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Draft report of the International Law Commission on the work of its sixty-fourth session

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Chapter IV Expulsion of aliens

A. Introduction

1. At its fifty-sixth session (2004), the Commission decided to include the topic “Expulsion of aliens” in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.¹ The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

2. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554).²

3. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573 and Corr.1) and a memorandum by the Secretariat (A/CN.4/565 and Corr.1). The Commission decided to consider the second report at its next session, in 2007.³

¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)* para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic “Expulsion of aliens” for possible inclusion in the Commission’s long-term programme of work (*ibid.*, *Fifty-third Session, Supplement No. 10 (A/53/10)*, para. 554) and at its fifty-second session (2000) it confirmed that decision (*ibid.*, *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 729). A brief syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year’s report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic in the long-term programme of work.

² *Ibid.*, *Sixtieth Session, Supplement No. 10 (A/60/10)*, paras. 242–274.

³ *Ibid.*, *Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 252.

4. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,⁴ and draft articles 3 to 7.⁵

5. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594) and decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.⁶ During the same session, the Commission approved the working group's conclusions and requested the Drafting Committee to take them into consideration in its work.⁷

6. At its sixty-first session (2009), the Commission considered the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1). At the Commission's request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.⁸

7. At its sixty-second session (2010), the Commission considered the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur (A/CN.4/617), together with the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1). It referred to the Drafting Committee revised draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled;⁹ draft articles A and 9,¹⁰ as contained in the sixth report of the Special Rapporteur (A/CN.4/625); draft articles B1 and C1,¹¹ as contained in the first addendum to the sixth report (A/CN.4/625/Add.1); and draft articles B and A1,¹² as revised by the Special Rapporteur during the sixty-second session.

8. At its sixty-third session (2011), the Commission considered the second addendum to the sixth report (A/CN.4/625/Add.2) and the seventh report (A/CN.4/642) of the Special Rapporteur. It also had before it comments received from Governments up to that point.¹³ The Commission referred to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in the second addendum to the sixth report;¹⁴ draft article F1, also contained in that addendum and revised by the Special Rapporteur during the session;¹⁵ and draft article 8, in the revised version introduced by the Special Rapporteur during the sixty-second session.¹⁶ At its sixty-third session the Commission also referred to the Drafting Committee the restructured summary of the draft articles contained in the seventh report of

⁴ *Ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), footnotes 401–402.

⁵ *Ibid.*, footnotes 396–400.

⁶ *Ibid.*, *Sixty-third Session, Supplement No. 10* (A/63/10), para. 170.

⁷ *Ibid.*, para. 171.

⁸ *Ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 91.

⁹ *Ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), footnotes 1244–1251.

¹⁰ *Ibid.*, footnotes 1255 and 1258.

¹¹ *Ibid.*, footnotes 1263–1264.

¹² *Ibid.*, footnotes 1260 and 1269.

¹³ See A/CN.4/604 and A/CN.4/628 and Add.1.

¹⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), footnotes 531–532 and 535–538.

¹⁵ *Ibid.*, footnote 534.

¹⁶ *Ibid.*, footnote 540.

the Special Rapporteur.¹⁷ At the same session it took note of an interim report by the Chairman of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.¹⁸

B. Consideration of the topic at the present session

9. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which it considered at its 3129th meeting, on 8 May 2012.

10. The eighth report first provided a survey of the comments made by States and the European Union on the topic of expulsion of aliens during the debate on the report of the Commission in the Sixth Committee during the sixty-sixth session of the General Assembly; it then set out some final observations by the Special Rapporteur. In introducing his report, the Special Rapporteur said that, as he saw it, most of those comments were the result of the time lag between the progress the Commission had made in considering the topic and the submittal of information on that progress to the Sixth Committee during its consideration of the Commission's previous annual reports. The Special Rapporteur had attempted, then, to dispel the misunderstandings created by that time lag while taking into account, where necessary, certain suggestions or proposing certain adjustments to the wording of the draft articles. Since the draft articles had already been referred to the Drafting Committee by the plenary Commission, it was in that context that those suggestions, largely of an editorial nature in any case, would be considered, as appropriate.

