

Chapter V

EXPULSION OF ALIENS

A. Introduction

107. 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.¹²⁴⁸ 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.

108. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur.¹²⁴⁹

109. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur¹²⁵⁰ and a study prepared by the Secretariat.¹²⁵¹ The Commission decided to consider the second report at its following session, in 2007.¹²⁵²

110. At its fifty-ninth session (2007), the Commission considered the second and third¹²⁵³ reports of the Special Rapporteur and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,¹²⁵⁴ and draft articles 3 to 7.¹²⁵⁵

111. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur¹²⁵⁶ and decided to establish a Working Group, chaired by 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.¹²⁵⁷ During the same session, the Commission approved the Working

¹²⁴⁸ *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.

¹²⁴⁹ *Yearbook ... 2005*, vol. II (Part Two), pp. 54–58, paras. 242–274. See the preliminary report in *ibid.*, vol. II (Part One), document A/CN.4/554.

¹²⁵⁰ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

¹²⁵¹ A/CN.4/565 and Corr.1 (mimeographed; available on the Commission’s website).

¹²⁵² *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 252.

¹²⁵³ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

¹²⁵⁴ *Ibid.*, vol. II (Part Two), p. 68, footnotes 326–327.

¹²⁵⁵ *Ibid.*, pp. 62–63, footnotes 321–325.

¹²⁵⁶ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/594.

¹²⁵⁷ *Ibid.*, vol. II (Part Two), p. 125, para. 170.

Group’s conclusions and requested the Drafting Committee to take them into consideration in its work.¹²⁵⁸

112. At its sixty-first session (2009), the Commission considered the fifth report of the Special Rapporteur.¹²⁵⁹ At the Commission’s request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate.¹²⁶⁰ He also submitted a new draft workplan with a view to restructuring the draft articles.¹²⁶¹ The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.¹²⁶²

B. Consideration of the topic at the present session

113. At the present session, the Commission had before it the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur,¹²⁶³ the new draft workplan presented by the Special Rapporteur with a view to structuring the draft articles,¹²⁶⁴ and the sixth report presented by the Special Rapporteur (A/CN.4/625 and Add.1–2). It considered them at its 3036th meeting, on 3 May 2010, its 3038th to 3041st meetings, on 5, 6, 7 and 10 May 2010, its 3044th meeting, on 14 May 2010, and its 3062nd to 3066th meetings, on 9, 13, 14, 15 and 16 July 2010. The Commission likewise had before it comments and information received from Governments.¹²⁶⁵

114. At its 3040th meeting, on 7 May 2010, the Commission decided to refer to the Drafting Committee draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled, originally contained in the fifth report,¹²⁶⁶ as revised and restructured by the Special Rapporteur.¹²⁶⁷

115. At its 3066th meeting, on 16 July 2010, the Commission decided to refer to the Drafting Committee draft

¹²⁵⁸ The conclusions were as follows: (a) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of aliens applies also to persons who have legally acquired one or several other nationalities; and (b) the commentary 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 (*ibid.*, para. 171).

¹²⁵⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

¹²⁶⁰ *Ibid.*, document A/CN.4/617.

¹²⁶¹ *Ibid.*, document A/CN.4/618.

¹²⁶² *Ibid.*, vol. II (Part Two), p. 129, para. 91.

¹²⁶³ See footnote 1260 above.

¹²⁶⁴ See footnote 1261 above.

¹²⁶⁵ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/604; and *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/628 and Add.1.

¹²⁶⁶ See footnote 1259 above.

¹²⁶⁷ See footnote 1260 above.

articles A and 9, as contained in the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1–2), and draft articles B1 and C1, as contained in the addendum to the sixth report, as well as draft articles B¹²⁶⁸ and A1,¹²⁶⁹ as revised by the Special Rapporteur during the session.

1. CONSIDERATION OF THE REVISED AND RESTRUCTURED DRAFT ARTICLES ON PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED

(a) *Presentation of the draft articles by the Special Rapporteur*

116. The Special Rapporteur explained that the Commission's consideration of the fifth report on expulsion of aliens¹²⁷⁰ had revealed a lack of understanding of what he himself meant to say about protection of the human rights of persons who had been or were being expelled as a limitation of the State's right to expel aliens. The wish was expressed that draft article 8, as proposed in the fifth report, be reformulated so as to clearly state the principle that the human rights of persons who had been or were being expelled should be fully protected. In addition, changes were proposed to other draft articles on the subject. The Commission had then asked the Special Rapporteur to submit to it a new version of the draft articles, taking account of the comments made during the debate. The Special Rapporteur had acceded to this request during the sixty-first session by revising the draft articles in question and by restructuring them into four sections dealing, respectively, with "General rules", "Protection required from the expelling State", "Protection in relation to the risk of violation of human rights in the receiving State" and "Protection in the transit State".¹²⁷¹

117. Section A, on "General rules", comprised the revised versions of draft articles 8, 9 and 10. In revised draft article 8,¹²⁷² entitled "General obligation to respect the human rights of persons who have been or are being expelled", the expression "fundamental rights" had been replaced by the broader and non-limitative term "human rights". In addition, the phrase "in particular those mentioned in the present draft articles" had been added in order to emphasize not only that there was no intention to establish a hierarchy among the human rights to be respected in the context of expulsion but also that the rights specifically mentioned in the draft articles were not exhaustive.

