

## Chapter VIII

### EXPULSION OF ALIENS

#### A. Introduction

166. At its fifty-sixth session (2004), the Commission decided to include the topic “Expulsion of aliens” in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.<sup>585</sup> The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

167. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur.<sup>586</sup>

168. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur<sup>587</sup> and a study prepared by the Secretariat.<sup>588</sup> The Commission decided to consider the second report at its next session, in 2007.<sup>589</sup>

169. At its fifty-ninth session (2007), the Commission considered the second and third reports<sup>590</sup> of the Special Rapporteur and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,<sup>591</sup> and draft articles 3 to 7.<sup>592</sup>

#### B. Consideration of the topic at the present session

170. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/594), which it considered at its 2969th, 2972nd and 2973rd meetings, on 30 May and 5 and 6 June 2008. At its 2973rd meeting, the Commission decided to establish

<sup>585</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364. 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 (*Yearbook ... 1998*, vol. II (Part Two), pp. 110–111, para. 554) and at its fifty-second session (2000) it confirmed that decision (*Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729). The annex to the report of the Commission to the General Assembly on the work of that session included a brief syllabus describing the possible overall structure of and approach to the topic (*ibid.*, annex, pp. 142–143). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the topic’s inclusion in the long-term programme of work.

<sup>586</sup> *Yearbook ... 2005*, vol. II (Part Two), pp. 54–58, paras. 242–274. See the preliminary report in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

<sup>587</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

<sup>588</sup> A/CN.4/565 and Corr.1 (mimeographed; available on the Commission’s website).

<sup>589</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 252.

<sup>590</sup> *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

<sup>591</sup> *Ibid.*, vol. II (Part Two), footnotes 326–327.

<sup>592</sup> *Ibid.*, footnotes 321–325.

a working group under the Chairpersonship of Mr. Donald M. McRae in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.

171. At the end of its meeting on 14 July 2008, the Working Group concluded that the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities. The Group also agreed to include in the commentary 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. The Chairperson of the Working Group presented the Group’s conclusions to the Commission at the latter’s 2984th meeting on 24 July 2008. The Commission approved those conclusions and requested the Drafting Committee to take them into consideration in its work.

172. At its 2989th meeting, on 4 August 2008, the Commission received an oral progress report by the Chairperson of the Drafting Committee. The draft articles referred to the Drafting Committee remain in the Committee until work on all draft articles is completed.

#### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FOURTH REPORT

173. During the Commission’s consideration of the third report of the Special Rapporteur, it had been observed that the issue of the expulsion of persons having two or more nationalities should be studied in more detail and resolved either within draft article 4, which set out the principle of non-expulsion of nationals, or in a separate draft article. It had also been observed that the issue of deprivation of nationality, which was sometimes used as a preliminary to expulsion, deserved thorough study.

174. With regard to the legal situation of persons having dual or multiple nationality, the Special Rapporteur had stated, in his third report, that it was not desirable to deal with the issue in connection with draft article 4, since the rule prohibiting the expulsion of nationals applied to any State of which a person was a national. The issue could, however, have an impact in the context of the exercise of diplomatic protection in cases of unlawful expulsion.

175. The fourth report, prepared in response to questions raised by a number of members, contained two parts. The first examined the problem of the expulsion of persons having dual or multiple nationality, while the second dealt with the loss of nationality and denationalization in relation to expulsion.

176. With regard to the expulsion of persons having two or more nationalities, the fourth report dealt principally with two issues. The first issue was whether the principle of non-expulsion of nationals was applicable in a strict manner to a person with dual or multiple nationality possessing the nationality of the expelling State. The second was whether a State would be in violation of its international obligations if it expelled an individual with dual or multiple nationality possessing the nationality of the expelling State, without first withdrawing its own nationality from that individual.

177. On the first point, it was noted that some States did sometimes treat their nationals who also held another nationality as aliens for purposes other than expulsion. Such an attitude was not, however, sufficient in itself to serve as a legal basis for expulsion, insofar as the persons concerned could claim the nationality of the expelling State in order to contest the legality of the expulsion.

