

Check against delivery

Expulsion of aliens

Statement of the Chairman of the Drafting Committee

6 June 2014

Mr. Chairman,

It is my pleasure, today, to introduce the third report of the Drafting Committee for the sixty-sixth session of the Commission. This report, which deals with the topic “Expulsion of aliens”, is contained in document A/CN.4/L.832. The Committee had before it the entire set of draft articles on the expulsion of aliens, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his ninth report, the suggestions made during the plenary debate and the comments received from Governments and from the European Union.

The Drafting Committee held 11 meetings from 14 to 27 May on this topic. I am pleased to report that the Committee was able to complete the second reading of a set of 31 draft articles on the expulsion of aliens, and decided to submit its report to the Plenary with the recommendation that the draft articles be adopted by the Commission on second reading.

Mr. Chairman,

This is an important day for the International Law Commission. The subject of the expulsion of aliens has been the subject of the Commission's attention for nearly 60 years and is on its agenda since 2004. I would recall that the question of the treatment of aliens was already among the 14 topics selected in 1949 for consideration by the Commission. At the time, Hersch Lauterpacht noted in the survey of International Law in Relation to the Work of Codification of the International Law Commission, that "in connexion with the codification of the law relating to the treatment of aliens it will probably be necessary – and feasible – to formulate the law relating to the expulsion of aliens and stateless persons. [...] It will still be necessary to define, in connexion with a general codification of the law on the subject, the details and conditions of its applications." Today, the Commission is about to realize this goal. The draft articles on the expulsion of aliens are based on the premise that every State has the right to expel aliens. However, this right is subject to general limitations, as well as specific substantive and procedural requirements. These limitations were already clarified in the arbitral practice before the Second World War. In addition, contemporary human rights law has had a significant impact on the law relating to the expulsion of aliens.

The Commission was particularly fortunate to have had at its disposal the services of an extremely well qualified and experienced Special Rapporteur, Mr. Maurice Kamto, who has put much of his energy and intellectual talent into conceptualizing and developing the international regime of the expulsion of aliens. On behalf of the Drafting Committee, I wish to express my deep appreciation for his full cooperation and the efficient manner in which he approached the second reading of the draft articles. His mastery of the subject greatly facilitated the task of the Drafting Committee. I also wish to express my appreciation to the members of the Committee for their cooperation and their constructive approach, as well as the good spirit in which they discussed the articles. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

The draft articles on the expulsion of aliens, as adopted by the Drafting Committee, are structured into five parts.

Part One – General Provisions

The Drafting Committee retained the title for Part One as “General Provisions”. It is constituted of five draft articles.

Draft article 1

Mr. Chairman,

Draft article 1 pertains to the scope of the draft articles. While paragraph 1 defines the scope in general terms, paragraph 2 excludes certain categories of individuals who would otherwise be covered by virtue of paragraph 1.

Paragraph 1 was adopted as formulated on first reading, with the exception that the words “lawfully or unlawfully” were deleted for the sake of clarity, and in order to address the concerns expressed by some governments. This is nonetheless reflected explicitly in the commentary. This amendment does not imply any modification as to the scope *ratione personae* of the draft articles,

which apply to aliens irrespectively of their lawful or unlawful presence on the territory of the State. The Drafting Committee considered that the deletion of the words “lawfully or unlawfully” would avoid giving the misleading impression that each provision of the draft articles applies generally to both categories of aliens, when some provisions distinguish between these two categories, particularly with respect to the rights to which they are entitled. In addition, in the French version of paragraph 1 only, the terms “aliens” is now used in singular (“d’un étranger”) to avoid creating a discrepancy with draft article 10, which prohibits collective expulsion. Paragraph 2 of draft article 1 was adopted without any changes. The title of draft article 1 remains “Scope”.

