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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FIFTY-NINTH SESSION**

Rapporteur: Mr. Ernest PETRIČ

CHAPTER VI

EXPULSION OF ALIENS

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A. Introduction

1. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, inter alia, the topic of “Expulsion of aliens” for possible inclusion in the Commission’s long-term programme of work,¹ which was subsequently done at the fifty-second session (2000).² A brief syllabus describing the possible overall structure of and approach to the topic was annexed to that year’s report of the Commission.³ In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the topic’s inclusion in the long-term programme of work.

2. At its fifty-sixth session, the Commission decided, at its 2830th meeting, held on 6 August 2004, to include the topic “Expulsion of aliens” in its current programme of work, and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.⁴ The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

3. At its fifty-seventh session, the Commission considered, at its 2849th to 2852nd meetings,⁵ the preliminary report of the Special Rapporteur (A/CN.4/554).

4. At its fifty-eighth session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/573) and a study prepared by the Secretariat (A/CN.4/565). At that session, the Commission decided to consider the second report at its next session, in 2007.⁶

¹ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10)*, para. 554.

² *Ibid.*, *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 729.

³ *Ibid.*, annex.

⁴ *Ibid.*, *Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 364.

⁵ *Ibid.*, *Sixtieth Session, Supplement No. 10 (A/60/10)*, paras. 242-274.

⁶ *Ibid.*, *Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 252.

B. Consideration of the topic at the present session

5. At the present session, the Commission had before it the second and third reports of the Special Rapporteur (A/CN.4/573 and A/CN.4/581), which it considered at its 2923rd to 2926th meetings, from 23 to 29 May 2007, and at its ... to ... meetings, from ... to ... July 2007, respectively. At its 2926th meeting, held on 29 May 2007, the Commission decided to refer to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur at that meeting.⁷

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1. Introduction by the Special Rapporteur of his second [and third] report[s]

6. The Special Rapporteur recalled that the Commission had endorsed most of the Special Rapporteur's choices and, broadly speaking, the draft workplan contained in annex I to the preliminary report. The States that had spoken at the 2005 session of the Sixth Committee of the General Assembly had expressed support for the general approach proposed by the Special Rapporteur, emphasizing the interest, urgency and complexity of the topic.

7. The topic indisputably lent itself to codification, given the existence of a body of customary rules, numerous treaties, long-standing doctrine and well established, albeit relatively recent, international and regional jurisprudence. The study of the topic by the Commission was all the more urgent in light of the increasing tendency among States to carry out expulsions without observing fundamental human rights norms, notably in the context of efforts to combat terrorism and in the face of the rising phenomena of illegal immigration and refugee flows.

8. The second report, which embarked on a study of the general rules on expulsion of aliens, addressed the scope of the topic and the definition of its constituent elements.

9. There had appeared to be a consensus, both in the Commission and in the Sixth Committee, that the topic should cover persons residing in the territory of a State of which they did not have nationality, with a distinction being made between persons in a regular situation and

⁷ See *intra*, notes 11 and 12.

those in an irregular situation, including those who had been residing for a long time in the expelling State. Refugees, asylum-seekers, stateless persons and migrant workers should also be included. On the other hand, some members and delegations had expressed doubt as to whether the topic should include denial of admission with regard to illegal immigrants, the situation of persons who had changed nationality following a change in the status of the territory where they were resident in the context of decolonization, and the situation of nationals of a State in situation of armed conflict. In the opinion of the Special Rapporteur, denial of admission and the situation of aliens entitled to privileges and immunities under international law should be excluded from the topic. According to draft article 1,⁸ the topic should include aliens with regular or irregular status, refugees, asylum-seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of the expelling State who had lost their nationality or been deprived of it. Expulsion of nationals, which, in principle, was prohibited, would be addressed in the third report.