178. On the second point, the rule prohibiting the expulsion by a State of its own nationals, as proposed by the Special Rapporteur in his third report, tended to support the idea that such an expulsion would be contrary to international law. In practice, however, the expulsion of persons having dual or multiple nationality without prior denationalization was not unusual.

179. According to an absolute understanding of the prohibition of the expulsion of nationals, it is sometimes argued that the expulsion of a person having dual or multiple nationality, including the nationality of the expelling State, must always be preceded by denationalization. In the view of the Special Rapporteur, however, requiring the expelling State to denationalize persons having dual or multiple nationality prior to expulsion was not the best solution, since denationalization could undermine any right of return of the person concerned.

180. In the light of the analysis contained in his fourth report, the Special Rapporteur was of the view that: (a) the principle of the non-expulsion of nationals did not apply to persons with dual or multiple nationality unless the expulsion could lead to statelessness; and (b) the practice of some States and the interests of expelled persons themselves did not support the enactment of a rule prescribing denationalization of a person with dual or multiple nationality prior to expulsion.

181. The legal problems raised by the expulsion of a person with dual or multiple nationality could be still more complex, depending on whether the expelling State was the State of dominant or effective nationality of the person concerned. The Special Rapporteur continued to doubt the practical interest and utility of entering into such considerations at the current stage. The various scenarios could more appropriately be addressed in the framework of a study on the protection of the property rights of expelled persons, which the Special Rapporteur planned to undertake at a later stage.

182. The question of whether there was any possibility of derogation from the rule prohibiting the expulsion of nationals also remained open. Putting to one side a number of historical examples, such as the expulsion of dethroned

monarchs, modern situations could be envisaged in which a State might, exceptionally, have the right to expel one of its nationals, provided that another State agreed to take that person and that the person retained the right to return to his or her own country at the request of the receiving State. For example, it might be admissible for a State that was the victim of espionage activities by one of its nationals to expel that person to the State for the benefit of which the activities in question had been conducted, if that other State was willing to receive the person concerned. The question was therefore whether the Commission wished to lay down an absolute prohibition against the expulsion of nationals or whether it was prepared to consider derogations in exceptional circumstances.

183. The second part of the fourth report related specifically to the problem of loss of nationality and denationalization in relation to expulsion. Even though loss of nationality and denationalization had similar consequences from the point of view of the legal situation of the person being expelled, the fact was that the loss of nationality was the consequence of an individual's voluntary act, whereas denationalization was a State decision of a collective or individual nature.

184. The Special Rapporteur was not convinced that it would be worthwhile for the Commission to prepare, even in the interests of the progressive development of international law, draft articles on the issues dealt with in his fourth report. Such issues pertained more to the nationality regime than the topic of expulsion of aliens.

## 2. SUMMARY OF THE DEBATE

### (a) *General comments*

185. It was noted that all States, in exercising their sovereign right to grant or withdraw nationality, were bound to respect international law, including certain basic human rights rules set out in a variety of universal and regional international instruments. Some members considered that the Commission should reaffirm the right of everybody to a nationality and the right not to be arbitrarily deprived of one's nationality. It was said that the Special Rapporteur had not attached sufficient importance in his fourth report to developments in the field of human rights.

186. It was also said that nationality should be seen as an individual's right and not simply as an instrument of State policy. It was also emphasized that there could be no difference between an individual's first nationality and other nationalities acquired subsequently. The prohibition against the expulsion of persons having dual or multiple nationality or against denationalization could not be restricted solely to cases in which statelessness might result, in which there was no State that was obliged to receive the expelled person, or in which the rules on the prohibition of arbitrary action and the principle of non-discrimination would be breached.

187. Some members shared the Special Rapporteur's conclusion that there should not be draft articles dealing specifically with the questions covered in his fourth report. Some, however, shared the Special Rapporteur's conclusion without supporting the analysis on which it was based.

188. Other members considered that the Commission should proceed to the preparation of draft articles on the expulsion of persons with dual or multiple nationality and on denationalization as a preliminary to expulsion. It was necessary, they felt, to lay down certain minimum rules in order to avoid arbitrary action and abuse. It was also suggested that consideration might be given to alternative solutions, such as draft guidelines or recommendations that could be included in an annex to the draft articles, if that could be of any practical use.