Draft article 2

Draft article 2 constitutes the traditional provision on “Use of terms”. It provides the definitions, for the purpose of the draft articles, of the two central concepts of the topic, namely “expulsion”, which is defined in sub-paragraph (a), and “alien”, the meaning of which is indicated in sub-paragraph (b). The discussion turned on the question of whether to add an element of intentionality in the definition, as suggested by some governments and on the coherence of such a requirement with the articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001. The question of the discrepancy between the general definition of expulsion stated in draft article 2 and other draft articles, particularly draft article 11, also arose. In order to respond to those concerns, the definition of “expulsion” set out in article 2, sub-paragraph (a), was refined with a view to maintaining the coherence within the entire set of articles. The words “other than a refugee” were deleted from the second part of the sub-paragraph (a), consequent to the adoption of draft article 6 formulated as a “without prejudice” clause. I will come back to this point more specifically when addressing the new text of draft article 6.

The definition of “alien” contained in paragraph (b) was adopted without any changes, and the title of draft article 2 remains “Use of terms”.

Draft article 3

Draft article 3, entitled “Right of expulsion”, is the core provision of the draft articles that balance the uncontested right of the State to expel an alien from its territory with the limitations to this right under international law. Some concerns were raised as to the formulation of the second part of the sentence adopted on first reading, which seemed to imply that the entire set of draft articles reflected applicable rules of international law.

The first sentence of draft article 3, which recognizes the right of the State to expel an alien from its territory was left unchanged. The Drafting Committee reformulated the second sentence of draft article 3 along the lines of a “without prejudice” clause. The proposal made during the debate in the plenary as to the insertion, in a second paragraph to draft article 3, of a derogation clause on the model of certain instruments of protection of human rights was not pursued. It was considered that the addition of this clause was no longer needed, since the new formulation of draft article 3 was sufficient to achieve the same result. The title of draft article 3 remains “Right of expulsion”.

Draft article 4

Draft article 4 confirms that the exercise of the right to expel by the State is conditioned by the adoption of a decision reached in accordance with law. The Drafting Committee acknowledged the fundamental importance of this provision and the overwhelming support it enjoyed from the governments who expressed their views on the topic. Therefore, draft article 4 was left unchanged. Its title remains “Requirement for conformity with law”.

Draft article 5

Draft article 5 deals with the different aspects of the question of the grounds for expulsion. Paragraph 1, which indicates that any expulsion decision shall state the ground on which it is based, was left unchanged. It was decided to shorten paragraph 2, which recalls the obligation of the State to expel an alien only on a ground that is provided for by law, in order not to mention explicitly the grounds of national security and public order. Although these grounds are the only ones provided for by international instruments, it was felt that they referred to exceptional circumstances. The Drafting Committee therefore considered more appropriate not to put too much emphasis on these circumstances in the text of the draft article itself, and to rather refer to these specific grounds in the commentary. A similar concern was expressed during the discussion of paragraph 3, which relates to the assessment of the ground for expulsion. Like paragraph 2, this provision was refined in order to avoid putting too much emphasis on the exceptional situations of threats to national security or public order. Paragraph 4 was amended to reflect that a State shall not expel an alien on a ground that is contrary to “its obligations under international law”, rather than simply “international law”. The Drafting Committee considered that this expression would give a clearer indication to States than the more general “international law”. In addition, the new formulation has the merit of harmonizing the language of draft article 5 with the formulation of draft article 25. The title of draft article 5 remains unchanged.

Part Two

Cases of prohibited expulsion

The Drafting Committee retained the title for Part Two as “Cases of prohibited

expulsion”. It is constituted of six draft articles.

Draft article 6

Draft article 6 deals with the expulsion of refugees, which is subject to restrictive conditions by virtue of the relevant rules of international law. It has been suggested by some governments, as well as in the plenary debate, that all references to refugees should be deleted, since the international law regime relating to the refugees was extremely complex, and that the draft articles might not always be consistent with that regime. The Drafting Committee considered that refugees were an important category of aliens, which should therefore be part of the draft articles. However, in order to address the possible discrepancies between the draft articles and the international law and practice on refugees on one hand, and to emphasize the special protection against expulsion they enjoy under international law, on the other hand, it was decided to adopt a new draft article 6 composed of two parts. The first part of the new article states, generally, that the draft articles are “without prejudice to the rules of international law relating to refugees, and to any more favourable rules or practice on refugee protection.” It is to be noted that the commentary will refer in more details to the rules and practice existing at the universal, regional and sub-regional levels, which are in some cases more favourable than those set out in the present draft articles. In view of its importance for refugee protection, the Drafting Committee considered important to refer to the practice in the text of draft article 6. The commentary will clarify the meaning of the most favourable practice, which is constituted by national legislation or declarations in the application of the existing rules.

