

## **Draft articles on the expulsion of aliens, with commentaries**

2014

Adopted by the International Law Commission at its sixty-sixth session, in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10). The report, which also contains commentaries to the draft articles (para. 45), will appear in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.



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## **Expulsion of aliens**

### **General commentary**

(1) Although the expulsion of aliens is a sovereign right of the State, it brings into play the rights of an alien subject to expulsion and the rights of the expelling State in relation to the State of destination of the person expelled. The subject matter thus does not fall outside international law. State practice on various aspects of the expulsion of aliens has been evolving at least since the nineteenth century. Several international treaties also contain provisions concerning one or another aspect of this topic. The applicable international case-law has been accumulating since the mid-nineteenth century and has in fact facilitated the codification of various aspects of international law. This basis in case-law has recently been reinforced by a judgment of the International Court of Justice<sup>12</sup> that clarifies the relevant law on various points. Nevertheless, the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature. On certain aspects, practice is still limited, although it does point to trends permitting some prudent development of the rules of international law in this domain. This is why the present draft articles involve both the codification and the progressive development of fundamental rules on the expulsion of aliens.

(2) The draft articles are divided into five parts. Part One, entitled “General provisions”, delimits the scope of the draft articles, defines the two key terms “expulsion” and “alien” for the purposes of the draft articles and then sets forth a few general rules relating to the right of expulsion, the requirement for conformity with law and the grounds for expulsion. Part Two of the draft articles deals with various cases of prohibited expulsion. Part Three addresses the question of protection of the rights of aliens subject to expulsion, first from a general standpoint (chapter I), then by dealing more specifically with the protection required in the expelling State (chapter II), protection in relation to the State of destination (chapter III) and protection in the transit State (chapter IV). Part Four of the draft articles concerns specific procedural rules, while Part Five sets out the legal consequences of expulsion.

(3) The formulation “alien[s] subject to expulsion” used throughout the draft articles is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process. That process generally begins when a procedure is instituted that could lead to the adoption of an expulsion decision, in some cases followed by a judicial phase; it ends, in principle, with the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision. In other words, the formulation covers the situation of the alien not only in relation to the expulsion decision adopted in his or her regard but also in relation to the various stages of the expulsion process that precede or follow the adoption of the decision and may in some cases involve the taking of restrictive measures against the alien, including possible detention for the purpose of expulsion.

### **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.

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<sup>12</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639.*

## Commentary

(1) The purpose of draft article 1 is to delimit 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.

(2) In stating that the draft articles apply to the expulsion by a State of aliens who are present in its territory, paragraph 1 defines the scope of the draft articles both *ratione materiae* and *ratione personae*. With regard to scope *ratione materiae*, which relates to the measures covered by the draft articles, reference is made simply to the “expulsion by a State”, which covers any and all expulsion measures; no further elaboration is provided, since “expulsion” is defined in draft article 2, subparagraph (a), below. With regard to scope *ratione personae*, that is, the persons covered by the draft articles, it follows from paragraph 1 that the draft articles apply in general to the expulsion of all aliens present in the territory of the expelling State, with no distinction between the various categories of persons involved, for example, aliens lawfully present in the territory of the expelling State, aliens unlawfully present, displaced persons, asylum seekers, persons granted asylum and stateless persons. The term “alien” is defined in draft article 2, subparagraph (b).

(3) The draft articles cover the expulsion of both aliens lawfully present and those unlawfully present in the territory of the expelling State, as paragraph 1 of the draft article indicates. The category of aliens unlawfully present in the territory of the expelling State covers both aliens who have entered the territory unlawfully and aliens whose presence in the territory has subsequently become unlawful, primarily because of a violation of the laws of the expelling State governing conditions of stay.<sup>13</sup> Although the draft articles apply in general to the expulsion of aliens present lawfully or unlawfully in the territory of the expelling State, it should be noted at the outset that some provisions of the draft articles draw necessary distinctions between the two categories of aliens, particularly with respect to the rights to which they are entitled.<sup>14</sup> It should be also noted that the inclusion within the scope of the draft articles of aliens whose presence in the territory of the expelling State is unlawful is to be understood in conjunction with the phrase in article 2, subparagraph (a), *in fine*, which excludes from the scope of the draft articles questions concerning non-admission of an alien to the territory of a State.<sup>15</sup>

(4) Paragraph 2 of draft article 1 excludes from the scope of the draft articles certain categories of aliens, namely, aliens enjoying privileges and immunities under international law. The purpose of the provision is to exclude aliens whose enforced departure from the territory of a State is governed by special rules of international law, such as persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State including, as appropriate, members of their families. In other words, such aliens are excluded from the scope of the draft articles because of the existence of special rules of international law governing the conditions under which they can be compelled to leave the territory of the State in which they are posted for the exercise of their functions.<sup>16</sup>

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<sup>13</sup> Some treaties distinguish between aliens who are lawfully present and those whose status is irregular, but they do not provide a definition of the term “alien unlawfully present” (see, *inter alia*, the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668, art. 13; the Convention relating to the Status of Refugees, United Nations, *Treaty Series*, vol. 189, No. 2545, art. 32); the Convention relating to the Status of Stateless Persons, United Nations, *Treaty Series*, vol. 360, p. 117, art. 31; and the 1955 European Convention on Establishment. See also A/CN.4/565, para. 755, footnotes 1760 to 1763). Some national legislation provides elements of a definition of this category of aliens, although the terms used to refer to them vary from country to country. An alien with irregular status can be understood to mean a person whose presence in the territory of the receiving State is in violation of the legislation of that State concerning the admission, stay or residence of aliens. First of all, an alien’s status may be illegal by virtue of the conditions under which he or she entered the State. Hence, any alien who crosses the frontier of the expelling State in violation of its rules concerning the admission of aliens will be considered to have irregular status. Second, the irregular status may be the result not of the conditions of entry but of the conditions of stay in the territory of the expelling State. In such cases, although the alien has crossed the frontier of the State legally and has therefore been lawfully admitted, he or she subsequently fails to comply with the conditions of stay stipulated by the laws of the receiving State. This occurs, for example, when a lawfully admitted alien remains in the territory of the State beyond the period set by the competent authorities of that State. Third, an alien’s presence in the expelling State may also be illegal for both of the aforementioned reasons, as would be the case if an alien had entered the receiving State illegally and had not subsequently had his or her status regularized, thus failing to comply with both the conditions of admission and the conditions of stay.

<sup>14</sup> See below, draft articles 6–7, 26–27 and 29 and the commentary thereto.

<sup>15</sup> See below, para. (5) of the commentary to draft article 2.

<sup>16</sup> See in particular the rules set out in the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95), the Vienna Convention on Consular Relations of 1963 (Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261) and the Convention on Special Missions (New York, 8

(5) On the other hand, some other categories of aliens who enjoy special protection under international law, such as refugees, stateless persons and migrant workers and their family members,<sup>17</sup> are not excluded from the scope of the draft articles. It is understood, however, that the application of the provisions of the draft articles to those categories of aliens is without prejudice to the application of the special rules that may govern one aspect or another of their expulsion from the territory of a State.<sup>18</sup> Displaced persons, in the sense of relevant resolutions of the United Nations General Assembly,<sup>19</sup> are also not excluded from the scope of the draft articles.

## **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.

### **Commentary**

(1) Draft article 2 defines two key terms, “expulsion” and “alien”, for the purposes of the present draft articles.

(2) Subparagraph (a) provides a definition of “expulsion”. The definition reflects the distinction between, on the one hand, a formal act by which a State orders and thereby compels an alien to leave its territory (regardless of what that act may be called under internal law) and, on the other hand, conduct attributable to that State which produces the same result.<sup>20</sup> The Commission thought it appropriate to include both types of cases in the definition of “expulsion” for purposes of the draft articles. It should also be clarified that draft article 2 merely provides a definition of “expulsion” and does not prejudice in any way the question of the lawfulness of the various means of expulsion to which it refers. Means of expulsion that do not take the form of a formal act are also included in the definition of expulsion within the meaning of the draft articles. They may fall under the regime of prohibition of “disguised expulsion” set out in draft article 10.

(3) The proviso that the formal act or conduct constituting expulsion must be attributable to the State is to be understood in the light of the criteria of attribution to be found in Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts.<sup>21</sup> The same criteria of attribution

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December 1969, United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 235).

<sup>17</sup> See in particular the rules set out in the 1951 Convention relating to the Status of Refugees, (Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150), the Convention relating to the Status of Stateless Persons (New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3).

<sup>18</sup> In this sense, see below the “without prejudice” clauses concerning refugees and stateless persons contained in draft articles 6 and 7.

<sup>19</sup> If a displaced person is by force of circumstances in a foreign territory, outside his or her State of origin or nationality, he or she would be in a situation comparable to that of a refugee. However, displaced persons cannot be assimilated to refugees, even though they generally have the same need for protection. The distinction between the two situations lies in the reasons for taking refuge in a foreign country. Displaced persons who are outside the territory of their country of origin or nationality are in that situation for reasons other than those set out in the definition of “refugee” in international law: they are outside their country because of natural or man-made disasters. The category of displaced persons essentially consists of victims of such disasters, who are commonly known as “ecological” or “environmental” refugees. It is these persons whom the General Assembly has had in mind since 1977 when referring to “refugees and displaced persons.” See, e.g., General Assembly resolution 59/170 of 20 December 2004, para. 10.

<sup>20</sup> In the domestic law of most States, expulsion is a legal act by the State, taking the form of an administrative act, since it is a decision of administrative authorities. It is a formal act that may be contested before the courts of the expelling State, since expulsion is a procedural process. One should also consider that expulsion occurs even in the absence of a formal legal act, as discussed below in the commentary to draft article 10.

<sup>21</sup> See *Yearbook ... 2001*, vol. II (Part Two), pp. 38–54.

as those defined in the latter articles must accordingly be applied in determining whether an expulsion should be considered the act of a State in accordance with international law.

(4) Conduct — other than the adoption of a formal decision — that could result in expulsion may take the form of either an action or an omission on the part of the State. Omission might in particular consist of tolerance towards conduct directed against the alien by individuals or private entities, for example, if the State failed to appropriately protect an alien from hostile acts emanating from non-State actors.<sup>22</sup> What appears to be the determining element in the definition of expulsion is that, as a result of either a formal act or conduct — active or passive — attributable to the State, the alien in question is *compelled* to leave the territory of that State.<sup>23</sup> In addition, in order to conclude that there has been expulsion as a result of *conduct* (that is, without the adoption of a formal decision), it is essential to establish the intention of the State in question, by means of that conduct, to bring about the departure of the alien from its territory.<sup>24</sup>

(5) For the sake of clarity, the Commission thought it useful to specify, in the second clause of subparagraph (a), that the concept of expulsion within the meaning of the draft articles did not cover extradition of an alien to another State, surrender to an international criminal court or tribunal or the non-admission of an alien to a State. With respect to non-admission, it should be explained that, in some legal regimes, the term “return (*refoulement*)” is sometimes used instead of “non-admission”. For the sake of consistency, the present draft articles use the latter term in cases where an alien is refused entry. The exclusion relates to the refusal by the authorities of a State — usually the authorities responsible for immigration and border control — to allow an alien to enter the territory of that State. On the other hand, the measures taken by a State to compel an alien already present in its territory, even if unlawfully present, to leave it are covered by the concept of “expulsion” as defined in draft article 2, subparagraph (a). This distinction should be understood in the light of the definition of the scope *ratione personae* of the draft articles, which includes both aliens lawfully present in the territory of the expelling State and those unlawfully present.<sup>25</sup> Moreover the exclusion of matters relating to non-admission from the scope of the draft articles is without prejudice to the rules of international law relating to refugees. That reservation is explained by draft article 6, subparagraph (b), which references the prohibition against return (*refoulement*) within the meaning of article 33 of the Convention on the Status of Refugees of 28 July 1951<sup>26</sup> and hence inevitably touches on questions of admission.

(6) Draft article 2, subparagraph (b), defines an “alien” as an individual who does not have the nationality of the State in whose territory the individual is present. The definition covers both individuals with the nationality of another State and individuals without the nationality of any State, that is, stateless persons.<sup>27</sup> Based on that definition, it follows that an individual who has the nationality of the State in whose territory the individual is present cannot be considered an alien with regard to that State, even if he or she possesses one or more other nationalities, and even if it happens that one of those other nationalities can be considered predominant, in terms of an effective link, *vis-à-vis* the nationality of the State in whose territory the individual is present.

(7) The definition of “alien” for the purposes of the draft articles is without prejudice to the right of a State to accord certain categories of aliens special rights with respect to expulsion by allowing them, under its internal law, to enjoy in that regard a regime similar to or the same as that enjoyed by its nationals. Nonetheless, any individual who does not have the nationality of the State in whose territory that

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<sup>22</sup> See below, draft article 10 and the commentary thereto.

<sup>23</sup> Expulsion is never an act or event requested by the expelled person, nor is it an act or event to which the expelled person consents. It is a formal measure or a situation of irresistible force that compels the person in question to leave the territory of the expelling State. The formal measure ordering the expulsion is an injunction and hence a legal constraint, while the execution of expulsion is a constraint in that it is physically experienced as such. This element of constraint is important in that it distinguishes expulsion from normal or ordinary departure of the alien from the territory. This is the element that arouses the attention or interest not only of the State of destination of the expelled person but also of third States with respect to the situation thus created, to the extent that the exercise of this incontestable right of a State places at issue the protection of fundamental human rights.

<sup>24</sup> See below, paragraphs (3) to (7) of the commentary to draft article 10.

<sup>25</sup> See above, paragraphs (2) and (3) of the commentary to draft article 1.

<sup>26</sup> Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150.

<sup>27</sup> With regard to stateless persons, see draft article 7 below.

individual is present should be considered an alien for purposes of the draft articles, and his or her expulsion from that territory is subject to the present draft articles.

### **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.

#### **Commentary**

(1) The first sentence of draft article 3 sets out the right of a State to expel an alien from its territory. That right is uncontested in practice as well as in case-law and writings. The right to expel is not conferred on a State by some external rule; it is a inherent right of the State, flowing from its sovereignty. This right has been recognized in particular in a number of arbitral awards and decisions of claims commissions<sup>28</sup> and in various decisions of regional courts and commissions.<sup>29</sup> Moreover, it is enshrined in the internal law of most States.

(2) The second sentence of draft article 3 is a reminder that the exercise of this right of expulsion is regulated by the present draft articles, without prejudice to other applicable rules of international law. The reference to “other” applicable rules of international law does not mean that the draft articles, as a whole, reflect current international law in the sense of treaty law. They are both a work of codification of international law and an exercise in its progressive development. Some of the rules contained therein are established by certain treaty regimes or firmly established in customary international law, although some of them constitute progressive development of international law. In addition, the specific mention of human rights is justified by the importance that respect for human rights assumes in the context of expulsion, an importance also underlined by the many provisions of the draft articles devoted to various aspects of the protection of the human rights of aliens subject to expulsion. Among the “other applicable rules of international law” to which a State’s exercise of its right to expel aliens is subject and which are not addressed in specific provisions of the draft articles, it is worth mentioning in particular some of the traditional limitations that derive from the rules governing the treatment of aliens, including the prohibitions against arbitrariness, abuse of rights and denial of justice. Other applicable rules also include rules in human rights instruments concerning derogation in times of emergency. It should be emphasized in this connection that most of the obligations of States under these instruments are not absolute in nature, and that derogations are possible in certain emergency situations, for example, where there is a public emergency threatening the life of the nation. Draft article 3 thus preserves the possibility for a State to adopt measures that derogate from certain requirements of the present draft articles insofar as it is consistent with its other obligations under international law.

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

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<sup>28</sup> See, for example, *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. IV, pp. 3347–3348; the *Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 731; the *Boffolo* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528, 529, 531 and 532; the *Oliva* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 608 (Ralston, Umpire); the *Paquet* case, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 325 (Filtz, Umpire); and *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92–113.

<sup>29</sup> With respect to the European Court of Human Rights, see in particular *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, para. 43. See also *Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87 and 13448/87, para. 102; *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 73; *Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94, para. 38; *Bouchelkia v. France*, Judgment (Merits), 29 January 1997, Application No. 23078/93, para. 48; and *H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 33. With regard to the African Commission on Human and Peoples’ Rights, see in particular communication No. 159/96, *Union Inter africaine des Droits de l’Homme, Fédération Internationale des Lignes des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation Nationale des Droits de l’Homme au Sénégal et Association Malienne des Droits de l’Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

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

### Commentary

(1) Draft article 4 sets out a fundamental condition to which a State's exercise of its right to expel aliens from its territory is subject. That condition is the adoption of an expulsion decision by the expelling State in accordance with law.

(2) The requirement that an expulsion decision must be made in accordance with law has, first of all, the effect of prohibiting a State from engaging in conduct intended to compel an alien to leave its territory without notifying the alien of a decision in that regard. The prohibition of any form of disguised expulsion is contained in draft article 10, paragraph 1.

(3) The requirement of conformity with the law follows logically from the fact that expulsion is to be exercised within the framework of law. The State's prerogative of regulating conditions of expulsion on its territory within the limits of international law entails the obligation to comply with the rules it has laid down or subscribed to in this area.<sup>30</sup> It is thus not surprising to note the wide agreement in the legislation of many States on the minimum requirement that the expulsion procedure must conform to the provisions of law.<sup>31</sup> Moreover, the requirement is well established in international human rights law, both universal and regional. At the universal level, it appears in article 13 of the International Covenant on Civil and Political Rights<sup>32</sup> (with respect to aliens lawfully present on the territory of the expelling State); in article 22, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;<sup>33</sup> in article 32, paragraph 2, of the Convention relating to the Status of Refugees;<sup>34</sup> and in article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons.<sup>35</sup> At the regional level, it is relevant to mention article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;<sup>36</sup> article 22, paragraph 6, of the American Convention on Human Rights (Pact of San José);<sup>37</sup> article 1, paragraph 1, of Protocol No. 7 to the European Convention on Human Rights;<sup>38</sup> and article 26, paragraph 2, of the Arab Charter on Human Rights,<sup>39</sup> which impose the same requirement with respect to aliens lawfully present in the territory of the expelling State.

(4) The requirement for conformity with law must apply to any expulsion decision, irrespective of whether the presence of the alien in question in the territory of the expelling State is lawful or not. It is

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<sup>30</sup> The two maxims of Roman law that apply in this case are: for the State's own rules, *patere legum or patere regulam quam fecisti*, and for the rules of international law, *pacta sunt servanda*.

<sup>31</sup> See, for example, article 14, paragraph 5, of the Czech Republic's Charter of Fundamental Rights and Freedoms, article 58, paragraph 2, of the Constitution of Hungary, article 23, paragraph 5, of the Constitution of the Slovak Republic or section 9 of the Constitution of Finland.

