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EXPULSION OF ALIENS
Statement of the Chairman of the Drafting Committee,
Mr. Mahmoud D. Hmoud

29 May 2012

Mr. Chairman,

It gives me great pleasure today to introduce the first report of the Drafting Committee for the sixty-fourth session of the Commission. This report concerns the topic "Expulsion of aliens" and is contained in document A/CN.4/L.797, which reproduces the entire set of draft articles on the expulsion of aliens as provisionally adopted on first reading by the Drafting Committee at the present session. The draft articles are hereby introduced with a view to their adoption by the Commission on first reading.

I should start by indicating that this report covers the entire work of the Drafting Committee on the draft articles on the expulsion of aliens, which began in 2007 and was completed at the present session. In this regard, you will recall that, during the previous sessions, the Drafting Committee had decided that the draft articles which had been provisionally worked out thus far would remain in the Drafting Committee until the completion of its work on the topic. The various draft articles on the expulsion of aliens were referred by the Commission to the Drafting Committee at successive sessions. At its fifty-ninth session, in 2007, the Commission referred to the Drafting Committee draft articles 1 and 2, originally contained in the second report of the Special Rapporteur (A/CN.4/573), as subsequently revised by the Special Rapporteur (A/62/10, footnotes 401 and 402), as well as draft article 3 to 7, contained in the Special Rapporteur's third report (A/CN.4/581). At its sixty-second session, in 2010, the Commission referred to the Drafting Committee draft articles 8 to 15 on the protection of the human rights of persons expelled or being expelled, originally contained in the Special Rapporteur's fifth report (A/CN.4/611), as revised and restructured by the Special Rapporteur in the light of the debate that took place at the sixty-first session of the Commission, in 2009 (document A/CN.4/617). Also at its sixty-second session, the Commission referred to the Drafting Committee draft articles A and 9 as they appeared in the Special Rapporteur's sixth report (A/CN.4/625); draft articles B1 and C1 as they appeared in addendum 1 to the Special Rapporteur's sixth report (A/CN.4/625/Add.1); and draft articles B and A1 as they had been revised by the Special Rapporteur in the course of that session. Finally, during the first part of the sixty-third session, in 2011, the Commission referred to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in addendum 2 to the Special Rapporteur's sixth report (A/CN.4/625/Add.2); draft article F1, originally proposed in the same document, as subsequently revised by the Special Rapporteur at that

session (see document A/66/10, footnote 534); and draft article 8, originally contained in the Special Rapporteur's sixth report, as subsequently revised by the Special Rapporteur at the sixty-second session (see document A/65/10, footnote 1268).

At the current session, the Drafting Committee held twelve meetings on the draft articles on the expulsion of aliens. It first considered a number of proposals formulated by the Special Rapporteur in the light of comments and suggestions made by States on certain draft articles as they had been referred to the Drafting Committee. Thereafter, the Committee addressed a number of issues that remained pending, and finally proceeded to a review of the whole set of draft articles.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Mr. Maurice Kamto, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I wish to thank the Secretariat for its valuable assistance.

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Mr. Chairman,

I shall introduce the report of the Drafting Committee in three parts.

The first part of my introduction covers **Parts One and Two** of the draft articles.

Part One, which is entitled **"General provisions"**, comprises draft articles 1 to 5.

Draft article 1 – Scope

Draft article 1 is entitled "Scope", as originally proposed. The Drafting Committee worked on the basis of a revised version of the draft article, in which the Special Rapporteur had attempted to streamline the formulation in the light of comments and suggestions made during the plenary debate in 2007 (see document A/62/10, footnote 401).

Paragraph 1, as provisionally adopted by the Drafting Committee, states that the present draft articles apply to the expulsion, by a State, of aliens who are lawfully or unlawfully present in its territory. The phrase "lawfully or unlawfully present" was introduced in order to signal that the draft articles deal with a broad range of aliens who may be in the territory of the expelling State, irrespective of the legality of their presence. In retaining this formulation, the Drafting Committee was mindful of the fact that, since the inception of the work on this topic, the general view in the Commission had been that the topic should include both aliens lawfully present and aliens unlawfully present in the territory of the expelling State. That being said, it should be noted from the outset that not all the provisions of the draft articles equally apply to aliens lawfully and unlawfully present, or treat these two categories of aliens in the same manner; I shall address these aspects more specifically when introducing those draft articles that draw a distinction

between aliens lawfully and unlawfully present in the territory of the expelling State. Furthermore, the inclusion within the scope of the draft articles of aliens unlawfully present is to be understood in conjunction with the exclusion, stated in draft article 2*(a) in fine*, of issues concerning non-admission from the scope of the draft articles. The commentary would clarify this point.

The notion of "expulsion", which determines the scope *ratione materiae* of the draft articles, is defined in draft article 2(*a*). As regards the scope *ratione personae*, there was a prolonged discussion in the Drafting Committee on whether it should be defined positively by listing the different categories of aliens covered, as had been originally proposed by the Special Rapporteur, or negatively by mentioning the categories of aliens that would *not* be covered. While some members of the Drafting Committee expressed a preference for the first option, several other members were of the opinion that providing a list of categories of aliens to be covered would, *inter alia*, entail the risk of omitting some other categories that should also be covered. The Drafting Committee eventually opted for an exclusionary clause.

Thus, paragraph 2 of draft article 1, as provisionally adopted by the Drafting Committee, excludes from the scope of the draft articles aliens enjoying privileges and immunities under international law. The commentary would clarify that the aliens thereby excluded from the scope of the draft articles are those whose departure from the territory of a State is governed by special rules of international law, namely diplomats, consular or other officials of a foreign State, agents of an international organization, including, as appropriate, members of their family, as well as military personnel posted abroad pursuant to a status-of-forces agreement. Furthermore, even though the scope *ratione personae* of the draft articles is defined negatively through the exclusionary clause of paragraph 2, the commentary would enumerate, for purposes of illustration, specific categories of aliens who fall within the scope of the draft articles, in addition to aliens in general. These include, for instance, refugees, stateless persons, as well as migrant workers and members of their family.

Draft article 2 – Use of terms

Mr. Chairman,

Draft article 2 provides a definition of two terms that are used throughout the draft articles. In accordance with the Commission's drafting practice, the Drafting Committee decided that the title of the draft article should be "Use of terms", rather than "Definitions" as originally proposed by the Special Rapporteur.

I shall first turn to subparagraph (*a*), which provides a definition of the term "expulsion". After an extensive debate, the Drafting Committee endorsed the Special Rapporteur's suggestion to adopt a formulation reflecting the distinction between, on the one hand, a formal act of a State compelling an alien to leave its territory, and, on the other hand, conduct attributable to that State which could lead to the same result. It was felt that both the formal act and the conduct should be included within the definition of "expulsion" for the purposes of the draft articles. The Drafting Committee decided to use the term "formal act" as an equivalent for the French term "*acte juridique*". It did not

retain the term "legal act" in English because that term could have led to confusion, as it might be understood as implying the lawful character of the expulsion. The Committee considered that such an ambiguity would have been unfortunate as draft article 2 is only concerned with the definition of the term "expulsion" and is without prejudice to the question of the lawfulness of an expulsion in a particular case.

Furthermore, the Drafting Committee found it appropriate to state clearly that the formal act or conduct possibly amounting to expulsion must be attributable to a State, and that the conduct may consist of "an action or omission". These qualifications are in line with the wording retained in the Commission's articles on the responsibility of States for internationally wrongful acts and on the responsibility of international organizations. The element of coercion as an essential feature of conduct in the context of expulsion, which was referred to in a separate subparagraph in the text proposed by the Special Rapporteur (document A/62/10, footnote 402), would be addressed in the commentary. The commentary would also provide some explanations on possible cases of expulsion "by conduct" and refer, in this context, to the element of the State's "intention" to provoke the alien's departure from its territory. The case of an omission by the State, which could take the form of its tolerance towards conduct adopted by individuals or private entities against an alien, would also be addressed. In providing such explanations, the commentary would make a reference to the prohibition of disguised expulsion as stated in draft article 11. In this regard, it should also be mentioned that the passive form retained in the second part of the first sentence of subparagraph (*a*) of draft article 2 ("…by which an alien *is compelled* to leave the territory…") was preferred by the Drafting Committee to the active form contained in the text proposed by the Special Rapporteur, as it allows to cover also the case of an "expulsion" resulting from an omission by the authorities of a State, such as a failure to protect the alien against hostile acts emanating from non-State actors.

The Drafting Committee considered it necessary to specify that the notion of expulsion does not cover the extradition of an alien to another State, the surrender of an alien to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State; hence, the addition of a clause to that effect in subparagraph (*a*) of draft article 2. It should be recalled that the exclusion of these issues from the scope of the draft articles appears to have found broad support both in the Commission and among States. With respect to non-admission, the commentary to draft article 2(*a*) would provide some explanations regarding the situations that are covered by the exclusionary clause. In particular, it would make it clear that non-admission, which normally takes place upon an alien's arrival at the border, is to be distinguished from the removal of an alien who is already present, albeit unlawfully, in the territory of the State, the latter case falling within the scope of the draft articles.

Subparagraph (*b*) of draft article 2 provides a definition of the term "alien" as "an individual who does not have the nationality of the State in whose territory the individual is present". This formulation corresponds to that proposed by the Special Rapporteur, except for the replacement of the term "person" by "individual" in order to make it clear that only natural persons are covered by the draft articles. It will be recalled that, in the text referred to the Drafting Committee, this definition was qualified by the proviso "except where the legislation of that State provides otherwise" (document A/62/10,

footnote 402). The Drafting Committee decided to delete that proviso, the formulation of which was considered to be unclear by several members. There is no doubt that a State may grant special protection against expulsion to certain categories of aliens, who could thus be regarded – to some extent – as nationals for purposes of expulsion. However, it was found that this was a matter for regulation under domestic law (or special treaty regimes) and that a reference thereto in the commentary could suffice. Moreover, it was felt that excluding those categories of individuals from the definition of "aliens" for the purposes of the draft articles might entail the undesired result of depriving them from the protection set forth in the draft articles.

Following a long discussion, the Drafting Committee decided to delete the definition of the term "territory" contained in subparagraph (*d*) of the text proposed by the Special Rapporteur (document A/62/10, footnote 402). It was considered that the proposed definition of "territory" as "the domain in which the State exercises all the powers deriving from its sovereignty" might create more problems than it was intended to solve, especially if one considers the existence of situations where a State exercises sovereign powers in the territory of another State. This may be the case, for instance, of territories under foreign administration, occupied territories or military bases.