118. Revised draft article 9,¹²⁷³ which corresponded to former draft article 10 and was entitled "Obligation

to respect the dignity of persons who have been or are being expelled", had been incorporated into the section on "General rules" in order to emphasize that it was general in scope. Since the right to dignity was being considered in the specific context of expulsion, paragraph 1 of former draft article 10 setting forth the general rule that human dignity was inviolable had been eliminated.

119. Revised draft article 10,¹²⁷⁴ entitled "Obligation not to discriminate [Non-discrimination rule]", corresponded to former draft article 14. It had also been incorporated into the section on "General rules" in order to emphasize that it was general in scope. The words "among persons who have been or are being expelled" had been added to take into account the comments of several members of the Commission who had stressed that, in that context, the discrimination prohibited was discrimination among aliens subject to expulsion, not discrimination between such aliens and the nationals of the expelling State.

120. Section B on "Protection required from the expelling State" comprised revised draft articles 11, 12 and 13 and a future draft article which the Special Rapporteur was planning to produce on the conditions of custody and treatment of persons who had been or were being expelled. Revised draft article 11,¹²⁷⁵ entitled "Obligation to protect the lives of persons who have been or are being expelled", combined paragraph 1 of former draft article 9 and paragraph 1 (which here became paragraph 2) of former draft article 11. The rearrangement was meant to respond to the strongly expressed desire of some members of the Commission to differentiate the obligations of the expelling State from those of the receiving State. The phrase "in a territory under its jurisdiction" had been added in order to take into account the concerns expressed by other members.

121. Revised draft article 12,¹²⁷⁶ entitled "Obligation to respect the right to family life", corresponded to former draft article 13. The reference to private life had been eliminated from the draft article, as some members of the

¹²⁷⁴ Revised draft article 10 read:

"Obligation not to discriminate [Non-discrimination rule]"

"1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

"2. Such non-discrimination among persons who have been or are being expelled shall also apply to the enjoyment of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State."

¹²⁷⁵ Revised draft article 11 read:

"Obligation to protect the lives of persons who have been or are being expelled"

"1. The expelling State shall protect the right to life of a person who has been or is being expelled.

"2. A State may not, in its territory or in a territory under its jurisdiction, subject a person who has been or is being expelled to torture or to inhuman or degrading treatment."

¹²⁷⁶ Revised draft article 12 read:

"Obligation to respect the right to family life"

"1. The expelling State shall respect the right to family life of a person who has been or is being expelled.

"2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by international law and shall strike a fair balance between the interests of the State and those of the person in question."

¹²⁶⁸ See footnote 1290 below.

¹²⁶⁹ See footnote 1300 below.

¹²⁷⁰ See footnote 1259 above.

¹²⁷¹ See footnote 1260 above.

¹²⁷² Revised draft article 8 read:

"General obligation to respect the human rights of persons who have been or are being expelled"

"Any person who has been or is being expelled is entitled to respect for his or her human rights, in particular those mentioned in the present draft articles."

¹²⁷³ Revised draft article 9 read:

"Obligation to respect the dignity of persons who have been or are being expelled"

"The dignity of a person who has been or is being expelled must be respected and protected in all circumstances."

Commission wished. Moreover, as other members had proposed, in paragraph 2 the reference to the “law” had been changed to read “international law”.

122. The purpose of revised draft article 13,¹²⁷⁷ entitled “Specific case of vulnerable persons”, was to extend to all “vulnerable persons” the protection which the former draft article 12 had reserved for children being expelled. While paragraph 1 specified what persons were meant, paragraph 2 was new and replaced paragraph 2 of the former draft article. It stressed that where a child was involved in expulsion the child’s best interests must prevail; in some cases the child’s best interests might require the child to be detained in the same conditions as an adult so that the child was not separated from the adult.

123. Revised draft articles 14 and 15 constituted section C on “Protection in relation to the risk of violation of human rights in the receiving State”.

124. Revised draft article 14,¹²⁷⁸ entitled “Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled”, was a reformulation of former draft article 9, particularly paragraph 1 thereof. The Special Rapporteur had endeavoured to take account of the desire expressed by some members of the Commission to extend the scope of the protection of the right to life to all expelled persons. That provision, of general scope, also covered the situation of asylum seekers, which therefore no longer required special treatment. Some members wanted the scope of the principle of *non-refoulement* to be extended to all persons who had been or were being expelled, whether or not they were lawfully present. The principle of *non-refoulement*, which had first been a fundamental principle of international refugee law, had then passed beyond the bounds of that branch of the law to become part of international humanitarian law and an integral part of the international human rights protection. In the opinion of the Special Rapporteur, the arguments drawn from various universal legal instruments and from converging regional legal regimes offered a sufficient basis for the rule set forth in draft article 14, paragraph 1.

¹²⁷⁷ Revised draft article 13 read:

“*Specific case of vulnerable persons*”

“1. Children, older persons, persons with disabilities and pregnant women who have been or are being expelled shall be considered, treated and protected as such, irrespective of their immigration status.

“2. In particular, any measure concerning a child who has been or is being expelled must be taken in the best interests of the child.”

¹²⁷⁸ Revised draft article 14 read:

“*Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled*”

“1. No one may be expelled or returned (*refoulé*) to a State where his or her right to life or personal liberty is in danger of being violated because of his or her race, religion, nationality, membership of a particular social group or political opinions.

“2. A State that has abolished the death penalty may not expel an alien who is under a death sentence to a State in which that person may be executed without having previously obtained an assurance that the death penalty will not be carried out.