Further, the second part of draft article 6 is composed of two sub-paragraphs, which emphasize specific rules on the international law of refugees bearing a particular importance for the topic. The language contained in the former draft article 6, paragraph 1, is reproduced under sub-paragraph (a), and the provision that was formerly draft article 6, paragraph 3, is now under sub-paragraph (b).

The text of sub-paragraph (b) has been refined to reflect exactly the language of the Convention of 1951 related to the status of refugees. Draft article 6, paragraph 2, pertaining to the question of refugees unlawfully present in the territory of the State who have applied for recognition of refugee status has been deleted, the Drafting Committee considering it more appropriate to address in the commentary the subtleties of this question which is still in the domain of *lex ferenda*.

In light of the substantial change made to article 6, a new title has been considered more appropriate. It now reads: “Rules relating to the expulsion of refugees”.

Draft article 7

The Drafting Committee has followed the reasoning in draft article 6 in examining draft article 7, which relates to the question of stateless persons. It has been decided to draft the first part of the article as a “without prejudice” clause, in order to avoid possible discrepancies between the present draft articles and the existing regime on stateless persons. The second part of draft article 7 sheds light to the specific rule prohibiting the expulsion of a stateless person lawfully in the territory of the State save on grounds of national security or public order. Accordingly, the new title of draft article 7 is “Rules relating to the expulsion of stateless persons”.

Former draft article 8

The former draft article 8 adopted in first reading was a “without prejudice” clause that was designed to ensure the application of other rules concerning the expulsion of refugees and stateless persons provided for by law but not

mentioned in draft articles 6 and 7. This provision became redundant in view of the amendments of draft articles 6 and 7, which have been redrafted as “without prejudice” clauses relating to those two categories of aliens. It has therefore been deleted.

Draft article 8 [9]

Draft article 8 addresses the specific situation in which a State might deprive a national of his or her nationality, and thus make the national an alien, for the sole purpose of expulsion. The text of this article has been adopted without any changes. It has been considered more elegant to delete the word “sole” from its title, which now reads: “Deprivation of nationality for the purpose of expulsion”.

Draft article 9 [10]

Draft article 9 addresses the specific question of the prohibition of collective expulsion. Paragraph 1 of draft article 9 contains a definition of collective expulsion for the purpose of this draft article. The original draft referred erroneously to the draft articles as a whole. A comma has also been added before “as a group” in the English version to harmonize the language used with the case law of the European Court of Human Rights relating to Protocol No. 4 to the European Convention on Human Rights.

Paragraph 2 sets out the prohibition of the collective expulsion of aliens. The text adopted on first reading referred expressly to the prohibition of the collective expulsion of migrant workers and members of their families, which is embodied in several instruments on protection of human rights, in particular the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Drafting Committee has deemed preferable

not to mention this category of aliens and to delete the express reference to it from the text of paragraph 2. The new text sets out more directly the principle of the prohibition of collective expulsion. It is also more in line with the text of the various regional instruments on the matter. This amendment does not mean, in any way, that the specific prohibition of the collective expulsion of migrant workers and members of their families has been excluded from the scope of the draft article. In order to avoid any misunderstanding, this aspect will be developed at length in the commentary.

Paragraph 3 specifies the conditions on the basis of which the members of a group of aliens may be expelled concomitantly, without such measure being regarded as a collective expulsion within the meaning of the draft articles. The original text adopted on first reading indicated a criterion of reasonable and objective examination of the particular case of each member of the group. The Drafting Committee has considered that this criterion could introduce a possible discrepancy with the other draft articles dealing with the review of the decision of expulsion by national authorities. For this reason, it has decided to remove the criterion of reasonable and objective examination and to refer more generally to an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

Finally, paragraph 4, which contains a “without prejudice” clause referring to situations of armed conflicts, has been left unchanged. The title of the draft article has not been modified either.