The Drafting Committee also decided to delete the definition of the term "frontier" that appeared in subparagraph (*e*) of the text proposed by the Special Rapporteur (document A/62/10, footnote 402). The Committee was of the view that it was not necessary to define a term that only appears in draft article 6, paragraph 3, which reproduces the content of Article 33, paragraph 1, of the 1951 Convention relating to the Status of Refugees. It was also considered that the proposed definition of the frontier as a zone would give rise to difficulties. The point was made, in particular, that the reference in the original definition to the non-enjoyment of "resident status" within the frontier zone was inappropriate because even aliens lawfully present in the territory of a State might not enjoy such a status. It was also noted that defining the "frontier" as a zone could produce the unintended effect of encouraging States to maintain an alien within their jurisdiction while denying the alien the benefit of his or her rights.

Draft article 3 – Right of expulsion

Draft article 3 is entitled "Right of expulsion". The text provisionally adopted by the Drafting Committee is largely based on a revised version presented by the Special Rapporteur to the Committee, in which paragraphs 1 and 2 of the original text were merged. This provision begins with the enunciation of the right of a State to expel an alien from its territory, followed by an indication according to which the expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Compared to the version of draft article 3 that was referred to the Drafting Committee, the current formulation avoids the reference to "fundamental principles of international law", which had been viewed by several members of the Commission as too restrictive, and refers instead to "the present draft articles and other applicable rules of international law". A specific mention of human rights was included in this draft article because of their particular relevance in the context of expulsion. In contrast, the Drafting

Committee did not deem it necessary to include a reference to good faith in the text of draft article 3.

Draft article 4 – Requirement for conformity with law

Draft article 4, entitled "Requirement for conformity with law", corresponds, except for some minor changes, to the text originally proposed by the Special Rapporteur in addendum 1 to his sixth report (A/CN.4/625/Add.1), which had received broad support in the Commission during the debate in 2011.

The requirement that expulsion shall occur only in pursuance of a decision reached in accordance with law is stated in Article 13 of the International Covenant on Civil and Political Rights in relation to the expulsion of an alien who is lawfully present in the territory of the expelling State. That said, the Drafting Committee decided to delete the term "lawfully", which appeared in the Special Rapporteur's text. The majority of the members of the Committee were of the view that the requirement for conformity with law corresponds to a well established rule of international law which applies to any expulsion measure, irrespective of the lawfulness of the presence of the alien in the territory of the expelling State. The commentary would emphasize this point, while also recognizing that different rules and procedures may be provided for in domestic laws in relation to the expulsion of aliens unlawfully present in the territory of the State. The commentary would also clarify that the requirement for conformity with law, as set out in draft article 4, refers both to the formal and to the substantive conditions for expulsion; therefore, it has a wider scope than the similar requirement enunciated in draft article 5, paragraph 2, with regard to the grounds for expulsion.

Draft article 5 – Grounds for expulsion

Draft article 5 is entitled "Grounds for expulsion", as originally proposed. The Drafting Committee devoted great attention to this provision, contained in the Special Rapporteur's sixth report (A/CN.4/625), which had given rise to a number of comments during the plenary debate in 2010.

Paragraph 1 enunciates the essential requirement – which was emphasized by various members of the Commission – that an expulsion decision shall state the ground on which it is based. The English text of this paragraph was reworded with a view to aligning it to the French text, which remains unchanged.

A discussion took place in the Drafting Committee on the formulation of paragraph 2. While recognizing that national security and public order were common grounds for the expulsion of aliens, the general view in the Drafting Committee was that these were not the only valid grounds. Mention was made, in this context, of other grounds such as breaches of immigration law. At the same time, it was generally recognized that a State may only expel aliens on a ground that is provided for in its legislation. Thus, the Drafting Committee decided to redraft paragraph 2 so as to indicate clearly that only those grounds that are provided for by law may be relied upon by a State in order to expel an alien. A specific mention of national security and public order was nevertheless retained in the text, given the particular relevance of these grounds in

relation to the expulsion of aliens. The commentary would clarify that the term "law" in paragraph 2 is to be understood as a reference to the domestic law of the expelling State. Furthermore, it would provide some clarifications with regard to the notions of "national security" and "public order" as grounds for the expulsion of an alien, while also mentioning other grounds – including, *inter alia*, the violation of immigration law – which are provided for in domestic laws.

Paragraph 3 corresponds, with minor modifications, to the text initially proposed by the Special Rapporteur. It sets out general criteria for the assessment by the expelling State of the ground for expulsion, whatever that ground may be. In order to reflect the fact that the reference to "the current nature of the threat to which the facts give rise" is only relevant with regard to grounds such as national security and public order, the Drafting Committee decided to move that element to the end of the paragraph and to qualify it by the words "where relevant". Furthermore, a few linguistic changes were introduced to the English text, including the replacement of the verb "must" by "shall" in the first line, and the replacement of the words "determined" by "assessed" and "seriousness" by "gravity" in order to align the English text with the French.

Paragraph 4, the text of which is identical to that originally proposed by the Special Rapporteur, simply indicates that a State shall not expel an alien on a ground that is contrary to international law.

Mr. Chairman,

I shall now turn to the draft articles pertaining to **Part Two, entitled "Cases of prohibited expulsion"**. This Part consists of draft articles 6 to 13.

Before introducing draft articles 6 and 7, dealing, respectively, with the prohibition of the expulsion of refugees and stateless persons, I should mention that the Drafting Committee considered it more appropriate to address the definition of "refugee" and "stateless person" in the commentary, rather than in the text of the draft articles. As regards refugees, the commentary would underline the need to take into account, not only the 1951 Convention, but also subsequent developments including the adoption of regional instruments such as the Convention governing the Specific Aspects of Refugee Problems in Africa, adopted in Addis Ababa on 10 September 1969. In this regard, the commentary would indicate that the draft articles are without prejudice to any *lex specialis* such as the broader definition of "refugee" which is contained in Article 1 of the 1969 Convention.

Draft article 6 – Prohibition of the expulsion of refugees

Mr. Chairman,

Draft article 6 is now entitled "Prohibition of the expulsion of refugees". The Drafting Committee based its work on a revised text presented by the Special Rapporteur, pursuant to a request made to him by the Drafting Committee at the sixtieth session of the Commission, in 2008, in order to follow more closely the content and structure of the relevant provisions of the 1951 Convention. It should be recalled that the formulation

initially proposed by the Special Rapporteur had been criticized by several members of the Commission as it sought to combine Articles 32 and 33 of the 1951 Convention without addressing the principle of "*non-refoulement*". Draft article 6 as provisionally adopted by the Drafting Committee consists of three paragraphs.

Paragraph 1 reproduces faithfully the text of Article 32, paragraph 1, of the 1951 Convention, while replacing the words "the contracting States" by the words "a State". This paragraph, which applies only to those refugees who are lawfully present in the territory of the expelling State, limits the grounds for the expulsion of such refugees to national security or public order. In order to align the English text of this draft article with the 1951 Convention, the words "may not", contained in the text referred to the Drafting Committee, were replaced by the words "shall not". Furthermore, pursuant to a preference that had been expressed by several members of the Commission, the reference to "terrorism" as a separate ground for the expulsion of a refugee, which appeared in brackets in the text originally proposed by the Special Rapporteur, was deleted from the draft article. The same is true concerning a previous reference to an additional ground for the expulsion of a refugee, namely "if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State"; this phrase was deleted because it does not appear in Article 32, paragraph 1, of the 1951 Convention, but in its Article 33, the content of which is reproduced in paragraph 3 of draft article 6. It was proposed that the commentary indicate that the terms "refugees lawfully present" in the territory of the State mean refugees who have been granted refugee status in that State.

The Drafting Committee had a long discussion on paragraph 2 of draft article 6. This paragraph, which finds no equivalent in the 1951 Convention, was proposed by the Special Rapporteur on the basis of judicial pronouncements and doctrinal opinions. It purports to extend the applicability of paragraph 1 to any refugee who, albeit unlawfully present in the territory of the receiving State, has applied for recognition of refugee status, while such application is pending. A discussion took place among the members of the Drafting Committee on whether it was necessary to provide, as initially proposed by the Special Rapporteur, an exception to such a protection for the case where the manifest intent of the application for refugee status would be to thwart an expulsion order likely to be handed down against the person concerned. After an intense debate, the Drafting Committee concluded that this was not necessary as draft article 6 applies only to those individuals who meet the requirements of the definition of "refugee" according to the 1951 Convention (or, as the case may be, any other relevant instrument such as the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa). A majority of the members believed that, if a person is a genuine refugee, the motives of his or her application for refugee status should not matter, nor should the fact that an application for refugee status purports to avoid an expulsion order. The commentary would clarify this point, while also emphasizing that a person is to be regarded as a refugee if he or she meets the requirements set forth in the relevant legal instruments, irrespective of whether or not that person has been granted refugee status. In contrast, the commentary would indicate that a person who does not meet the requirements of the definition of "refugee" may be expelled for grounds other than those mentioned in paragraph 1, and that draft article 6 is without prejudice to the right of a State to expel an individual whose application for refugee status is manifestly abusive. It was also suggested that the

commentary indicate that paragraph 2 of draft article 6 may be regarded as an exception to the principle according to which the unlawful presence of an alien in the territory of a State may by itself justify the expulsion of that alien.

Paragraph 3 of draft article 6, dealing with *non-refoulement*, combines paragraphs 1 and 2 of Article 33 of the 1951 Convention. The text follows that of the 1951 Convention, except for the addition of the words "to a State" in the second line, in order to cover all cases of expulsion and not only the situation of "*refoulement*" *stricto sensu*. The commentary would indicate that paragraph 3 applies both to refugees lawfully present and to refugees unlawfully present in the territory of a State.

The Drafting Committee had a discussion on whether draft article 6 should have also covered other legal aspects of the expulsion of refugees, including by reproducing *in extenso* the content of Article 32 of the 1951 Convention. After careful consideration, the Committee came to the conclusion that it was preferable to cover such aspects through the "without prejudice" clause contained in draft article 8.

Draft article 7 – Prohibition of the expulsion of stateless persons

Mr. Chairman,

I shall now turn to draft article 7, which is entitled "Prohibition of the expulsion of stateless persons" and consists of a single paragraph.

A number of changes were introduced by the Drafting Committee to the original, in order to align it with the wording of Article 31, paragraph 1, of the 1954 Convention relating to the Status of Stateless Persons. Thus, in the English text, the verb "may" at the beginning of the paragraph was replaced by the verb "shall". Also, following a suggestion made by several members of the Commission, the term "lawfully", which appeared in brackets in the text proposed by the Special Rapporteur, was retained as it appears in the 1954 Convention. Furthermore, as in draft article 6 concerning refugees, the reference to "terrorism" as a possible ground for the expulsion of a stateless person, which appeared in brackets in the text proposed by the Special Rapporteur, was deleted in order to take into account a preference expressed by several members of the Commission. Moreover, as for the case of refugees, the Drafting Committee decided to delete the reference to an additional ground for the expulsion of a stateless person, which appeared in the text originally proposed by the Special Rapporteur and which was not mentioned in Article 31, paragraph 1, of the 1954 Convention, namely "if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State".