11. The eighth report also raised the question of the final form that the Commission's work on the topic would take, a question that had arisen during the debates in both the Commission and the Sixth Committee. In that regard, the Special Rapporteur remained convinced that there were few topics that lent themselves as well to codification as did expulsion of aliens. He hoped, therefore, that, when the time came, the Commission would transmit the results of its work on the topic of expulsion of aliens to the General Assembly in the form of draft articles, entrusting the Assembly with deciding what they should ultimately take.

12. At its 3134th and 3135th meetings, on 29 May 2012, the Commission considered the report of the Drafting Committee and, at its 3135th meeting, adopted on first reading a set of 32 draft articles on expulsion of aliens (see sect. C.1 below).

13. At its ... and ... meetings, on ... and ... August 2012, the Commission adopted the commentaries to the draft articles on expulsion of aliens adopted on first reading (see sect. C.2 below).

14. At its ... meeting, on ... August 2012, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.

15. At its ... meeting, on ... August 2012, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Maurice

¹⁷ A/CN.4/642, pp. 14–16.

¹⁸ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*, para. 214.

Kamto, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on expulsion of aliens.

C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading

1. Text of the draft articles

16. The text of the draft articles adopted by the Commission on first reading is reproduced below.

Expulsion of aliens

Part One

General provisions

Draft article 1

Scope

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Draft article 2

Use of terms

For the purposes of the present draft articles:

- (a) “expulsion” means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;
- (b) “alien” means an individual who does not have the nationality of the State in whose territory that individual is present.

Draft article 3

Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Draft article 4

Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Draft article 5

Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.

3. The ground for expulsion shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question and, where relevant, the current nature of the threat to which the facts give rise.

4. A State shall not expel an alien on a ground that is contrary to international law.

Part Two

Cases of prohibited expulsion

Draft article 6

Prohibition of the expulsion of refugees

1. A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.

2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State who has applied for recognition of refugee status, while such application is pending.

3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Draft article 7

Prohibition of the expulsion of stateless persons

A State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Draft article 8

Other rules specific to the expulsion of refugees and stateless persons

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.

Draft article 9

Deprivation of nationality for the sole purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

Draft article 10

Prohibition of collective expulsion

1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.

2. The collective expulsion of aliens, including migrant workers and members of their families, is prohibited.

3. 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.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Draft article 11

Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.
2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

Draft article 12

Prohibition of expulsion for purposes of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

Draft article 13

Prohibition of the resort to expulsion in order to circumvent an extradition procedure

A State shall not resort to expulsion in order to circumvent an ongoing extradition procedure.

Part Three

Protection of the rights of aliens subject to expulsion

Chapter I

General provisions

Draft article 14

Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. 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.
2. They are entitled to respect for their human rights, including those set out in the present draft articles.

Draft article 15

Obligation not to discriminate

1. The State shall exercise its right to expel aliens without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.
2. Such non-discrimination shall also apply 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**

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.
2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

Chapter II**Protection required in the expelling State****Draft article 17****Obligation to protect the right to life of an alien subject to expulsion**

The expelling State shall protect the right to life of an alien subject to expulsion.

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

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

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

1. (a) The detention of an alien subject to expulsion shall not be punitive in nature.
(b) An alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty.
2. (a) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.
(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.
3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.
(b) Subject to paragraph 2, detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

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

1. The expelling State shall respect the right to family life of an alien subject to expulsion.
2. The expelling State shall not interfere with the exercise of the right to family life, except where provided by law and on the basis of a fair balance between the interests of the State and those of the alien in question.

Chapter III**Protection in relation to the State of destination****Draft article 21****Departure to the State of destination**

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.
2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.
3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

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

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.
2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that 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.

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

1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.
2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

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**

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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

The transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

Part Four
Specific procedural rules

Draft article 26
Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:
 - (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 he or she cannot understand or speak the language used by the competent authority.
2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.
3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.
4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

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

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

Draft article 28
Procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

Part Five
Legal consequences of expulsion

Draft article 29
Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return 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.
2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

Draft article 30

Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

Draft article 31

Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law entails the international responsibility of the expelling State.

Draft article 32

Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.