Draft article 10 [11]

Draft article 10 relates to the prohibition of disguised expulsion. It is intended to indicate that a State does not have the right to utilize disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of a formal expulsion decision. This article involves cases where the disguised expulsion is done by the State itself, as well as cases where it tolerates

acts by national or other persons with the same objective. Paragraph 1 sets out the principle of the prohibition. It has been left unchanged. The definition of disguised expulsion contained in paragraph 2 has been refined with a view to presenting more clearly the two elements characterizing it, namely that the alien is compelled to leave the territory as the intentional result of an action or omission attributable to the State. The definition also sheds light on the specific case where the expulsion is the result of unlawful acts committed by the nationals of the State or other persons. In addition, it has been stressed explicitly that this prohibition covers only actions and omissions with the purpose of provoking the departure of an alien other than in accordance with law. This addition ensures the coherence between draft article 11 and draft articles 4 and 5. The title of draft article 10 remains “Prohibition of disguised expulsion”.

Draft article 11 [12]

Draft article 11, entitled “Prohibition of expulsion for the purposes of confiscation of assets”, sets out the prohibition of confiscatory expulsion, that is, expulsions with the aim of unlawfully depriving an alien of his or her assets. It enjoys the overwhelming support of Governments and its title and text have been left unchanged.

Draft article 12 [13]

Only minor edits were made to the title and to the text of draft article 13, which prohibits in general terms the resort to expulsion in order to circumvent an ongoing extradition procedure. The word “ongoing” was added to the title, in order to make it correspond more exactly to the content of the article, and the words “of an alien” were added after the word “expulsion” in the text of the article. In addition, it has been suggested that it would certainly be useful to refer to the work of the Commission on the Responsibility of International Organizations in the commentary in order to define the term “circumvent”

contained therein.

Part Three

Protection of the rights of aliens subject to expulsion

Part Three of the draft articles concerns the “Protection of the rights of aliens subject to expulsion”. Its title remains unchanged. It is composed of four chapters.

Chapter I

General provisions

Chapter I contains the “General Provisions”. It is composed of three draft articles.

Draft article 13 [14]

Draft article 13 sets out the obligation of States to respect the human dignity and human rights of aliens subject to expulsion. It has been adopted without any changes made to its title or text.

Draft article 14 [15]

Draft article 14 concerns the obligation not to discriminate in the context of the expulsion of aliens. Some Governments have expressed concern regarding the

very general prohibition that was set out in paragraph 1 of draft article 15 as adopted on first reading.

The case law of international courts and tribunals on which this article is based does actually establish that the expelling State is not prohibited to make certain distinctions, but that it has the obligation to respect the rights of the alien subject to expulsion without discrimination of any kind. The State is entitled to set out different rules for different categories of people on rational grounds. To avoid any misunderstanding, the Drafting Committee decided to reformulate draft article 14 in a single paragraph, which encapsulates more directly the rule that the expelling State shall respect the rights of the alien subject to expulsion without discrimination. A new title has also been adopted. It should read: “Prohibition of discrimination”.

Draft article 15 [16]

Draft article 15 sets out the particular requirements concerning the expulsion of vulnerable persons such as children, older persons, persons with disabilities and pregnant women. The first paragraph is general in scope. It sets out the principle and provides a non-exhaustive list of vulnerable persons. Draft article 15, paragraph 2, deals with the specific case of children. This draft article has been adopted without any changes. Its title remains: “Vulnerable persons”.

Chapter II

Protection required in the expelling State

Chapter II deals with the “Protection required in the expelling State”. It is composed of five articles.

Draft article 16 [17]

Draft article 16 recalls the obligation of the expelling State to protect the right to life of an alien subject to expulsion. It has been adopted without any changes to its text or its title.

Draft article 17 [18]

Draft article 17, which recalls the general prohibition, in the context of expulsion, of torture or cruel, inhuman or degrading treatment or punishment, has also not been amended. Its title remains “Prohibition of torture or cruel, inhuman or degrading treatment or punishment”.