The Drafting Committee had a discussion on whether a provision on *non-refoulement*, similar to that retained in paragraph 3 of draft article 6 on refugees, should be included in draft article 7. The Committee finally decided to omit such a provision, with the understanding that stateless persons enjoy the protection recognized by draft articles 23 and 24, which apply to aliens in general.

Furthermore, as for draft article 6 dealing with refugees, the Drafting Committee decided that other aspects relating to the expulsion of stateless persons would be covered by the "without prejudice" clause contained in draft article 8.

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

Draft article 8, which is new, is entitled "Other rules specific to the expulsion of refugees and stateless persons". It contains a "without prejudice" clause preserving the application of other rules on the expulsion of refugees and stateless persons, which are provided for by law and which are not mentioned in draft articles 6 and 7, respectively. The term "law" in draft article 8 is intended to refer to the rules contained in the relevant international instruments dealing with refugees and stateless persons, as well as any internal rules of the expelling State to the extent that they are not incompatible with that State's obligations under international law.

This "without prejudice" clause concerns, in particular, the rules relating to the procedural requirements for the expulsion of a refugee or of a stateless person, which are stated, respectively, in Article 32, paragraph 2, of the 1951 Convention and in Article 31, paragraph 2, of the 1954 Convention. It also concerns the provisions of Article 32, paragraph 3, of the 1951 Convention and Article 31, paragraph 3, of the 1954 Convention, which require the expelling State to allow a refugee or, respectively, a stateless person subject to expulsion a reasonable period of time within which to seek legal admission into another country, and also reserve the right of the expelling State to apply, during that period, such internal measure as it may deem necessary.

Mr. Chairman,

Before I introduce draft article 9, I would like to address briefly the issue of the expulsion of nationals. It will be recalled that, in his third report (A/CN.4/581), the Special Rapporteur had proposed a draft article 4 entitled "Non-expulsion by a State of its own nationals", which the Commission referred to the Drafting Committee. That draft article gave rise to an intense debate in the Drafting Committee. While some members would have favoured the inclusion in the draft articles of a provision stating the prohibition of the expulsion by a State of its own nationals, other members questioned the need and even the appropriateness of such a provision, which would deal with a category of individuals who should not fall within the scope of the present topic. Moreover, divergent views were expressed regarding the content of the proposed draft article. While some members were of the opinion that no exceptions could be recognized to the principle prohibiting the expulsion of nationals, and were therefore opposed to the text initially proposed by the Special Rapporteur, which contemplated possible exceptions, some other members expressed the view that no absolute prohibition of the expulsion of nationals existed under current international law. After careful consideration, the Drafting Committee came to the conclusion that, since nationals would fall outside the scope of the topic as determined by draft article 1, it would not be appropriate to include in the draft articles a provision on the expulsion of nationals.

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

The Drafting Committee nevertheless discussed the advisability of including in the draft articles a provision dealing with cases of deprivation of nationality in connection with expulsion. The Committee was mindful of the Commission's approval of the conclusions of a working group established in 2008 in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion (see A/63/10, paragraph 171). One of these conclusions, which the Drafting Committee had been requested to take into consideration in its work, was that the commentary to the draft articles should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. However, the Drafting Committee considered that, since no prohibition of the expulsion of nationals was stated in the draft articles, it would not be appropriate to address therein the question of the circumvention of such a prohibition. More radically, a view was also expressed in the Committee against the inclusion of any provision that would touch upon the sensitive area of nationality, in which States maintained a wide margin of discretion.

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

Draft article 10 – Prohibition of collective expulsion

Draft article 10 is entitled "Prohibition of collective expulsion", as originally proposed. A discussion took place in the Drafting Committee on whether a definition of collective expulsion was necessary or appropriate in the context of the draft articles. The Drafting Committee eventually decided to include such a definition in paragraph 1 of draft article 10. However, contrary to the original proposal by the Special Rapporteur, the definition retained by the Drafting Committee addresses only the collective element and does not replicate the general elements of the definition of expulsion, which are provided for in draft article 2(*a*). Thus, collective expulsion is defined in paragraph 1 as the "expulsion of aliens as a group".

Paragraph 2, which states the prohibition of collective expulsion, corresponds to the first sentence of paragraph 1 of the text originally proposed by the Special Rapporteur. This prohibition is to be read in conjunction with paragraph 3 of the draft article.

Paragraph 3 is based on the formulation contained in the second sentence that appeared in paragraph 1 of the text initially proposed by the Special Rapporteur. It indicates that a State may expel concomitantly the members of a group of aliens,

provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group. The commentary would indicate that the criterion of the "reasonable and objective examination" is drawn from the case-law of the European Court of Human Rights.

Paragraph 4 contains a "without prejudice" clause referring to the case of armed conflict. You will recall that the original draft article on collective expulsion proposed by the Special Rapporteur and referred to the Drafting Committee contained a paragraph that allowed, under certain conditions, the collective expulsion of aliens in times of armed conflict. At a later stage, in order to respond to concerns expressed by several members of the Commission, the Special Rapporteur presented to the Drafting Committee a revised version of that paragraph, which aimed at providing further limitations on the right of a State to expel aliens collectively in the event of an armed conflict. During the discussions in the Drafting Committee, some members expressed the view that a possible exception, in times of armed conflict, to the prohibition of collective expulsion would only apply in respect of aliens who are nationals of a State engaged in an armed conflict with the State in which they are, and not to any alien who would be in the territory of a State engaged in an armed conflict. The view was also expressed that such aliens might be subject to measures of collective expulsion only if they were engaged as a group in activities which endanger the security of the State. According to a different view, current international law would not impose such limitations on the right of a State to expel aliens who are nationals of another State with which it is engaged in an armed conflict. Furthermore, the point was made that the issue of expulsion in times of armed conflict was a complex one, and that the Commission should not take the risk of elaborating a draft article that would not be entirely compatible with international humanitarian law. In the light of these difficulties, the Committee eventually opted for a "without prejudice" clause, which was formulated broadly so as to cover any rules of international law that may be applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Draft article 11 – Prohibition of disguised expulsion

Draft article 11 is entitled "Prohibition of disguised expulsion", as originally proposed. Although some members of the Commission had suggested, during the debate in 2010, alternative wording such as "constructive" or "*de facto*" expulsion in order to characterize the situations referred to in draft article 11, the Drafting Committee decided to retain the term "disguised expulsion" as proposed by the Special Rapporteur. It was felt that this terminology was appropriate as it adequately reflected the main purpose of the draft article, which is to indicate that a State shall not utilize disguised means or techniques in order to provoke the same result as that of an expulsion decision, namely the forcible departure of an alien from its territory. Furthermore, the point was made in the Drafting Committee that the term "constructive expulsion" might have conveyed an undesired positive connotation, and that it would have been difficult to find a satisfactory equivalent to that term in French.

Paragraph 1 of draft article 11, which states the prohibition of any form of disguised expulsion, corresponds to the text originally proposed by the Special Rapporteur in his sixth report (A/CN.4/625).

Paragraph 2 is also based on the text proposed by the Special Rapporteur. However, the Drafting Committee introduced some changes to that text, with a view to clarifying the definition of "disguised expulsion". It was felt, in particular, that there was a need to circumscribe more precisely the notion of "disguised expulsion" in order to avoid possible overlaps with the general definition of "expulsion" in draft article 2(*a*). After careful consideration, the Drafting Committee agreed on the inclusion of the word "indirectly" in the second line of paragraph 2, so as to capture the specificity of "disguised expulsion". This specificity lies in the fact that the expelling State, without adopting an expulsion decision, produces by its actions or omissions the same result, namely the forcible departure of an alien from its territory. In order to make it clearer that this provision refers only to situations in which the forcible departure is the intended result of actions or omissions of the State concerned, the Drafting Committee decided to replace, at the end of paragraph 2, the words "with a view to provoking the departure" by the more explicit formulation "with the intention of provoking the departure".

Some concerns were expressed in the Drafting Committee about the reference, in paragraph 2, to situations where the State supports or tolerates acts committed by private persons. Some members of the Committee considered that it would be problematic to regard such support or tolerance as possibly amounting to a disguised expulsion prohibited by international law. However, the majority of the members were of the view that a mention of such situations could be retained, while making it clear, through the insertion of word "including", that reference was made only to support or tolerance that could be regarded as "actions or omissions of the State … with the intention of provoking the departure of aliens from its territory". In other words, the element relating to the specific intent of the expelling State, which is enunciated at the end of the paragraph, refers also to the case of support or tolerance of acts committed by private persons. It was suggested that the commentary indicate that a high threshold should be applied in order to regard situations of "tolerance" by the State as disguised expulsion. That being said, the Drafting Committee was of the view that the scenario relating to "support" or "tolerance" could also encompass situations in which the acts supported or tolerated by the expelling State were committed by aliens acting on its territory. Therefore, contrary to the text originally proposed by the Special Rapporteur, in which only acts of the *citizens* of the expelling State were mentioned, the draft article provisionally adopted by the Drafting Committee refers, in more general terms, to "acts committed by its nationals or other persons". The commentary would indicate that the term "persons' is intended to cover both natural and legal persons.

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

Draft article 12, which is entitled "Prohibition of expulsion for purposes of confiscation of assets", corresponds to paragraph 2 of the originally proposed draft article on the protection of the property of aliens subject to expulsion. The Drafting Committee did not introduce any change to the wording of this provision. However, following a suggestion made by some members of the Commission in 2011, the Drafting Committee preferred to address the issue of confiscatory expulsions in a separate draft article, which it decided to place in Part Two as it deals with a specific case of prohibited expulsion.

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

Draft article 13 is now entitled "Prohibition of the resort to expulsion in order to circumvent an extradition procedure". It will be recalled that, in his sixth report (A/CN.4/625) presented to the Commission in 2010, the Special Rapporteur had proposed a draft article entitled "Prohibition of extradition disguised as expulsion". In an attempt to respond to the concerns raised by some members, who regarded the proposed draft article as being too broad, the Special Rapporteur presented to the Commission, at the same session, a revised draft article on "Expulsion in connection with extradition", which the Commission referred to the Drafting Committee in 2011.

The draft article as was referred to the Drafting Committee stated that the 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 might be carried out only where the conditions for expulsion were met in accordance with international law. A discussion took place in the Drafting Committee regarding the usefulness of such a proposition. In particular, several members considered that the proposed draft article failed to address the main issue at stake, namely the use of expulsion as a means to circumvent the conditions for extradition. It was therefore proposed that the draft article be recast so as to focus on the issue of circumvention. This proposal was received favorably in the Committee.