“3. The provisions of paragraphs 1 and 2 of this article shall also apply to the expulsion of a stateless person who is in the territory of the expelling State.”

125. Despite the preference expressed by some members for a formulation tending towards abolition of the death penalty, the Special Rapporteur did not believe that such changes should be made to draft article 14, paragraph 2, for the reasons explained in paragraph 58 of his fifth report. Paragraph 3, which extended the protection in question to stateless persons, had been added to address a concern expressed in the Commission.

126. Revised draft article 15,¹²⁷⁹ entitled “Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment”, corresponded to former draft article 11, which had been divided into two because some members of the Commission had felt the need to draw a distinction between the protection of the human rights of an alien who had been or was being expelled in the expelling State and the protection required in the receiving State. The new text of draft article 15 therefore drew on paragraphs 2 and 3 of the former draft article 11, with the addition in draft article 15, paragraph 2, of the phrase “and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection”, in order to reflect the jurisprudence of the European Court of Human Rights in the case of *H.L.R. v. France*.¹²⁸⁰

127. Lastly draft article 16,¹²⁸¹ entitled “Application of the provisions of this chapter in the transit State”, was new and sought to extend the set of provisions protecting the rights of the expelled person to the entire expulsion process and the whole of the journey from the expelling State to the receiving State.

(b) *Summary of the debate*

128. Several members supported the revised draft articles on protection of the human rights of persons who had been or were being expelled, in which the Special Rapporteur had taken into consideration most of the comments made during the discussion at the Commission’s sixty-first session. It was pointed out, however, that there was still a need for caution with regard to the level of protection that should be granted to individuals in the draft articles, since the Commission was required to set forth principles of general international law and not to draw up an instrument for protecting human rights which each State would be free to accept or reject.

129. With regard to draft article 9 on the obligation to respect the dignity of persons who had been or were being

¹²⁷⁹ Revised draft article 15 read:

“*Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment*”

“1. A State may not expel a person to another country where there is a real risk that he or she would be subjected to torture or to inhuman or degrading treatment.

“2. The provisions of paragraph 1 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”

¹²⁸⁰ *H.L.R. v. France, Application No. 24573/94, Judgment (merits) of 29 April 1997, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 1997-III, p. 745, at p. 758, para. 40.*

¹²⁸¹ Draft article 16 read:

“*Application of the provisions of this chapter in the transit State*”

“The provisions of this chapter shall also apply in the transit State to a person who has been or is being expelled.”

expelled, some members reiterated their view that human dignity was a general principle from which all human rights flowed and not a specific human right. It was suggested that the requirement that dignity must be respected should be laid down in an introductory section of the draft articles, perhaps among the principles. Reference was also made to the fact that some aspects of protection of dignity were covered in draft article 11, paragraph 2, which prohibited torture and inhuman or degrading treatment. According to another viewpoint, the concept of dignity was of particular importance in the context of expulsion, for aliens awaiting expulsion were frequently subjected to offences against their dignity that did not necessarily amount to the violation of a specific human right. With respect to the wording of draft article 9, it was emphasized that the dignity referred to in that context was the same for every human being and should not be confused with individual perceptions of honour or pride, which could vary from one person to another. Hence it was proposed that draft article 9 should reproduce the wording of article 10 of the International Covenant on Civil and Political Rights and refer to “respect for the inherent dignity of the human person”.

130. In connection with draft article 10 on non-discrimination, it was pointed out that the revised version failed to take due account of the concerns of certain members of the Commission who thought there could be legitimate reasons for treating different groups of aliens differently in the context of expulsion: for example, citizens of member and non-member States of the European Union, or aliens covered by re-admission agreements. It was suggested that the possibility of “positive discrimination” based on the existence of rules on the free movement of persons be recognized in the commentary. Some doubts were also expressed about the meaning and scope of paragraph 2. In particular, it was noted that different expulsion procedures might apply depending on whether the alien was lawfully present in the territory of the expelling State.

131. With regard to draft article 11, it was suggested that it was important to ensure that the obligation of States to respect and guarantee respect for human rights was not limited to areas where they exercised territorial jurisdiction. More generally, it was suggested that the references to the notion of “territory” and “jurisdiction” be clarified.

132. With reference to draft article 12, it was pointed out that the phrase “such cases as may be provided for by international law” was rather vague.

133. With regard to draft article 14, some members proposed strengthening the protection contained in paragraph 2. It was again proposed to extend the protection afforded by that paragraph to cases where a death sentence had not been passed on a given alien but there was a risk that it might be imposed in the receiving State. In addition, doubts were expressed about the need for a paragraph 3 specifically referring to stateless persons.

134. With respect to draft article 15, doubts were expressed about what was regarded as the excessively broad wording of paragraph 2, which referred to situations in which the risk of torture or cruel, inhuman or degrading treatment emanated from persons acting in a private capacity.

2. CONSIDERATION OF THE SIXTH REPORT OF THE SPECIAL RAPPORTEUR

(a) *Presentation by the Special Rapporteur*

135. The sixth report (A/CN.4/625 and Add.1–2) continued with the study of the “General rules”; addendum 1 dealt with the procedural rules for expulsion. Concerning, in particular, the analysis of national legislation, the Special Rapporteur had relied on the Secretariat’s study on the topic.¹²⁸²

136. The Special Rapporteur had first reverted to the question of collective expulsion in order to allay certain misgivings expressed by some members with regard to draft article 7, paragraph 3, proposed in the third report¹²⁸³ and referred by the Commission to the Drafting Committee in 2007.¹²⁸⁴ This provision confined the possibility of collective expulsion of foreign nationals of a State engaged in armed conflict to those who “taken together as a group, ... have demonstrated hostility towards the receiving State”. Having analysed the relevant provisions of the Geneva Conventions for the protection of war victims and its 1977 Additional Protocols I and II, the Special Rapporteur had arrived at the conclusion that the provision did not contradict international humanitarian law.