10. With regard to the definition of the terms used, which was dealt with in draft article 2,⁹ the Special Rapporteur proposed that the concept of “alien” should be defined in opposition to that

⁸ “Article 1: Scope

- (1) The present draft articles shall apply to any person who is present in a State of which he or she is not a national (*ressortissant*).
- (2) They shall apply, in particular, to aliens who are present in the host country, lawfully or with irregular status, to refugees, asylum-seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it.”

⁹ “Article 2: Definitions

For the purposes of the draft articles:

- (1) The expulsion of an alien means the act or conduct by which an expelling State compels a *ressortissant* of another State to leave its territory.
- (2) (a) An alien means a *ressortissant* of a State other than the territorial or expelling State;
- (b) Expulsion means an act or conduct by which the expelling State compels an alien to leave its territory;

of “*ressortissant*”, rather than that of “national”. Despite the variable senses in which the term “*ressortissant*” was used, it could be assigned a broader meaning than that of “national” in order also to cover persons subject to the authority of a State as the result of a particular legal connection, such as refugees, asylum-seekers, stateless persons or persons affiliated with territories under a mandate or protectorate. If necessary, draft article 2, paragraph 2 (d), could be reformulated to make nationality the main legal bond in this context.¹⁰

11. In the preliminary report, the term “expulsion” denoted a unilateral act by which a State compelled an alien to leave its territory. Nevertheless, taking into account the comments made by certain members as well as recent international case law, the Special Rapporteur had come to the conclusion that “expulsion” also covered cases where a State, by its conduct, compelled an individual to leave its territory.

12. Since expulsion involved leaving the territory of a State by crossing a frontier, draft article 2 also proposed a definition of the terms “frontier” and “territory”.

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- (c) Frontier means the zone at the limits of the territory of an expelling State in which the alien no longer enjoys resident status and beyond which the national expulsion procedure is completed;
 - (d) *Ressortissant* means any person who, by any legal bond including nationality, comes under [the jurisdiction] [the personal jurisdiction] of a State;
 - (e) Territory means the domain in which the State exercises all the powers deriving from its sovereignty.”

¹⁰ The Special Rapporteur proposed the following alternative formulation: “Any person who has the nationality of a State or who, by any other legal bond, comes under [the personal jurisdiction] [the jurisdiction] of a State.”

2. Summary of the debate

(a) General comments and methodology

13. The Special Rapporteur was commended on the quality and depth of his second [and third] report[s]. Great appreciation was also expressed for the analytical study prepared by the Secretariat, which constituted a valuable tool for the Commission in addressing the topic.

14. Several members emphasized the importance, urgency and complexity of the topic, taking into account, in particular, the upsurge in the phenomenon of migration, including irregular migration, and the challenges posed by the fight against terrorism.

15. The view was expressed that expulsion of aliens was a topic more suited to political negotiation than to codification by an expert body. However, several members were of the opinion that the topic lent itself to codification, and it was asserted that codification could take the form of draft articles with a view to the adoption of an international convention.

16. Some members were of the view that all the existing rules in different areas, including treaty rules, should be examined in an effort to develop a general regime that would nevertheless preserve the special rules established by certain specific regimes. Others considered that it was not advisable to attempt to elaborate general rules on the issue and that the Commission should instead focus on defining the rules applicable to the various categories of aliens.

17. Several members expressed support for the general approach taken by the Special Rapporteur, emphasizing in particular the need to reconcile the right of a State to expel aliens with the relevant rules of international law, including those relating to the protection of human rights and to the minimum standards for the treatment of aliens. It was also asserted that the Commission should focus on the rights and obligations of States, and not only on the relationship between the expelling State and the expelled individual.

18. It was observed that the issue of expulsion of aliens was mainly governed by national laws, with States having an indisputable right to expel, subject to respect for the relevant rules of international law. Special attention must be given to national jurisprudence, which contributed to the development of certain criteria designed to prevent the arbitrary use of the right to expel.