The precise formulation and content of draft article 13 gave rise to an intense debate in the Drafting Committee. Some members of the Committee were of the view that the enunciation of the prohibition of expulsion in order to circumvent extradition should have been complemented by an additional paragraph stating that no expulsion of a person whose extradition has been requested may take place either to the requesting State or to a third State with an interest in the extradition of the person to the requesting State, as long as the extradition process has not been completed, except for reasons of national security or public order. Other members were of the view that such a formulation would have been too absolute. In particular, the point was made by some members that reasons of national security or public order were not the only ones for which a State could be allowed to expel a person in respect of whom a request for extradition had been made; other reasons such as the breach of immigration law were mentioned in this context. According to a point of view, it would have been difficult to formulate a provision going beyond the general proposition that circumvention is more likely to occur in those situations in which an extradition process is ongoing. Also, following a proposal made in the Sixth Committee during the debate on the Commission's 2011 report, the possibility of addressing the issue through a "without prejudice" clause concerning the obligations of the States concerned in relation to extradition was alluded to during the discussions in the Drafting Committee.

Having regard to these difficulties, the Drafting Committee eventually decided to retain a general formulation, which indicates that a State shall not resort to expulsion in order to circumvent an ongoing extradition procedure. The commentary would provide some illustrations regarding the content of this prohibition and emphasize that it only applies as long as an extradition procedure is ongoing. As appropriate, reference would also be made in the commentary to relevant case-law.

Mr. Chairman,

This concludes the first part of my introduction of the report of the Drafting Committee on the draft articles on the expulsion of aliens.

* * *

Mr. Chairman,

In this second part of my introduction of the report of the Drafting Committee on the draft articles on the expulsion of aliens, I shall cover the draft articles pertaining to **Part Three, entitled "Protection of the rights of aliens subject to expulsion"**. These draft articles were provisionally adopted by the Drafting Committee at the Commission's sixty-second session, in 2010. They were referred to the Drafting Committee in their revised version contained in document A/CN.4/617.

Before I introduce these draft articles, I would like to draw your attention to a terminological point. Some discussion took place in the Drafting Committee concerning the phrase "a person/alien who has been or is being expelled", which appeared in several draft articles proposed by the Special Rapporteur. This formulation was considered ambiguous by some members of the Committee. It was observed, among other things, that it remained unclear at which point the alien would have to be regarded as having been expelled: once he had received notice of an expulsion decision, or once the expulsion decision had been implemented through the forcible departure of the alien from the territory of the expelling State? After careful consideration, the Drafting Committee opted for the expression "aliens [or alien] subject to expulsion", which was regarded as encompassing both expulsion as a formal act – *i.e.* the adoption of the expulsion decision as such – and expulsion viewed as a process which includes all steps that may be taken with a view to adopting and implementing an expulsion decision.

I shall now turn to **Chapter I of Part Three**, which is entitled **"General provisions"** and consists of draft articles 14 to 16.

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

Draft article 14, which is now entitled "Obligation to respect the human dignity and human rights of aliens subject to expulsion", is the result of the merging of the revised draft articles 8 and 9 proposed by the Special Rapporteur in document A/CN.4/617, which dealt, respectively, with the general obligation to respect the human rights of persons subject to expulsion and with the obligation to respect the dignity of those persons.

Paragraph 1 of draft article 14 states that all aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process. Some members of the Drafting Committee were of the view that human dignity should not have been referred to in a draft article, since it was not a human right entailing specific obligations for States, but rather the source of inspiration of human rights in general. Other members, including the Special Rapporteur, believed that it was important to state in a draft article the obligation to respect the human

dignity of persons subject to expulsion. It was observed, in particular, that in the course of the expulsion process aliens were often subjected to humiliating treatment which, without necessarily amounting to cruel, inhuman or degrading treatment, was offensive to their dignity as human beings.

The Drafting Committee eventually decided to address the question of respect for human dignity as an element of draft article 14. However, the general reference to the "dignity of the person", which was contained in the text proposed by the Special Rapporteur, was replaced by a more specific reference to "the inherent dignity of the human person", a phrase which was taken from Article 10 of the International Covenant on Civil and Political Rights, addressing the situation of persons deprived of their liberty. The wording retained by the Drafting Committee is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent to every human person, as opposed to a subjective notion of dignity, the determination of which might depend on the preferences or sensitivity of a particular person.

The text of paragraph 2 of draft article 14, which recalls that aliens subject to expulsion are entitled to respect for their human rights, largely corresponds to the text of the revised draft article 8 proposed by the Special Rapporteur. The words "in particular", which preceded the reference to the rights mentioned in the draft articles, were replaced by the word "including", which was considered to be more neutral as it avoids conveying the erroneous impression that the rights set out in the draft articles should be regarded as more important than the other human rights to which an alien subject to expulsion is also entitled.

Draft article 15 – Obligation not to discriminate

Mr. Chairman,

Draft article 15 is entitled "Obligation not to discriminate". The formulation of this provision is largely based on the text of a revised draft article 10 proposed by the Special Rapporteur.

Paragraph 1 states the principle of non-discrimination in relation to expulsion. The Drafting Committee slightly modified the beginning of this paragraph, which now reads "The State shall exercise its right to expel aliens without discrimination…", in order to bring it closer to the wording of draft article 3 on the "Right of expulsion". The content of the non-exhaustive list of prohibited discriminatory grounds has been the subject of discussions in the Committee. In the text that was referred to the Drafting Committee, the Special Rapporteur had proposed a list based on Article 2, paragraph 1, of the International Covenant on Civil and Political Rights. During the discussions, some members of the Committee suggested the inclusion of certain additional grounds such as sexual orientation or association with a minority. According to the view of other members, paragraph 1 of draft article 15 should have simply reproduced the non-exhaustive list of the Covenant, without mentioning any other specific grounds, even less when such grounds were still controversial. The point was also made that the addition of any ground to the Covenant's list might be interpreted as an implicit exclusion of other grounds not mentioned. The compromise solution eventually reached in the Drafting

Committee consisted of retaining the list of grounds contained in the Covenant, as proposed by the Special Rapporteur, with the only addition of the ground relating to the "ethnic" origin, which appeared to be particularly relevant in the context of expulsion, and while complementing that list with a general reference to "any other ground impermissible under international law". It was found that this solution had the advantage of capturing legal developments that would have gone beyond the Covenant, while also preserving the possibility of special legal regimes allowing for certain differentiations between aliens, such as the law of the European Union.

Some members of the Drafting Committee proposed that the commentary make an explicit reference to "sexual orientation" as a prohibited ground for discrimination and to the relevant case-law on that matter. According to the view of other members, the issue remained controversial and the prohibition of discriminations on that ground was not universally recognized.

Some members of the Drafting Committee underlined the existence of possible exceptions to the prohibition of discrimination based on nationality, in particular in the context of associations of States, such as the European Union, which are characterized by the freedom of movement enjoyed by their citizens. It was agreed that this position would be mentioned in the commentary.

The formulation of paragraph 2 of draft article 15, which indicates that the non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, was discussed at length in the Drafting Committee. Some concerns were raised with regard to the text originally proposed by the Special Rapporteur, in particular with regard to the reference to "international human rights law" which was regarded as imprecise and too doctrinal. Thus, the Committee decided to refer more simply to "the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles".

Draft article 16 – Vulnerable persons

Mr. Chairman,

Draft article 16 is now entitled "Vulnerable persons". Its text is largely based on the revised draft article that the Special Rapporteur had presented with a view to extending to other categories of vulnerable persons the special protection that was afforded to children in the draft article originally proposed. While the draft article provisionally adopted by the Drafting Committee follows, to a large extent, the text proposed by the Special Rapporteur, some modifications were introduced by the Drafting Committee to that text.

A discussion took place in the Drafting Committee on how the requirement that special protection shall be afforded to vulnerable persons should be phrased. Some members were of the view that the original formulation "shall be considered, treated and protected as such" lacked clarity. After careful consideration, the Drafting Committee agreed on the phrase "considered as such and treated and protected with due regard for their vulnerabilities". In spite of some doubts expressed on the adequacy of the word

"considered", the Drafting Committee decided to retain that word as it stresses the importance that the vulnerabilities faced by those persons be duly recognized by the expelling State as a basis for affording them the treatment and protection which are required precisely because of their respective vulnerabilities. The Drafting Committee also discussed the appropriateness of retaining the phrase "irrespective of their immigration status", which appeared in the text proposed by the Special Rapporteur. While the point was made that the immigration status might have some relevance in certain cases, it was also stated that such a phrase might have conveyed the wrong impression that only draft article 16 – as opposed to the other draft articles on the protection of the human rights of aliens subject to expulsion – applies also to aliens unlawfully present in the territory of the expelling State. Thus, after some hesitation, the Drafting Committee decided to delete the phrase "irrespective of their immigration status".

The scope of draft article 16 was also discussed in the Drafting Committee. Some members observed that there might be other categories of vulnerable persons who could be in need of special protection in the context of expulsion. Mention was made, in particular, of persons suffering from incurable diseases. Thus, in order to take that concern into account, the Drafting Committee decided to complement the list of vulnerable persons proposed by the Special Rapporteur by adding the words "and other vulnerable persons". The commentary would elaborate on this point by providing, as appropriate, examples of other categories of vulnerable persons who could enjoy the special protection afforded by draft article 16.

In dealing with the specific case of children, paragraph 2 of draft article 16 refers to the concept of "the best interests of the child" which appears in Article 3 of the 1989 Convention on the Rights of the Child. Some concerns were raised in the Drafting Committee about the formulation proposed by the Special Rapporteur. Some members observed that it was too strict, as the best interests of the child could not be the only criterion to be applied in matters of expulsion. Following some discussion, the Drafting Committee replaced the initial text by a formulation more closely based on Article 3, paragraph 1, of Convention on the Rights of the Child. Thus, paragraph 2 as reformulated by the Drafting Committee states the requirement that "in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration".

Mr. Chairman,

I shall now turn to **Chapter II of Part Three**, which is entitled **"Protection required in the expelling State"** and consists of draft articles 17 to 20.

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

Draft article 17, which is entitled "Obligation to protect the right to life of an alien subject to expulsion", corresponds, with minor linguistic changes, to paragraph 1 of the revised draft article 11 proposed by the Special Rapporteur.

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

Draft article 18 is entitled "Prohibition of torture or cruel, inhuman or degrading treatment or punishment". It is largely based on paragraph 2 of the revised draft article 11 proposed by the Special Rapporteur. However, some modifications were introduced to its text by the Drafting Committee.

