was maintained that, in the twenty-first century, collective expulsions should be treated as *prima facie* prohibited. At best, a clear presumption in favour of their prohibition had to be established. It was added that while an expulsion may involve a group of people sharing similar characteristics, the decision to expel should nonetheless be taken at the level of the individual and not the group. Another view was that the term "collective" required further precision as it was not clear how many individuals would constitute a "collective" expulsion. Others maintained that such issues should be considered separately from that of the treatment of migrant workers, in which case the relevant international treaties would prevail. Similarly, it was suggested that the Special Rapporteur consider existing bilateral repatriation agreements as possible models for establishing regulations in this area.

268. Some members agreed with the Special Rapporteur's suggestion that some consideration be given to the question of the consequences, under international law, of an expulsion of aliens, in terms of State responsibility and diplomatic protection. Other members expressed reservations since such matters were taken into account by other topics both previously and currently before the Commission. It was suggested that, in the initial phases of consideration of the topic, the focus be placed instead on the basic questions of the rights and duties of States with respect to expulsion, leaving for a later stage the question of whether to attempt to elaborate on the consequences for breaches of those duties.

(f) *Methodological issues*

269. Many members expressed support for the Special Rapporteur's proposal that the focus be on drafting articles covering all aspects of expulsion, and not merely on providing a set of residual principles. It was maintained that a simple body of general principles would not be fully operational, nor would it be particularly useful or effective. It was suggested that a future set of draft articles could include a provision allowing for the application of treaties—whether universal or regional—giving further protection to the individuals concerned. Others expressed concern as to what an exhaustive regime would involve. It was suggested that the topic should not cover other settled rules, and that the task should be limited to bridging the gaps where these could be clearly identified.

270. The Special Rapporteur was further encouraged to undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law at both global and regional levels, as well as of national laws and practice.

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

271. The Special Rapporteur noted no basic disagreement in the Commission with regard to the approach being taken to the subject, with the exception of the suggestion that the study commence with a consideration of the issues and interests at stake. In response, the Special Rapporteur noted that some of these issues had been raised in the introductory part of his report, and that it was the well-established practice of the Commission to study a topic with a view to identifying rules of customary international law or those rules pertaining to the progressive development of international law.

272. As for the points of agreement in the Commission, the Special Rapporteur noted that support existed for: retaining the current title of the topic, while defining its two component terms; the proposition that the central problem of the subject concerned reconciling the right to expel with the requirements of international law, in particular with the rules of international human rights law; carefully delimiting the scope of the topic; and not considering questions of refusal of admission and immigration, movements of population or situations of decolonization or self-determination, nor the position of the occupied territories in the Middle East. Many members also expressed support for the methodology proposed in the report, namely that a comprehensive legal regime be drawn up recognizing, where necessary, the provisions of existing international conventions. He also acknowledged those who suggested that the topic be undertaken on the basis of a comparative analysis and criticism of national legislation in the area, and drawing on the jurisprudence of

global, regional and human rights instances. The general outline proposed by the Special Rapporteur had, likewise, been approved by most members of the Commission, with the reservation that some answers to particular questions needed to be provided.

273. The Special Rapporteur further provided a detailed overview of the discussion. He agreed with those members who suggested that "expulsion" be defined so as not necessarily to require the taking of a formal act in all cases. In addition, the qualifications suggested by the Commission on the concept of "alien" would be covered in the provision on scope, which would include a clear indication of the different categories of persons to be covered. To his mind, that would include persons residing in the territory of a State of which they did not have nationality, with the distinction being made between persons in a regular situation and those in an irregular situation (including those who have been residing for a long time in the State seeking to expel them). The topic would also cover refugees, asylum-seekers, stateless persons and migrant workers in the definition. He also accepted the suggestion that the question of the expulsion of stateless persons to a State where they maintained residence be considered separately.

274. On the other hand, as had been pointed out in the debate, it would be difficult to include in the topic denial of admission. Another category not covered by the scope would be persons whose nationality status changed because of a change in the status of the territory where they were resident, in the context of decolonization. He noted further that, while his preference was not to enter into questions of the nationality of persons expelled during an armed conflict, he did not intend totally to discard the rules of armed conflict from the topic because international humanitarian law included precise rules on expulsion of aliens.