Draft article 18 [20]

Draft article 18 establishes the obligation of the expelling State to respect the right to family life of an alien subject to expulsion. There was no particular issue with paragraph 1, which sets out the need to respect the family life of an alien subject to expulsion. The language of paragraph 2, however, did not enjoy the same support from Governments. This paragraph recognized that the right to family life may be subject to limitations. The Drafting Committee acknowledged that the text adopted in 2001 was probably too close to the text of a regional instrument, namely the European Convention on Human Rights. Therefore, it considered more appropriate to redraft it by using the terms of article 17 of the International Covenant on Civil and Political Rights, which are also used in the other regional instruments on protection of human rights. Draft article 18

therefore indicates that the expelling State shall not interfere arbitrarily or unlawfully with the exercise of the right to family life. The two paragraphs have also been merged in a single paragraph. The title remains unchanged. It reads “Obligation to respect the right to family life”.

Draft article 19

Draft article 19 sets out the specific rules relating to the detention of an alien for the purpose of expulsion. Draft article 19, paragraph 1, sub-paragraph (a) has been refined in order to clarify that the principle of the non-punitive nature of the detention of an alien subject to expulsion is limited to detention for the purpose of expulsion and does not extend to detention for other purposes, in the context of criminal procedures in particular. In addition, the Drafting Committee has considered that sub-paragraph (a) needed to be completed in order to set out the prohibition of the arbitrary detention of an alien for the purpose of expulsion. This amendment is consistent, notably, with the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case.

Subparagraph (b) provides that, save in exceptional circumstances, an alien who is detained in the course of an expulsion procedure must be held separately from persons sentenced to penalties involving deprivation of liberty. The general formulation adopted on first reading has given rise to concerns by States that may have understood it as a general obligation of separated detention of all aliens that were eventually to be expelled. Although this is explained in the commentary, the Drafting Committee has considered appropriate to amend the language of subparagraph (b) in order to state explicitly that this obligation of States focuses exclusively on persons detained for the sole purpose of expulsion.

Draft article 19, paragraph 2, sub-paragraph (a) is general in scope and sets out the principle that the detention of an alien with a view to his or her expulsion is subject to time limits. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out and cannot be of excessive

duration. The formulation chosen in 2012 was considered redundant by the Drafting Committee. Consequently, the general wording stating that “the duration of the detention shall not be unrestricted”, which introduced the specific rule, has been deleted.

Draft article 19, paragraph 2, sub-paragraph (b) has been amended with a view to focusing on the principle, explained in the commentary, that the decision to extend the duration of the detention of an alien for the purpose of expulsion can be taken only by a court, or by another authority subject to judicial review. This reformulation addresses the concerns expressed by several States where such a decision can be taken by an administrative authority, and confirms the principle recognized in international jurisprudence that, in such case, the decision of extension has to be reviewable.

Paragraph 3 (a) sets out the requirement of regular review of the detention of an alien for the purpose of expulsion on the basis of specific criteria established by law. It has been adopted without any changes. Sub-paragraph (b) has been the object of several comments by Governments, which seemed to consider that it was so broadly drafted that it implied the obligation to release an alien in all situations when the expulsion could not be carried out. This was deemed particularly problematic in cases where issues of national security or public order could arise. For this reason, sub-paragraph (b) was amended in order to establish clearly that its scope was limited to detention for the purpose of expulsion and did not cover detention for any other reason.

Accordingly, the title of draft article 19 was amended. It now reads: “Detention of an alien for the purpose of expulsion”.

Draft article 20 [30]

Draft article 20 concerns the protection of the property of an alien subject to expulsion and establishes two obligations for the expelling State. The first relates

to the adoption of measures to protect the property of the alien in question, while the second concerns the free disposal by an alien of his or her property. The text and title of draft article 20 have been adopted without any modifications. However, the Drafting Committee has considered more appropriate to move this draft article, originally draft article 30, at the end of Chapter II of Part Three which concerns the protection required in the expelling State.