<sup>32</sup> The provision reads as follows: "An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ..." (International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171).

<sup>33</sup> The provision reads as follows: "Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law" (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3).

<sup>34</sup> The provision states, in particular, that the expulsion of a refugee lawfully in the territory of a Contracting State "shall only be in pursuance of a decision reached in accordance with due process of law ..." (Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150).

<sup>35</sup> This provision has essentially the same wording, *mutatis mutandis*, as the provision quoted in the preceding footnote concerning refugees (Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117).

<sup>36</sup> The provision reads as follows: "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law" (African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217).

<sup>37</sup> The provision reads as follows: "An alien lawfully in the territory of a State party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law" (American Convention on Human Rights (Pact of San José), San José, Costa Rica, 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 143).

<sup>38</sup> The provision reads as follows: "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law ..." (Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117).

<sup>39</sup> The provision reads as follows: "No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law ..." (Charter adopted by the Summit of the League of Arab States at its sixteenth regular session (Tunis, May 2004); entered into force on 15 March 2008; translation from the Office of the United Nations High Commissioner for Human Rights; English version available at <http://www.unicef.org/tdad/arabcharterhumanrights.doc>).

understood, however, that domestic legislation may provide for different rules and procedures for expulsion depending on the lawful or unlawful nature of that presence.<sup>40</sup>

(5) The requirement for conformity with law is quite general, since it applies to both the procedural and the substantive conditions for expulsion.<sup>41</sup> In consequence, its scope is wider than the similar requirement set out in draft article 5, paragraph 2, with regard to the grounds for expulsion.

(6) In its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice confirmed the requirement for conformity with law as a condition for the lawfulness of an expulsion under international law. Referring, in that context, to article 13 of the International Covenant on Civil and Political Rights and to article 12, paragraph 4, of the African Charter on Human and Peoples' Rights, the Court observed:

“It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with ‘the law’, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law.”<sup>42</sup>

(7) Although the requirement for conformity with law is a condition for the lawfulness of any expulsion measure under international law, the question might arise as to the extent of an international body's power of review of compliance with internal law rules in a context like that of expulsion. An international body is likely to be somewhat reticent in that regard. As an example, one might mention the position taken by the Human Rights Committee with respect to the expulsion by Sweden in 1977 of a Greek political refugee suspected of being a potential terrorist. That individual argued before the Committee that the expulsion decision had not been taken “in accordance with law” and therefore was not in compliance with the provisions of article 13 of the Covenant. The Human Rights Committee took the view that the interpretation of internal law was essentially a matter for the courts and authorities of the State party concerned, and that “it was not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question [had] interpreted and applied the internal law correctly in the case before it ..., unless it [was] established that they [had] not interpreted and applied it in good faith or that it [was] evident that there [had] been an abuse of power”.<sup>43</sup> The International Court of Justice and the European Court of Human Rights took a similar approach to their own power to assess whether a State had complied with its internal law in a case of expulsion.<sup>44</sup>

## 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.

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<sup>40</sup> In this sense, see draft article 26, para. 4, below.

<sup>41</sup> See, in that sense, the opinion of the Steering Committee for Human Rights of the Council of Europe when it states, in connection with article 1, paragraph 1, of Protocol 7 to the European Convention on Human Rights, that expulsion decisions must be taken “by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules” (Council of Europe, Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 11).

<sup>42</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 639, at p. 663, para. 65. Referring to the procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the Court concluded that the expulsion of Mr. Diallo had not been decided “in accordance with law” (*ibid.*, p. 666, para. 73).

<sup>43</sup> Human Rights Committee, communication No. 58/1979 *Anna Maroufidou v. Sweden*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, p. 165, para. 10.1.

<sup>44</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 639, and *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, para. 58: “Where the Convention refers directly back to domestic law, as in article 5, compliance with such law is an integral part of Contracting States ‘engagements’ and the Court is accordingly competent to satisfy itself of such compliance where relevant (article 19); the scope of its task in this connection, however, is subject to limits inherent in the logic of the European system of protection, since it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, *inter alia* and *mutatis mutandis*, the *Winterwerp* judgment of 24 October 1979, Series A, No. 33, p. 10, § 46).”



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.

### Commentary

(1) The question of the grounds for expulsion encompasses several aspects having to do with the statement of the ground for expulsion, the existence of a valid ground and the assessment of that ground by the competent authorities. Draft article 5 deals with those issues.

(2) Draft article 5, paragraph 1, sets out an essential condition under international law, namely, the statement of the ground for the expulsion decision. The duty of the expelling State to indicate the grounds for an expulsion is well-established in international law. It is recognized that while the conditions for admission of aliens into the territory of a State fall under its sovereignty and therefore its exclusive competence, a State may not at will deprive them of their right of residence. As early as 1892, the Institute of International Law was of the view that an act ordering expulsion must “*être motivé en fait et en droit*” [be reasoned in fact and in law].<sup>45</sup> In its judgment on the merits in the *Diallo* case, the International Court of Justice found that the Democratic Republic of the Congo had failed to fulfil this obligation to give reasons and that, throughout the proceedings, it had failed to adduce grounds that might provide “a convincing basis” for Mr. Diallo’s expulsion; the Court therefore concluded that the arrest and detention of Mr. Diallo with a view to his expulsion had been arbitrary. In that regard, the Court could not but

“find not only that the decree itself was not reasoned in a sufficiently precise way ... but that throughout the proceedings, the Democratic Republic of the Congo has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo’s expulsion. ... Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.”<sup>46</sup>

In the *Amnesty International v. Zambia* case, the African Commission on Human and Peoples’ Rights held that Zambia had violated the right of the alien concerned to receive information by failing to inform him of the reasons for his expulsion. According to the Commission, the fact “that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (article 9 (1))”.<sup>47</sup>

(3) Draft article 5, paragraph 2, sets out the fundamental requirement that the ground for expulsion must be provided for by law. The reference to “law” here is to be understood as a reference to the internal law of the expelling State. In other words, international law makes the lawfulness of an expulsion decision dependent on the condition that the decision is based on a ground provided for in the law of the expelling State. The Commission considers that this requirement is implied by the general requirement of conformity with law, set forth in draft article 4.<sup>48</sup> It would be futile to search international law for a list of valid grounds of expulsion that would apply to aliens in general;<sup>49</sup> it is for the internal law of each State to provide for and define the grounds for expulsion, subject to the reservation stated in paragraph 4 of the draft article, namely, that the grounds must not be contrary to the obligations of the State under international law. In this regard, internal laws may be found to provide for a rather wide variety of grounds for expulsion. It must be noted that violation of internal law on entry and stay (immigration law)

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<sup>45</sup> *Règles internationales sur l’admission et l’expulsion des étrangers* [International Regulations on the Admission and Expulsion of Aliens], adopted on 9 September 1892 at the Geneva session of the Institute of International Law, art. 30.

<sup>46</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, at p. 669, para. 81.*

<sup>47</sup> African Commission on Human and Peoples’ Rights, Communication No. 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report, 1998–1999, paras. 32 and 33.

<sup>48</sup> See above, para. (5) of the commentary to draft article 4.

<sup>49</sup> However, see below, draft article 6, subparagraph (a), and draft article 7, which limit the grounds for expulsion of refugees and stateless persons to “grounds of national security or public order”, thus reproducing the rules contained in the relevant treaty instruments.

constitutes the most common ground for expulsion. This ground provided for in the legislation of many States is permissible under international law; in other words, the unlawfulness of the presence of an alien in the territory of a State can in itself constitute a sufficient ground for expulsion. Moreover, national security and public order are also grounds that are frequently invoked to justify an expulsion.

(4) Paragraph 3 sets out general criteria for the expelling State's assessment of the ground for expulsion. The assessment shall be made in good faith and reasonably, in the light of all the circumstances. The gravity of the facts, the conduct of the alien in question and the current nature of the threat to which the facts give rise are mentioned as among the factors to be taken into consideration, where relevant, by the expelling State. The criterion of "the current nature of the threat" mentioned *in fine* is particularly relevant when the ground for expulsion is a threat to national security or public order.

(5) The purpose of draft article 5, paragraph 4, is simply to recall the prohibition against expelling an alien on a ground contrary to the expelling State's obligations under international law. The prohibition would apply, for example, to expulsion based on a ground that was discriminatory in the sense of draft article 14 below.<sup>50</sup> It should be specified that the expression "to its obligations under international law" does not mean that a State may interpret such obligations in a restrictive manner, to avoid other obligations under international law that are opposable to it.

## **Part Two** **Cases of prohibited expulsion**

### **Article 6** **Prohibition of 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.

#### **Commentary**

(1) 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 contains a "without prejudice" clause aimed at ensuring the continued application to refugees of the rules concerning their expulsion, as well as of any more favourable rules or practice on refugee protection. In particular, subparagraphs (a) and (b) of draft article 6 recall two particularly important rules concerning the expulsion or return (*refoulement*) of refugees.

(2) The term "refugee" should be understood not only in the light of the general definition contained in article 1 of the Convention relating to the Status of Refugees of 28 July 1951,<sup>51</sup> as amended by article 1 of the Protocol relating to the Status of Refugees of 31 January 1967,<sup>52</sup> which eliminated the geographic and temporal limitations of the 1951 definition, but also having regard to subsequent developments in the matter, including the practice of the Office of the United Nations High Commissioner for Refugees

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<sup>50</sup> On the lawfulness of grounds for expulsion under international law, see also, below, draft article 11 (Prohibition of expulsion for the purpose of confiscation of assets) and draft article 12 (Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure).

<sup>51</sup> Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150, art. 1.

<sup>52</sup> Protocol relating to the Status of Refugees, New York, 31 January 1967, United Nations, *Treaty Series*, vol. 606, No. 8791, p. 267, art. 1.

(UNHCR).<sup>53</sup> In that regard, the broader definition of “refugee” adopted in the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 merits particular mention.<sup>54</sup>

(3) The terms “rules of international law relating to refugees” should be understood as referring to all of the treaty rules at the universal, regional and subregional levels that relate to refugees, as well as to relevant customary rules, to which the draft articles are without prejudice. Draft article 6 refers, in particular, to the exclusion clause in article 1, subparagraph (F) of the Convention relating to the Status of Refugees<sup>55</sup> and the rules on procedural conditions applying to the expulsion of a refugee such as is contained, in particular, in article 32, paragraph 2, of that Convention.<sup>56</sup> It likewise relates to the provisions of article 32, paragraph 3, of the 1951 Convention<sup>57</sup> which require the expelling State to allow a refugee or stateless person a reasonable period within which to seek legal admission into another country, and which likewise accord that State the right to apply during that period such internal measures as it might deem necessary.

(4) Moreover, draft article 6 adds that the present draft articles are without prejudice to more favourable rules or practice on refugee protection. In addition to the rules of international law, national practice in this area is of particular importance in that it can be the source of important rights for refugees. This means, *inter alia*, the pertinent rules in the internal law of the expelling State, as long as they are not incompatible with the State’s international obligations or with declarations made by the expelling State pursuant to its treaty obligations.

(5) Draft article 6, subparagraph (a), reproduces the wording of article 32, paragraph 1, of the Convention relating to the Status of Refugees of 28 July 1951. The rule contained in that paragraph, which applies only to refugees lawfully in the territory of the expelling State, limits the grounds for expulsion of such refugees to those relating to reasons of national security or public order.

(6) The prohibition of expulsion of a refugee lawfully in the territory of the expelling State for any grounds other than national security or public order has also been extended to any refugee who, being unlawfully in the territory of the State, has applied for refugee status, as long as this application is under consideration. However, such protection can be envisaged only for so long as the application is pending. This protection, which reflects a trend in the legal literature<sup>58</sup> and finds support in the practice of some States<sup>59</sup> and of UNHCR,<sup>60</sup> would constitute a departure from the principle whereby the unlawfulness of the

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<sup>53</sup> See UNHCR, *Handbook on Procedures for Determining Refugee Status*, Geneva, UNHCR, 1979, paragraph 28 of which reads as follows: “Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”

<sup>54</sup> “OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45.

<sup>55</sup> This provision reads as follows: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

<sup>56</sup> This provision reads as follows: “The expulsion of such a refugee [namely, a refugee lawfully in the territory of the expelling State] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”

<sup>57</sup> This provision reads as follows: “The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

<sup>58</sup> See, in particular, Elihu Lauterpacht and Daniel Bethlehem, “Complementary forms of protection”, *Global Consultations on International Protection*, UNHCR document EC/GC/01/18 of 4 September 2001, para. 11 (g).

<sup>59</sup> French practice is particularly interesting in this regard. Unlike the 1951 Convention, which simply says that the Contracting States may not expel or return (*refouler*) a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened,” according to the French Constitutional Council, the fourth preambular paragraph of the French Constitution of 27 October 1946, to which the Constitution in force, of 4 October 1958, refers, implies, in general terms, that an alien claiming refugee status is allowed to remain provisionally in French territory until a ruling has been made on his or her application (Constitutional Council, Decision No. 93-325 DC of 13 August 1993, *Journal officiel*, 18 August 1993, pp. 11722 *et seq.*). This solution is directly inspired by the one used by the Assembly of the French Council of State which, on two occasions, has recognized that an asylum seeker claiming refugee status should be allowed to remain provisionally in French territory until the French Office for the Protection of Refugees and Stateless Persons or, where applicable, the Refugee

presence of an alien in the territory of a State can in itself justify expulsion of the alien. The protection might be set aside only in cases where the manifest intent of the application for refugee status was to thwart an expulsion decision likely to be handed down against the individual concerned. It concerns only individuals who, while not enjoying the status of refugee in the State in question, did meet the definition of “refugee” within the meaning of the 1951 Convention or, in some cases, other relevant instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and should therefore be regarded as refugees under international law. Any individual who does not correspond to the definition of refugee within the meaning of the relevant legal instruments is ineligible to enjoy the protection recognized in draft article 6 and can be expelled on grounds other than those stipulated in subparagraph (a), including on the sole ground of the unlawfulness of his or her presence in the territory of the expelling State. In any event, article 6 is without prejudice to the right of a State to expel, for reasons other than those mentioned in subparagraph (a), an alien whose application for refugee status is manifestly abusive.

(7) Draft article 6, subparagraph (b), which concerns the obligation of *non-refoulement*, combines paragraphs 1 and 2 of article 33 of the 1951 Convention. Unlike the other provisions of the draft articles, which do not cover the situation of non-admission of an alien to the territory of a State,<sup>61</sup> draft article 6, subparagraph (b), provides that these draft articles are without prejudice to that situation as well, as indicated by the opening phrase: “A State shall not expel or return (*refouler*) ...”. Moreover, unlike the protection stipulated in subparagraph (a), the protection mentioned in subparagraph (b) applies to all refugees, regardless of whether their presence in the receiving State is lawful or unlawful. It should also be emphasized that the mention of this specific obligation of *non-refoulement* of refugees is without prejudice to the application to them of the general rules prohibiting expulsion to certain States as contained in draft articles 23 and 24.

## 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.

### Commentary

(1) As is the case for refugees, stateless persons are protected under the relevant rules of international law by a favourable regime that places limits on their expulsion. Article 1 of the Convention relating to the Status of Stateless Persons of 28 September 1954,<sup>62</sup> defines the term “stateless person” as “a person who is not considered as a national by any State under the operation of its law.”<sup>63</sup>

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Appeals Commission, has ruled on his or her application (Council of State, Assembly, 13 December 1991, *M. Nkodia and Prefect of Hérault v. Dakoury*, *Revue française de droit administratif*, January–February 1992, pp. 90–103).

<sup>60</sup> See *supra* note 53.

<sup>61</sup> See above draft article 2, subpara. (a), *in fine*.

<sup>62</sup> Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117.

<sup>63</sup> This provision reads as follows:

“Article 1 – Definition of the term stateless person

1. For the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.
2. This Convention shall not apply:
  - (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
  - (ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
  - (iii) To persons with respect to whom there are serious reasons for considering that:
    - (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
    - (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
    - (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.”

(2) Draft article 7 consists of a “without prejudice” clause aimed at ensuring the continued application to stateless persons of the rules concerning their expulsion. It relates, in particular, to the rules on procedural conditions applying to the expulsion of a stateless person as contained in article 31, paragraph 2, of the 1954 Convention.<sup>64</sup> It likewise relates to the provisions of article 31, paragraph 3, of the 1954 Convention<sup>65</sup> which require the expelling State to allow a stateless person a reasonable period within which to seek legal admission into another country, and which likewise accord that State the right to apply during that period such internal measures as it might deem necessary.

(3) By analogy with subparagraph (a) of draft article 6 concerning refugees, draft article 7 is patterned after article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons. Here, too, the limitation on the grounds for expulsion applies only to stateless persons lawfully present in the territory of the expelling State.

(4) Draft article 7 does not contain a parallel provision to subparagraph (b) of draft article 6 concerning refugees, which refers to the obligation of *non-refoulement*. Stateless persons, like any other alien subject to expulsion, are entitled to the protection recognized by draft articles 23 and 24 below, which apply to aliens in general.

### **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.

#### **Commentary**

(1) Draft article 8 concerns the specific situation in which a State might deprive a national of his or her nationality, and thus makes that national an alien, for the sole purpose of expelling him or her. Such a deprivation of nationality, insofar as it has no other justification than the State’s desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.<sup>66</sup> For this reason, draft article 8 sets forth the prohibition of the deprivation of nationality for the sole purpose of expulsion.

(2) It would no doubt have been simpler to state, for example, that “[a] State may not deprive a national of his or her nationality for the sole purpose of expulsion.” However, the Commission preferred the current wording because the phrase “shall not make its national an alien, by deprivation of nationality”, in addition to linking the specific situation covered in the draft article to the topic of the expulsion of aliens, is expository in nature: it describes how a national of a State may become an alien in that State by means of deprivation of his or her nationality when the sole aim of that State is to expel the person concerned.

(3) It should be clarified, however, that draft article 8 does not purport to limit the normal operation of legislation relating to the grant or loss of nationality; consequently, it should not be interpreted as affecting a State’s right to deprive an individual of its nationality on a ground that is provided for in its legislation. Similarly, draft article 8 does not relate to situations when an individual voluntarily renounces his or her nationality.

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<sup>64</sup> This provision reads as follows: “The expulsion of such a stateless person [namely, a stateless person lawfully in the territory of the expelling State] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”

<sup>65</sup> This provision reads as follows: “The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

<sup>66</sup> General Assembly resolution 217 (III) A of 10 December 1948. Article 15 of the Universal Declaration of Human Rights reads as follows: “1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” See also art. 20, para. 3, of the American Convention on Human Rights (“No one shall be arbitrarily deprived of his nationality or of the right to change it.”), as well as art. 29, para. 1, of the Arab Charter on Human Rights (“Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality”).