I should first mention that the reference to "torture or to inhuman or degrading treatment" was replaced by a more complete reference to "torture or to cruel, inhuman or degrading treatment or punishment". Also, the Drafting Committee discussed the appropriateness of the words "in its territory or in a territory under its jurisdiction", which appeared in the text proposed by the Special Rapporteur. It was suggested by some members that reference be made, more broadly, to persons under the jurisdiction or control or the expelling State. This proposal met with the opposition of other members who were of the view that the notion of jurisdiction was broad enough to cover the situations to be addressed in this draft article. Since no agreement could be reached on that point, the Drafting Committee opted for omitting any reference, in the text of the draft article, to the notions of "territory", "jurisdiction" or "control", while noting that the element of territory was already covered under the definition of "expulsion" contained in draft article 2(*a*). It was felt, in particular, that the question of acts that would be committed outside the territory of the expelling State in relation to the expulsion of an alien could be better addressed, as necessary, in the commentary.

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

Draft article 19 is now entitled "Detention conditions of an alien subject to expulsion". While the initial proposal for this draft article was contained in the Special Rapporteur's sixth report (A/CN.4/625), the text referred to the Drafting Committee was a revised version presented by the Special Rapporteur to the Commission during the debate at the sixty-second session, in 2010.

The Drafting Committee considered that the reference, in the draft article proposed by the Special Rapporteur, to the obligation to respect the human rights of aliens detained pending expulsion could be omitted, both in the text and in the title, in order to avoid repeating the content of draft article 14 which deals, in general terms, with the obligation to respect the human dignity and human rights of aliens subject to expulsion at all stages of the expulsion process.

Furthermore, the Drafting Committee reversed the order of subparagraphs 1(*a*) and 1(*b*) as they appeared in the text proposed by the Special Rapporteur. It was deemed preferable to begin this provision by stating, in subparagraph 1(*a*), the general principle that the detention of an alien subject to expulsion shall not be punitive in nature. What has now become subparagraph 1(*b*) should be regarded as a consequence arising from that general principle. You will recall that, during the debate in plenary, some members of the Commission had expressed the view that the corresponding draft article B proposed by the Special Rapporteur was too rigid, especially with regard to the requirement that the detention of an alien pending expulsion should occur in a place other

than a facility in which persons sentenced to prison were detained. In an attempt to respond to these concerns, the Drafting Committee agreed on a reformulation of subparagraph 1(*b*) that avoids conveying the impression that the expelling State would be under an obligation to provide special facilities for the detention of aliens subject to expulsion. The Drafting Committee was of the view that what really matters in this regard is that an alien subject to expulsion is detained separately from persons sentenced to penalties involving deprivation of liberty, irrespective of whether the detention takes place in a separate facility or in different sections of a same facility. Moreover, the Drafting Committee decided to qualify the requirement set out in subparagraph 1(*b*) by inserting the proviso "save in exceptional circumstances", which appears in Article 10 (2)(*a*) of the International Covenant on Civil and Political Rights in relation to the right of accused persons to be segregated from persons convicted of a criminal offence and to be subject to separate treatment appropriate to their status as unconvicted persons. For the sake of clarity, the commentary would emphasize that subparagraph 1(*b*) refers only to detention with a view to ensuring the implementation of an expulsion decision and is without prejudice to the case of aliens who have been sentenced or are being prosecuted for a criminal offence, including those situations in which the expulsion of an alien might be ordered as an additional penalty or as an alternative to prison. As in the title of the draft article, and for the reasons that I have already explained, the general reference to respect for the human rights of an alien subject to expulsion was deleted from the text of subparagraph 1(*b*).

Paragraph 2 of draft article 19, which addresses the issue of the duration of the detention of an alien subject to expulsion, also comprises two subparagraphs.

The Drafting Committee retained the text of subparagraph 2(*a*) as proposed by the Special Rapporteur, with the only exception of the replacement, in the English text, of the words "may" and "must" by the word "shall" in the first two sentences of this subparagraph. A discussion took place in the Drafting Committee on whether the words "reasonably necessary" should be retained in the second sentence. Some members were of the view that the prohibition of a detention of an excessive duration in the third sentence was sufficient, without there being a need for introducing a subjective element of reasonableness. However, the majority of the members was in favor of retaining the words "reasonably necessary", as they would provide a judicial authority with an adequate standard to assess the necessity of the duration of the detention.

Subparagraph 2(*b*) states that the extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power. In spite of the doubts raised by some members of the Drafting Committee on the applicability of such a requirement in the context of the implementation of immigration law, the Drafting Committee decided to retain the subparagraph in the form proposed by the Special Rapporteur. It was noted that the requirement set forth therein was intended to prevent possible abuses by the administrative authorities with respect to the determination of the length of the detention of an alien subject to expulsion.

The text of subparagraph 3(*a*), stating the requirement and modalities of the review of the detention of an alien subject to expulsion, was slightly modified by the Drafting Committee in order to make it clear that the object of such a review is the

continuing detention of the alien in question, and not the initial decision on his or her detention. The phrase "periodically at given interval", which characterized the review in the text proposed by the Special Rapporteur, was considered redundant by the Drafting Committee and was thus replaced by the words "at regular intervals". While the point was made that paragraph 3(*a*) was to be regarded as a recommendation *de lege ferenda*, it was also suggested that its inclusion appeared to be justified in the light of the principles of contemporary human rights law, also taking into account the non-punitive nature of the detention of an alien pending his or her expulsion.

Subparagraph 3(*b*) gave rise to a discussion in the Drafting Committee. While some members supported the idea that the detention of an alien subject to expulsion shall not end when the expulsion decision cannot be carried out for a reason that is attributable to the alien concerned, other members were of the view that the detention of the alien shall end as soon as it appears that his or her expulsion has become impossible, for whatever reason that may be. While making the relationship between the rule and the exception more explicit, the formulation finally retained by the Drafting Committee follows the text proposed by the Special Rapporteur, with the insertion, however, of the proviso "subject to subparagraph 2(*a*)", which is intended to serve as a reminder of the prohibition of all detentions of excessive duration.

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

Draft article 20, entitled "Obligation to respect the right to family life", is largely based on the revised draft article presented by the Special Rapporteur on this issue. It will be recalled that the reference to private life, which appeared in the draft article originally proposed by the Special Rapporteur in his fifth report (A/CN.4/611), was omitted in the revised text that was subsequently referred to the Drafting Committee.

The text of paragraph 1 of draft article 20, stating the obligation of the expelling State to respect the right to family life of an alien subject to expulsion, corresponds, with minor linguistic changes, to the text originally proposed by the Special Rapporteur.

Paragraph 2 addresses the conditions under which limitations on the right to family life of an alien subject to expulsion are allowed. In this regard, the Drafting Committee was of the view that the verb "derogate from", which appeared in the text proposed by the Special Rapporteur, was not appropriate in the context of a limitation clause because that term has a specific legal meaning referring to derogations from human rights obligations that could be allowed, under certain conditions, in cases of public emergency (see, *e.g.* Article 4 of the International Covenant on Civil and Political Rights). Thus, the words "derogate from" were replaced by the words "interfere in the exercise of", a terminology which is in line with that of the International Covenant on Civil and Political Rights and of the European Convention of Human Rights, where the term "interference" is used in this context.

Mention is made in paragraph 2 of two cumulative requirements that need to be met in order to justify an interference with the exercise of the right to family life of an alien subject to expulsion. The first requirement is that such interference takes place only in cases "provided by law". It will be recalled that, following a suggestion made by some

members of the Commission during the debate in 2009, the revised version of the draft article proposed by the Special Rapporteur contained a reference to "international law", instead of "law". However, the Drafting Committee considered that what is actually meant in this provision is that an interference by the expelling State with the exercise of the alien's right to family life must find an appropriate basis in the domestic legislation of the expelling State. Therefore, the Drafting Committee reestablished the reference to "law" as it appeared in the Special Rapporteur's original text. The second requirement is that an interference with the exercise of the right to family life is only permitted on the basis of a fair balance between the interests of the State or those of the alien in question. In this regard, the Drafting Committee preferred the words "on the basis of a fair balance" to the initial formulation which referred to the need to "strike" a fair balance between the interests of the State and those of the person in question. The commentary would include a reference to the case-law of the European Court of Human Rights, in which the criterion of the "fair balance" has been applied in order to assess the lawfulness of an interference with the exercise of the right to family life, in the light of Article 8 of the European Convention on Human Rights.

Mr. Chairman,

I shall now introduce the draft articles pertaining to the **Chapter III** of Part Three, which is entitled **"Protection in relation to the State of destination"**. This Chapter consists of draft articles 21 to 24.

Draft article 21 – Departure to the State of destination

Draft article 21 is now entitled "Departure to the State of destination". The Drafting Committee was of the view that the term "return", which appeared in the original title, was not appropriate because the State of destination might well be a State in which the alien had never been before.

The substance of paragraph 1, as provisionally adopted by the Drafting Committee, corresponds to a large extent to the original proposal by the Special Rapporteur. You will recall, however, that during the debate in 2010 some members of the Commission suggested that paragraph 1 be recast to prevent its being construed as an encouragement to the exercise of undue pressure on the alien. It was noted, in particular, that the verb "encourage" lacked legal precision and could pave the way to abuse. On the basis of a new formulation subsequently presented by the Special Rapporteur, the Drafting Committee addressed these concerns by stating, in paragraph 1, that the expelling State shall take "appropriate measures" to "facilitate the voluntary departure" of an alien subject to expulsion.

With regard to paragraph 2 of draft article 21, the Drafting Committee retained the text originally proposed by the Special Rapporteur, except for the deletion of the specific reference to the rules of international law relating to air travel, as proposed by certain members of the Commission and by a number of States during the debate in the Sixth Committee, and for the replacement, in the English text, of the term "orderly transportation" by "safe transportation". While recognizing the particular relevance of air transportation in the implementation of an expulsion decision, as well as the existence of

an extensive body of international law relating to air travel, the Drafting Committee was of the view that a reference to that law in the commentary would suffice, also considering that other means of transportation were used for expulsion purposes. Furthermore, the commentary to the draft article would explain the scope and meaning of the phrase "safe transportation … in accordance with the rules of international law", which appears in paragraph 2, by emphasizing that it refers not only to the need to ensure, as the case may be, the safety of other passengers on an airplane, but also to the protection of the human rights of the alien being expelled as well as the avoidance of any excessive use of force.

In paragraph 3, the Drafting Committee introduced a few changes to the text proposed by the Special Rapporteur. In order to respond to a suggestion made by several States, the phrase "reasonable period of time" was retained instead of the phrase "appropriate notice". Furthermore, the Committee was of the view that the exception originally envisaged in this context, namely the situation where there was reason to believe that the alien in question would abscond during such a period, was too narrow and failed to reflect other possible factors to be considered by a State in determining the time period that should be given to the alien to prepare for his or her departure. Thus, the Drafting Committee opted for a simple formulation, which mentions the requirement that the decision concerning the time period must be taken having regard to all circumstances. The commentary would clarify that the risk that the alien in question could abscond is a factor that the expelling State may well take into consideration in this context. Finally, the Drafting Committee considered that the introductory phrase "in all cases", which appeared in the original version of paragraph 3, was unnecessary and possibly misleading; it therefore deleted that phrase, with the understanding that the commentary would make it clear that paragraph 3 covers both the cases of voluntary departure addressed in paragraph 1 and the cases of forcible implementation of an expulsion decision addressed in paragraph 2.