137. The sixth report then addressed the issue of “disguised expulsion”, a term used in that context to describe situations where a State aided or tolerated acts committed by its citizens with the intended effect of driving a person out of its territory or provoking the departure of that individual. That type of expulsion was by its nature contrary to international law because it violated the human rights of the person so expelled and did not respect the procedural rules giving the expelled person an opportunity to defend his or her rights. Paragraph 1 of draft article A¹²⁸⁵ accordingly prohibited disguised expulsion, as defined in paragraph 2.

138. The sixth report also dealt with the issue of extradition disguised as expulsion. As part of the progressive development of international law, draft article 8¹²⁸⁶ established the prohibition of that practice, which had been condemned by a number of national courts and by the European Court of Human Rights in its judgment in the *Bozano* case.¹²⁸⁷ It should be noted, however, that extra-

¹²⁸² See footnote 1251 above.

¹²⁸³ See footnote 1253 above.

¹²⁸⁴ For the text, see *Yearbook ... 2007*, vol. II (Part Two), p. 63, footnote 325.

¹²⁸⁵ Draft article A read:

“Prohibition of disguised expulsion

“1. Any form of disguised expulsion of an alien shall be prohibited.

“2. For the purposes of this draft article, disguised expulsion shall mean the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory.”

¹²⁸⁶ Draft article 8 read:

“Prohibition of extradition disguised as expulsion

“Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request.”

¹²⁸⁷ *Bozano v. France*, Application No. 9990/82, Judgment of 18 December 1986, European Court of Human Rights, *Judgments and Decisions: Series A*, vol. 111, paragraph 60.

dition disguised as expulsion presupposed that the main reason for expulsion was extradition; in other words, expulsion sought to circumvent the provisions of domestic law that permitted the legality of an extradition to be contested. National case law in the matter was based on the purpose of the expulsion and on the intention of the States concerned.

139. The sixth report then discussed at length the grounds for expulsion. The grounds embodied in international conventions and international case law appeared to be limited basically to public order and national security, although national legislation provided for various other grounds. In addition, international case law yielded little information about the content of the notions of public order and national security, which were very largely determined by domestic law. In those circumstances, the Special Rapporteur considered that to draw up an inventory of the grounds for expulsion that was meant to be exhaustive would be to attempt the impossible. Nevertheless, he had examined the criteria for assessing the grounds for expulsion on the basis of national, regional and international jurisprudence and doctrine.

140. In the light of those considerations, the Special Rapporteur had proposed a draft article 9¹²⁸⁸ that dealt with various aspects of the grounds for expulsion and their assessment, which probably warranted clarification in the commentary. Paragraph 1 established the requirement that grounds be given for any expulsion decision. Paragraph 2 designated public order and national security as grounds that might justify the expulsion of an alien, while specifying that expulsion had to be carried out in accordance with the law. Paragraph 3 stated that the ground given had to be in conformity with international law. Lastly, paragraph 4 listed certain requirements for the State's determination of the ground for expulsion: it must be done in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they gave rise, in the light of the circumstances and of the conduct of the person in question.

141. The sixth report also addressed the conditions in which persons being expelled were detained. Initially, draft article B¹²⁸⁹ had been entitled "Obligation to respect the human rights of aliens who are being expelled or are

¹²⁸⁸ Draft article 9 read:

"Grounds for expulsion"

"1. Grounds must be given for any expulsion decision.

"2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

"3. A State may not expel an alien on a ground that is contrary to international law.

"4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question."

¹²⁸⁹ Draft article B, as contained in the sixth report, read:

"Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion"

"1. The expulsion of an alien must be effected in conformity with international human rights law. It must be accomplished with humanity, without unnecessary hardship and subject to respect for the dignity of the person concerned.

"2. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons

being detained pending expulsion" and had comprised four paragraphs. However, during the session the Special Rapporteur had decided to submit to the Commission a revised version of the draft article¹²⁹⁰ in which the title was amended and paragraph 1 deleted. The purpose of those changes was to limit the scope of the provision to detention pending expulsion in order to avoid any duplication with the draft articles that set forth, in a general manner, the obligation to respect the human rights and the dignity of the person who had been or was being expelled.¹²⁹¹ Draft article B codified rules that had either been expressly established in certain international legal instruments, embodied in international, albeit regional, case law, or recognized by most national legislation.

142. In the first addendum to his sixth report (A/CN.4/625/Add.1), the Special Rapporteur had examined the question of expulsion proceedings. In that context, he had first tackled the distinction between aliens lawfully or unlawfully present in the territory of the State, a distinction that was based, at least implicitly, on a number of international conventions and was widely established in State practice. In the opinion of the Special Rapporteur, while that distinction was indisputably relevant as far as procedural rules were concerned, it should not come into play with respect to the human rights of expelled persons.

143. Since the procedures applicable to the expulsion of aliens unlawfully present in the territory of the expelling State varied considerably from one State to another, the

sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

"(b) The detention of an alien who has been or is being expelled must not be punitive in nature.

"3. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision 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.