(b) Scope of the topic

19. Several members emphasized the need clearly to define the scope of the topic, which was not limited to the *ratione personae* aspect. The debate was concerned with removal measures and with the situations and persons to be covered. Some members suggested simplifying draft article 1, paragraph 1, as proposed by the Special Rapporteur, by stating that the draft articles applied to the expulsion of aliens. A proposal was made to delete draft article 1, since draft article 2, which dealt with definitions, might suffice to delineate the parameters of the topic.

(i) Removal measures and situations covered by the topic

20. While several members supported excluding non-admission of aliens from the scope of the topic, certain members expressed a preference for its inclusion, inter alia, to take into account the interests of the numerous illegal immigrants who were detained for long periods in international zones. The view was expressed that the real problem that the Commission should address was not confined to expulsion but concerned more generally the means - including refusal of admission - by which States could control the presence of aliens in their territory. It was therefore suggested that the topic should include aliens applying for admission to a State while already in the territory of this State. Furthermore, in some cases, refusal of admission could be incompatible with the principle of non-refoulement.

21. A number of members agreed that extradition should be excluded from the scope of the topic. However, it was suggested that the scenario of an expulsion constituting disguised extradition should be addressed. In addition, certain members objected to the Special Rapporteur's proposal to exclude from the scope of the topic extraordinary or extrajudicial transfer (or rendition), which raised serious problems in international law.

22. Conflicting opinions were expressed concerning the possible inclusion in the scope of the topic of expulsions carried out in situations of armed conflict. While some members were of the view that the Commission should deal with this issue, others considered that the Commission should exclude from the draft articles, if necessary by means of an explicit provision, an issue covered by well-established rules of the law of armed conflict, notably concerning expulsions in the context of military occupation. It was also proposed that a "without prejudice" clause should be included in respect of the rules of international humanitarian law.

23. It was suggested that the Commission should study the issue of ethnic cleansing aimed at aliens, as well as deprivation of nationality followed by expulsion, the conformity of which with international law was questionable. It was considered necessary for the topic to cover the situation of persons who became aliens following the creation of a new State.

(ii) Categories of persons covered by the topic

24. Several members considered that the draft articles should apply to aliens physically present in the territory of the expelling State, whether legally or illegally. However, a legal regime governing expulsion must take account of the distinction between these two categories of aliens. It was also proposed that it should be specified that the draft articles applied only to natural persons, not to legal persons.

25. While some members emphasized the usefulness of draft article 1, paragraph 2, which contained a list of categories of aliens to be covered, others considered that this paragraph was unnecessary and that the examples cited should at the very most be included in the commentary. It was also suggested that paragraphs 1 and 2 of the draft article should be combined, deleting the words “in particular” in paragraph 2. Another view was that the current scope of the draft articles was too broad and that the Commission should limit its work to certain categories of aliens, which should be defined.

26. While certain members clearly supported excluding individuals entitled to privileges and immunities under international law from the scope of the topic, conflicting opinions were expressed concerning the possible inclusion of migrant workers. Some members suggested excluding refugees and stateless persons, since their status with regard to expulsion was well established and covered by a body of existing rules, including treaty rules. On the other hand, other members considered that refugees and stateless persons should be covered by the draft articles, at least insofar as there remained gaps or shortcomings in the rules applicable to these categories of persons. In this regard, it was suggested that the Commission should take into account the recommendations of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees. It was also suggested that a “without prejudice” clause should be included in the draft articles in respect of the rules relating to refugees.

27. Lastly, it was suggested that reference should be made in the commentary to the draft articles to the unlawfulness of expulsion of nationals.

(c) Definitions

28. While certain members emphasized the importance of clarifying the key concepts of the topic at this stage and ensuring consistent use of the terms (inter alia, “expelling State”, “host State” or “territorial State”) in the draft articles, others were of the view that the Commission should advance with its work before deciding on definitions.