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

Draft article 22 is now entitled "State of destination of aliens subject to expulsion". The Drafting Committee introduced a number of changes to the original text of the draft article. Some of these changes are of a substantive nature and are intended to respond to concerns expressed and comments made by several members of the Commission during last year's debate. As you will recall, while some members supported the priority given in the original text to the State of nationality as the "natural" State of destination of an alien subject to expulsion, some other members considered that there was no reason why the possibility of expelling an alien to a State other than his or her State of nationality should be limited to those situations in which that State could not be identified. Furthermore, some members of the Commission were of the opinion that a greater role should be recognized to the alien's choice in determining his or her State of destination. At the same time, certain members observed that only the State of nationality had an obligation to receive a person expelled from another State. These divergent positions were reiterated in the Drafting Committee, where a prolonged discussion took place. The Committee eventually agreed, as a compromise solution, on a text that comprises two paragraphs.

The original paragraph 1 was recast so as to mention, in addition to the State of nationality, other potential States of destination. The State of nationality is still mentioned first, as it is undisputed that it has an obligation to receive the alien under international law. However, the Drafting Committee was of the view that other options could be envisaged, also taking into consideration, wherever feasible, the alien's preferences. Thus, paragraph 1 also mentions, as possible States of destination, any State (other than the State of nationality) that has the obligation to receive the alien under international law, and any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien concerned. This new formulation also incorporates the essence of the original paragraph 3 by retaining the principle that the expulsion of an alien to a State is subject to that State's consent to receive the alien, except where the State is required to do so under international law. The commentary would provide some indications regarding the meaning of the phrase "any State that has the obligation to receive the alien under international law". A reference would be made, in this context, to the position adopted by the Human Rights Committee in relation to Article 12(4) of the International Covenant on Civil and Political Rights, according to which "[n]o one shall be arbitrarily deprived of the right to enter his own country". According to the Human Rights Committee, the term "his own country" is broader than the "country of nationality" and "embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien" (*see* General Comment No. 27: Freedom of movement (Article 12), 18 October 1999, para. 20); this would be the case, according to the same Committee, of nationals of a country who have there been stripped of their nationality in violation of international law; of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them; and possibly also "other categories of long-term residents" (*ibid.*).

Paragraph 2 of draft article 22 addresses the situation where neither the State of nationality nor any other State that has an obligation to receive the alien under international law has been identified, and no other State is willing to receive the alien. It indicates that, in such a case, the alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State. The very last phrase ("the State from where he or she has entered the expelling State") should be understood as referring primarily to the State of embarkation, but is broad enough to cover also those situations in which the alien has entered the expelling State through means other than air transportation. The formulation and content of paragraph 2 was the subject of an intense debate in the Drafting Committee. According to a point of view, if no State of destination could be identified pursuant to paragraph 1, the expelling State should then allow the alien to remain in its territory as no other State could be compelled to receive him or her. While eventually agreeing on the text that is now being presented to the Commission, the Drafting Committee was not able to overcome the divergence of views among its members on whether or not certain States, such as the State that has issued a travel document or a permit of entry or stay, or the State of embarkation, would have an obligation to receive the alien under international law. While, according to some members, a State having issued a permit of entry or stay might well be under such an obligation, some other members considered that the issuance by a State of a permit of entry or stay in favour of an alien did not create for that State any obligation *vis-à-vis* other States, including the expelling State. In this connection,

reasons of national security or public order were mentioned as legitimate grounds that could be invoked by a State in order to refuse the return of an alien to whom a permit of entry or stay had been issued and who, in the meantime, was expelled from another State. Also, divergent views were expressed in the Drafting Committee with regard to the position of the State of embarkation. While it was noted that the expulsion of an alien to the State of embarkation was common practice and should thus be mentioned in the draft article, if only as a possibility, the view was also expressed that the State of embarkation had no legal obligation to receive the alien.

Finally, it should be recalled that paragraph 2 of the draft article originally proposed by the Special Rapporteur contained a reference to the situation where there is a risk of torture, cruel or other inhuman or degrading treatment in the State of nationality of the alien subject to expulsion. This reference has been omitted in the text provisionally adopted by the Drafting Committee. The Committee noted that the obligation not to expel an alien to a State where he or she would face such a risk applies with regard to any State of destination and is already stated in draft article 24.

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

Draft article 23 is now entitled "Obligation not to expel an alien to a State where his or her life or freedom would be threatened". The Drafting Committee opted for this new title in order to make it clear that this provision enunciates an obligation not to expel to certain States. The phrase "where his life or freedom would be threatened" is taken from Article 33 of the 1951 Convention relating to the Status of Refugees, which states the prohibition of *refoulement*, and replaces the original proposal of the Special Rapporteur which referred to a State "where his or her right to life or personal liberty is in danger of being violated".

In its paragraph 1, draft article 23 states the prohibition to expel a person to a State where his or her life or freedom would be threatened on any of the grounds that are mentioned in draft article 15, which deals with the obligation not to discriminate. Such grounds include those listed in Article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of "ethnic origin" and "any other ground impermissible under international law". The Drafting Committee was of the view that there was no reason why the list of discriminatory grounds in draft article 23 should be different from the list contained in draft article 15. The text referred to the Drafting Committee, which mentioned only the discriminatory grounds that are listed in Article 33 of the 1951 Refugee Convention, was regarded as too narrow in view of the fact that draft article 23 has a broader scope as it applies to aliens in general and to various types of situations.

As for draft article 15, the Drafting Committee had a lengthy discussion on whether sexual orientation should be also listed among the prohibited grounds of discrimination. Since divergent views were expressed on this point, the Drafting Committee adopted a compromise solution whereby sexual orientation would not be mentioned in the text of the draft article, with the understanding that the commentary to draft article 15, on the obligation not to discriminate, would address this issue and reflect

in a balanced manner the different positions that were expressed by members. The commentary to draft article 23 would also explain that the list of discriminatory grounds contained therein is identical to the list in draft article 15.

Paragraph 2 of draft article 23 addresses the situation in which the life of an alien subject to expulsion would be threatened with the death penalty in the State of destination. It should be recalled that, during the plenary debate in 2009 and 2010, some members of the Commission had suggested that the protection afforded in the original draft article be strengthened. It was observed, in particular, that the formulation proposed by the Special Rapporteur was too restrictive in that it stated an obligation not to expel only for those States that had abolished the death penalty. It was noted, in this regard, that in various States where the death penalty had not yet been abolished, that penalty was not applied. Furthermore, it was proposed that the protection be extended to cover also those situations in which, although the alien subject to expulsion is not under a death sentence in the State of destination, there is a risk that she or she will be sentenced to death in that State. These concerns were reiterated by some members in the Drafting Committee, where it was also suggested that the obligation set out in paragraph 2 could be made applicable to States in general, as a matter of progressive development.

In an attempt to respond to some of these concerns, the Drafting Committee modified the wording of paragraph 2 in order to render the obligation set forth therein applicable to "a State that does not apply" the death penalty. Also, the second part of the sentence was reformulated so as to cover both the case in which the death penalty has already been imposed in the State of destination, and the case in which there is a risk that it will be imposed.

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

The text the draft article as referred to the Drafting Committee contained a third paragraph stating that the protection afforded in paragraphs 1 and 2 was also applicable to the expulsion of stateless persons. During the plenary debate in 2010, some doubts were expressed regarding the need for such an additional paragraph. After some discussion, the Drafting Committee concluded that a third paragraph addressing the specific case of stateless persons was unnecessary, and that it was sufficient to specify in the commentary that draft article 23 also applies to stateless persons, who are in any event covered by the definition of an "alien" according to draft article 2(*b*). It was also felt that a specific mention of stateless persons in draft article 23 could have created the wrong impression that stateless persons were not covered by other draft articles.

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

Mr. Chairman,

I shall now turn to draft article 24, which is entitled "Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment". As for draft article 23, the Drafting Committee opted for a new title, which makes it clear that this provision sets out an obligation of non-expulsion to certain States.

Draft article 24 as provisionally adopted by the Drafting Committee consists of only one paragraph. While the formulation retained is largely based on paragraph 1 of a revised text proposed by the Special Rapporteur, the Drafting Committee introduced a number of modifications to that text. Some changes were made in order to align the wording of draft article 24 to that of Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Thus, the Committee replaced the reference to torture and inhuman or degrading treatment, which appeared in the text proposed by the Special Rapporteur, by a more complete reference to "torture or […] cruel, inhuman or degrading treatment or punishment". Also, the words "where there is a real risk that he or she would be subjected to" were replaced by the phrase "where there are substantial grounds to believe that he or she would be in danger of being subjected to". Furthermore, the words "to another country" were replaced by the words "to a State" and, in order to ensure consistency with other draft articles stating a prohibition, the words "may not" were replaced, in the English text, by "shall not" at the beginning of the article.

You will recall that the Special Rapporteur's original and revised texts of this draft article both contained a paragraph 2 dealing with situations in which the risk of torture or other cruel, inhuman or degrading treatment would emanate from persons or groups of persons acting in a private capacity. During the debate in 2009, some members of the Commission expressed concerns regarding the initial formulation of that second paragraph. Some of these concerns were reiterated during the debate on the revised text, in 2010. In particular, the view was expressed that the formulation of paragraph 2 remained too broad in spite of the addition by the Special Rapporteur of a caveat concerning the inability of the receiving State to obviate the risk of ill-treatment by providing appropriate protection.

Several members of the Drafting Committee were of the view that it was not necessary to address, in draft article 24, aspects relating to the scope of the prohibition of torture and other forms of ill-treatment, including cases where the risk of such treatment would emanate from persons acting in a private capacity. It was observed that the latter issue was a matter for interpretation by courts and tribunals. After careful consideration, the Drafting Committee decided to delete paragraph 2, with the understanding that the commentary would mention the main aspects of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law. These include, in particular, the factors that would need to be taken into consideration in order to assess the risk of torture or other forms of ill-treatment in the State of destination – which are

specifically addressed in Article 3, paragraph 2, of the Convention against Torture – as well as the situations in which such a risk could emanate from persons or groups of persons acting in a private capacity. On this last point, reference would be made to relevant case-law, including that of the European Court of Human Rights.

Mr. Chairman,

I shall now turn to the fourth and last Chapter of Part Three, namely **Chapter IV** entitled **"Protection in the transit State"**.