"4. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

"(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned."

¹²⁹⁰ The revised version of draft article B read:

"Obligation to respect the human rights of an alien being detained pending expulsion"

"1. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

"(b) The detention of an alien who had been or is being expelled must not be punitive in nature.

"2. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision 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 decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

"(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned."

¹²⁹¹ These were draft articles 8 and 9 in their revised wording as presented by the Special Rapporteur in document A/CN.4/617 (see footnotes 1260 above); see also footnotes 1272 and 1273 above.

Special Rapporteur had arrived at the conclusion that it was better to leave them to be regulated by national legislation, without prejudice to a State's right to provide such aliens with the same guarantees as those for aliens lawfully present on its territory. That was the meaning of draft article A1¹²⁹² which, subject to that proviso, restricted the scope of the subsequent draft articles to aliens lawfully present in the territory of the expelling State.

144. The guarantees set out in draft articles B1 and C1 for lawfully present aliens had been drawn from various universal and regional human rights instruments, among which special mention had to be made of article 13 of the International Covenant on Civil and Political Rights. Draft article B1¹²⁹³ established the fundamental guarantee that expulsion could take place only pursuant to a decision reached in accordance with the law. That guarantee, which was embodied in universal and regional instruments and in the national legislation of several countries, also rested on the principle that the State was bound to observe its own rules (*patere legem* or *patere regulam quam fecisti*).

145. Aliens lawfully in the territory of the expelling State also enjoyed a certain number of procedural rights listed in draft article C1.¹²⁹⁴ Most of those guarantees had their source not only in national laws, but also in treaty law. Although treaty law and international jurisprudence did not specifically provide a basis for legal aid, the right to such aid was established in the national legislation of several States and also in European Union law. It had been included in the list in draft article C1 by way of progressive development. The right to translation and interpretation could be described as a generally recognized principle in court proceedings.

¹²⁹² Draft article A1 read:

"Scope of [the present] rules of procedure"

"1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State.

"2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time."

¹²⁹³ Draft article B1 read:

"Requirement for conformity with the law"

"An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law."

¹²⁹⁴ Draft article C1 read:

"Procedural rights of aliens facing expulsion"

"1. An alien facing expulsion enjoys the following procedural rights:

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

"(b) the right to challenge the expulsion [the expulsion decision];

"(c) the right to a hearing;

"(d) the right of access to effective remedies to challenge the expulsion decision without discrimination;

"(e) the right to consular protection;

"(f) the right to counsel;

"(g) the right to legal aid;

"(h) the right to interpretation and translation into a language he or she understands.

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

146. The Special Rapporteur also announced that he had finalized the second addendum to his sixth report (A/CN.4/625/Add.2) which would deal with the legal consequences of expulsion and could be considered by the Commission at its sixty-third session (2011).

(b) *Summary of the debate*

147. As far as methodology was concerned, it was suggested that consideration be given to the possibility of reorganizing the draft articles in five parts: a first part should determine the scope of the draft articles and define "expulsion"; the second could set forth the substantive conditions that had to be met if expulsion were to be internationally lawful; a third part would cover procedural matters; a fourth part could contain provisions concerning the property of the expelled person; and a fifth part could be devoted to the legal obligations of the States of transit and destination.

148. Although some doubts had been expressed about the relevance of some sources and the reliability of the some of the information used in the sixth report, the wealth and representative nature of the material used were also emphasized. It was nonetheless stated that the report could have paid more attention to the practice of States in certain regions of the world and to the views they expressed in international forums. It was noted that the lack of definitive findings that could be drawn from the sources consulted showed perhaps that the subject was not yet ripe for codification. It was therefore more a matter of identifying and recommending standards adopted in reasonably unequivocal practice. The view that the subject lent itself more to political negotiation than to an exercise in codification and progressive development was also reiterated.

149. It had been pointed out that caution was needed when dealing with the practice and case law in special regimes such as refugee law, regional mechanisms for protecting human rights or European Union law. Moreover, it might be advisable to introduce a saving clause into the draft articles to indicate that their purpose was not to reduce the protection afforded by special regimes.

150. Several members supported draft article A concerning the prohibition of disguised expulsion, although some considered that the situations covered by that provision should be described in different terms. In that context, it was suggested that the terms "informal expulsion", "indirect expulsion", "*de facto* expulsion" or "constructive expulsion" might be used. The opinion was expressed, however, that the cases addressed in the sixth report in connection with that draft article varied widely; it would therefore be advisable to recast the provision using the premise that conduct whereby a State intended to provoke the expulsion of an alien must be treated as expulsion, irrespective of the form it took. According to a different point of view, the real problem that arose in the cases considered in the report stemmed from the violation of the procedural and substantive guarantees available to the person subject to expulsion. It would therefore be preferable to do no more than to include in the draft articles a provision setting forth the conditions that had to be met for the expulsion of an alien.

151. Several members endorsed the Special Rapporteur's opinion that disguised expulsion was by its nature contrary to international law, because it violated all the procedural guarantees and prevented the rights of the expelled person from being protected. It was further suggested that it should be made clear that the prohibition set out in draft article A also applied to States of transit and destination.