(4) Furthermore, draft article 8 does not address the issue of the expulsion by a State of its own nationals, something that falls outside the scope of the draft articles, which deal solely with the expulsion of aliens.

### **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.

#### **Commentary**

(1) Paragraph 1 of draft article 9 contains a definition of collective expulsion for the purposes of the present draft articles. According to this definition, collective expulsion is understood to mean the expulsion of aliens “as a group”. This criterion is informed by the case-law of the European Court of Human Rights.<sup>67</sup> It is a criterion that the Special Rapporteur on the rights of non-citizens of the Commission on Human Rights, Mr. David Weissbrodt, had also endorsed in his final report of 2003.<sup>68</sup> Only the “collective” aspect is addressed in this definition, which must be understood in the light of the general definition of expulsion contained in draft article 2, subparagraph (a).

(2) Paragraph 2 sets out the prohibition of the collective expulsion of aliens. This prohibition is expressly embodied in several international human rights treaties. At the universal level, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families expressly prohibits the collective expulsion of these persons, providing, in article 22, paragraph 1, that “[m]igrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.” At the regional level, the American Convention on Human Rights provides in article 22, paragraph 9, that “[t]he collective expulsion of aliens

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<sup>67</sup> See *Vedran Andric v. Sweden*, Decision as to the admissibility of Application No. 45917/99, 23 February 1999, para. 1: “The Court finds that collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis ...” See also *Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 59: “The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see *Andric*, cited above)”. See also *Case of Georgia v. Russia (I)*, Judgment (Merits), 3 July 2014, Application No. 13255/07, para. 167: “The Court reiterates its case-law according to which collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken following, and on the basis of, a reasonable and objective examination of the particular case of each individual alien of the group” (see *Conka*, cited above, § 59). The Court has subsequently specified that “the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis” (see, among other authorities, *Sultani [v. France]*, Judgment, 20 September 2007, Application No. 45223/05) § 81, and *Hirsi Jamaa and Others [v. Italy]*, Judgment, 23 February 2012, Application No. 27765/09, §184). That does not mean, however, that where there has been a reasonable and objective examination of the particular case of each individual “the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4” (see *Conka*, cited above, *ibid.*.)”

<sup>68</sup> In it, the Special Rapporteur states the following: “Any measure that compels non-citizens, as a group, to leave a country is prohibited except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-citizen in the group.” The rights of non-citizens, Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283 (E/CN.4/Sub.2/2003/23), 26 May 2003, para. 11 (citing the European Court of Human Rights, *Conka v. Belgium*, *op. cit.*). In its case-law, the European Court of Human Rights speaks of a “reasonable and objective examination”. This phrase was not used in the final version of draft article 9 in order to keep the concomitant expulsion of more than one alien under the general legal regime on expulsion established by the present draft articles.

is prohibited”. Article 4 of Protocol No. 4 to the European Convention on Human Rights<sup>69</sup> stipulates that “[c]ollective expulsion of aliens is prohibited”. Similarly, article 12, paragraph 5, of the African Charter on Human and Peoples’ Rights provides that “[t]he mass expulsion of non-nationals shall be prohibited” and in the same provision defines this form of expulsion as “that which is aimed at national, racial, ethnic or religious groups”. Lastly, in article 26, paragraph 2, *in fine*, the Arab Charter on Human Rights states that “[c]ollective expulsion is prohibited under all circumstances”.

(3) Article 13 of the International Covenant on Civil and Political Rights does not expressly prohibit collective expulsion. However, the Human Rights Committee expressed the opinion that such a form of expulsion would be contrary to the procedural guarantees to which aliens subject to expulsion are entitled. In its General Comment No. 15 on the position of aliens under the Covenant, the Committee stated the following:

“Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out ‘in pursuance of a decision reached in accordance with law’, its purpose is clearly to prevent arbitrary expulsions. *On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.* This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when ‘compelling reasons of national security’ so require. Discrimination may not be made between different categories of aliens in the application of article 13.”<sup>70</sup> (emphasis added)

(4) The prohibition of the collective expulsion of aliens set out in paragraph 2 of the present draft article should be read in the light of paragraph 3, which elucidates it by specifying the conditions under which the members of a group of aliens may be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles. Paragraph 3 states that such an expulsion is permissible provided that it 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*. The latter phrase refers in particular to draft article 5, paragraph 3, which states that the ground for expulsion must 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.<sup>71</sup>

(5) Paragraph 4 of draft article 9 is a “without prejudice” clause referring to situations of armed conflict. This clause, which relates in general terms to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State aims to avoid any incompatibility between the rights and obligations of the State set out in the present draft articles and those under international humanitarian law.

## **Article 10**

### **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 an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons,

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<sup>69</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *European Treaty Series*, No. 46.

<sup>70</sup> Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10.

<sup>71</sup> See above, paragraph (4) of the commentary to draft article 5.

intending to provoke the departure of aliens from its territory other than in accordance with the law.

### Commentary

(1) Draft article 10 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 an expulsion decision, namely to compel an alien to depart from its territory. In the legal literature in English,<sup>72</sup> the term “constructive expulsion” is sometimes used to designate methods of expulsion other than the adoption of a decision as such. The Commission considered, however, that it was difficult to find a satisfactory equivalent of the term “constructive expulsion” in other languages, particularly French, as the term might carry an undesirable positive connotation. Consequently, the Commission opted in this context for the term “disguised expulsion”.

(2) Paragraph 1 of draft article 10 sets out the prohibition of any form of disguised expulsion, thus indicating that such conduct is prohibited under international law regardless of the form it takes or the methods employed. This is because, in essence, disguised expulsion infringes the human rights of the alien in question, including the procedural rights referred to in Part Four of the draft articles.

(3) Draft article 10, paragraph 2, contains a definition of disguised expulsion that focuses on what characterizes it. The specificity lies in the fact that the expelling State, without adopting a formal expulsion decision, engages in conduct intended to produce and actually producing the same result, namely the forcible departure of an alien from its territory. The element of *détournement* is conveyed by the adverb “indirectly” that qualifies the occurrence of an alien’s departure as a result of the conduct of the State. The last phrase of paragraph 2 is intended to indicate that the notion of “disguised expulsion” covers only situations in which the forcible departure of an alien is the *intentional result* of an action or omission attributable to the State. The State’s intention to provoke an alien’s departure from its territory, which is inherent in the definition of expulsion in general, thus remains a decisive factor when expulsion occurs in a disguised form. In addition, paragraph 2 of the draft article relates only to actions or omissions of a State intended to provoke an alien’s departure in a way other than in accordance with the law. This prohibition does not cover, in particular, situations when expulsion results from a decision adopted in conformity with the law and on grounds in accordance with international law.<sup>73</sup>

(4) The definition of disguised expulsion, based on the elements of “compulsion” and “intention”, appears consistent with the criteria applied in this regard by the Iran-United States Claims Tribunal, which had before it a number of claims relating to situations of the same nature as those envisaged in draft article 10. The two essential elements of the notion of “disguised expulsion” that emerge from the relevant decisions of the Tribunal have been summarized as follows:

“Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility.”<sup>74</sup>

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<sup>72</sup> See, *inter alia*, Ruth L. Cove, “State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals”, *Fordham International Law Journal*, vol. 11, 1987–1988, pp. 802–838.

<sup>73</sup> See in particular draft articles 4 and 5 above, concerning the requirement for conformity with law and grounds for expulsion, respectively.

<sup>74</sup> D.J. Harris, *Cases and Materials on International Law*, 7th ed. (London, Sweet & Maxwell, 2010), p. 470 (commenting on the Iran-United States Claims Tribunal cases relating to disguised expulsion). Concerning this case-law, see also Giorgio Gaja “Expulsion of Aliens: Some Old and New Issues in International Law”, *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 283–314, particularly pp. 289–290, which refer to the following decisions of the Tribunal: *Short v. Islamic Republic of Iran*, Award of 14 July 1987, *Iran-United States Claims Tribunal Reports*, vol. 16 (1987-III), pp. 85–86; *International Technical Products Corporation v. Islamic Republic of Iran*, Award of 19 August 1985, *Iran-United States Claims Tribunal Reports*, vol. 9 (1985-II), p. 18; and *Rankin v. Islamic Republic of Iran*, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17 (1987-IV), pp. 147–148. See also Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th rev. ed. (London/New York, Routledge, 1997), p. 262; John R. Crook, “Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience”, *American Journal of International Law*, vol. 83, 1989, pp. 278–311 at pp. 308 and 309; and R. Cove, *op. cit.*, pp. 802–838.



(5) The approach taken by the Eritrea-Ethiopia Claims Commission seems to follow the same lines. The Commission considered the claim of Ethiopia that Eritrea was responsible for “indirect” or “constructive” expulsions of Ethiopians that were contrary to international law. The Commission rejected certain claims after finding that the Ethiopians in question had not been expelled by the Government of Eritrea or made to leave by Government policy; instead, they had left the country for other reasons, such as economic factors or upheavals brought about by war, for which Eritrea could not be held responsible. The Commission noted that free consent seemed to have prevailed in these situations.<sup>75</sup>

In considering subsequent expulsions, the Eritrea-Ethiopia Claims Commission emphasized the high legal threshold for responsibility based on the jurisprudence of the Iran-United States Claims Tribunal. The Commission concluded that Ethiopia had failed to meet the high legal threshold for proof of such claims as follows:

“126. Ethiopia also contended that those who left between May 2000 and December 2000 were victims of unlawful indirect or constructive expulsion. The Parties expressed broadly similar understanding of the law bearing on these claims. Both cited the jurisprudence of the Iran-U.S. Claims Tribunal, which establishes a high threshold for liability for constructive expulsion. That Tribunal’s constructive expulsion awards require that those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that government. Finally, the government’s actions must have been taken with the intention of causing the aliens to depart.

127. The evidence does not meet these tests. Post-war Eritrea was a difficult economic environment for Ethiopians and Eritreans both, but the Eritrean Government did not intentionally create generalized economic adversity in order to drive away Ethiopians. The Commission notes that the Government of Eritrea took actions in the summer of 2000 that were detrimental to many Ethiopians’ economic interests and that there was anti-Ethiopian public opinion and harassment. Nevertheless, many Ethiopians in Eritrea evidently saw alternatives to departure and elected to remain or to defer their departures. Given the totality of the record, the Commission concludes [that the claim of wide-scale constructive expulsion does not meet the high legal threshold for proof of such a claim.]<sup>76</sup>

(6) Among the acts of a State that might constitute disguised expulsion within the meaning of draft article 10 should be included support or tolerance shown by the State towards acts committed individually or collectively by private persons.<sup>77</sup> Support or tolerance shown by a State towards acts committed by private persons could fall within the scope of the prohibition of disguised expulsion if such support or tolerance constituted an “action or omission attributable to the State ... intending to provoke the departure of aliens from its territory”. In other words, such support or tolerance on the part of the expelling State must be assessed according to the criterion of the specific intention to which the last phrase of paragraph 2 refers. It is understood that a particularly high threshold should be set for this purpose when it is a matter of mere tolerance unaccompanied by definite actions of support on the part of the State for the acts of

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<sup>75</sup> *Partial Award, Civilians Claims, Ethiopia’s Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 91–95, United Nations, *Reports of International Arbitral Awards*, vol. XXVI, pp. 277–278.

<sup>76</sup> *Ibid.*, pp. 285–286 [citing Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal*, pp. 343–365 (1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 464–471 (1996)].

<sup>77</sup> See in this connection the Declaration of Principles of International Law on Mass Expulsion by the International Law Association. The definition of the term “expulsion” contained in the Declaration also covers situations in which the forcible departure of individuals is achieved by means other than a formal decision by the authorities of the State. It encompasses situations in which a State aids, abets or tolerates acts committed by its citizens with the intention of provoking the departure of individuals from the territory of the State. According to the Declaration,

“‘expulsion’ in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons, against their will from its territory for reason of race, nationality, membership of a particular social group or political opinion;

... ‘a failure to act’ may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return”.

International Law Association, Declaration of Principles of International Law on Mass Expulsion, 62nd Conference of the International Law Association, Seoul, 24–30 August 1986, *Conference Report 1986*, p. 13.

private persons. The criteria for the attribution of conduct to a State are the same as those contained in chapter II of the articles on the responsibility of States for internationally wrongful acts adopted in 2001.<sup>78</sup>

(7) The situation of support or tolerance towards acts of private persons could involve acts committed by either nationals of the State in question or aliens present in the territory of that State. That is what is meant by the phrase “its nationals or other persons”, which, moreover, covers both natural and legal persons.

### **Article 11** **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.

#### **Commentary**

(1) Draft article 11 sets out the prohibition of confiscatory expulsions, that is, expulsions with the aim of unlawfully depriving an alien of his or her assets. The unlawful confiscation of property may well be the undeclared aim of an expulsion. “For example, the ‘right’ of expulsion may be exercised ... in order to expropriate the alien’s property ... In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purposes.”<sup>79</sup> Such expulsions, to which some States have resorted in the past,<sup>80</sup> are unlawful from the perspective of contemporary international law. Aside from the fact that the grounds for such expulsions appear unsound,<sup>81</sup> it must be said that they are incompatible with the fundamental principle set out in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in 1985, which states: “No alien shall be arbitrarily deprived of his or her lawfully acquired assets.”<sup>82</sup>

(2) In addition, an expulsion for the sole purpose of confiscation of the assets of the alien in question implicates the right to property as recognized in various human rights treaties.<sup>83</sup> It should be noted that the prohibition set out in draft article 11 does not extend to situations in which assets are confiscated as a sanction consistent with law for the commission of an offence by an alien giving rise to the confiscation of assets.

### **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.

#### **Commentary**

(1) Draft article 12 sets out in general terms the prohibition against resorting to expulsion in order to circumvent an ongoing extradition procedure. One could speak of “disguised extradition” in this context.<sup>84</sup>

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<sup>78</sup> *Yearbook ... 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4.

<sup>79</sup> Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford, Clarendon Press, 1978), p. 209.

<sup>80</sup> See, *inter alia*, the examples cited in: Franck Paul Weber, “Expulsion: genèse et pratique d’un contrôle en Allemagne”, *Cultures et Conflits*, No. 23 (1996), pp. 107–153; Anne Bazin, “Les décrets Beneš et l’intégration de la République tchèque dans l’Union européenne”, *Questions d’Europe*, No. 59, 22 September 2002; and Louis B. Sohn and Richard R. Baxter, “Responsibility of States for Injuries to the Economic Interests of Aliens”, *American Journal of International Law*, vol. 55, 1961, p. 566.

<sup>81</sup> See Goodwin-Gill, *op. cit.*, *supra* note 79, pp. 216–217 and 307–308.

<sup>82</sup> Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, annex, art. 9.

<sup>83</sup> See also draft article 20 below, concerning the protection of the property of an alien subject to expulsion.

<sup>84</sup> See European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, especially the Court’s conclusion in paragraph 60 of its judgment: “Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant’s deprivation of liberty in the night of 26 to 27 October 1975 was neither ‘lawful’, within the meaning of article 5 § 1 (f) (art. 5-1-f), nor compatible with the ‘right to security of person’.” Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to ‘detention’ necessary in the ordinary course of ‘action ... taken with a view to deportation’. The findings of the presiding judge of the Paris tribunal de grande instance — even if obiter — and of the Limoges Administrative Court, even if that court had only to determine the lawfulness of the order of 17 September 1979,

As the wording of draft article 12 clearly indicates, the prohibition in question applies only as long as the extradition procedure is ongoing, in other words, from the moment at which the State in the territory of which the alien is present receives from another State a request for extradition in respect of the alien until a definitive decision is taken and enforced by the competent authorities of the first State on the request for extradition. It does not extend to situations in which no request for extradition has been made or to situations in which a request for extradition has been rejected or resolved in some other manner.

(2) In addition, the prohibition set out in draft article 12 relates only to situations in which the sole purpose of the expulsion is to circumvent an extradition procedure. The term “circumvent” presupposes an intention of the expelling State to use the expulsion procedure for the sole purpose of avoiding its obligations in the context of an extradition procedure. Where the sole purpose is not to circumvent an extradition procedure, the expelling State retains the right to expel an alien when the conditions for doing so have been met.

### **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.

#### **Commentary**

(1) Draft article 13, paragraph 1, sets out the obligation of the expelling State to treat all aliens subject to expulsion with humanity and respect for the inherent dignity of the human person at all stages of the expulsion process. The wording of this paragraph is taken from article 10 of the International Covenant on Civil and Political Rights, which deals with the situation of persons deprived of their liberty. The addition *in fine* of the phrase “at all stages of the expulsion process” is intended to underline the general nature of the obligation in question, which covers all stages of the process that can lead to the adoption of an expulsion decision and its implementation, including, in some cases, the imposition of restrictive or custodial measures.

(2) The general principle of respect for the dignity of any alien subject to expulsion is of particular importance in view of the fact that aliens are not infrequently subjected to humiliating treatment in the course of the expulsion process offensive to their dignity as human beings, without necessarily amounting to cruel, inhuman or degrading treatment. The phrase “the inherent dignity of the human person”, drawn from article 10 of the International Covenant on Civil and Political Rights, is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent in every human being.

(3) Draft article 13, paragraph 2, simply recalls that all aliens subject to expulsion are entitled to respect for their human rights. The word “including”, which precedes the reference to the rights mentioned in the draft articles, is intended to make it clear that the specific mention of some rights in the draft articles is justified only because of their particular relevance in the context of expulsion; their mention should not be understood as implying in any way that respect for those rights is more important than respect for other human rights not mentioned in the draft articles. It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue

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are of the utmost importance in the Court’s view; they illustrate the vigilance displayed by the French courts. There has accordingly been a breach of article 5 § 1 (art. 5–1) of the Convention.”

of general international law. That said, mention should be made in particular in this context of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly on 13 December 1985.<sup>85</sup>

#### **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.

#### **Commentary**

(1) Draft article 14 concerns the obligation to respect rights without discrimination in the context of the expulsion of aliens. The obligation not to discriminate is set out, in varying formulations, in the major universal and regional human rights instruments.<sup>86</sup> This obligation has also been recognized in case-law concerning expulsion. It was for example, stated in general terms by the Iran-United States Claims Tribunal in the *Rankin* case:

“A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State’s action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State’s treaty obligations.”<sup>87</sup>

Also noteworthy is the *Mauritian women* case, in which the Human Rights Committee considered that there had been a violation of the International Covenant on Civil and Political Rights because the law in question introduced discrimination on the ground of sex by protecting the wives of Mauritian men against expulsion while not affording such protection to the husbands of Mauritian women.<sup>88</sup>

The European Court of Human Rights took the same position that the Human Rights Committee had taken in the aforementioned *Mauritian women* case in its judgment of 28 May 1985 in the *Abdulaziz, Cabales and Balkandali* case.<sup>89</sup> The Court held unanimously that article 14 of the European Convention on Human Rights had been violated by reason of discrimination against each of the applicants on the ground of sex: unlike male immigrants settled in the United Kingdom, the applicants did not have the right, in the same situation, to obtain permission for their non-national spouses to enter or remain in the country for settlement. After having stated that “advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe”, the Court held that “very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention”.<sup>90</sup> It also emphasized that article 14 was concerned with the “avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways”.<sup>91</sup> On the other hand, it held that in the current case, the fact that applicable rules affected “fewer white people than others” was not a sufficient reason to consider them as

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<sup>85</sup> General Assembly resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, annex.