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

Chapter IV comprises only one draft article, namely draft article 25 which is now entitled "Protection in the transit State of the human rights of an alien subject to expulsion". The text of draft article 25 as provisionally adopted by the Drafting Committee is a reformulation of the draft article originally proposed by the Special Rapporteur, which aimed at extending to the transit State the protection of the human rights of aliens subject to expulsion. While several members of the Commission supported the inclusion of a draft article on the human rights obligations of the transit State, some members were of the view that the draft article should be reworded so as to avoid conveying the erroneous impression that the transit State would be required to comply with human rights rules that are binding only upon the expelling State. The same point was raised in the Drafting Committee. In order to address this concern, the Drafting Committee reformulated the draft article so as to refer specifically to the obligations of the transit State under international law. The commentary would make it clear that this phrase is intended to cover the obligations arising from a treaty to which the transit State is a party or from a rule of general international law.

Mr. Chairman,

This concludes the second part of my introduction of the report of the Drafting Committee on the draft articles on the expulsion of aliens.

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Mr. Chairman,

In this third part of my introduction of the report of the Drafting Committee on the draft articles on the expulsion of aliens, I shall present **Parts Four and Five** of the draft articles.

Part Four is now entitled **"Specific procedural rules"** and comprises draft articles 26 to 28.

Draft article 26 – Procedural rights of aliens subject to expulsion

Draft article 26 is now entitled "Procedural rights of aliens subject to expulsion". You will recall that the Special Rapporteur had originally proposed, in the first version of

draft article A1 and C1 contained in addendum 1 to his sixth report (A/CN.4/625/Add.1), to draw up a list of procedural rights applicable to the expulsion of aliens who are lawfully present in the territory of the expelling State, while leaving to the discretion of the expelling State whether or not to grant such procedural rights, or at least some of them, also to aliens unlawfully present. During the plenary debate in 2010, several members of the Commission expressed the view that some procedural rights should also be recognized to aliens unlawfully present in the territory of the expelling State. In an attempt to respond to these concerns, the Special Rapporteur presented to the Commission, at the same session, a revised version of draft article A1 providing for the applicability of certain procedural rights to aliens who, albeit unlawfully present, enjoy a special status in the expelling State or have been residing in that State for a certain period of time, e.g. six months. The Commission then referred draft article C1, together with the revised draft article A1, to the Drafting Committee.

The Drafting Committee considered thoroughly the question of the procedural rights of aliens subject to expulsion. A preliminary discussion took place on a terminological issue, namely whether the draft articles should refer to procedural rights or to procedural guarantees. It was noted by some members of the Drafting Committee that a distinction existed in some legal systems between procedural rights *stricto sensu* and other procedural guarantees. All things considered, the Committee decided to retain, in draft article 26, the term "procedural rights" in a generic sense.

Following an extensive discussion on the general approach to be followed with regard to the enunciation of procedural rights, the majority of the members of the Drafting Committee favored the inclusion, in paragraph 1 of the draft article, of a single list of procedural rights that apply – with the possible exception envisaged in paragraph 4 with regard to aliens who have been unlawfully present for less than six months – both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State. The procedural rights stated in paragraph 1 are the following: (*a*) the right to receive notice of the expulsion decision; (*b*) the right to challenge the expulsion decision; (*c*) the right to be heard by a competent authority; (*d*) the right of access to effective remedies to challenge the expulsion decision; (*e*) the right to be represented before the competent authority; and (*f*) the right to have the free assistance of an interpreter if the alien cannot understand or speak the language used by the competent authority.

As regards the various rights listed in paragraph 1, the Drafting Committee considered that the "right to be heard by a competent authority", stated in subparagraph 1(*c*), is essential for the exercise of the alien's right to challenge the expulsion decision, which is stated in subparagraph 1(*b*); this point should be emphasized in the commentary. Some discussions took place regarding the content and exact formulation of the right to be heard. It will be recalled that the English text of this subparagraph as was referred to the Drafting Committee mentioned a "right to a hearing". It was noted in the Drafting Committee that this wording could have been interpreted as implying a right to an oral hearing, which was not necessarily recognized by international law in the context of expulsion proceedings. A more neutral formulation ("right to be heard") was therefore retained by the Drafting Committee, thus aligning the English text to the original French, which refers in this context to a "*droit d'être entendu*". The commentary would indicate

that the "right to be heard" does not necessarily imply, under international law, a right to an oral hearing, as State practice is not uniform in this regard.

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

Subparagraph 1(*e*) now refers to the right to be represented before the competent authority. The Drafting Committee retained this general wording, instead of the term "the right to counsel" as originally proposed by the Special Rapporteur, as the Committee was of the view that, in the context of expulsion proceedings, the right to be represented does not entail, under international law, a right to be represented by a lawyer. Moreover, the formulation retained by the Committee is in line with that of Article 13 of the International Covenant on Civil and Political Rights.

In relation to subparagraph 1(*f*), several members of the Drafting Committee were of the view that the alien's right to have the free assistance of an interpreter, if he or she cannot understand or speak the language used by the competent authority, is an essential element of the right to be heard stated in subparagraph 1(*c*) and is also relevant in connection with the procedural rights stated in subparagraphs 1(*a*) and 1(*b*). The wording retained in subparagraph 1(*f*) corresponds to that used, in connection with criminal proceedings, in Article 14, paragraph 1(*f*) of the International Covenant on Civil and Political Rights. The Committee was of the view that, in the case envisaged in subparagraph (*f*), the provision of interpretation should be free so as to ensure the effective exercise by the alien concerned of the other procedural rights to which he or she is entitled. In this context, the alien should indicate to the competent authorities the language or languages that he or she understands. According to the Drafting Committee, the alien's right to the free assistance of an interpreter as stated in subparagraph 1(*f*) should not be construed as entailing a right to receive the written translation of potentially voluminous documents. All these aspects would be alluded to in the commentary.

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

Paragraph 2 of draft article 26 indicates that the list of procedural rights contained in paragraph 1 is without prejudice to other procedural rights or guarantees provided by law. The commentary would indicate that this "without prejudice" clause refers mainly to procedural rights recognized under the domestic law of the expelling State, but also covers any other procedural right that may be recognized under applicable rules of international law.

Paragraph 3 of draft article 26 addresses the question of consular assistance. In the draft article originally proposed by the Special Rapporteur, a "right to consular protection" appeared within the list of procedural rights to be enjoyed by an alien subject to expulsion. However, the Drafting Committee was of the view that it was preferable to address this issue in a separate paragraph so as to spell out more precisely its legal implications while also recognizing the function of consular assistance as a guarantee for the respect of other rights.

The precise formulation of paragraph 3 was the subject of discussions in the Drafting Committee. Some members were of the view that the original reference to a "right to consular protection" was inappropriate because such a right was not recognized under international law. The point was made that, although a right to consular protection or assistance was recognized under certain domestic legal systems, the State of nationality of an alien subject to expulsion remained free, under international law, to decide on the provision of any protection or assistance to that alien. At the same time, it was noted by some members that, under Article 36 of the 1963 Vienna Convention on Consular Relations, an alien subject to expulsion enjoyed certain rights in relation to communication with and access to consular officers of his or her State of nationality. With these considerations in mind, the Drafting Committee decided to rephrase paragraph 3 so as to refer both to the alien's right "to seek consular assistance" and to the obligation of the expelling State not to impede the exercise of that right and, as the case may be, the provision of such assistance. The term "consular assistance" in paragraph 3 is to be understood as a reference to any assistance that the State of nationality of the alien subject to expulsion may wish to provide to him or her in conformity with the rules of international law on consular relations. The commentary would refer, in this context, to the relevant provisions of the 1963 Convention, notably Article 5 on the definition of consular functions and Article 36 on communication and contact with nationals of the sending State. Specific reference would be made in the commentary to the case of aliens being detained, which is addressed in subparagraphs 1(*b*) and 1(*c*) of Article 36 of the 1963 Convention. The commentary would also indicate that the draft article does not address the question of any right to consular assistance that an alien subject to expulsion might invoke *vis-à-vis* his or State of nationality in accordance with the internal law of that State.

Paragraph 4 of draft article 26 addresses the special case of aliens unlawfully present in the territory of the expelling State and whose presence in that territory has been for less than six months. It is formulated as a "without prejudice" clause which preserves, in such a case, the application of any legislation of the expelling State concerning the expulsion of those aliens. Some members of the Drafting Committee questioned the advisability of setting a time limit in this context, and the view was also expressed that a minimum core of procedural rights should apply to all aliens without any exception. It was further suggested that the alien's level of integration at various levels (social, economic, professional or family) could also be taken into account in considering the extent to which the expelling State is required to grant certain procedural rights, during the expulsion process, to aliens unlawfully present in its territory. The Drafting Committee considered, however, that a criterion referring to the level of integration of the alien concerned would have been difficult to implement, and therefore opted for an objective time-limit relating to the duration of the alien's presence in the territory of the

expelling State. In this connection, a period of six months was deemed reasonable, also considering that such a time limit was found, in connection with procedural rules governing the expulsion process, in the legislation of some States.

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

Draft article 27 is entitled "Suspensive effect of an appeal against an expulsion decision". It will be recalled that the Special Rapporteur had originally refrained from proposing a draft article dealing with this matter, as he considered that State practice had not sufficiently converged to warrant the formulation, if only as progressive development, of such a provision. During the plenary debate in 2011, some members of the Commission shared the view of the Special Rapporteur that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. According to other members, the Commission should formulate a draft article, if only as part of progressive development, contemplating the suspensive effect of an appeal against an expulsion decision, provided that there was no conflict with compelling reasons of national security. In this connection, some members pointed to the fact that an appeal against an expulsion decision which lacked suspensive effect would not be effective, since an alien who had to leave the country was likely to encounter economic or other obstacles to his or her return to the expelling State. According to another view, the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of being subjected to torture or ill-treatment in the State of destination.

In an attempt to respond to some of these concerns, the Special Rapporteur presented to the Drafting Committee, as an exercise of progressive development, a new draft article dealing with the suspensive effect of an appeal against an expulsion decision. In that draft article, a distinction was made between the situation of aliens lawfully present in the territory of the expelling State and the situation of aliens unlawfully present. According to that proposal, the suspensive effect would have been recognized to an appeal lodged by an alien lawfully present in the territory of the expelling State, and possibly also by an alien unlawfully present who met some additional requirements such as a minimum duration of his or her presence in the territory of the expelling State or a minimum degree of social integration in that State.

After a prolonged discussion, the Committee opted for a draft article recognizing the suspensive effect only to an appeal lodged by an alien lawfully present in the territory of the expelling State. The commentary would indicate that, even in such cases, the suspensive effect is recognized in the draft articles as a matter of progressive development, as State practice is neither consistent nor uniform in that respect. The commentary would also mention that some members of the Commission would have preferred that the draft article recognize the same guarantee to certain categories of aliens who, albeit unlawfully present in the territory of the expelling State, had been there for a certain period of time or met other conditions to be defined.