152. With regard to the definition of disguised expulsion contained in draft article A, paragraph 2, the expression "forcible departure" was criticized and it was emphasized that the prohibition in question should also cover situations in which an alien would be compelled—even without the use of physical force—to leave the territory of a State. Some members stressed that a distinction should be made between situations covered in that draft article and other situations, such as certain incentives to leave, which could not necessarily be treated as disguised expulsion. Again on the definition, it was pointed out that the words "actions or omissions" lacked clarity and did not draw an appropriate distinction between disguised expulsion and ordinary expulsion. It was also thought that the proposed definition went too far in that it also included situations, which were difficult to ascertain objectively, where a State "supports ... or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory".

153. Some members supported draft article 8 contained in the sixth report, on the prohibition of extradition disguised as expulsion, as part of the progressive development of international law. It was pointed out that a provision on disguised extradition should be included in the draft in that its purpose was to ban expulsion on grounds other than those that might normally warrant such a measure. The question was also raised whether the Special Rapporteur intended to deal with the merits of the principle of *male captus bene detentus*. Other speakers, however, queried the advisability of including the draft article, even by way of progressive development; they commented in particular that it was inappropriate to have in the draft articles a provision that was more concerned with extradition than with expulsion. Attention was drawn to the fact that that was all the more true as the aim of the proposed draft article was to protect the integrity of the extradition regime.

154. According to some members, draft article 8 as proposed by the Special Rapporteur was too broad in scope. The point was made that this form of expulsion was not categorically prohibited by case law, especially that of the European Court of Human Rights. It was therefore proposed that the provision should be worded in a narrower and more precise manner. According to one point of view, the scope of the provision should be restricted by a reference to the criterion of *intention*, in order to prohibit the use by a State of an expulsion procedure in order to circumvent the limitations on extradition resulting from that State's international obligations or its own laws. It was also proposed that the wording of the rule be turned around to state that an alien could be expelled when the prerequisites for his or her expulsion were met, irrespective of the fact, or possibility, that the alien in question might be the subject of an extradition request.

155. Some members expressed their support for draft article 9. It was pointed out that paragraph 1, setting forth the requirement that grounds must be given for any expulsion decision, reflected an established rule of international law.

156. Some members also supported draft article 9, paragraph 2, which accorded particular importance to the grounds of public order and national security—without excluding other grounds—and also laid down the condition that expulsion must be in accordance with the law. It was pointed out that, while the grounds relating to public order and national security were certainly the most important, they were not the sole grounds, and that drawing up a supposedly exhaustive list of grounds for expulsion would unduly restrict the discretion that the expelling State must be allowed in order to determine those grounds. According to another view, it was doubtful that public order and national security could constitute the common denominator of all grounds for expulsion. Some members suggested the inclusion of a reference to other grounds, such as being convicted of a serious offence, unlawful entry, violation of major administrative rules and public health considerations. It was also proposed that it be clearly stated that any expulsion had to rest on legitimate grounds and that any ground for expulsion had to be determined in accordance with the law.

157. A different viewpoint was that the grounds for expulsion should be limited to public order and national security, at least with a view to progressive development.

158. With regard to the grounds for expulsion, a number of speakers stressed the importance of the distinction between aliens lawfully and those unlawfully present in the territory of a State, a distinction that was frequently borne out by State practice. It was pointed out that the unlawful nature of an alien's presence in the territory of a State was a sufficient ground for expulsion under the legislation of many States, as long as the procedural guarantees envisaged under international and domestic law were observed.

159. It was suggested that more specifics be provided, either in the text or in the commentary, on the grounds for expulsion that were contrary to international law. In particular, some speakers underlined the fact that "cultural" grounds for expulsion, which served to limit the number of foreign workers in a country, were prohibited by international law, as they violated the principle of non-discrimination. Mention was also made of the unlawful nature of expulsion for purposes of reprisal, and it was suggested that expulsion on grounds of morality should be excluded.

160. A number of speakers endorsed draft article 9, paragraph 3, which stipulated that grounds for expulsion must be in conformity with international law, and the list of criteria for assessing the grounds for expulsion contained in paragraph 4 of the draft article.

161. Some speakers supported draft article B, on the conditions of detention of a person who had been or was being expelled. In particular, the facts that the draft article tackled, among other things, the serious problem of unrestricted

or excessive duration of detention and that it set out procedural rules aimed at reinforcing assurances about conditions of detention for aliens, were welcomed. According to other speakers, the rules set out in draft article B were not flexible enough or were too detailed; that was particularly the case with the requirement that the detention of an alien pending expulsion be carried out in a place other than a facility in which persons sentenced to penalties involving deprivation of liberty were detained. It was also suggested that in some cases, aliens unlawfully present in a country might need to be detained with a view to establishing the facts, or even in order to protect such persons.

162. As regards the procedural rules relevant to expulsion, some members agreed with the Special Rapporteur that a distinction should be made between aliens legally (or lawfully) in a State's territory and aliens illegally (or unlawfully) in that territory. Some members pointed out that the distinction was grounded in various international instruments, international jurisprudence and national legislation and jurisprudence.

163. While some members supported draft article A1, several others thought that, in the context of expulsion, certain procedural guarantees must likewise be given to aliens unlawfully in the territory of the expelling State. It was pointed out that draft article A1, paragraph 2, was inadequate on that point, since by simply acknowledging that the expelling State had the right to extend certain procedural guarantees to certain aliens who were in its territory illegally, it was merely stating the obvious.