<sup>86</sup> See, for example, article 7 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 2 of the Convention on the Rights of the Child, article 14 of the European Convention on Human Rights and its Protocol No. 12 or article 28 of the African Charter on Human and Peoples’ Rights.

<sup>87</sup> *Rankin v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, p. 142, para. 22.

<sup>88</sup> Communication No. R 9/35, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, pp. 139–142, para. 9.2.

<sup>89</sup> European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94; relevant parts of the judgment are recalled by Marc Bossuyt in his commentary on article 14 in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l’homme. Commentaire article par article* (Paris, Economica, 1999), pp. 482–483.

<sup>90</sup> *Ibid.*, para. 78.

<sup>91</sup> *Ibid.*, para. 82.

racist in character as they “did not contain regulations differentiating between persons or groups on the ground of their race or ethnic origin.”<sup>92</sup>

(2) Draft article 14 sets out the obligation of the expelling State to respect the rights of the alien subject to expulsion without discrimination of any kind. As this obligation applies to the exercise of the right of expulsion, it covers both the decision to expel or not to expel and the procedures relating to the adoption of an expulsion decision and its possible implementation.

(3) The list of prohibited grounds for discrimination contained in draft article 14 is based on the list included in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of “ethnic origin” and a reference to “any other ground impermissible under international law.” The express mention of “ethnic origin” in the draft article is justified because of the undisputed nature of the prohibition in contemporary international law of discrimination on this ground and in view of the particular relevance of ethnic issues in the context of the expulsion of aliens. The reference to “any other ground impermissible under international law” clearly indicates the non-exhaustive nature of the list of prohibited grounds for discrimination included in draft article 14.

(4) With regard to the prohibition of any discrimination on the ground of sexual orientation, differences remain and in certain regions the practice varies. In any case, there is international practice and case-law on this matter. It should be noted that the interpretation by the Human Rights Committee of the reference to “sex” in articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights was that the notion includes sexual orientation.<sup>93</sup>

(5) The reference in the draft article to “any other ground impermissible under international law” makes it possible to capture any legal development concerning prohibited grounds for discrimination that might have occurred since the adoption of the Covenant. On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on national origin. In particular, it preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.<sup>94</sup>

## **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.

### **Commentary**

(1) Draft article 15 sets out particular requirements concerning the expulsion of vulnerable persons such as children, older persons, persons with disabilities and pregnant women.

(2) Draft article 15, paragraph 1, is general in scope. It sets out the obligation of the expelling State to treat and protect vulnerable persons who are subject to expulsion with due regard for their vulnerabilities and special needs. The reference to the requirement that the individuals in question “shall be considered as such”, is intended to emphasize the importance of due recognition by the expelling State of their

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<sup>92</sup> *Ibid.*, para. 85.

<sup>93</sup> Communication No. 488/1992, *Nicholas Toonen v. Australia*, Views adopted on 31 March 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, p. 235, para. 8.7. For the case-law of the European Court of Human Rights, see, *inter alia*, *Salgueiro Da Silva Mouta v. Portugal*, Judgment of 21 December 1999, Application No. 33290/96, para. 28, and *E.B. v. France*, Judgment of 22 February 2008, Application No. 43546/02, para. 50.

<sup>94</sup> The European Court of Human Rights dealt with this issue in the case of a Moroccan national who was expelled from Belgium. The Court said that “[a]s for the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order.” (*Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, para. 49).

vulnerabilities, as it is that recognition that would justify granting these individuals special treatment and protection.

(3) It is hardly possible to list in a draft article all categories of vulnerable persons that might merit special protection in the context of an expulsion procedure. Aside from the categories of persons explicitly mentioned, there might be other individuals, such as those suffering from incurable diseases or an illness requiring particular care which, *ex hypothesi*, could not be provided — or would be difficult to provide — in the possible State or States of destination. The addition of the phrase “and other vulnerable persons” clearly indicates that the list included in paragraph 1 is not exhaustive.

(4) Draft article 15, paragraph 2, deals with the specific case of children and reproduces the wording of article 3, paragraph 1, of the Convention on the Rights of the Child.<sup>95</sup> While not excluding consideration of other relevant factors, paragraph 2 sets out the requirement that the best interests of the child shall be a primary consideration in all decisions concerning children who are subject to expulsion.<sup>96</sup>

## 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.

#### Commentary

Draft article 16 recalls the obligation of the expelling State to protect the right to life of an alien subject to expulsion. This right, which is “inherent” in “every human being” according to article 6, paragraph 1, of the International Covenant on Civil and Political Rights, is proclaimed, admittedly in various ways, in core international instruments for the protection of human rights, both universal<sup>97</sup> and regional.<sup>98</sup>

#### 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.

#### Commentary

(1) Draft article 17 recalls, in the context of expulsion, the general prohibition of torture or cruel, inhuman or degrading treatment or punishment. This is an obligation enshrined in various treaty instruments for the protection of human rights, both universal and regional.<sup>99</sup> The obligation not to subject aliens to torture or cruel, inhuman or degrading treatment is also set forth in General Assembly resolution 40/144.<sup>100</sup> In its judgment of 20 November 2010 in the *Ahmadou Sadio Diallo* case, the International Court

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<sup>95</sup> Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3. Article 3 reads as follows: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

<sup>96</sup> See in particular European Court of Human Rights, *Case of Mubilanzila Mayeka and Keniki Mitunga v. Belgium*, Judgment, 12 October 2006, Application No. 13178/03, para. 55.

<sup>97</sup> See in particular article 3 of the 1948 Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights.

<sup>98</sup> See article 2 of the European Convention on Human Rights; article 2 of the Charter of Fundamental Rights of the European Union; article 3 of the American Convention on Human Rights; article 4 of the African Charter on Human and Peoples’ Rights; and article 5 of the Arab Charter on Human Rights.

<sup>99</sup> See, *inter alia*, article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights, preambular paragraph 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the African Charter on Human and Peoples’ Rights, article 5, paragraph 2, of the American Convention on Human Rights and article 3 of the European Convention on Human Rights.

<sup>100</sup> General Assembly resolution 40/144 of 13 December 1985, annex, art. 6.

of Justice recalled in connection with an expulsion case that the prohibition of inhuman or degrading treatment forms part of general international law.<sup>101</sup>

(2) Draft article 17 concerns only the obligation of the expelling State itself not to subject an alien to torture or cruel, inhuman or degrading treatment or punishment. On the other hand, the obligation not to expel an alien to a State where he or she may be subjected to such treatment or punishment is set out in draft article 24 below.

(3) Draft article 17 does not address the question of the extent to which the prohibition of torture or cruel, inhuman or degrading treatment or punishment also covers cases in which such treatment is inflicted, not by *de jure* or *de facto* State organs but by persons or groups acting in a private capacity. That issue is left to the relevant international monitoring bodies to assess or, where appropriate, to the courts that might be called upon to rule on the exact extent of the obligations arising from one instrument or another for the protection of human rights.<sup>102</sup>

## 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.

#### Commentary

(1) Draft article 18 establishes the obligation of the expelling State to respect the right to family life of an alien subject to expulsion. This right is of particular relevance in the context of the expulsion of aliens. By the mere fact of compelling an alien to leave the territory of a State, expulsion may undermine the unity of the alien's family in the event that, for various reasons, family members are not able to follow the alien to the State of destination. It is not surprising, therefore, that the legislation and case-law of various States recognize the need to take into account family considerations as a limiting factor in the expulsion of aliens.<sup>103</sup>

(2) The right to family life is included both in universal instruments and in regional conventions for the protection of human rights. At the universal level, article 17 of the International Covenant on Civil and Political Rights states:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, *family*, home or correspondence, nor to unlawful attacks on his honour and reputation. (emphasis added).

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<sup>101</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 671, para. 87; See also paragraph (1) of the commentary to article 24 below.

<sup>102</sup>See, in this regard, the points made in para. (4) of the commentary to article 24 below.

<sup>103</sup>See, for example, Czech Republic, Act No. 326 of 30 November 1999 on Residence of Aliens in the Territory of the Czech Republic and Amendment to Some Acts (as amended through Act No. 140 Sb. of 3 April 2001 and Act. No. 427 of 21 December 2010), art. 9(3); Spain, Organic Law 4/2000 (11 January 2000) concerning the rights and liberties of foreigners in Spain and their social integration, modified by the Organic Law 2/2009 (11 December 2009), arts. 57.5. b) and 64.2 a); Sweden, Aliens Act (SFS 2005:716), arts. 8:15, 8:13 and 8a:2; and Switzerland, Federal Act on Foreign Nationals (No. 142.20) of 16 December 2005, Art. 3 (2), and Chapter 7: Family Reunification (Art 42-52); see also *Re Ratzlaff*, Belgian State, Cour de Cassation, 21 September 1959, *International Law Reports*, volume 47, 1974, E. Lauterpacht (ed.), pp. 263–264; *Cazier v. Belgian State (Minister of Justice)*, Conseil d'État, 13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 335–336; *K.A. v. State of the Netherlands*, District Court of the Hague, 12 July 1979, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 444–448; *Deportation to U. Case, ibid.*, pp. 613–617; *In Re Paul B.*, Federal Republic of Germany, Federal Constitutional Court (Supreme Senate), 1 March 1966, *International Law Reports*, volume 45, E. Lauterpacht (ed.), pp. 371–376; *Expulsion Order Case, ibid.*, pp. 436–443; *Expulsion of Alien Case*, Federal Republic of Germany, Administrative Court of Appeals of Bavaria, 12 January 1966, *International Law Reports*, volume 57, E. Lauterpacht, C. J. Greenwood (eds.), pp. 313–315; *Residence Prohibition Order Case (1), ibid.*, pp. 431–433; *Expulsion of Alien (Germany) Case*, German Federal Republic, Federal Administrative Supreme Court, 25 October 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 393–395; *Expulsion of Foreign National (Germany) Case*, Federal Republic of Germany, Administrative Court of Appeal of the Land of North Rhine-Westphalia, 16 May 1961, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 255–257; *In re Barahona*, Supreme Court of Costa Rica, 10 August 1939, *Annual Digest and Reports of Public International Law Cases, 1938–1940*, H. Lauterpacht (ed.), Case No. 138, pp. 386–388; *Louie Yuet Sun v. The Queen*, Ontario High Court of Justice, 22 March 1960, Supreme Court, 28 November 1960, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 252–255; *Seyoum Faisa Joseph v. U.S. Immigration & Naturalization Service, ibid.*; *Fernandes v. Secretary of State for the Home Department*, Court of Appeal of England, 20 November 1980, *International Law Reports*, volume 78, E. Lauterpacht, C.J. Greenwood (eds.), pp. 371–378; *Harisiades v. Shaughnessy, ibid.*, pp. 345–350 (expelled despite having a wife and children who were citizens). See also the memorandum of the Secretariat on expulsion of aliens (A/CN.4/565), paras. 466–467.

2. Everyone has the right to the protection of the law against such interference or attacks.”

Similarly, under the terms of article 5, paragraph 1 (b), of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, aliens enjoy “the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence.”<sup>104</sup>

(3) At the regional level, article 8, paragraph 1, of the European Convention on Human Rights provides that “[e]veryone has the right to respect for his private and family life ...”. Article 7 of the Charter of Fundamental Rights of the European Union reproduces this provision *in extenso*. Under section III (c) of the Protocol to the European Convention on Establishment,<sup>105</sup> the contracting States, in exercising their right of expulsion, must in particular pay due regard to family ties and the period of residence in their territory of the person concerned. While the African Charter on Human and Peoples’ Rights does not contain this right, in other respects it is deeply committed to the protection of the family (see article 18). Article 11, paragraph 2, of the American Convention on Human Rights establishes this right in the same terms as the above-cited article 17 of the International Covenant on Civil and Political Rights. Article 21 of the Arab Charter on Human Rights also sets out the right.

(4) However, the obligation to respect the family life of an alien subject to expulsion, set out in the first sentence of draft article 18, does not accord the alien absolute protection against expulsion. The second sentence of draft article 18 indicates that the expelling State must not interfere arbitrarily or unlawfully with the exercise of that right. This limitation appears explicitly in article 17, paragraph 1, of the International Covenant on Civil and Political Rights and article 21, paragraph 1, of the Arab Charter of Human Rights and is highlighted in article 8, paragraph 2, of the European Convention on Human Rights.<sup>106</sup>

(5) The provisions of draft article 18 are without prejudice to the case-law on protection of family life established by the European Court of Human Rights. According to this case-law, the expelling State may interfere with the exercise of the right to family life only where provided by law and in achieving a “fair balance” between the interests of the State and those of the alien in question. The notion of “fair balance” is inspired by the Court’s case-law regarding article 8 of the European Convention on Human Rights and, more specifically, by the requirement that “interference” in family life must be *necessary in a democratic society* within the meaning of paragraph 2 of that article. In *Moustaquim v. Belgium*, the Court concluded that the expulsion of Mr. Moustaquim did not satisfy that requirement.<sup>107</sup> Given the circumstances of the case, in particular the long period of time during which Mr. Moustaquim had resided in Belgium, the ties of his close relatives with Belgium as well as the relatively long interval between the latest offence committed by Mr. Moustaquim and the deportation order, the Court came to the conclusion that the measure was not “necessary in a democratic society” since “a proper balance was not achieved between the interests involved, and ... the means employed was therefore disproportionate to the legitimate aim pursued.”<sup>108</sup> The Court considered on several occasions whether expulsion measures in conformity with article 8 of the European Convention on Human Rights, particularly in the cases *Nasri v. France*,<sup>109</sup> *Cruz Varas and Others v. Sweden*<sup>110</sup> and *Boultif v. Switzerland*.<sup>111</sup> In this last case, the Court set forth a list of criteria to be applied in order to determine whether the interference in family life resulting from an expulsion is “necessary in a democratic society.”<sup>112</sup>

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<sup>104</sup>General Assembly resolution 40/144 of 13 December 1985, annex.

<sup>105</sup>European Convention on Establishment (with Protocol), Paris, 13 December 1955, United Nations, *Treaty Series*, vol. 529, No. 7660, p. 141.

<sup>106</sup>This requirement is set out in general terms in draft article 4, above.

<sup>107</sup>*Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), European Court of Human Rights, 18 February 1991, Application No. 12313/86, paras. 41 to 46.

<sup>108</sup>*Ibid.*, para. 46.

<sup>109</sup>*Nasri v. France*, Judgment (Merits and Just Satisfaction), 13 July 1995, Application No. 19465/92, specifically para. 46.

<sup>110</sup>*Cruz Varas and Others v. Sweden*, Judgment (Merits), 20 March 1991, Application No. 15576/89, specifically para. 88.

<sup>111</sup>*Boultif v. Switzerland*, Judgment (Merits and Just Satisfaction), 2 August 2001, Application No. 54273/00.

<sup>112</sup>In more general terms, the Court set forth, in the *Case of Boultif v. Switzerland*, a list of criteria to be applied in order to determine whether the interference in family life resulting from an expulsion is “necessary in a democratic society”. Such criteria include the nature and the seriousness of the offence committed by the applicant, the duration of the applicant’s stay in the territory of the State, the time at which the offence was committed as well as many different factors relating to the



(6) The criterion of “fair balance” also seems compatible with the approach taken by the Human Rights Committee for the purpose of assessing whether expulsion measures are in conformity with article 17 of the International Covenant on Civil and Political Rights.<sup>113</sup>

## 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.

### Commentary

(1) Draft article 19 sets forth the obligations of the expelling State in respect of the detention of an alien for the purpose of expulsion. Such obligations cover only situations in which deprivation of liberty is ordered in the context of an expulsion procedure and for the sole purpose of the alien’s expulsion. The rules contained in draft article 19 do not cover the detention of an alien for any reason other than expulsion, including when it is caused by the commission of a crime that is both grounds for detention and a reason for expulsion.

(2) Draft article 19, paragraph 1, sets out the non-arbitrary and non-punitive nature of detention to which aliens facing expulsion may be subject.<sup>114</sup> Subparagraph (a) establishes the general principle that such detention must not be arbitrary or punitive in nature whereas subparagraph (b) sets out one of the consequences of that principle. Subparagraph (b) provides that, save in exceptional circumstances, an

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family ties of the applicant, including children:

“The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other’s country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society. In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant’s stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant’s conduct during that period; the nationalities of the various persons concerned; the applicant’s family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant’s country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.” (European Court of Human Rights, *Case of Boulif v. Switzerland, op.cit.*, para. 48).

<sup>113</sup>According to the Committee, “the separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal” (communication No. 558/1993, Views adopted on 3 April 1997, *International Human Rights Reports*, vol. 5 (1998), p. 76, para. 11.4). In a previous case, the Committee found that “the interference with Mr. Stewart’s family relation that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate State interest and due consideration was given in the deportation proceedings to the deportee’s family connections” (communication No. 538/1993, Views adopted on 1 November 1996, *International Human Rights Reports*, vol. 4 (1997), p. 429, para. 12.10).

<sup>114</sup>See, in this regard, Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 43: “Administrative detention should never be punitive in nature.”

alien who is detained for the purpose of expulsion must be held separately from persons sentenced to penalties involving deprivation of liberty. Such a safeguard is granted to accused persons, in their capacity as unconvicted persons, under article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights. In view of the non-punitive nature of detention for the purpose of expulsion, there is all the more reason to provide the safeguard set out in article 10, paragraph 2, of the Covenant to aliens subjected to that form of detention, as indicated by the position expressed by the Human Rights Committee in its comments on article 13 of the Covenant in relation to expulsion. The Committee noted that if expulsion procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (articles 9<sup>115</sup> and 10<sup>116</sup>) may also be applicable.<sup>117</sup> The same requirement is set out in principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in the annex to General Assembly resolution 43/173 of 9 December 1988. This principle, which also covers detention for the purpose of expulsion, stipulates: “Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.” The International Court of Justice has likewise recognized that the scope of the provisions of article 9, paragraphs 1 and 2, of the Covenant is not confined to criminal proceedings: “they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory.”<sup>118</sup>

(3) The reference to “exceptional circumstances” that could justify non-compliance with the rule set out in paragraph 1 (b) is drawn from article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights.