189. It was suggested that the Special Rapporteur had allowed himself to be overly influenced by the practice of some States, in the fight against terrorism, for example, and that he had sometimes based his analysis on historical examples or on situations other than cases of expulsion.

190. Several members were of the view that a working group should be established to consider the questions dealt with in the Special Rapporteur's fourth report.

(b) *The situation of persons having dual or multiple nationality in relation to expulsion*

191. Some members were of the view that the Commission could not ignore the question of dual or multiple nationality, a phenomenon which was increasingly common in the modern age. It was noted that it was not possible to establish a rule prohibiting the expulsion of nationals without answering the question of whether the rule also applied to persons having dual or multiple nationality. Regardless of whether a provision would be included in the draft articles on the non-expulsion of nationals, it was necessary to determine whether a State could consider a person having dual or multiple nationality as an alien for the purposes of expulsion.

192. Contrary to the view maintained by the Special Rapporteur, a number of members believed that, with regard to expulsion, international law did not allow a State to consider its nationals having one or several other nationalities as aliens. Some members emphasized that the prohibition against the expulsion of nationals, which was recognized in a number of universal and regional human rights instruments, equally applied to persons having dual or multiple nationality, including the nationality of the expelling State. Reference was made to the European Convention on Nationality of 6 November 1997, article 17 (1) of which stated that "[n]ationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party". The particular situation of women having dual or multiple nationality was also mentioned.

193. In the view of some members, the elements of practice cited by the Special Rapporteur to make a distinction between persons having only one nationality on the one hand and, on the other hand, those having dual or multiple nationality were not conclusive with respect to the question of expulsion. Such was the case with agreements on consular protection of persons having dual nationality and with certain restrictions on the political rights of persons having dual nationality, in particular eligibility for certain government functions. In addition, some

members mentioned national legislation which prohibited the expulsion of persons having dual or multiple nationality in the same way as persons having only the nationality of the expelling State.

194. Another viewpoint was that a failure to make any distinction, for the purposes of expulsion, between persons having a single nationality, dual nationality or multiple nationality led to a situation where differing legal and factual realities were treated as being the same.

195. It was said that it was not necessary to devote a draft article to the situation of persons having dual or multiple nationality in the context of expulsion, as those persons were covered by the rule prohibiting the expulsion of nationals. Another view was that it was important to specify that the prohibition against the expulsion of nationals included persons having dual or multiple nationality. It was also proposed that a draft article should be prepared stating that persons having dual or multiple nationality had the same rights as those holding only the nationality of the expelling State.

196. Some members shared the view of the Special Rapporteur that the notion of dominant or effective nationality could play a role in the context of the expulsion of persons having dual or multiple nationality. Other members, however, stressed that the prohibition against expelling a national was applicable regardless of whether the dominant or effective nationality of the person subject to expulsion was that of the expelling State. In other words, the criterion of dominant or effective nationality, which was relevant in the context of diplomatic protection or the field of private international law for the purposes of the settlement of conflicts of nationality or conflicts of laws, could not justify a State treating its nationals having one or several other nationalities as aliens for the purposes of expulsion.

197. Lastly, it was observed that the existence of a receiving State, for example one of the States of nationality of the person expelled, was not a decisive factor in determining the legality of an expulsion.

(c) *Loss of nationality, denationalization and expulsion*

198. Some members considered that the expulsion of a person having dual or multiple nationality, including the nationality of the expelling State, was not permissible if the person concerned had not been previously denationalized. The opposite approach would be to recommend that States should treat persons having dual or multiple nationality as aliens. The fact that expulsions of persons having dual or multiple nationality without prior denationalization were not unusual in practice did not suffice to make such expulsions legitimate. Other members were of the view that denationalization could never be used for the purposes of expulsion, while some others were of the view that denationalization was absolutely prohibited under international law.

199. It was observed that the distinction between loss of nationality and denationalization was not evident, insofar as the former could also be regarded as an automatic form of denationalization.

200. Some members pointed out that, under international law, a State could make provision in its legislation for loss of nationality by a person who acquired the nationality of another State. It was also pointed out that States had the right to punish the abuse or fraudulent use of dual or multiple nationality.

201. The observation was made that, once an alien was defined as a person who did not have the nationality of the expelling State, the question arose as to whether the right of a State to expel aliens included the right to expel a person who had become an alien by virtue of denationalization.