164. Among other things, it was suggested that aliens unlawfully in the territory of the expelling State be accorded the right to a fair assessment of their conditions of expulsion by a competent authority. Several speakers were also of the view that draft article B1, under which a decision on expulsion must be reached in accordance with the law, should also apply to aliens unlawfully in the territory of the expelling State. Some speakers considered that certain procedural guarantees set out in draft article C1 should likewise be enjoyed by aliens in an unlawful situation. It was pointed out that that was true of the right to receive notice of the expulsion decision (even though differences might be provided for regarding the scope of that right), the right to a hearing, the right to translation and the right to consular protection. On the other hand, the view was expressed that international and national practice lacked the necessary elements to extend to aliens in an unlawful situation the right to effective remedies to challenge an expulsion decision. Another view was that it would be preferable to grant aliens in an unlawful situation the same procedural rights as those accorded to aliens lawfully present.

165. It was pointed out that the need to provide certain guarantees to all aliens stemmed from the very idea of the rule of law. It was also suggested that it was not always easy to distinguish between aliens lawfully or unlawfully present in the territory of the expelling State, including because the unlawful presence of an alien might be tolerated, and in certain cases encouraged, by the State in question. Moreover, some speakers thought that a distinction should be drawn between aliens unlawfully present for some time in the territory of the expelling State and aliens who had recently arrived, and that the former deserved

a treatment somewhere between that given the latter and that given to aliens lawfully present, all the more so if their presence had been tolerated by the expelling State. Another view held that the issue of whether to give more favourable treatment to aliens whose unlawful presence in the territory of the expelling State had lasted for a certain length of time fell solely within the purview of the domestic legislation of the State in question.

166. As to terminology, it was suggested that a definition of an "alien legally (or lawfully) in the territory of the expelling State" should be developed, based on the definition in addendum 1 to the sixth report (A/CN.4/625/Add.1, in the subsection on "Semantic clarification of the concept of 'resident' alien or an alien 'lawfully' or 'unlawfully' in the territory of the State"), which referred to "an alien [who] fulfils the conditions for entry or stay established by law in that State". In addition, some speakers stressed the need to avoid the use of potentially pejorative expressions such as "illegal (or unlawful) alien". It was, after all, only the presence of the alien in question in the territory of the State that could be described as illegal or unlawful.

167. It was also suggested that the draft articles clearly indicate that a State was not entitled to change the status of an alien in order to avoid giving him or her the procedural guarantees enjoyed by aliens lawfully in its territory. Reference was made to the position of the Human Rights Committee, which considered that the rights accorded under article 13 of the International Covenant on Civil and Political Rights to aliens lawfully in the territory of the expelling State also applied if the legality of an alien's presence in the territory of the expelling State was disputed.¹²⁹⁵

168. Several members supported in general terms draft article C1, which set out various procedural rights that were applicable to aliens who were lawfully present in the territory of the expelling State and were facing expulsion. Some members nevertheless considered that the exception concerning national security contained in article 13 of the International Covenant on Civil and Political rights should be incorporated in that provision.

169. Regarding the various procedural rights set forth in draft article C1, it was suggested that paragraph 1 (b) should refer to the right to challenge the expulsion *decision*, rather than the expulsion itself. As to consular protection, it was suggested that the commentary should cite article 5, subparagraph (e), of the 1963 Vienna Convention on Consular Relations and refer to the obligation of the State to inform a person facing expulsion of his or her right to consular protection. Regarding the right of access to effective remedies to challenge the expulsion decision without discrimination, it was pointed out that, in that context, non-discrimination must be construed as being among aliens, and not as implying any principle of national treatment.

¹²⁹⁵ Human Rights Committee, general comment No. 15 (The position of aliens under the Covenant), 11 April 1986, para. 9: "However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13" (Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-First Session, Supplement No. 40 (A/41/40)*, annex VI, p. 118).

170. Some members of the Commission were nevertheless of the view that certain procedural rights set forth in draft article C1 were not well established in international law. Such was the case, in their view, with the right to legal aid, which might create financial difficulties for certain States. It was suggested that this guarantee be viewed as a matter of national treatment: insofar as mechanisms for legal aid existed in the expelling State, an alien must have access to them on a non-discriminatory basis. Another proposal was that draft article C1 should ensure provision for legal aid to the greatest extent possible, taking into consideration the resources of the expelling State. It was also suggested that the right to a hearing in the context of an administrative procedure like expulsion, as well as the right to counsel and the right to translation and interpretation, were also not established under international law.

171. Some speakers felt that the interpretation of article 13 of the International Covenant on Civil and Political Rights justified the inclusion of the right to the suspension of the execution of an expulsion decision until that decision became definitive, absent compelling reasons of national security.

172. Lastly, the insertion of the word “including” in the *chapeau* to draft article C1, paragraph 1, was proposed in order to stress the non-exhaustive nature of the list of procedural rights set out in that provision.

(c) *Special Rapporteur's concluding remarks*

173. The Special Rapporteur reacted to a number of general comments that had been made during the debate. In response to the remark that the topic was more suited for political negotiation than for an exercise of codification and progressive development, he observed that all the topics considered by the Commission were in reality, and with no exception, possible subjects of negotiations. The Special Rapporteur recalled that the methodology adopted in his reports was first to examine the sources of international law recognized in Article 38 of the Statute of the International Court of Justice; only in the absence of a rule derived from one or the other of those sources could domestic practice serve as a basis for proposing draft articles as a matter of progressive development. Replying to certain criticisms of his use of sources and examples in his sixth report, the Special Rapporteur explained that he had tried to make the best use of the material available, the sources of which had always been clearly cited, and that he had expressly stated in his report that the cases cited were not comprehensive and certainly not intended to stigmatize the countries mentioned. Based on available information, the Special Rapporteur had also attempted to take into account the jurisprudence of several regions as well as the positions and practice of States belonging to various regions of the world. Finally, the consideration of old sources—some of which appeared to be unavoidable—was in no way anachronistic; it aimed at providing an account of the evolution of the topic.