(4) The rule set out in paragraph 1 (b) does not necessarily require the expelling State to put in place facilities specially set aside for the detention of aliens with a view to their expulsion; the detention of aliens could occur in a facility in which persons sentenced to custodial penalties are also detained, provided, however, that the aliens in question are placed in a separate section of the facility.

(5) It should be clarified that the safeguards mentioned above apply only to detention for the purpose of ensuring the implementation of an expulsion decision; they are without prejudice to the case of aliens subject to expulsion who have been convicted of a criminal offence, including those situations in which the expulsion of an alien might be ordered as an additional measure or as an alternative to prison.

(6) The important issue of the length of detention, which poses difficult problems in practice, is the subject of draft article 19, paragraph 2, which comprises two subparagraphs. Subparagraph (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.<sup>119</sup> Such requirements are

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<sup>115</sup>Article 9 of the Covenant provides: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

<sup>116</sup>Article 10 of the Covenant provides: “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

<sup>117</sup>Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 9.

<sup>118</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, at p. 668, para. 77.*

<sup>119</sup>The prohibition of excessive duration of detention was affirmed by the European Court of Human Rights with respect to article 5 of the European Convention on Human Rights; see in particular *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 113: “The Court recalls, however, that any

confirmed in international case-law, the legislation of various States and a significant number of judicial findings of national courts.<sup>120</sup> The words “reasonably necessary” that appear in paragraph 2 (a) are intended to provide administrative authorities and, if necessary, a judicial authority with a standard to assess the necessity and the duration of the detention of an alien for the purpose of expulsion.

(7) Paragraph 2 (b) states that the extension of the duration of the detention may be decided upon only by a court or by another competent authority, subject to judicial review. The stipulation regarding judicial review of other competent authorities is designed to prevent possible abuses by the administrative authorities with respect to the length of the detention of an alien subject to expulsion. The content of paragraph 2 (b) is inspired by the case-law of the European Court of Human Rights.<sup>121</sup>

(8) Draft article 19, paragraph 3, is inspired by a recommendation put forward by the Special Rapporteur on the human rights of migrants.<sup>122</sup> 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. According to paragraph 3 (a), it is detention as such, as opposed to the initial decision concerning placement in detention, that should be subject to regular review. Such safeguards flowed from the non-punitive nature of the detention of aliens for the purpose of expulsion.

(9) Paragraph 3 (b) sets out the principle that 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. The application of this principle is without prejudice to the right of the expelling State to apply to the person subject to expulsion its criminal law for offences committed by that person. The entire paragraph should be understood in the light of paragraph 2, which means, in particular, that under paragraph 2 (a), even in the event that the impossibility of carrying out an expulsion decision is attributable to the alien in question, the alien cannot be kept in detention for an excessive length of time.

## 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.

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deprivation of liberty under art. 5, para. 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under art. 5, para. 1 (f) ... It is thus necessary to determine whether the duration of the deportation proceedings was excessive.”

See also: Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 35 (“Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite”) and para. 75 (g) ([the recommendation of] “[e]nsuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite”).

<sup>120</sup>See, for example, Brazil, Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933–1934, H. Lauterpacht (ed.), Case No. 139, pp. 333–334; *Kestutis Zadvydas, Petitioner, v. Christine G. Davis* United States Supreme Court, 533 U.S. 678, 28 June 2001; *In re Flaumembaum*, Cámara Criminal de la Capital, 24 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, H. Lauterpacht (ed.), Case No. 94, pp. 313–315; Constitutional Court of the Russian Federation, *Ruling No. 6, Case of the review of the constitutionality of a provision in the second part of article 31 of the USSR Act of 24 July 1981, “On the legal status of aliens in the USSR” in connection with the complaint of Yahya Dashti Gafur*, 17 February 1998; *In re Cantor*, Federal Supreme Court (Argentina), 6 April 1938, *Annual Digest and Reports of Public International Law Cases*, 1938–1940, H. Lauterpacht (ed.), Case No. 143, pp. 392–393; *In re Hely*, Venezuelan Federal Court of Cassation, 16 April, 1941 (Per ILR, 1941–42, p. 313); *Re Janoczka*, Manitoba Court of Appeal (Canada), 4 August 1932, *Annual Digest of Public International Law Cases*, 1931–1932, H. Lauterpacht (ed.), Case No. 154, pp. 291–292; *United States Ex Rel. Janivaris v. Nicolls*, United States, District Court, District of Massachusetts, 20 October 1942, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, H. Lauterpacht (ed.), Case No. 95, pp. 316–318.

<sup>121</sup>See in particular *Shamsa v. Poland*, Judgment, 27 November 2003, Applications Nos. 45355/99 and 45357/99, para. 59. The Court referred to “the right of habeas corpus” contained in art. 5, para. 4, of the Convention to “support the idea that detention extended beyond the initial period as envisaged in paragraph 3 calls for the intervention of a court as a guarantee against arbitrariness”.

<sup>122</sup>Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 75 (g). This recommendation states:

“(g) ... The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant.”

## Commentary

(1) Draft article 20, which concerns the protection of the property of an alien subject to expulsion, 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 the alien of his or her property.

(2) The wording of article 20 is sufficiently general to encompass all the guarantees relating to the protection of the property of an alien subject to expulsion under the applicable legal instruments. It should be recalled that article 17, paragraph 2, of the Universal Declaration of Human Rights states that “[n]o one shall be arbitrarily deprived of his property.” Concerning expulsion more specifically, article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that:

“6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

...

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.”

At the regional level, article 14 of the African Charter on Human and Peoples’ Rights states that:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

The American Convention on Human Rights (Pact of San José, Costa Rica) states in article 21 on the right to property that:

“1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

[...]

Similarly, article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>123</sup> states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Lastly, article 31 of the Arab Charter on Human Rights states:

“Everyone has a guaranteed right to own property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property.”

(3) It may be considered that the obligation to protect the property of an alien subject to expulsion ought to involve allowing the individual a reasonable opportunity to protect the property rights and other

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<sup>123</sup>Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Paris, 20 March 1952, United Nations, *Treaty Series*, vol. 213, No. 2889, article 1, p. 262.

interests that he or she may have in the expelling State. Failure to give an alien such opportunity has given rise to international claims.<sup>124</sup> As early as 1892, the Institute of International Law adopted a resolution containing a provision indicating that aliens who are domiciled or resident, or have a commercial establishment in the expelling State, shall be given the opportunity to settle their affairs and interests.

*“L’expulsion d’étrangers domiciliés, résidents ou ayant un établissement de commerce ne doit être prononcée que de manière à ne pas trahir la confiance qu’ils ont eue dans les lois de l’État. Elle doit leur laisser la liberté d’user, soit directement, si c’est possible, soit par l’entremise de tiers par eux choisis, de toutes les voies légales pour liquider leur situation et leurs intérêts, tant actifs que passifs, sur le territoire.”* [Deportation of aliens who are domiciled or resident or who have a commercial establishment in the territory shall only be ordered in a manner that does not betray the trust they have had in the laws of the State. It shall give them the freedom to use, directly where possible or by the mediation of a third party chosen by them, every possible legal process to settle their affairs and their interests, including their assets and liabilities, in the territory.]<sup>125</sup>

More than a century later, the Iran-United States Claims Tribunal held, in *Rankin v. The Islamic Republic of Iran*, that an expulsion was unlawful if it denied the alien concerned a reasonable opportunity to protect his or her property interests:

“The implementation of this policy could, in general terms, be violative of both procedural and substantive limitations on a State’s right to expel aliens from its territory, as found in the provisions of the Treaty of Amity and in customary international law. ... For example, by depriving an alien of a reasonable opportunity to protect his property interests prior to his expulsion.”<sup>126</sup>

Similarly, with regard in particular to migrant workers, paragraph 18 (sect. VI) of the Migration for Employment Recommendation (Revised), adopted by the General Conference of the International Labour Organization on 1 July 1949, reads as follows:

“(1) When a migrant for employment has been regularly admitted to the territory of a Member, the said Member should, as far as possible, refrain from removing such person or the members of his family from its territory on account of his lack of means or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned.

...

(2) Any such agreement should provide:

“(c) that the migrant must have been given reasonable notice so as to give him time, more particularly to dispose of his property” (emphasis added).

Such considerations are taken into account in national laws, which, *inter alia*, may afford the alien a reasonable opportunity to settle any claims for wages or other entitlements before his or her departure or provide for the necessary actions to be taken in order to ensure the safety of the

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<sup>124</sup>In the *Hollander* case, the United States claimed compensation from Guatemala for the summary expulsion of one of its citizens and pointed out that Mr. Hollander “... was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him, [and claimed that] [t]he Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquillity to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three years before ...” (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been Party*, vol. IV, p. 107). See also D.J Harris, *Cases and Materials on International Law*, 7th ed. (London, Sweet & Maxwell, 2010), p. 470, Letter from U.S. Dept. of State to Congressman, 15 December 1961, 8 Whiteman 861 (case of *Dr. Breger*): “As to Dr. Breger’s expulsion from the island of Rhodes in 1938, it may be pointed out that under generally accepted principles of international law, a State may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner, such as by using unnecessary force to effect the expulsion or by otherwise mistreating the alien or by refusing to allow the alien a reasonable opportunity to safeguard property. In view of Dr. Breger’s statement to the effect that he was ordered by the Italian authorities to leave the island of Rhodes within six months, it appears doubtful that international liability of the Italian Government could be based on the ground that he was not given enough time to safeguard his property.”

<sup>125</sup>*Règles internationales sur l’admission et l’expulsion des étrangers* [International Regulations on the Admission and Expulsion of Aliens], Geneva session, 1892, resolution of 9 September 1892, art. 41.

<sup>126</sup>*Rankin v. The Islamic Republic of Iran*, Award of 3 November 1987, *Iran-US Claims Tribunal Reports*, vol. 17, p. 147, para. 30 e.

alien's property while the alien is detained pending deportation.<sup>127</sup> More generally, the need to protect the property of aliens subject to expulsion is also taken into account, to varying degrees and in different ways, by the laws of a number of States.<sup>128</sup>

(4) According to draft article 20, an alien must be guaranteed the free disposal of his or her property "in accordance with the law". This clarification should not be interpreted as allowing the expelling State to apply laws that would have the effect of denying or limiting arbitrarily the free disposal of property. However, it takes sufficient account of the interest that the expelling State may have in limiting or prohibiting, in accordance with its own laws, the free disposal of certain assets, particularly assets that were illegally acquired by the alien in question or that might be the proceeds of criminal or other unlawful activities. Furthermore, the clarification that the alien should be allowed to dispose freely of his or her property "even from abroad" is intended to address the specific needs, where applicable, of an alien who has already left the territory of the expelling State because of an expulsion decision concerning him or her. That point was taken into account by the International Court of Justice in its 2010 judgment in the *Diallo* case, even although the Court ultimately found that in the case in question Mr. Diallo's direct rights as *associé* had not been violated by the Democratic Republic of the Congo, because "no evidence [had] been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as *gérant* or as *associé*."<sup>129</sup>

(5) It is understood that the rules set forth in draft article 20 are without prejudice to the right any State has to expropriate or nationalize the property of an alien, in accordance with the applicable rules of international law.

(6) The issue of the property rights of enemy aliens in time of armed conflict is not specifically addressed in draft article 20, since the Commission's choice, as mentioned in the commentary to draft article 9, is not to address aspects of the expulsion of aliens in time of armed conflict. It should, however, be noted that the issue of property rights in the event of armed conflict was the subject of extensive discussion in the Eritrea- Ethiopia Claims Commission.<sup>130</sup>

### **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.

#### **Commentary**

(1) Draft article 21 concerns the protection that an expelling State must accord 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.

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<sup>127</sup> See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 714.

<sup>128</sup> For an overview, see *ibid.*, para. 481.

<sup>129</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 681, para. 121.

<sup>130</sup> Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, decision of 17 December 2004, paras. 124-129, 133, 135-136, 140, 142, 144-146 and 151-152, and *ibid.*, *Ethiopia's Claim 5*, decision of 17 December 2004, paras. 132-135; United Nations, *Reports of International Arbitral Awards*, vol. XXVI, pp. 195-247 and 249-290.

(2) Article 21, paragraph 1, provides that the expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.<sup>131</sup> Even though it aims to a certain extent to make voluntary departure of the alien the preferred solution, the provision cannot be interpreted as authorizing the expelling State to exert undue pressure on the alien to opt for voluntary departure rather than forcible implementation of an expulsion decision. It aims at facilitating voluntary departure, where appropriate.

(3) Paragraph 2 concerns cases of forcible implementation of an expulsion decision. It provides that in such a case 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. It should be clarified in this regard that the expression “safe transportation ... in accordance with the rules of international law” refers not only to the requirement to ensure the protection of the rights of the alien subject to expulsion and avoid any excessive use of force against the alien but also to the need to ensure, if necessary, the safety of persons other than the alien in question, for example the passengers on an aeroplane taken by the alien to travel to the State of destination.

(4) This requirement was implicit in the arbitral award rendered in the *Lacoste* case, although it was held that the claimant had not been subjected to harsh treatment:

“*Lacoste* further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. ... The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country.”<sup>132</sup>

Similarly, in the *Boffolo* case, the umpire indicated in general terms that “[e]xpulsion [...] must be accomplished in the manner least injurious to the person affected”.<sup>133</sup>

In the *Maal* case, the umpire stressed the sacred character of the human person and the requirement that an expulsion should be accomplished without unnecessary indignity or hardship:

“[H]ad the exclusion of the claimant been accomplished without unnecessary indignity or hardship to him the umpire would feel constrained to disallow the claim.

...

From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we have to consider him as a gentleman or simply as a man his rights to his own person and to his own undisturbed sensitivities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been told to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted.”<sup>134</sup>

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<sup>131</sup>The voluntary departure of the alien facing expulsion permits greater respect for human dignity while being easier to manage administratively. The implementation of this expulsion process is negotiated between the expelling State and the alien subject to the expulsion order. In 2005, the Committee of Ministers of the Council of Europe placed the emphasis on voluntary departure, saying that “The host state should take measures to promote voluntary returns, which should be preferred to forced returns.” (Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return, 925th meeting, 4 May 2005, documents of the Committee of Ministers CM(2005) 40 final, 9 May 2005). Similarly, in its proposal for a directive on return of 1 September 2005, the Commission of the European Communities indicated that the return decision shall provide for “an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period.” (Proposal for a directive of the European Parliament and of the Council, 1 September 2005, on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final).

<sup>132</sup>*Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. IV, pp. 3347–3348.

<sup>133</sup>*Boffolo* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 528 (Ralston, Umpire).

<sup>134</sup>*Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 732.

(5) When transportation of the alien to the State of destination takes place, for example, by aeroplane, reference to the rules of international law also cover the rules relating to air transportation, particularly the regulations adopted in the framework of the International Civil Aviation Organization (ICAO). The Convention on International Civil Aviation and annex 9 thereto should be mentioned in particular in this respect.<sup>135</sup> The annex states, *inter alia*, that:

“5.2.1 During the period when [...] a person to be deported is under their custody, the state officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity.”

(6) In both situations considered in draft article 21 — voluntary departure of the alien or forcible implementation of the expulsion decision — paragraph 3 requires the expelling State to give the alien a reasonable period of time to prepare for his or her departure, taking into account all circumstances. The circumstances to be taken into account for the purpose of determining what seems in the case in question to be a reasonable period of time vary in nature. They can relate to, *inter alia*, ties (social, economic or other) that the alien subject to expulsion has established with the expelling State, the conduct of the alien in question, including, where applicable, the nature of the threat to the national security or public order of the expelling State that the presence of the alien in its territory could constitute or the risk that the alien would evade the authorities of the State order to avoid expulsion. The requirement of granting a reasonable period of time to prepare for departure must also be understood in the light of the need to permit the alien subject to expulsion to protect adequately his or her property rights and other interests in the expelling State.<sup>136</sup>

## 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.

### Commentary

(1) Draft article 22 concerns the determination of the State of destination of aliens subject to expulsion. In this context, paragraph 1 refers first of all to the alien’s State of nationality, since it is undisputed that that State has an obligation to receive the alien under international law.<sup>137</sup> In the case of a person who has several nationalities, the term “his or her State of nationality” means each of the countries of which the person is a national. In accordance with draft articles 23 and 24 of the present draft articles, if the alien subject to expulsion is justified in fearing for his or her life or there are substantial grounds for believing that she or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment, then he or she cannot be expelled to such a country. Paragraph 1 also recognizes the existence of other potential States of destination, distinguishing between States that might be obliged, under international law, to receive the alien and those that are not obliged to do so. This

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<sup>135</sup>Convention on International Civil Aviation, Chicago, 7 December 1944, United Nations, *Treaty Series*, vol. 15, No. 102, p. 295, and annex 9, Facilitation; the text is also available on the ICAO website: <http://www.icao.int>.

<sup>136</sup>See above, para. (3) of the commentary to draft article 20.

<sup>137</sup>See, *inter alia*, the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties, adopted by the VIth International Conference of American States, signed at Havana on 20 February 1928. League of Nations, *Treaty Series*, vol. CXXXII, 1932–1933, No. 3045, p. 306. Article 6, paragraph 2, reads: “States are required to receive their nationals expelled from foreign soil who seek to enter their territory.” See also, Institute of International Law, *Règles internationales sur l’admission et l’expulsion des étrangers*, Geneva session, 9 September 1892, *Annuaire de l’Institut de droit international*, vol. XII, 1892–1894, art. 2: “In principle, a State must not prohibit access into or a stay in its territory either to its subjects or to those who, after having lost their nationality in said State, have acquired no other nationality.” See also article 32, paragraph 3, of the Refugee Convention.



distinction reflects, with regard to the expulsion of aliens, the uncontested principle that a State is not required to receive aliens in its territory, save where obliged to do so by a rule of international law. While this is a fundamental distinction, it does not necessarily result in an order of priority in determining the State of destination of an expelled alien; in other words, the fact that a State of nationality has been identified and that there is, hypothetically, no legal obstacle to the alien's expulsion to that State in no way precludes the possibility of expelling the alien to another State that has the obligation to receive the alien under international law, or to any other State willing to accept him or her. In this regard, the expelling State, while retaining a margin of appreciation in the matter, should take into consideration, as far as possible, the preferences expressed by the expelled alien for the purposes of determining the State of destination.<sup>138</sup>

(2) The wording "or any other State that has the obligation to receive the alien under international law" is intended to cover situations where a State other than the State of nationality of the expelled alien would be required to receive that person under a rule of international law, whether a treaty rule binding on that State or a rule of customary international law.<sup>139</sup> One should also mention, in this context, the position expressed by the Human Rights Committee in relation to article 12, paragraph 4, of the International Covenant on Civil and Political Rights:

"The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence."<sup>140</sup>

Thus, paragraph 1, by acknowledging that an alien subject to expulsion may express a preference as to the State of destination, permits the alien to make known the State with which he or she has the closest links, such as the State of prior residence, the State of birth or the State with which the alien has particular family or financial links. Draft article 22, paragraph 1, gives the expelling State the right to assess such factors in order to preserve its own interests as well as those of the alien subject to expulsion.