(i) The concept of “alien”

29. Several members questioned the Special Rapporteur’s approach, which consisted in defining the concept of “alien” in opposition to that of “*ressortissant*”, rather than that of “national”. In particular, it was pointed out that the definition of “*ressortissant*” proposed by the Special Rapporteur was too broad and created confusion, and that the term in question could not be translated, for example, into English and Spanish; accordingly, the criterion of nationality alone should be used. Likewise, certain members proposed amending the language of draft article 2, paragraph 2 (a), by defining “alien” as a person who was not a national of the expelling State, without making any reference to the ties the individual concerned might have with another State. It was also suggested that the Commission should look into the issue of dual nationality in light of the rule whereby expulsion of nationals ought to be prohibited; in addition, it should be specified that the definition of “aliens” included stateless persons.

30. It was observed that certain categories of aliens, such as “refugees”, “asylum-seekers” and “migrant workers”, needed to be defined. It was suggested that a broad definition should be retained for the term “refugee”, taking into account recent developments that had affected this concept.

(ii) The concept of “expulsion”

31. Several members agreed with the Special Rapporteur’s broad definition of the concept of “expulsion”, contained in draft article 2, paragraph 2 (b), which was based on the element of “compulsion”, exercised by means of a legal act or conduct by the expelling State. However, it was considered necessary to indicate that this definition did not cover extradition (with the

possible exception of an expulsion constituting a disguised form of extradition). In addition, the need to elaborate criteria for determining whether the conduct of a State should be qualified as expulsion was emphasized. In this vein, it was suggested that the draft articles should specify that the said conduct must involve compulsion that left the alien no option but to leave the territory of the State. Another view was that expulsion should be defined as an “act”, “conduct” by the State being relevant mainly in the context of responsibility for an internationally wrongful act.

(iii) The concepts of “territory” and “frontier”

32. Certain reservations were expressed concerning the definitions contained in draft article 2, paragraphs 2 (c) and 2 (e). In addition, it was asserted that the Commission should consider the legal implications of the presence of an alien in the territorial sea or internal waters of a State. The view was expressed that, for the purposes of the draft articles, the definition of the “territory” of a State should not include the “territorial sea”.

33. Doubts were expressed as to the relevance of the concept of “residence”, alluded to in draft article 2, paragraph 2 (c), in defining State frontiers. It was emphasized that, in airport zones, States must respect all their international obligations, including the right to consular assistance. In addition, certain members were of the view that a proper definition of the concept of “territory” would make it unnecessary to define the term “frontier”.

(d) Other issues

34. It was maintained that article 13 of the International Covenant on Civil and Political Rights reflected universally accepted principles that could constitute an appropriate basis for the Commission’s work. Provisions of certain regional human rights instruments were also mentioned, including Protocols Nos. 4 and 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and Peoples’ Rights, and the Arab Charter on Human Rights (new version of 2004).

35. It was proposed that the Commission should consider the possible grounds for the illegality of an expulsion, as well as looking into the lawfulness of the expropriation or confiscation

measures that sometimes accompanied the expulsion of an alien. However, it was pointed out that a detailed analysis of the regulations relating to expropriation was not within the Commission's purview.

36. The question of whether and to what extent the expelling State must give the expelled alien the possibility of choosing the State of destination was mentioned. In this context, it was particularly important to determine nationality since, in principle, only the national State had the obligation to accept an expelled person.

37. Certain members of the Commission asserted that collective expulsion of aliens was prohibited under contemporary international law; in addition, it was maintained that the prohibition of *refoulement* was a rule of *jus cogens*.

3. Special Rapporteur's concluding remarks

38. The Special Rapporteur thanked the Commission members for their comments and observations, to which he had listened very closely. Certain comments, however, concerned aspects which had already been debated by the Commission and on which the Commission had already given the Special Rapporteur guidance approved by the General Assembly. The Special Rapporteur remained of the view that the topic lent itself to codification by an expert body, it being understood that States could subsequently initiate political negotiation on the fruits of the Commission's work.