174. Concerning the proposal aimed at restructuring the draft articles, the Special Rapporteur was of the view that it would be better, at this stage, to continue working on the basis of the revised workplan,¹²⁹⁶ once all the draft

articles had been elaborated, it would be appropriate to restructure, in a coherent and logical way, the whole set of draft articles.

175. Concerning draft article A on disguised expulsion, he was not necessarily opposed to the replacement, in French, of the expression “*expulsion déguisée*” (“disguised expulsion”) by an equivalent of the English expression “constructive expulsion”, which was well entrenched in arbitral awards, as long as the equivalent could be found. While recognizing that paragraph 2 could be deleted since it duplicated the definition of expulsion in draft article 2 proposed in his second report,¹²⁹⁷ the revised version of which¹²⁹⁸ was sent to the Drafting Committee in 2007, the Special Rapporteur remained convinced of the need for a draft article prohibiting that form of expulsion, which violated all the procedural rules and afforded no protection to persons subject to expulsion.

176. The Special Rapporteur did not agree with those members of the Commission who thought that draft article 8, on extradition disguised as expulsion, went beyond the scope of the draft. However, in order to take account of the comments made by some members, he had proposed a revised version of that article.¹²⁹⁹

177. With regard to draft article 9, on grounds for expulsion, the Special Rapporteur was not in favour of the proposal to limit such grounds to public order and national security. The in-depth survey of the grounds for expulsion that he had carried out in the sixth report showed that it would be unwise to reduce all the grounds for expulsion to those two. It would be better to leave the matter open in draft article 9 by simply stating that the grounds in question must not be contrary to international law. He had taken note of the comments made about the contribution by the ICJ to the clarification of the notion of national security, and the pertinent elements of that contribution would be reflected in the commentary.

178. While some members of the Commission had claimed that the wording of draft article B1 was too detailed, the guarantees set out in that provision were derived from the jurisprudence and related to the fact that expulsion and, consequently, detention with a view to expulsion, were not punitive in nature. Nevertheless, the Drafting Committee might be able to find a more general formulation.

179. Regarding the procedural guarantees relating to expulsion, the Commission had been favourable to the general outlines proposed in addendum 1 to the sixth report, including the need to differentiate between the case of aliens lawfully present in a State and that of those unlawfully present, and within the latter group, between aliens recently arrived in the expelling State

¹²⁹⁷ See footnote 1250 above.

¹²⁹⁸ See footnote 1254 above.

¹²⁹⁹ The revised version of draft article 8 read:

“*Expulsion in connection with extradition*

“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 of expulsion are met in accordance with international law [or with the provisions of the present draft article].”

¹²⁹⁶ See footnote 1261 above.

and those who had been there for some time. Nevertheless, the Special Rapporteur was responsive to the desire expressed by some members of the Commission for certain procedural guarantees to be accorded to aliens unlawfully present in a State's territory, and he had subsequently prepared a revised version of draft article A1 in which a distinction was proposed concerning the extent of the procedural guarantees based on the length of the alien's presence in the territory of the expelling State.¹³⁰⁰ Whereas paragraph 1 granted all aliens who had illegally entered the territory of the expelling State at a recent date the minimum guarantee that expulsion must take place in accordance with the law, paragraph 2 was intended to offer certain specific guarantees to an alien who was unlawfully in an expelling State but who had a special legal status in the country or had been residing there for some time (a period of six months might be envisaged for that purpose).

¹³⁰⁰ The revised version of draft article A1 read:

“Draft article A1. Procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State

“1. The expulsion of an alien who entered illegally [at a recent date] the territory of the expelling State [or within a period of less than 6 months] takes place in accordance with the law.

“2. The expulsion of an illegal alien who has a special legal status in the country or has been residing in the country for some time [at least six months?] takes place in pursuance of a decision taken in conformity with the law and the [respect] of the following procedural rights:

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

“(b) the right to challenge the expulsion [the expulsion decision];

“(c) the right to a hearing;

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

“(e) the right to consular protection.”

180. In the light of the reformulation of draft article A1, the Special Rapporteur thought it preferable not to change the text of draft article B1 through the deletion, as suggested by some members of the Commission, of the word “lawfully”; it was preferable not to depart from the text of article 13 of the International Covenant on Civil and Political Rights.

181. The Special Rapporteur noted that the principle behind draft article C1 had not been challenged and that it had simply been some guarantees that had been disputed. Whereas setting out the right to legal aid was certainly part of the progressive development of international law, the right to translation and interpretation was indisputably established, in the view of the Special Rapporteur, if only as a general principle of law.

182. The Special Rapporteur had taken note of the proposal to provide for appeal of an expulsion decision with suspensive effect. In his view, whereas that rule was established in European regional law, it was not part of general international law; thus, to incorporate it would be to engage in progressive development.

183. The Special Rapporteur had likewise noted the proposal to codify a rule, derived from the Human Rights Committee's interpretation of article 13 of the International Covenant on Civil and Political Rights, to the effect that the procedural guarantees that must be accorded to an alien lawfully in the territory of an expelling State also applied when the legality of the alien's presence in the territory was in dispute. Nevertheless, the Special Rapporteur considered that this point could be adequately reflected in the commentary.