(3) Draft article 22, paragraph 2, addresses the situation where it has not been possible to identify either the State of nationality or any other State that has the obligation to receive the alien under international law. In such cases, it is stated that the alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State. The last phrase ("the State from where he or she has entered the expelling State") should be

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<sup>138</sup>See in particular article 22, paragraph 7, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), which reads as follows: "Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin." See also article 32, paragraph 3, of the Convention Relating to the Status of Refugees (Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545).

<sup>139</sup>For examples of the first hypothesis, see Robert Jennings and A. Watts, in *Oppenheim's International Law*, 9th ed., pp. 898–899 (referring to, *inter alia*, the Treaty establishing the EEC, 1957; the Protocol between the Governments of Denmark, Finland, Norway and Sweden concerning the exemption of nationals of these countries from the obligation to have a passport or residence permit while resident in a Scandinavian country other than their own (United Nations, *Treaty Series*, vol. 199, p. 29) [concluded on 22 May 1954] (Iceland acceded in 1955); the Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, 1957 (United Nations, *Treaty Series*, vol. 322, p. 245) (Iceland became a party effective from 1966), as modified by a further agreement in 1979: RG, 84 (1980), p. 376; and the Convention between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands on the transfer of controls of persons to the external frontiers of Benelux territory, 1960 (United Nations, *Treaty Series*, vol. 374, p. 3)).

<sup>140</sup>Human Rights Committee, general comment No. 27, Freedom of movement (art. 12), adopted on 18 October 1999, para. 20.

understood primarily to mean the State of embarkation, although the chosen wording is sufficiently general also to cover situations where an alien has entered the territory of the expelling State by a mode of transport other than air transport.

(4) Readmission agreements are of particular interest in determining the State of destination of an expelled alien. These agreements fall within the broad scope of international cooperation, in which States exercise their sovereignty in light of variable considerations that in no way lend themselves to normative standardization through codification. That said, such agreements should be implemented in compliance with the relevant rules of international law, particularly those aimed at protecting the human rights of the alien subject to expulsion.

(5) Determination of the State of destination of the alien subject to expulsion under draft article 22 must be done in compliance with the obligations contained in draft article 6, subparagraph (b) (prohibition of *refoulement*), and in draft articles 23 and 24, which prohibit expulsion of an alien to a State where his or her life would be threatened or to a State where the alien may be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### **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 apply 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.

### **Commentary**

(1) Draft article 23 deals with protection of the life of an alien subject to expulsion in relation to the situation in the State of destination. Paragraph 1 prohibits the expulsion of an alien “to a State where his or her life would be threatened” on one of the grounds set out in draft article 14, which establishes the obligation not to discriminate. The wording referring to a State “where his or her life would be threatened”, which delimits the scope of this prohibition of expulsion, corresponds to the content of article 33 of the Convention relating to the Status of Refugees of 28 July 1951, which establishes the prohibition of return (*refoulement*), without extending to all aliens the prohibition of expulsion or return (*refoulement*) of a refugee to a State where his or her freedom would be threatened.

(2) The prohibited grounds of discrimination set out in draft article 14 and reproduced in draft article 23 are those contained in article 2, paragraph 1, of the International Covenant on Civil and Political Rights. There is no valid reason why the list of discriminatory grounds in draft article 23 should be less broad in scope than the list contained in draft article 14. In particular, the list of grounds contained in article 33 of the 1951 Convention was too narrow for the present draft article, which addresses the situations not only of persons who could be defined as “refugees”, but of aliens in general, and in a wide range of possible situations. As for the prohibition of any discrimination on grounds of sexual orientation, there is a trend in that direction in international practice and case-law, but the prohibition is not universally recognized.<sup>141</sup>

(3) Paragraph 2 of draft article 23 concerns the specific situation where the life of an alien subject to expulsion would be threatened in the State of destination 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. The Human Rights Committee has taken the position that, under article 6 of the Covenant, States that did not have the death penalty or have abolished it may not expel a person to another State in which he or she has been sentenced to death, unless they have previously

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<sup>141</sup> See above, paragraph (4) of the commentary to draft article 14.

obtained an assurance that the penalty will not be carried out.<sup>142</sup> While it may be considered that, within these precise limits, this prohibition now corresponds to a distinct trend in international law, it would be difficult to state that international law goes any further in this area.

(4) Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects: first, because the prohibition established in paragraph 2 covers not only States that did not have the death penalty or have abolished it, but also States that retain the penalty in their legislation but do not apply it in practice: this is the meaning of the phrase, “[a] State that does not apply the death penalty”; second, because the scope of protection has been extended to cover not only situations where the death penalty has already been imposed but also those where there is a real risk that it will be imposed.

#### 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.

#### Commentary

(1) The wording of draft article 24, which obliges the expelling State not to 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, is inspired by article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>143</sup> Article 3 of the Convention restricts the obligation of *non-expulsion* to acts of torture. It does not therefore extend this obligation to situations in which there are substantial grounds for believing that an alien subject to expulsion would be subjected to cruel, inhuman or degrading treatment or punishment.<sup>144</sup> However, draft article 24 broadens the scope of the protection afforded by this provision of the Convention, since the obligation not to expel contained in the draft article covers not only torture, but also other cruel, inhuman or degrading treatment or punishment. This broader scope of the prohibition has been introduced at the universal level and by certain regional systems. At the universal level, it is reflected in general comment No. 20 of the Human Rights Committee to the effect that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”<sup>145</sup> In its Views in *Maksudov et al v. Kirghizstan*, dated 31 July 2008, the Human Rights Committee recalled the principle set out in General Comment No. 20 and added that it “should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of.”<sup>146</sup> A recommendation by the

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<sup>142</sup>See, in this regard, Human Rights Committee, Communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40*, vol. II (A/58/40 (Vol. II)), p. 93, para. 10.6: “For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author’s right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.”

<sup>143</sup>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85. Article 3 of the Convention states:

“1. No State party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

<sup>144</sup>See, *inter alia*, *S.V. et al v. Canada*, Committee against Torture, Communication No. 49/1996, 15 May 2001, U.N. Doc. CAT/C/26/D/49/1996; *B.S. v. Canada*, Committee against Torture, Communication No. 166/2000, 14 November 2001, U.N. Doc. CAT/C/27/D/166/2000; and *T.M. v. Sweden*, Committee against Torture, Communication No. 228/2003, 18 November 2003, U.N. Doc. CAT/C/31/D/228/2003; see also Manfred Nowak, Elizabeth McArthur (eds.), *The United Nations Convention Against Torture: A Commentary*, New York, O.U.P., 2008, pp. 165–166.

<sup>145</sup>Human Rights Committee, forty-fourth Session, 1992, *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, U.N. Doc. HRI/GEN/1/Rev.6, general comment No. 20, para. 9.

<sup>146</sup>*Maksudov et al. v. Kyrgyzstan*, Human Rights Committee, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 31 July 2006, U.N. Doc. CCPR/C/93/D/1461, 1462, 1476 and 1477/2006, para. 12.4.

Committee on the Elimination of Racial Discrimination takes a similar stance.<sup>147</sup> At the regional level, this global or undifferentiated approach to torture and to other cruel, inhuman or degrading treatment or punishment has been enunciated in the jurisprudence of the European Court of Human Rights concerning article 3 of the European Convention on Human Rights.<sup>148</sup> The Inter-American Court of Human Rights has affirmed a similar position in *Lori Berenson-Mejía v. Peru*, in which it stated that:

“torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes.”<sup>149</sup>

(2) With regard to determining the existence of “substantial grounds” within the meaning of draft article 24, attention should be drawn to article 3, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that the competent authorities shall take into account “all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”. This provision has been interpreted on many occasions by the Committee against Torture established pursuant to the Convention, which has considered a number of communications alleging that the expulsion of aliens to particular States was contrary to article 3.<sup>150</sup>

(3) The Committee against Torture has adopted guidelines concerning the implementation of article 3 in its general comment No. 1.<sup>151</sup> These guidelines indicate the information that may be relevant in determining whether the expulsion of an alien to a particular State is consistent with article 3:

“The following information, while not exhaustive, would be pertinent:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?

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<sup>147</sup> See the recommendation of the Committee on the Elimination of Racial Discrimination to States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965, United Nations, *Treaty Series*, vol. 660, No. 9464, p. 212) to “[e]nsure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment” (general recommendation No. 30: Discrimination against non-citizens, 64th session, 23 February–12 March 2004, CERD/C/64/Misc.11/Rev.3, para. 27).

<sup>148</sup> See, in particular, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, paras. 72–107. In paragraph 80, the Court states: “The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees ...”

<sup>149</sup> *Lori Berenson-Mejía v. Peru*, Inter-American Court of Human Rights, judgment of 25 November 2004, Series C, No. 119, para. 100 (footnote omitted).

<sup>150</sup> See, *inter alia*, *Mutombo v. Switzerland*, Committee against Torture, Communication No. 13/1993, 27 April 1994, U.N. Doc. CAT/C/12/D/13/1993; *Khan v. Canada*, Committee against Torture, Communication No. 15/1994, 15 November 1994, U.N. Doc. A/50/44; *Kisoki v. Sweden*, Committee against Torture, Communication No. 41/1996, 8 May 1996, U.N. Doc. CAT/C/16/D/41/1996; *Tala v. Sweden*, Committee against Torture, Communication No. 43/1996, 15 November 1996, U.N. Doc. CAT/C/17/D/43/1996; *Paez v. Sweden*, Committee against Torture, Communication No. 39/1996, 28 April 1997, U.N. Doc. CAT/C/18/D/39/1996; *Aemei v. Switzerland*, Committee against Torture, Communication No. 34/1995, 9 May 1997, U.N. Doc. CAT/C/18/D/34/1995; *A.F. v. Sweden*, Committee against Torture, Communication No. 89/1997, 3 September 1997, U.N. Doc. CAT/C/20/D/89/1997; *Ayas v. Sweden*, Committee against Torture, Communication No. 97/1997, 12 November 1998, U.N. Doc. CAT/C/21/D/97/1997; *Korban v. Sweden*, Committee against Torture, Communication No. 88/1997, 16 November 1998, U.N. Doc. CAT/C/21/D/88/1997; *Haydin v. Sweden*, Committee against Torture, Communication No. 101/1997, 20 November 1998, U.N. Doc. CAT/C/21/D/101/1997; *Elmi v. Australia*, Committee against Torture, Communication No. 120/1998, 14 May 1999, U.N. Doc. CAT/C/22/D/120/1998; *A.S. v. Sweden*, Committee against Torture, Communication No. 149/1999, 6 November 1999, U.N. Doc. CAT/C/25/D/149/1999; *Arana v. France*, Committee against Torture, Communication No. 63/1997, 9 November 1999, U.N. Doc. CAT/C/23/D/63/1997; *Karoui v. Sweden*, Committee against Torture, Communication No. 185/2001, 8 May 2002, U.N. Doc. 1/57/44; *Ríos v. Canada*, Committee against Torture, Communication No. 133/1999, 17 December 2004, U.N. Doc. CAT/C/33/D/133/1999; *T.A. v. Sweden*, Committee against Torture, Communication No. 226/2003, 27 May 2005, U.N. Doc. CAT/C/34/D/226/2003; *Agiza v. Sweden*, Committee against Torture, Communication No. 233/2003, 24 May 2005, U.N. Doc. CAT/C/34/D/233/2003; *Brada v. France*, Committee against Torture, Communication No. 195/2002, 24 May 2005, U.N. Doc. CAT/C/34/D/195/2002; *Dadar v. Canada*, Committee against Torture, Communication No. 258/2004, 5 December 2005, U.N. Doc. CAT/C/35/D/258/2004.

<sup>151</sup> Committee against Torture, general comment on the implementation of article 3 of the Convention in the context of article 22 (general comment No. 1), adopted on 21 November 1997.

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the author?

(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?<sup>152</sup>

The Committee has also indicated that substantial grounds for believing that there is a risk of torture require more than a mere theory or suspicion but less than a high probability of such a risk.<sup>153</sup> Other elements on which the Committee against Torture has provided important clarifications are the existence of a personal risk of torture;<sup>154</sup> the existence, in this context, of a present and foreseeable danger;<sup>155</sup> the issue of subsequent expulsion to a third State;<sup>156</sup> and the absolute nature of the prohibition.<sup>157</sup>

(4) As was the case for draft article 17,<sup>158</sup> the Commission preferred not to address, in the text of draft article 24, situations where the risk of torture or cruel, inhuman or degrading treatment or punishment emanated from persons or groups of persons acting in a private capacity. In this regard, it should be recalled that in its general comment No. 1, the Committee against Torture expressed the following view on this issue:

“Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of ‘a consistent pattern or gross, flagrant or mass violations of human rights’ refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>159</sup>

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<sup>152</sup>*Ibid.*, para. 8.

<sup>153</sup>*Ibid.*, para. 6: “Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.”

<sup>154</sup>*Ibid.*, para. 1: “Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.” See also: Committee against Torture, communication No. 13/1993, *Mutombo v. Switzerland*, Views adopted on 27 April 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44 (A/49/44)*, p. 52, para. 9.3.

<sup>155</sup>See, for example, *A.D. v. The Netherlands*, Committee against Torture, Communication No. 96/1997, 12 November 1999, U.N. Doc. CAT/C/23/D/96/1997; *U.S. v. Finland*, Committee against Torture, Communication No. 197/2002, U.N. Doc. CAT/C/30/D/197/2002.

<sup>156</sup>See, on this point, the above-cited general comment No. 1 of the Committee against Torture, para. 2: “The Committee is of the view that the phrase ‘another State’ in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited”

<sup>157</sup>See, for example, *Paez v. Sweden*, Committee against Torture, Communication No. 39/1996, 28 April 1997, U.N. Doc. CAT/C/18/D/39/1996 and *Dadar v. Canada*, Committee against Torture, Communication No. 258/2004, 5 December 2005, U.N. Doc. CAT/C/35/D/258/2004.

<sup>158</sup>See para. (3) of the commentary to draft article 17 above.

<sup>159</sup>Committee against Torture, general comment on the implementation of article 3 of the Convention in the context of article 22 (general comment No. 1) (A/53/44), annex IX, adopted on 21 November 1997, para. 3. See also Committee against Torture, communication No. 258/2004, *Mostafa Dadar v. Canada*, Decision adopted on 23 November 2005, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, p. 241, para. 8.4; communication No. 177/2001, *H.M.H.I. v. Australia*, Decision adopted on 1 May 2002, *ibid.*, *Fifty-seventh Session, Supplement No. 44 (A/57/44)*, p. 171, para. 6.4; and communication No. 191/2001, *S.S. v. The Netherlands*, Decision adopted on 5 May 2003, *ibid.*, *Fifty-eighth Session, Supplement No. 44 (A/58/44)*, p. 123, para. 6.4: “The issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned.”

See also communication No. 237/2003, *Ms. M.C.M.V.F. v. Sweden*, Decision adopted on 14 November 2005, *ibid.*,

For its part, the European Court of Human Rights has drawn from the absolute character of article 3 of the European Convention on Human Rights the conclusion that the said provision may also cover cases where the danger emanates not from the State of destination itself but from “persons or groups of persons who are not public officials”, when the State of destination is not able to offer adequate protection to the individual concerned.

“Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”<sup>160</sup>

## **Chapter IV Protection in the transit State**

### **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.

#### **Commentary**

The implementation of an expulsion order often involves the transit of the alien through one or more States before arrival in the State of destination.<sup>161</sup> Draft article 25 sets out the transit State’s obligation to protect the human rights of the alien subject to expulsion, in conformity with its obligations under international law. The chosen wording clearly indicates that the transit State is obliged to respect

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*Sixty-first Session, Supplement No. 44 (A/61/44), p. 194, para. 6.4:*

“The Committee has not been persuaded that the incidents that concerned the complainant in 2000 and 2003 were linked in any way to her previous political activities or those of her husband, and considers that the complainant has failed to prove sufficiently that those incidents be attributable to state agents or to groups acting on behalf of or under the effective control of state agents”;

and communication No. 120/1998, *S.S. Elmi v. Australia*, Views adopted on 14 May 1999, *ibid.*, *Fifty-fourth Session, Supplement No. 44 (A/54/44)*, pp. 119–120, paras. 6.5–6.8:

“The Committee does not share the State party’s view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, in this instance for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1.

The State party does not dispute the fact that gross, flagrant or mass violations of human rights have been committed in Somalia. Furthermore, the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her report the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs.

The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions.

In addition to the above, the Committee considers that two factors support the author’s case that he is particularly vulnerable to the kind of acts referred to in article 1 of the Convention. First, the State party has not denied the veracity of the author’s claims that his family was particularly targeted in the past by the Hawiye clan, as a result of which his father and brother were executed, his sister raped and the rest of the family was forced to flee and constantly move from one part of the country to another in order to hide. Second, his case has received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye.”

<sup>160</sup> *H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 40.

<sup>161</sup> In general, priority is given to direct return, without transit stops in the ports or airports of other States. However, the return of illegal residents may require use of the airports of certain States in order to make the connection to the third destination State (paragraph 3.3. of the Green Paper on a community return policy on illegal residents, European Commission, 10 April 2002, COM(2002) 175 final).

only its own obligations under international conventions to which it is a party or under the rules of general international law, and not obligations that are, *ex hypothesi*, binding on the expelling State alone.

**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.

**Commentary**

(1) Draft article 26, 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. The sole exception — to which reference is made in paragraph 4 of the draft article — is that of aliens who have been unlawfully present in the territory of that State for a brief duration.

(2) Paragraph 1 (a) sets forth the right to receive notice of the expulsion decision. The expelling State's respect for this essential guarantee is a *conditio sine qua non* for the exercise by an alien subject to expulsion of all of his or her procedural rights. This condition was explicitly embodied in article 22, paragraph 3, of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which stipulates that the expulsion decision “shall be communicated to them in a language they understand”. In 1892 the Institute of International Law already expressed the view that “*l’acte ordonnant l’expulsion est notifié à l’expulsé*” [the expulsion order shall be notified to the expellee]<sup>162</sup> and also that “*si l’expulsé a la faculté de recourir à une haute cour judiciaire ou administrative, il doit être informé, par l’acte même, et de cette circonstance et du délai à observer*” [if the expellee is entitled to appeal to a high judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal].<sup>163</sup> The legislation of several States contains a requirement that an expulsion decision must be notified to the alien concerned.<sup>164</sup>

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<sup>162</sup> *Règles internationales sur l’admission et l’expulsion des étrangers*, [International Regulations on the Admission and Expulsion of Aliens] adopted on 9 September 1892, at the Geneva session of the Institute of International Law, art. 30. [French original]

<sup>163</sup> *Ibid.*, art. 31.