202. The point was stressed that denationalization had often been abused to violate the rights of certain persons, wrongfully deprive them of their property and then expel them. It was also said that denationalization occurred most often in non-democratic societies as political punishment or in special circumstances, for example, during succession of States or armed conflict. Mention was made of some national legislation prohibiting denationalization in any circumstance.

203. Some members were of the view that denationalization was only allowed in exceptional circumstances; that it must not lead to statelessness; that it must be neither discriminatory nor arbitrary; and that it must respect certain procedural guarantees. It was suggested that the Commission should identify the minimum conditions that must be met with respect to denationalization, taking account of the fundamental principles of international law and human rights principles.

204. It was proposed that a draft article should be prepared prohibiting denationalization where it would render a person stateless.

205. Some members were of the view that denationalization of a person with a view to facilitating his or her expulsion was contrary to international law. If the expulsion of nationals was prohibited, it necessarily followed that a State could not circumvent that prohibition by denationalizing one of its nationals with a view to his or her expulsion. It was suggested that the commentary should clarify that point. Other members proposed that a draft article should be prepared explicitly prohibiting denationalization for the purposes of expulsion.

206. Several members downplayed the relevance of the partial award rendered by the Eritrea–Ethiopia Claims Commission,<sup>593</sup> to which the Special Rapporteur had referred in his fourth report. Since the award had been handed down in a very particular case, involving a situation of State succession and armed conflict, it was not possible to infer from it general rules on denationalization followed by expulsion, especially as the Claims Commission had reached different conclusions on the various individual cases of expulsion of which it had been seized. It was further pointed out that the individuals in question

had been considered less as dual nationals than as nationals of an enemy State posing a threat to the security of the expelling State.

### 3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

207. The Special Rapporteur stated that he was not ready to embark on a study of the issues pertaining to the regime of nationality. Having listened to the members who had taken part in the discussion, moreover, he had yet to be convinced of the advisability of preparing draft articles on the issues dealt with in his fourth report.

208. The Special Rapporteur had suggested that a draft article should be devoted to the principle of non-expulsion of nationals, in order to reiterate a rule that seemed to be well established. On that point, he would await instructions from the Commission as to whether the rule prohibiting the expulsion of nationals must be an absolute rule or whether exceptions could be contemplated.

209. Contrary to the view expressed by some members, the notion of dominant or effective nationality to which the Special Rapporteur had referred in his fourth report was a well-established notion that was recognized in several contexts, in particular in case law and doctrine.

210. In the Special Rapporteur's view, a rule prohibiting the expulsion of persons having dual or multiple nationality who were nationals of the expelling State did not exist as such in international law. If, however, the Commission decided to extend to those categories of persons the rule prohibiting the expulsion of nationals, the current draft article 4 would suffice, without the issue of dominant or effective nationality needing to be addressed.

211. According to the Special Rapporteur, a draft article stating that it was prohibited to denationalize a person who would be rendered stateless by virtue of denationalization did not seem necessary, since the prohibition was well-established in international law.

212. Neither international treaty law nor international customary law contained a rule prohibiting a State from denationalizing a person with a view to his or her expulsion. The practice in several States tended to be quite the opposite; generally speaking, the purpose of denationalization was to expel the persons concerned. At most, the commentary on draft article 4 could state that, to the extent possible, States should not denationalize a person with a view to his or her expulsion and, if they did so, they must respect their national legislation and any particular criteria which might be set out in the commentary.

213. The Special Rapporteur had been somewhat surprised by the discussion on the relevance of the partial award by the Eritrea–Ethiopia Claims Commission to which he had referred in his fourth report. While it was possible to criticize the award, it was not acceptable to downplay its significance to the point of denying that it had any relevance to the subject in hand. The real issue was whether the arguments and conclusions of the Claims Commission had a sufficient basis in international law.

<sup>593</sup> *Ethiopia/Eritrea*, Eritrea–Ethiopia Claims Commission, *Partial Award: Civilian Claims–Eritrea's Claims 15, 16, 23 and 27–32, 17 December 2004*, UNRIAA, vol. XXVI (Sales No. E/F.06.V.7), p. 195.