Draft article 28 – Procedures for individual recourse

Draft article 28, which is entitled "Procedures for individual recourse", is new. It will be recalled that, during the 2011 debate on the draft article on diplomatic protection proposed by the Special Rapporteur, some members suggested that a reference be made to the individual complaint mechanisms available to aliens subject to expulsion under treaties on the protection of human rights, either in a separate draft article or in a "without prejudice" clause to be inserted into the draft article on diplomatic protection. In response to that suggestion, the Special Rapporteur presented to the Drafting Committee the text of a "without prejudice" clause that could have become an additional paragraph of the draft article on diplomatic protection. During the discussions in the Drafting Committee, two options emerged: either to have a single draft article covering, in two separate paragraphs, diplomatic protection and individual recourse to a competent international body; or to have two separate draft articles dealing, respectively, with each of these two questions. After careful consideration, the Drafting Committee opted for the second option and decided to devote a specific draft article to the question of individual recourse to a competent international body, and to place that draft article at the end of Part Four, dealing with procedural rules. Furthermore, the Drafting Committee deemed it preferable to draft the article, not as a "without prejudice" clause, but as a reminder that an alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

Mr. Chairman,

I shall now turn to **Part Five** of the draft articles, which is entitled **"Legal consequences of expulsion"** and comprises draft articles 29 to 32.

Draft article 29 – Readmission to the expelling State

Draft article 29 is now entitled "Readmission to the expelling State". It should be recalled that the draft article initially proposed by the Special Rapporteur, which was entitled "Right of return to the expelling State", gave rise to some concerns during the debate in the Commission in 2011. In particular, several members were of the view that the draft article was too broad as it recognized a right of return in the event of unlawful expulsion, irrespective of the lawfulness or unlawfulness of the alien's presence in the territory of the expelling State, and of the reason for which the expulsion was to be regarded as unlawful.

In the Drafting Committee, the appropriateness of stating in the draft articles a right to readmission in cases of unlawful expulsion was debated. Some members were of the view that the recognition of such a right would go too far and would also be questionable from the perspective of *lex ferenda*. According to another point of view, the rules on the responsibility of States for internationally wrongful acts, which are referred to in the "without prejudice" clause contained in draft article 31, and in particular the rules governing reparation, including, as the case may be, *restitutio in integrum*, already provided an adequate solution to this issue; therefore, there was no need for addressing the issue from the perspective of an individual right of the expelled alien. However, the

Drafting Committee eventually decided to devote a separate draft article to the question of readmission in case of unlawful expulsion.

The Drafting Committee worked on the basis of a revised text presented by the Special Rapporteur in response to concerns raised during the plenary debate on the original draft article. In this regard, the Special Rapporteur proposed that the scope of the draft article be narrowed down so as to limit the right of return in case of unlawful expulsion to those aliens who were lawfully present in the territory of the expelling State. Also, in view of the fact that some States had questioned the existence of any automatic right of return to the expelling State, the Special Rapporteur proposed to the Drafting Committee that the term "readmission" be used instead of "return". These proposals were well received by the members of the Committee. In contrast, the Committee was of the view that it would have been difficult to limit the recognition of a right to readmission to those cases where the expulsion decision had violated a substantive legal rule as opposed to a procedural one, since procedural and substantive rules are often interconnected and difficult to distinguish from one another.

Following a lengthy discussion, the Drafting Committee retained a formulation which it considered to be sufficiently cautious in that it covers only aliens lawfully present in the territory of the expelling State and recognizes a right to readmission to the expelling State only if it is established by a competent authority that the expulsion was unlawful, and save where the return of the alien constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State. That being said, the Committee formulated this draft article as an exercise of progressive development rather than an attempt to codify existing rules.

The term "unlawful expulsion", contained in the draft article, covers any expulsion in violation of a rule of international law. However, that term should also be understood in the light of the principle stated in Article 13 of the International Covenant on Civil and Political Rights, and reiterated in draft article 4, according to which an alien may be expelled only in pursuance of a decision reached in accordance with law, *i.e.*, primarily, the internal law of the expelling State. The commentary would address this point.

The recognition of a right to readmission according to draft article 29 is limited to those situations in which the unlawful character of the expulsion has been the subject of a binding determination, either by the authorities of the expelling State or by an international body, such as a court or a tribunal, which is competent to do so. In this regard, the phrase "on the basis of the annulment of the expulsion decision", which appeared in the text of the draft article as referred to the Drafting Committee, was considered to be too restrictive. The Committee found that it would not have been appropriate to subordinate the alien's right to be readmitted to an annulment of the expulsion decision that could normally be effected only by an authority of the expelling State. Furthermore, the formulation retained by the Drafting Committee covers also those situations where the unlawful expulsion did not occur through the adoption of a formal decision – a scenario which is addressed in draft article 11 on the prohibition of disguised expulsion. The commentary would clarify these various aspects.

Draft article 29 should not be read as conferring on determinations made by international bodies effects other than those that are provided for in the instruments by which such bodies were established. It only recognizes, as a matter of progressive development, an independent right of the alien to be readmitted as a result of the determination of the unlawful character of his or her expulsion by a competent authority, be it internal or international.

As it is clearly indicated in the draft article, the expelling State would retain the right to deny readmission where the return of the alien would constitute a threat to national security or public order, and also in those situations where the alien would no longer fulfil the conditions for admission under the law of the expelling State. The Drafting Committee was of the view that recognizing those exceptions was necessary in order to preserve an appropriate balance between the rights of the alien unlawfully expelled and the expelling State's discretion to control the entry of any alien into its territory in accordance with its current immigration law. The last phrase also takes into account the fact that, in certain cases, the circumstances on the basis of which a permit of entry or stay was originally granted to the alien might no longer exist. However, the discretion of the expelling State as regards the assessment of the condition for readmission is to be exercised in good faith; for instance, the expelling State should not be allowed to rely on internal legislation that would regard the mere existence of an expulsion decision as a bar to readmission. This limitation is clearly reflected in paragraph 2 of the draft article which states that "in no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted". The commentary would emphasize this point and refer to Article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, on which the text of paragraph 2 of draft article 29 is based.

Finally, the commentary would indicate that draft article 29 is without prejudice to the legal regime of the responsibility of States for internationally wrongful acts, referred to in draft article 31, including the rules governing the various forms of reparation.

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

Draft article 30 is now entitled "Protection of the property of an alien subject to expulsion". As previously mentioned, the content of paragraph 1 of the draft article originally proposed by the Special Rapporteur, stating the prohibition of expulsion for confiscatory purposes, was moved to Part Two of the draft articles and has now become draft article 12.

Therefore, draft article 30 as provisionally adopted by the Drafting Committee consists of only paragraph 2 of the draft article initially proposed. The Drafting Committee considered a proposal, made during the plenary debate in 2011, which aimed at replacing the term "property" by "property rights". However, after careful consideration, the Committee deemed it preferable to retain the generic reference to "property" and avoid the notion of "property rights", which was still controversial under human rights law. The text provisionally adopted by the Drafting Committee is largely based on that originally proposed by the Special Rapporteur. However, the Drafting

Committee considered it appropriate to strengthen the formulation of this general obligation by replacing the words "shall protect" by the words "shall take appropriate measures to protect". Also, the Drafting Committee decided to replace the phrase "to the extent possible", which appeared in brackets in the text referred to it, by the phrase "in accordance with the law". It was found that the former phrase, which had been criticized by various members of the Commission and by several States, could have had the effect of unduly weakening the protection, while the phrase "in accordance with the law" allowed to address in a satisfactory manner the cases in which the expelling State could have a legitimate interest in limiting the disposal by the alien of his or her property; such cases may include, for instance, restrictions that could be placed on the disposal of illegally acquired property, including assets that would be the product of criminal or other unlawful activities. The commentary would address this point and also provide some clarifications on the reference to the need that the free disposal of the property should be allowed *even from abroad*. Furthermore, upon the recommendation of the Special Rapporteur, the Drafting Committee decided to delete the last phrase of the original text, which referred to an obligation to return the property to the alien expelled on the request of the latter or of his or her heirs or beneficiaries. This was done in response to concerns expressed by some members of the Commission during the plenary debate in 2011 and reiterated in the Drafting Committee. It had been noted, in particular, that the enunciation of an obligation to return the alien's property would be incompatible with the right of the expelling State to expropriate the property of an alien if the conditions set forth by international law – in particular, the payment of adequate compensation – were met; moreover, the point was made that forms of reparation other than return could also be relevant in the event of loss or destruction of an alien's property.

For the time being, draft article 30 appears in Part Five of the draft articles, entitled "Legal consequences of expulsion". However, the Commission could consider whether the current placement of draft article 30 should be retained or whether the draft article could be moved to Chapter II of Part Three, after draft article 20.

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

Draft article 31 is now entitled "Responsibility of States in cases of unlawful expulsion". The inclusion in the draft articles of a provision referring to the legal regime of responsibility of States for internationally wrongful acts, which was proposed by the Special Rapporteur in addendum 2 to his sixth report (A/CN.4/625/Add.2), found broad support in the Commission. The formulation originally proposed by the Special Rapporteur referred, in this context, to the "legal consequences" of an unlawful expulsion. However, the Special Rapporteur presented to the Drafting Committee a revised version of the draft article, which referred directly to the engagement of the international responsibility of the expelling State as a result of an unlawful expulsion. The Drafting Committee worked on the basis of the revised text presented by the Special Rapporteur. The text of the draft article as provisionally adopted by the Drafting Committee indicates that the international responsibility of the expelling State is engaged in the event of an expulsion in violation of international obligations. As stated in the draft article, such obligations may exist under the present draft articles or any other rule of international law. The commentary to draft article 31 would address the obligation of reparation as a

consequence of the international responsibility incurred by the expelling State in the event of an unlawful expulsion.

Draft article 32 – Diplomatic protection

Finally, draft article 32 is entitled "Diplomatic protection", as originally proposed. It refers to the right of the State of nationality of an alien subject to expulsion to exercise diplomatic protection in respect of that alien. Apart from minor linguistic changes, the text retained by the Drafting Committee corresponds to that originally proposed by the Special Rapporteur. This draft article is to be understood as a generic reference to the legal institution of diplomatic protection, which is well established in international law. The general conditions and modalities of the exercise of diplomatic protection in accordance with international law are applicable to the protection exercised by the State of nationality in respect of an alien subject to expulsion. The commentary would clarify that point, while also referring to the articles on diplomatic protection adopted by the Commission in 2006, the text of which appears as an annex to General Assembly resolution 62/67 of 6 December 2007, and to relevant case-law.

Mr. Chairman,

This concludes my introduction of the first report of the Drafting Committee for the sixty-fourth session of the Commission. It is my sincere hope that the Plenary will be in a position to adopt the draft articles presented.

Thank you.