Chapter III

Protection in relation to the State of destination

The title of Chapter III is “Protection in relation to the State of destination”. It is composed of four draft articles.

Draft article 21

Draft article 21 concerns the general protection that an expelling State must accord to an alien subject to expulsion in relation to his or her departure to a State of destination. The draft article covers the possibility of both voluntary departure and forcible implementation of the expulsion decision. Paragraph 1 provides that the expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion. Paragraph 2 concerns cases of forcible implementation of an expulsion decision. Paragraph 3 requires the expelling State to give the alien a reasonable period of time to prepare for his or her departure. Draft article 21 was adopted without changes. Its title remains “Departure to the State of destination”.

Draft article 22

Draft article 22 concerns the determination of the State of destination of aliens

subject to expulsion. Paragraph 1 identifies the State of destination as the State of nationality of the alien subject to expulsion or any other State that has the obligation to receive the alien under international law, or any other State willing to receive the alien at the request of the expelling State or of the alien expelled. Paragraph 2 addresses the situation where it has not been possible to identify the State of nationality or another State where the alien could be expelled under paragraph 1. Draft article 22 has been adopted without any changes. Its title reads “State of destination of aliens subject to expulsion”.

Draft article 23

Draft article 23, as adopted on first reading, dealt with the question of the protection of the life or freedom of an alien subject to expulsion in relation to the situation in the State of destination. The prohibition set out in paragraph 1 has been the source of concerns by Governments, since it was extending the scope of the Convention relating to the Status of Refugees of 1951 to situations where the freedom of the alien was threatened. The Drafting Committee has considered more appropriate not to engage in such a development of international law and to delete from paragraph 1, and from the title of draft article 23, the reference to “freedom”.

Paragraph 2 concerns the specific prohibition to expel an alien to a State of destination where his or her life would be threatened by the imposition or execution of the death penalty, unless an assurance has previously been obtained that the death penalty will not be imposed or, if already imposed, will not be carried out. It covers both States that never had, or have abolished, the death penalty, and States that do not apply it anymore. The language of paragraph 2 has been refined in order to make it correspond to the standard set in the case law which inspired it. The new wording indicates that the expelling State which does not have the death penalty shall not expel an alien to a State where he or she has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death.

The title of draft article 23, as amended, reads as follows “Obligation not to expel an alien to a State where his or her life would be threatened”.

Draft article 24

Draft article 24 requires the expelling State not to expel an alien to a State where there are substantial grounds for believing that he or she may be subjected to torture or to cruel, inhuman and degrading treatment. Concerns have been expressed as to the extension of the prohibition contained in article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which refers exclusively to torture and not to cruel, inhuman or degrading treatment. In view of the concurring views on that matter of universal bodies, such as the Human Rights Committee or the Committee on the Elimination of Racial Discrimination, as well as judicial bodies, such as the European Court of Human Rights and the Inter-American Court of Human Rights, the Drafting Committee has considered preferable not to amend this draft article, with the understanding that the restrictive approach of the 1984 Convention and of its treaty organ, the Committee Against Torture, will be properly reflected in the Commentary. The title of draft article 24 remains “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”.

Chapter IV **Protection in a transit State**

Chapter IV, which is constituted of a single draft article, concerns the protection of the alien subject to expulsion in a transit State. Its title remains “Protection in a transit State”.

Draft article 25

Draft article 25 sets out the obligation of the States through which an alien expelled might transit to protect the human rights of this alien in conformity with its obligation under international law. This draft article's text remains unchanged, save a minor edit. Its title is "Protection in a transit State of the human rights of an alien subject to expulsion".

Part Four

Specific procedural rules

Part four states the specific procedural rules applicable in the context of the expulsion of an alien. The title of part four, which is constituted of three draft articles, is "Specific procedural rules".