<sup>164</sup> See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 649.

(3) Paragraph 1 (b) sets out the right to challenge the expulsion decision, a right well established in international law. At the universal level, article 13 of the International Covenant on Civil and Political Rights provides the individual facing expulsion with the right to submit the reasons against his or her expulsion, except where “compelling reasons of national security otherwise require”. It states that “[a]n alien lawfully in the territory of a State Party to the present Covenant ... shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion*”<sup>165</sup> (emphasis added). The same right is to be found in article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144 of 13 December 1985, which provides that “[a]n alien lawfully in the territory of a State ... shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled”. At the regional level, article 1, paragraph 1 (a) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that an alien lawfully resident in the territory of a State and subject to an expulsion order shall be allowed “to submit reasons against his expulsion”. Article 3, paragraph 2, of the European Convention on Establishment offers the same safeguard by providing that “[e]xcept where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion”. Lastly, the right of an alien to contest his or her expulsion is also embodied in internal law.<sup>166</sup>

(4) The right to be heard by a competent authority, set out in paragraph 1 (c), is essential for the exercise of the right to challenge an expulsion decision, which forms the subject of paragraph 1 (b). Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to be heard, the Human Rights Committee has taken the view that an expulsion decision adopted without the alien having been given an opportunity to be heard may raise questions under article 13 of the Covenant:

“The Committee is also concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government, resulting in decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee’s view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant.”<sup>167</sup>

The national laws of several States grant aliens the right to be heard during expulsion proceedings, as do many national tribunals.<sup>168</sup> Given the divergence in State practice in this area, it cannot be said that international law gives an alien subject to expulsion the right to be heard in person by the competent authority. What is required is that an alien be furnished with an opportunity to explain his or her situation and submit his or her own reasons before the competent authority. In some circumstances, written proceedings may satisfy the requirements of international law. One writer, commenting on the decisions of the Human Rights Committee concerning cases related to articles 13 and 14 of the Covenant, expressed the opinion that “[e]ven though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Article 13 does not, in contrast to Article 14, paragraph 3 (d), give rise to a right to personal appearance.”<sup>169</sup>

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<sup>165</sup> See Human Rights Committee, communication No. 193/1985, *Pierre Giry v. Dominican Republic*, Views adopted on 20 July 1990, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. II (A/45/40 (Vol. II)), pp. 40–41, para. 5.5. The Committee found that the Dominican Republic had violated article 13 of the Covenant by not taking its decision “in accordance with law” and by also omitting to afford the person concerned an opportunity to submit the reasons against his expulsion and have his case renewed by a competent authority.

<sup>166</sup> See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, arts. L.522-1 and L.522-2; and Sweden, Aliens Act (SFS 2005:716), chapter 14. See also the above-cited memorandum by the Secretariat (A/CN.4/565), para. 618.

<sup>167</sup> Concluding observations of the Human Rights Committee: Sweden, 1 November 1995, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), para. 88.

<sup>168</sup> See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, arts. L. 213-2, L.512-1, L.522-1 and L.524-1; and Sweden, Aliens Act (SFS 2005:716), article 13.3; See also the above-cited memorandum by the Secretariat (A/CN.4/565), para. 618.

<sup>169</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, 2nd revised ed. (Kehl am Rhein, N.P. Engel Publisher, 2005), p. 297 (citing communications No. 173/1984, *M.F. v. The Netherlands*, para. 4; No. 236/1987, *V.M.R.B. v. Canada*; No. 155/1983, *Eric Hammel v. Madagascar*, paras. 19.2 and 20; and No. 193/1985, *Pierre Giry v. Dominican*



(5) Paragraph 1 (d) sets out the right of access to effective remedies to challenge the expulsion decision. While article 13 of the International Covenant on Civil and Political Rights entitles an alien lawfully present in the expelling State to a review of the expulsion decision, it does not specify the type of authority which should undertake the review:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed ... *to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*”<sup>170</sup> (emphasis added).

The Human Rights Committee has drawn attention to the fact that the right to a review, as well as the other guarantees provided in article 13, may be departed from only if “compelling reasons of national security” so require. The Committee has also stressed that the remedy at the disposal of the alien expelled must be an effective one:

“An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when ‘compelling reasons of national security’ so require.”<sup>171</sup>

The Human Rights Committee has also considered that protests lodged with the expelling State’s diplomatic or consular missions abroad are not a satisfactory solution under article 13 of the International Covenant on Civil and Political Rights:

“In the Committee’s opinion, the discretionary power of the Minister of the Interior to order the expulsion of any alien, without safeguards, if security and the public interest so require poses problems with regard to article 13 of the Covenant, particularly if the alien entered Syrian territory lawfully and has obtained a residence permit. Protests lodged by the expelled alien with Syrian diplomatic and consular missions abroad are not a satisfactory solution in terms of the Covenant.”<sup>172</sup>

Article 13 of the European Convention on Human Rights recognizes a right to an effective remedy with respect to a violation of any right or freedom set forth in the Convention, including in cases of expulsion:<sup>173</sup>

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

In respect of a complaint based on article 3 of the European Convention on Human Rights concerning a case of expulsion, the European Court of Human Rights said the following about the effective remedy to which article 13 refers:

“In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy

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*Republic*, paras. 5.5 and 6).

<sup>170</sup>Human Rights Committee, communication No. 193/1985, *Pierre Giry v. Dominican Republic*, Views adopted on 20 July 1990, para. 5.5. (The Committee found that the Dominican Republic had violated article 13 of the Covenant by omitting to afford the person concerned an opportunity to have his case reviewed by a competent authority.)

<sup>171</sup>Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10. In *Eric Hammel v. Madagascar* (communication No. 155/1983, Views adopted on 3 April 1987, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, p. 138, para. 19.2), the Committee considered that the claimant had not been given an effective remedy to challenge his expulsion. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 666–667, para. 74.

<sup>172</sup>Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001 *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), para. 82 (22), p. 75.

<sup>173</sup>In contrast, the applicability of article 6 of the European Convention on Human Rights in cases of expulsion is less clear. “When no right under the Convention comes into consideration, only the procedural guarantees that concern remedies in general are applicable. While Article 6 only refers to remedies concerning ‘civil rights and obligations’ and ‘criminal charges’, the Court has interpreted the provision as including also disciplinary sanctions. Measures such as expulsion that significantly affect individuals should also be regarded as covered” (Giorgio Gaja, “Expulsion of Aliens: Some Old and New Issues in International Law”, *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 309–310).

under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.”<sup>174</sup>

Article 1 of Protocol No. 7 to the European Convention on Human Rights grants the alien subject to expulsion the right to have his or her case reviewed by a competent authority:

“Article 1 – Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

...

b. to have his case reviewed, and

...

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

Similarly, article 3, paragraph 2 of the European Convention on Establishment provides:

“Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to *appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority*” (emphasis added).

Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 32, paragraph 2, of the Convention relating to the Status of Refugees; article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons; article 9, paragraph 5, of the European Convention on the Legal Status of Migrant Workers;<sup>175</sup> and article 26, paragraph 2, of the Arab Charter on Human Rights also require that there be a possibility of appealing against an expulsion decision. This right to a review procedure has also been recognized, in terms which are identical to those of article 13 of the International Covenant on Civil and Political Rights, by the General Assembly in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144:

“An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to *have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority*” (emphasis added).

In its General Recommendation No. 30, the Committee on the Elimination of Racial Discrimination stressed the need for an effective remedy in the event of expulsion and recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination should:

“Ensure that ... non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.”<sup>176</sup>

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<sup>174</sup>European Court of Human Rights, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 151.

<sup>175</sup>European Convention on the Legal Status of Migrant Workers, Strasbourg, 24 November 1977, United Nations, *Treaty Series*, vol. 1496, No. 25700, p. 7.

<sup>176</sup>Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, para. 25. See also the Committee’s concluding observations concerning France, 1 March 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 18 (A/49/18)*, para. 144 (right of appeal).

The requirement that the alien subject to expulsion be provided with a review procedure has also been stressed by the African Commission on Human and Peoples' Rights with respect to illegal immigrants:

“The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law.”<sup>177</sup>

Similarly, in another case, the African Commission on Human and Peoples' Rights held that Zambia had violated the African Charter on Human and Peoples' Rights by not giving an individual the opportunity to challenge an expulsion order:

“36. Zambia has contravened Article 7 of the Charter in that he was not allowed to pursue the administrative measures, which were opened to him in terms of the Citizenship Act ... By all accounts, Banda's residence and status in Zambia had been accepted. He had made a contribution to the politics of the country. The provisions of Article 12 (4) have been violated.

...

38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity to contest the deportation order. Surely, government cannot say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all account, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the Courts of Zambia. Zambia has violated Article 7 of the Charter.

...

52. Article 7 (1) states that:

‘Every individual shall have the right to have his cause heard ...

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed ...’.

53. The Zambia government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to a fair hearing, which contravenes all Zambian domestic laws and international human rights laws.”<sup>178</sup>

(6) Paragraph 1 (e), the content of which is based on article 13 of the International Covenant on Civil and Political Rights, gives an alien subject to expulsion the right to be represented before the competent authority. From the standpoint of international law, this right does not necessarily encompass the right to be represented by a lawyer during expulsion proceedings. In any case, it does not encompass an obligation on the expelling State to pay the cost of representation.

(7) The right of an alien to the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority, which is set out in paragraph 1 (f) and recognized in the legislation of a number of States,<sup>179</sup> is an essential element of the right to be heard, which is set out in paragraph 1 (c). It is also of some relevance to the right to be notified of the expulsion decision and the

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<sup>177</sup>African Commission on Human and Peoples' Rights, communication No. 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

<sup>178</sup>African Commission on Human and Peoples' Rights, communication No. 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report, 1998–1999.

<sup>179</sup>See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, articles L111-8, L221-4, L512-2, L522-2; Spain, Organic Law 4/2000 (11 January 2000) concerning the rights and liberties of foreigners in Spain and their social integration, modified by Organic Law 2/2009 (11 December 2009), art. 63.3; and Sweden, Administrative Act (SFS 1986:223), art. 8 and Alien Act (SFS 2005:716), art. 13:11 See also the above-cited memorandum by the Secretariat (A/CN.4/565), para. 645.

right to challenge that decision, to which paragraphs 1 (a) and (b) of this draft article refer. In this connection, it will be noted that the Committee on the Rights of the Child expressed concerns at reports of “ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to ... interpretation.”<sup>180</sup> Free interpretation is vital to the effective exercise by the alien in question of all of his or her procedural rights. In this context, the alien must inform the competent authorities of the language(s) which he or she is able to understand. However, the right to the free assistance of an interpreter should not be construed as including the right to the translation of possibly voluminous documentation, or to interpretation into a language which is not commonly used in the region where the State is located or at the international level, provided that this can be done without impeding the fairness of the hearing. The wording of paragraph 1 (f) is based on article 14, paragraph 1 (f), of the International Covenant on Civil and Political Rights, which makes provision for that right in the context of criminal proceedings.

(8) Under general international law the expelling State must respect the procedural rights set forth in draft article 26, paragraph 1. Moreover, paragraph 2 specifies that the procedural rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law. This refers primarily to the rights or guarantees that the expelling State’s legislation offers aliens (for example, possibly a right to free legal assistance)<sup>181</sup>, which that State would be bound to respect by virtue of its international legal obligation to comply with the law throughout the expulsion procedure.<sup>182</sup> In addition, paragraph 2 should be understood to preserve any other procedural right an alien subject to expulsion may enjoy under a rule of international law, in particular one laid down in a treaty, which is binding on the expelling State.

(9) 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. From the standpoint of international law, the alien’s State of nationality remains free to decide whether or not to furnish him or her with assistance, and the draft article does not address the question of the possible existence of a right to consular assistance under that State’s internal law. At the same time, the expelling State is bound, under international law, not to impede the exercise by an alien of his or her right to seek consular assistance or, as the case may be, the provision of such assistance by the sending State. The right of an alien subject to expulsion to seek consular assistance is also expressly embodied in some national legislation.<sup>183</sup>

(10) The consular assistance referred to in draft article 26, paragraph 3, encompasses the various forms of assistance which the alien subject to expulsion might receive from his or her State of nationality in conformity with the rules of international law on consular relations, which are essentially reflected in the Vienna Convention on Consular Relations of 24 April 1963.<sup>184</sup> The right of the alien concerned to seek consular assistance and the obligations of the expelling State in that context must be ascertained in the light of those rules. Particular mention should be made of article 5 of the Convention, which lists consular functions, and of article 36, which concerns communication between consular officials and nationals of the sending State. Article 36, paragraph 1 (a), guarantees freedom of communication in very general terms, which suggests that it is a guarantee that applies fully in expulsion proceedings. Moreover the same guarantee is set forth in equally general terms in article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly

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<sup>180</sup>Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, (CRC/C/15/Add.185), para. 45 (a).

<sup>181</sup>With respect to the right of the expellee to be granted legal aid, see, *inter alia*, the relevant legislation of the European Union, in particular Council Directive 2003/109/EC of 25 November 2003, dealing with the situation of third country nationals who are long-term residents. Article 12 of the Directive provides:

“4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.

“5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside.” (European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44–53).

<sup>182</sup>See draft article 4 above and the commentary thereto.

<sup>183</sup>See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 631. See also the first addendum to the Special Rapporteur’s sixth report (A.CN.4/625/Add.1), paras. 97–102.

<sup>184</sup>Vienna Convention on Consular Relations, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

resolution 40/144.<sup>185</sup> Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, which concerns a person who has been committed to prison or to custody pending trial, or who has been detained in any other manner, requires the receiving State to inform the consular post if the person concerned so requests and to inform the person of his or her rights in that respect. Paragraph 1 (c) states that consular officials shall have the right to visit a national of the sending State who has been placed in detention. The International Court of Justice has applied article 36 of the Vienna Convention on Consular Relations in contexts other than that of the expulsion of aliens, for example in the cases concerning *La Grand and Avena and Other Mexican Nationals*.<sup>186</sup> The Court noted that “Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State”<sup>187</sup> and that “[t]he clarity of these provisions, viewed in their context, admits of no doubt”.<sup>188</sup> The Court again examined this question in relation to detention for the purposes of expulsion in its Judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo*. In accordance with the precedent established in the case concerning *Avena and Other Mexican Nationals*,<sup>189</sup> the Court noted that it is for the authorities of the State which proceeded with the arrest:

“to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect ... Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights ‘without delay’.”<sup>190</sup>

Having noted that the Democratic Republic of the Congo had not provided “the slightest piece of evidence” to corroborate its assertion that it had orally informed Mr. Diallo of his rights, the Court found that there had been a violation by that State of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations.<sup>191</sup>

(11) Paragraph 4 concerns aliens who have been unlawfully present in the territory of the expelling State for a brief duration. It takes the form of a “without prejudice” clause which, in such cases, seeks to preserve the application of any legislation of the expelling State concerning the expulsion of such persons. Several States’ national laws make provision for simplified procedures for the expulsion of aliens unlawfully present in their territory. Under these procedures such aliens often do not even have the right to challenge their expulsion, let alone the procedural rights enumerated in paragraph 1, whose purpose is to give effect to that right. This being so, as an exercise in the progressive development of international law the Commission considered that even foreigners unlawfully present in the territory of the expelling State for a specified minimum period of time should have the procedural rights listed in paragraph 1. According to the legislation of some countries, this period of time must not exceed six months.<sup>192</sup>

## **Article 27**

### **Suspensive effect of an appeal against an expulsion decision**

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<sup>185</sup>This provision reads: “Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.”

<sup>186</sup>*LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at pp. 489–498 paras. 64–91; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, p. 12, at pp. 39–57 paras. 49–114.

<sup>187</sup>*LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at p. 494 para. 77.

<sup>188</sup>*Ibid.*

<sup>189</sup>Judgment, *I.C.J. Reports 2004*, p. 12, at p. 46, para. 76.

<sup>190</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010*, p. 672, para. 95.

<sup>191</sup>*Ibid.*, p. 673, paras. 96 and 97.

<sup>192</sup>See the discussion of this point in the first addendum to the Special Rapporteur’s sixth report (A.CN.4/625/Add.1), paras. 17–40.

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.

### Commentary

(1) Draft article 27, which formulates the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State, is progressive development of international law. State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision when there is a real risk of serious irreversible harm to the alien subject to expulsion.

(2) However, the formulation of a suspensive effect in a draft article is nevertheless warranted. One of the reasons militating in favour of a suspensive effect is certainly the fact that, unless the execution of the expulsion decision is stayed, an appeal might well be ineffective in view of the potential obstacles to return, including those of an economic nature, which might be faced by an alien who in the intervening period has had to leave the territory of the expelling State as a result of an expulsion decision, the unlawfulness of which was determined only after his or her departure.

(3) In this context, it is interesting to note the position of the European Court of Human Rights regarding the effects of an appeal on the execution of the decision. While the Court recognized the discretion enjoyed by States parties in this respect, it indicated that measures whose effects are potentially irreversible should not be enforced before the national authorities have determined whether they are compatible with the Convention. For example, in the case of *Čonka v. Belgium* the Court concluded that there had been a violation of article 13 of the Convention:

“The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible ... . Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.”<sup>193</sup>

(4) One might also mention that the Parliamentary Assembly of the Council of Europe has recommended that aliens expelled from the territory of a member State of the Council of Europe should be entitled to a suspensive appeal, which should be considered within three months from the date of the decision on expulsion:

“With regard to expulsion: ii. any decision to expel a foreigner from the territory of a Council of Europe member state should be subject to a right of suspensive appeal; iii. if an appeal against expulsion is lodged, the appeal procedure shall be completed within three months of the original decision to expel”.<sup>194</sup>

In this context it is interesting to note that the Parliamentary Assembly also took the view that an alien who was not lawfully present also had this right of appeal:

“An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious. He shall have the right and the possibility of appealing to an independent appeal authority before being removed. It should be studied if also, or alternatively, he shall have the right to bring his case before a judge. He shall be informed of his rights. If he applies to a court or to a high administrative authority, no removal may take place as long as the case is pending;

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<sup>193</sup>European Court of Human Rights, *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 79; See also European Court of Human Rights, *A.C. and others v. Spain*, Judgment, 22 April 2014, Application No. 6528/11, para. 88.