39. In response to certain comments on methodology, the Special Rapporteur reiterated his preference - endorsed by the Commission - for a study of the general rules on the issue, to be followed by a consideration of the rules applicable to specific categories of aliens. The legal consequences of an expulsion, as well as its potential effects on an alien's property, would not be overlooked in subsequent reports; there was no need, however, to refer to those issues in draft article 1, which dealt with the scope of the topic.

40. The Special Rapporteur supported the proposal to specify, in the commentary to draft article 1, that the draft articles applied only to natural persons. Responding to members who had expressed support for the exclusion of refugees and stateless persons from the scope of the topic, the Special Rapporteur pointed out that the existing legal instruments did not establish a

comprehensive regime for the expulsion of these categories of persons. The Commission should therefore examine the rules applicable to these persons - including non-refoulement of refugees - keeping in mind contemporary law and practice. The same comment applied to the expulsion of enemy aliens, which was not governed by international humanitarian law instruments.

41. In the Special Rapporteur's opinion, the enumeration of the various categories of aliens in draft article 1, paragraph 2, was necessary. Deleting this paragraph, as had been proposed by certain members, would unduly expand the *ratione personae* scope of the draft articles to any category of aliens, including, for example, those entitled to privileges and immunities under international law.

42. The Commission and almost all the States that had spoken in the Sixth Committee had expressed a preference for excluding non-admission from the scope of the topic. The Special Rapporteur continued to share this view, since an alien could not be expelled before being admitted and the right to admit was inherent to the sovereignty of each State. Nevertheless, in international zones, States must respect all the relevant rules of international law, including those relating to the fundamental rights of the human being.

43. The issue of extradition disguised as expulsion would be addressed in a subsequent report. On the other hand, the Special Rapporteur did not support the proposal to include in the topic the issue of transfers of criminals, which came under international criminal law. Making such transfers subject to the rules on expulsion of aliens would risk compromising efficient cooperation between States in the fight against crime, including terrorism.

44. The Special Rapporteur took note of the reservations expressed by several Commission members concerning the use of the term "*ressortissant*". It would be used henceforth as a synonym for "national". However, the concepts of "non-national" and "alien" were not always equivalent, since certain categories of "non-nationals" were not considered aliens for the purposes of expulsion under the law of certain States. The problem of dual nationality would be discussed in subsequent reports.

45. The Special Rapporteur agreed that it was necessary to define the compulsion that the conduct of a State must involve in order for it to be qualified as "expulsion".

46. Lastly, with regard to the concepts of “territory” and “frontier”, the Special Rapporteur insisted on keeping the proposed definitions. The definition of “territory” corresponded to the unanimously accepted one, which included, in particular, internal waters and the territorial sea. A specific definition should be given for the concept of “frontier” in the context of the present topic. For the purposes of immigration, the frontier was a zone (for example, a port, airport or customs zone), rather than a line.

47. In the light of these considerations, the Special Rapporteur submitted to the Commission a revised version of draft articles 1¹¹ and 2.¹²

[Continued in A/CN.4/707/Add.1]

¹¹ “1. The present draft articles shall apply to the expulsion of aliens, as enumerated in paragraph 2 of this article, who are present in the territory of the expelling State.

or

1. The present draft articles shall apply to the expulsion by a State of those aliens enumerated in paragraph 2 of this article who are present in its territory.

2. They shall apply to aliens who are lawfully or unlawfully present in the expelling State, refugees, asylum-seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of the expelling State who have lost their nationality or been deprived of it.”

¹² “For the purposes of the draft articles:

(a) *Expulsion* means a legal act or a conduct by which a State compels an alien to leave its territory;

(b) *Alien* means a person who does not have the nationality of the State in whose territory he or she is present, except where the legislation of that State provides otherwise;

(c) *Conduct* means any act by the authorities of the expelling State against which the alien has no remedy and which leaves him or her no choice but to leave the territory of that State;

(d) *Territory* means the domain in which the State exercises all the powers deriving from its sovereignty;

(e) *Frontier* means the zone at the limits of the territory of an expelling State in which the alien does not enjoy resident status and beyond which the expulsion procedure is completed.”