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## International Law Commission

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

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### Chapter IV Expulsion of aliens

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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.<sup>1</sup> 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. From its fifty-seventh session (2005) to its sixty-fourth session (2012), the Commission received and considered eight reports by the Special Rapporteur,<sup>2</sup> 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,<sup>3</sup> a new draft workplan presented by the Special Rapporteur with a view to restructuring the draft articles,<sup>4</sup> a memorandum by the Secretariat<sup>5</sup> and comments and observations received from Governments.<sup>6</sup>

3. At its sixty-fourth session (2012), the Commission adopted on first reading a set of 32 draft articles on the expulsion of aliens, together with the commentaries thereto.<sup>7</sup> It decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

#### B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the ninth report of the Special Rapporteur (A/CN.4/670), containing his proposals for reformulating the draft articles adopted on first reading in the light of the comments and observations of Governments (A/CN.4/669 and Add.1). At its 3199th meeting, on 6 May 2014, and at its 3201st to 3204th meetings, from 8 to 14 May 2014, the Commission considered the ninth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft articles on the basis of the proposals of the Special

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<sup>1</sup> *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.

<sup>2</sup> A/CN.4/554 (preliminary report), A/CN.4/573 and Corr.1 (second report), A/CN.4/581 (third report), A/CN.4/594 (fourth report), A/CN.4/611 and Corr.1 (fifth report), A/CN.4/625 and Add.1 and 2 (sixth report), A/CN.4/642 (seventh report) and A/CN.4/651 (eighth report).

<sup>3</sup> A/CN.4/617.

<sup>4</sup> A/CN.4/618.

<sup>5</sup> A/CN.4/565 and Corr.1 (memorandum by the Secretariat).

<sup>6</sup> For the comments and observations received from Governments, see A/CN.4/604 and A/CN.4/628.

<sup>7</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10 (A/67/10)*, paras. 41 to 43.

Rapporteur, taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

5. The Commission considered the report of the Drafting Committee (A/CN.4/L.832) at its 3217th meeting, on 6 June 2014, and adopted the entire set of draft articles on the expulsion of aliens on second reading (sect. E.1 below).

6. At its ... meeting, on ... 2014, the Commission adopted the commentaries to the draft articles mentioned above (sect. E.2 below).

7. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

## **C. Recommendation of the Commission**

8. ....

## **D. Tribute to the Special Rapporteur**

9. At its ... meeting, on ... 2014, the Commission, after adopting the commentary to the draft articles on the expulsion of alien, adopted the following resolution by acclamation:

...

## **E. Text of the draft articles on the expulsion of aliens**

### **1. Text of the draft articles**

10. The text of the draft articles adopted by the Commission on second reading at its sixty-sixth session is reproduced below.

Expulsion of aliens

#### **Part One General provisions**

##### **Article 1 Scope**

1. The present draft articles apply to the expulsion by a State of aliens present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

##### **Article 2 Use of terms**

For the purposes of the present draft articles:

(a) "expulsion" means a formal act or conduct 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 to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

**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, without prejudice to other applicable rules of international law, in particular those relating to human rights.

**Article 4****Requirement for conformity with law**

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

**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.
3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or 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 its obligations under international law.

**Part Two****Cases of prohibited expulsion****Article 6****Rules relating to the expulsion of refugees**

The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

- (a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;
- (b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever 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.

**Article 7****Rules relating to the expulsion of stateless persons**

The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

**Article 8****Deprivation of nationality for the 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.

**Article 9****Prohibition of collective expulsion**

1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.
2. The collective expulsion of aliens 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 an assessment of the particular case of each individual member of the group in accordance with the present draft articles.
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.

**Article 10****Prohibition of disguised expulsion**

1. Any form of disguised expulsion of an alien is prohibited.
2. For the purposes of the present draft article, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intended to provoke the departure of aliens from its territory other than in accordance with law.

**Article 11****Prohibition of expulsion for the purpose of confiscation of assets**

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

**Article 12****Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure**

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

**Part Three****Protection of the rights of aliens subject to expulsion****Chapter I****General provisions****Article 13****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.

**Article 14****Prohibition of discrimination**

The expelling State shall respect the rights of the alien subject to expulsion 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.

**Article 15****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****Article 16****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.

**Article 17****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.

**Article 18****Obligation to respect the right to family life**

The expelling State shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right.

**Article 19****Detention of an alien for the purpose of expulsion**

1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.  
(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.
2. (a) The duration of the detention 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, subject to judicial review, by another competent authority.
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 for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

## **Article 20**

### **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.

## **Chapter III**

### **Protection in relation to the State of destination**

## **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.

## **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.

## **Article 23**

### **Obligation not to expel an alien to a State where his or her life would be threatened**

1. No alien shall be expelled to a State where his or her life 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 have the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

**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****Article 25****Protection in a transit State of the human rights of an alien subject to expulsion**

A 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****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, except where compelling reasons of national security otherwise require;
  - (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 a brief duration.

**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 when there is a real risk of serious irreversible harm.

**Article 28****International 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****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.

**Article 30****Responsibility of States in cases of unlawful expulsion**

The expulsion of an alien in violation of the expelling State's obligations set forth in the present draft articles or in any other rule of international law entails the international responsibility of that State.

**Article 31****Diplomatic protection**

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

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