Draft article 26

Draft article 26 sets out the procedural rights of aliens subject to expulsion. Paragraph 1 sets out a list of procedural rights from which any alien subject to expulsion must benefit, irrespective of whether that person is lawfully or unlawfully present in the territory of the expelling State. Concern has been expressed as to the absence of exception to one of these rights, namely the right to challenge the expulsion decision. Indeed, article 13 of the 1966 Covenant on Civil and Political Rights provides for an exception to the right to submit the reasons against his expulsion and to have his case reviewed when compelling reasons of national security otherwise require. In order to be consistent with the Covenant, the Drafting Committee has included a similar limitation to the right to challenge the expulsion decision under sub-paragraph (b). The other sub-paragraphs of paragraph 1 remain unchanged.

Under general international law the expelling State must respect the procedural rights set forth in draft article 26, paragraph 1. Paragraph 2 specifies that the

procedural rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law. This paragraph has not been amended.

Draft article 26, paragraph 3, deals with consular assistance, the purpose of which is to safeguard respect for the rights of an alien subject to expulsion. This paragraph refers to the alien's right to seek consular assistance, which is not synonymous with a right to obtain that assistance.

Paragraph 4, as adopted on first reading, took the form of a "without prejudice" clause which sought to preserve the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in the territory of the expelling State for less than six months. This rule was an exercise of progressive development of international law, the six-month threshold in particular. It has been suggested that such a threshold could appear arbitrary and that this rule could face difficulties of implementation in situations when the precise duration of the stay of the alien unlawfully present on the territory of the State was not clearly established. For this reason, the Drafting Committee considered appropriate to replace the six-month threshold by the more flexible indication of "a brief duration".

The title of draft article 26 remains "Procedural rights of aliens subject to expulsion".

Draft article 27

Draft article 27 recognizes the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State. This provision, which constitutes progressive development of international law, has given rise to many comments from governments in disagreement with its broad scope. The Drafting Committee has considered that the suspensive effect shall not indeed apply to all appeals lodged against an expulsion decision, but only to situations where the absence of such an effect could entail serious irreversible harm for the alien subject to expulsion who is lawfully present in the territory of the expelling State. This position is in line with the case-law of the European Court of Human Rights. For this reason, draft article 27 has been amended in order for the suspensive effect to apply exclusively when there is a real risk of serious irreversible harm. The title of draft article 27 remains

“suspensive effect of an appeal against an expulsion decision.

Draft article 28

The purpose of draft article 28 is to make clear that the aliens subject to expulsion may, in some cases, be entitled to individual recourse to a competent international body. The text of this draft article has been adopted without changes. Its title has been modified in order not to give the misleading impression that this article concerns domestic procedures. It now reads as follows: “International procedures for individual recourse”.

Part Five

Legal consequences of expulsion

Part five deals with the legal consequences of expulsion. It is formed of three draft articles.

Draft article 29

Draft article 29 recognizes, in paragraph 1, as an exercise in progressive development and when certain conditions are met, that an alien who has had to leave the territory of a State owing to an unlawful expulsion has the right to re-enter the territory of the expelling State. This right depends upon three conditions: (1) it applies only to aliens whose presence in the territory of the State was lawful; (2) the return of the alien shall not constitute a threat to national security or public order and (3) the alien shall fulfil the conditions for admission under the law of the expelling State. Paragraph 2 indicates that in no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted. Draft article 29 has been adopted without changes. Its title has not

been amended either.

Draft article 30

Draft article 30 sets out the principle that an expulsion in violation of a rule of international law entails the international responsibility of the expelling State for an internationally wrongful act. The language of draft article 30 has been refined in order to refer to the obligations of the expelling State “set forth” in the draft articles, rather than “under” the present draft articles. This change has been considered appropriate, since some provisions of the draft articles constitute a progressive development of international law. The title of draft article 30 remains: “Responsibility of States in cases of unlawful expulsion”.

Draft article 31

Draft article 31 refers to the institution of diplomatic protection, for which the legal regime is well established in international law. It is undisputed that the State of nationality of an alien subject to expulsion can exercise diplomatic protection on behalf of its national, subject to the conditions specified by the rules of international law. The text and title of draft article 31 remains unchanged.

Mr. Chairman,

This concludes my introduction of the third report of the Drafting Committee this year. It is my sincere hope that the Plenary will be in a position to adopt the draft articles on the expulsion of aliens, on second reading, as presented.

Thank you.