<sup>194</sup>Parliamentary Assembly of the Council of Europe, Recommendation 1624 (2003), Common policy on migration and asylum, 30 September 2003, para. 9.

A person holding a valid residence permit may only be expelled from the territory of a member state in pursuance of a final court order.<sup>195</sup>

The Commission did not go as far as this.

**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.

**Commentary**

The purpose of draft article 28 is to make it clear that aliens subject to expulsion may, in some cases, be entitled to individual recourse to a competent international body. The individual recourse procedures in question are mainly those established under various universal and regional human rights instruments.

**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.

**Commentary**

(1) Draft article 29 states, 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. Although such a right — with a variety of conditions — may be discerned in the legislation of some States<sup>196</sup> and even at the international level,<sup>197</sup> practice does not appear to converge enough for it to be possible to affirm the existence, in positive law, of a right to readmission, as an individual right of an alien who has been unlawfully expelled.

(2) Even from the standpoint of progressive development, the Commission was cautious about formulating any such right. Draft article 29 therefore concerns solely the case of an alien lawfully present in the territory of the State in question who has been expelled unlawfully and applies only when a competent authority has established that the expulsion was unlawful and when the expelling State cannot validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question.

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<sup>195</sup>Parliamentary Assembly of the Council of Europe, Appendix to Recommendation 769 (1975) on the legal status of aliens, 3 October 1975, paras. 9–10.

<sup>196</sup>See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, art. L524-4.

<sup>197</sup>The Inter-American Commission on Human Rights in effect recognized the existence of this right in a case involving the arbitrary expulsion of a foreign priest, in that it resolved:

“To recommend to the government of Guatemala: a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; b) that it investigate the acts reported and punish those responsible for them; and c) that it inform the Commission in 60 days on the measures taken to implement these recommendations” (Inter-American Commission on Human Rights, Resolution 30/81, Case 73/78 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54, doc. 9 rev.1, 16 October 1981).

(3) The adjective “unlawful” qualifying expulsion in the draft article refers to any expulsion in breach of a rule of international law. It must also, however, be construed in the light of the principle, set forth in article 13 of the International Covenant on Civil and Political Rights and reiterated in draft article 4, that an alien may be expelled only in pursuance of a decision reached in accordance with law, that is to say primarily in accordance with the internal law of the expelling State.

(4) Under draft article 29, a right of readmission applies only in situations where the authorities of the expelling State, or an international body such as a court or a tribunal which is competent to do so, have found in a binding determination that expulsion was unlawful. Such a determination is not present when an expulsion decision which was unlawful at the moment when it was taken is held by the competent authorities to have been cured in accordance with the law. The Commission considered that it would have been inappropriate to make the recognition of this right subject to the annulment of the unlawful expulsion decision, since in principle only the authorities of the expelling State are competent to annul such a decision. The wording of draft article 29 also covers situations where expulsion has occurred without the adoption of a formal decision, in other words through conduct attributable to the expelling State.<sup>198</sup> That said, by making the right of readmission subject to the existence of a prior determination by a competent authority as to the unlawfulness of the expulsion, draft article 29 avoids giving the alien, in this context, the right to judge for him or herself whether the expulsion to which he or she has been subject was lawful or unlawful.

(5) Draft article 29 should not be understood as conferring on the determinations of international bodies legal effects other than those for which provision is made in the instrument by which the body in question was established. It recognizes only, as a matter of progressive development, and on an independent basis, a right to readmission to the territory of the expelling State, the existence of which right is subject, *inter alia*, to a previous binding determination that the expulsion was unlawful.

(6) As this draft article clearly indicates, the expelling State retains the right to deny readmission to an alien who has been unlawfully expelled, if that readmission constitutes a threat to national security or public order or if, for any other reason, the alien no longer fulfils the conditions for admission under the law of the expelling State. It is necessary to allow such exceptions to readmission in order to preserve a fair balance between the rights of the unlawfully expelled alien and the power of the expelling State to control the entry of any alien to its territory in accordance with its legislation in force when a decision is to be taken on the readmission of the alien in question. The purpose of the final exception mentioned in draft article 29 is to take account of the fact that, in some cases, the circumstances or facts forming the basis on which an entry visa or residence permit was issued to the alien might no longer exist. A State’s power to assess the conditions for readmission must, however, be exercised in good faith. For example, the expelling State would not be entitled to refuse readmission on the basis of legislative provisions which made the mere existence of a previous expulsion decision that was revealed to be unlawful a bar to readmission. This restriction is reflected in draft article 29, paragraph 2, which states: “In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.” This formulation draws on the wording of article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>199</sup>

(7) Lastly, the formulation of a right to readmission under draft article 29 is without prejudice to the legal regime governing the responsibility of States for internationally wrongful acts, to which reference is made in draft article 30. In particular, the legal rules governing reparation for an internationally wrongful act remain relevant in the context of the expulsion of aliens.

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

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<sup>198</sup> See in this connection draft article 10 above, which prohibits all forms of disguised expulsion.

<sup>199</sup> The provision reads: “If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the *earlier decision shall not be used to prevent him or her from re-entering the State concerned*” (emphasis added).



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

## Commentary

(1) It is undisputed that an expulsion in violation of a rule of international law entails the international responsibility of the expelling State for an internationally wrongful act. In this regard, draft article 30 is to be read in the light of Part Two of the articles on the responsibility of States for internationally wrongful acts.<sup>200</sup> Part Two sets out the content of the international responsibility of a State, including in the context of the expulsion of aliens.<sup>201</sup>

(2) The fundamental principle of full reparation by the State of the injury caused by an internationally wrongful act is stated in article 31 of the articles on State responsibility,<sup>202</sup> while article 34<sup>203</sup> sets out the various forms of reparation, namely restitution (article 35), compensation (article 36) and satisfaction (article 37). The jurisprudence on reparation in cases of unlawful expulsion is particularly abundant.<sup>204</sup>

(3) Restitution, in the form of the return of the alien to the expelling State, has sometimes been chosen as a form of reparation. In this regard, the first Special Rapporteur on international responsibility, Mr. García Amador, stated: "In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the return of the expelled alien."<sup>205</sup> He was referring, in this context, to the *Lampton* and *Wiltbank* cases (concerning two United States citizens expelled from Nicaragua in 1894) and the case of four British subjects also expelled from Nicaragua.<sup>206</sup> The return in a case of unlawful expulsion has been ordered by the Inter-American Commission on Human Rights in connection with the arbitrary expulsion of a foreign priest.<sup>207</sup>

(4) Compensation is a well-recognized means of reparation for the injury caused by an unlawful expulsion to the alien expelled or to the State of nationality. It is not disputed that the compensable injury includes both material and moral damage.<sup>208</sup> A new approach was taken by the Inter-American Court of

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<sup>200</sup> See *Yearbook ... 2001*, vol. II (Part Two), pp. 86–116.

<sup>201</sup> See para. (5) of the general commentary to the Commission's articles on the responsibility of States for internationally wrongful acts; *Yearbook ... 2001*, vol. II (Part Two), p. 32.

<sup>202</sup> Article 31 reads as follows: "Article 31 – Reparation: 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

<sup>203</sup> Article 34 reads as follows: "Article 34 – Forms of reparation: Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

<sup>204</sup> See, for example, *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323–325, at p. 325 (Filtz, Umpire); *Oliva Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600–609; *Maal Case*, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 730–733; *Daniel Dillon (U.S.A.) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 368–371; *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92–113; *Case of Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), European Court of Human Rights, 18 February 1991, Application No. 12313/86; *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), European Court of Human Rights, 5 February 2002, Application No. 51564/99.

<sup>205</sup> International responsibility: sixth report by F.V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Reparation of the injury), *Yearbook ... 1961*, vol. II, A/CN.4/134 and Add.1, para. 99.

<sup>206</sup> *Ibid.*, para. 99, footnote 159. These cases are mentioned by John Bassett Moore in *A Digest of International Law*, Washington, Government Printing Office, vol. IV, 1906, pp. 99–101. *Lampton* and *Wiltbank* had been expelled by the Government of Nicaragua and then allowed to return to Nicaragua at the request of the United States. As for the four British subjects, Great Britain had demanded "the unconditional cancellation of the decrees of expulsion" and Nicaragua had replied that "there was no occasion for the revocation of the decree of expulsion, as all the persons guilty of taking part in the Mosquito rebellion had been pardoned".

<sup>207</sup> "The Inter-American Commission on Human Rights resolves: ... 3. To recommend to the Government of Guatemala: (a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; (b) that it investigate the acts reported and punish those responsible for them; and (c) that it inform the Commission in 60 days on the measures taken to implement these recommendations" (Inter-American Commission on Human Rights, Resolution 30/81, Case 7378 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54, doc. 9, rev. 1, 16 October 1981).

<sup>208</sup> See, on this issue, for example, *Case of Emre v. Switzerland*, application No. 5056/10, European Court of Human Rights, 22 May 2008, or *Case of the "Mapiripán Massacre"*, Inter-American Court of Human Rights, Series C, No. 134, 7 March 2005, and *Pueblo Bello* See also, in this connection, the Judgment of 19 June 2012 rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case, which is discussed in para. (6) below.

Human Rights to the right to reparation by including interruption of the life plan in the category of harm suffered by victims of violations of human rights.<sup>209</sup>

Damages have been awarded by a number of arbitral tribunals to aliens who had been victims of unlawful expulsions. In the *Paquet* case, the umpire held that, given the arbitrary nature of the expulsion, the Government of Venezuela should pay Mr. Paquet compensation for the direct damages he had suffered:

“... the general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the Government suspects of being prejudicial to the public order;

That, besides, the sum demanded does not appear to be exaggerated:

Decides that N.A. Paquet is entitled to an indemnity of 4,500 francs.”<sup>210</sup>

Damages were also awarded by the umpire in the *Oliva* case to compensate the loss resulting from the breach of a concession contract, although these damages were limited to those related to the expenditures which the alien had incurred and the time he had spent in order to obtain the contract.<sup>211</sup> Commissioner Agnoli had considered that the arbitrary nature of the expulsion would by itself have justified a demand for damages:

“[A]n indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity.”<sup>212</sup>

In other cases, it was the unlawful manner in which the expulsion had been carried out (including the duration and conditions of a detention pending deportation) that gave rise to compensation. In the *Maal* case, the umpire awarded damages to the claimant because of the harsh treatment he had suffered. Given that the individuals who had carried out the deportation had not been punished, the umpire considered that the sum awarded needed to be sufficient in order for the State responsible to “express its appreciation of the indignity” inflicted on the claimant:

“The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted. [...] And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation. In the opinion of the umpire the respondent Government should be held to pay the claimant Government in the interest of and on behalf of the claimant, solely because of

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<sup>209</sup>See, *inter alia*, the judgments rendered in the following cases: *Loayza Tamayo v. Peru*, Judgment of 27 November 1998 (Reparations and costs), Series C, No. 42, paras. 144–154; *Cantoral Benavides*, Judgment of 3 December 2001 (Reparations and costs), Series C, No. 88, paras. 60 and 80; *Gutiérrez Soler v. Colombia*, Judgment of 12 September 2005 (Merits, reparations and costs), Series C, No. 132, paras. 87–89.

<sup>210</sup>*Paquet* case, Belgium-Venezuela Mixed Claims Commission, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 325.

<sup>211</sup>*Oliva* case, Italy-Venezuela Mixed Claims Commission, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 607 to 609 (Ralston, umpire), containing details about the calculation of damages in the particular case.

<sup>212</sup>*Oliva* case, *ibid.*, p. 602 (Agnoli, commissioner).

these indignities the sum of five hundred dollars in gold coin of the United States of America, or its equivalent in silver at the current rate of exchange at the time of the payment; and judgment may be entered accordingly.”<sup>213</sup>

In the *Daniel Dillon* case, damages were awarded to compensate maltreatment inflicted on the claimant due to the duration and conditions of his detention:

“The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at \$2,500, U.S. currency, without interest.”<sup>214</sup>

In the *Yaeger* case, the Iran-United States Claims Tribunal awarded the claimant compensation for (1) the loss of personal property that he had to leave behind because he had not been given sufficient time to leave the country;<sup>215</sup> and (2) for the money seized at the airport by the “Revolutionary Komitehs”.<sup>216</sup>

In some instances, the European Court of Human Rights has awarded a sum of money as compensation for non-pecuniary damages resulting from an unlawful expulsion. In *Moustaquim v. Belgium*, the Court disallowed a claim for damages based on the loss of earnings resulting from an expulsion in violation of article 8 of the European Convention on Human Rights, citing the absence of a causal link between the violation and the alleged loss of earnings. However, the Court awarded the applicant, on an equitable basis, 100,000 Belgian francs as a compensation for non-pecuniary damages for the period that he had to live away from his family and friends, in a country where he had no ties.<sup>217</sup> In the *Čonka v. Belgium* case, the European Court of Human Rights awarded the sum of 10,000 euros to compensate non-pecuniary damages resulting from a deportation which had violated articles 5, paragraphs 1 and 4, of the European Convention on Human Rights (right to liberty and security), article 4 of Protocol No. 4 to that Convention (prohibition of collective expulsion), as well as article 13 of the Convention (right to an effective remedy) taken in conjunction with article 4 of Protocol No. 4.<sup>218</sup>

(5) Satisfaction as a form of reparation is addressed in article 37 of the articles on State responsibility. It is likely to be applied in the case of an unlawful expulsion, particularly in situations where the expulsion decision has not yet been executed. In such cases, the European Court of Human Rights considered that a judgment determining the unlawfulness of the expulsion order was an appropriate form of satisfaction and therefore abstained from awarding non-pecuniary damages. Attention may be drawn in this respect to *Beldjoudi v. France*,<sup>219</sup> *Chahal v. United Kingdom*<sup>220</sup> and *Ahmed v. Austria*.<sup>221</sup> It is relevant to recall in this connection that the Commission itself, in its commentary to article 37 of the articles on State

<sup>213</sup> *Maal* case, Netherlands-Venezuela Mixed Claims Commission, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 732 and 733 (Plumley, umpire).

<sup>214</sup> *Daniel Dillon (United States of America) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, p. 369.

<sup>215</sup> *Yaeger v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 107 to 109, paras. 51–59.

<sup>216</sup> *Ibid.*, p. 110, paras. 61–63.

<sup>217</sup> *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, paras. 52 to 55.

<sup>218</sup> *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 42.

<sup>219</sup> *Beldjoudi v. France*, Judgment (Merits and Just Satisfaction), 26 March 1992, Application No. 12083/86, para. 86: “The applicants must have suffered non-pecuniary damages, but the present judgment provides them with sufficient compensation in this respect.” The Court added that there would have been a violation of article 8 of the Convention “if the decision to expel Mr. Beldjoudi [had been] implemented” (operative para. 1).

<sup>220</sup> *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 158: “In view of its decision that there has been no violation of Article 5, para. 1 ..., the Court makes no award for non-pecuniary damages in respect of the period of time Mr. Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Articles 5, para. 4, and 13 constitute sufficient just satisfaction.”

<sup>221</sup> *Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94. The Court disallowed a claim for compensation for loss of earnings because of the lack of a causal connection between the alleged damage and the Court’s conclusion with regard to article 3 of the Convention (para. 50). The Court then stated: “The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgment affords him sufficient compensation in that respect” (para. 51). The Court then held: “... for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented” (operative para. 2).

responsibility, stated: “One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal.”<sup>222</sup> Again with respect to satisfaction as a form of reparation, it should be noted that the Inter-American Court of Human Rights does not limit itself to awarding compensation to victims of unlawful expulsion, considering that “the reparations that must be made by the State necessarily include effectively investigating the facts [and] punishing all those responsible”.<sup>223</sup>

(6) The question of reparation for internationally wrongful acts related to the expulsion of an alien was addressed by the International Court of Justice in its judgment of 30 November 2010 in the *Ahmadou Sadio Diallo* case:

“Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples’ Rights, and article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea’s final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC’s international responsibility.”<sup>224</sup>

After recalling the legal regime governing reparation, based on the principle, established by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów*, that the reparation must, as far as possible, “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”<sup>225</sup> and the principle, recently recalled in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, that the reparation may take “the form of compensation or satisfaction, or even both”,<sup>226</sup> the Court stated:

“In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea’s claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.”<sup>227</sup>

Subsequently, on 19 June 2012, the Court handed down a judgment on the question of compensation payable by the Democratic Republic of the Congo to the Republic of Guinea.<sup>228</sup> It awarded the Republic of Guinea compensation of \$85,000 for the non-material injury suffered by Mr. Diallo because of the wrongful acts attributable to the Democratic Republic of the Congo,<sup>229</sup> and, on basis of equitable considerations, awarded \$10,000 dollars to compensate for Mr. Diallo’s alleged loss of personal property.<sup>230</sup> The Court, however, rejected, for lack of evidence, requests for compensation for the loss of remuneration that Mr. Diallo’s had allegedly suffered during his detention and following his unlawful expulsion.<sup>231</sup> The Court in its judgment addressed in a general way several points regarding the conditions and manner of compensation, including the causal link between the unlawful acts and the injury, the assessment of the injury — including the non-material injury — and the evidence for the latter.

### 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.

<sup>222</sup> Para. (6) of the commentary to art. 37; *Yearbook ... 2001*, vol. II (Part Two), pp. 106–107.

<sup>223</sup> *Bámaca-Velásquez v. Guatemala*, Judgment of 22 February 2002, (Reparations), paras. 73 and 106.

<sup>224</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, at p. 691, para. 160.

<sup>225</sup> Judgment No. 13 (Merits), 1928, P.C.I.J. Series A, No. 17, p. 47.

<sup>226</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Judgment, I.C.J. Reports 2010, pp. 103–104, para. 273.

<sup>227</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 691, p. 639, at para. 161.

<sup>228</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324.

<sup>229</sup> *Ibid.*, pp. 333–335, paras. 18–25.

<sup>230</sup> *Ibid.*, pp. 335–338 and 343, paras. 26–36 and 55.

<sup>231</sup> *Ibid.*, pp. 338–342, paras. 37–50.

## Commentary

(1) 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. Those rules are essentially reflected in the articles on diplomatic protection adopted by the Commission in 2006, the text of which was annexed by the General Assembly to its resolution 62/67 of 6 December 2007.<sup>232</sup>

(2) In its judgment of 2007 regarding the preliminary objections in the *Diallo* case, the International Court of Justice reiterated, in the context of the expulsion of aliens, two essential conditions for the exercise of diplomatic protection, namely the nationality link and the prior exhaustion of domestic remedies.<sup>233</sup>

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<sup>232</sup>For the text of the articles on diplomatic protection and the commentaries thereto, see the report of the Commission on the work of its fifty-eighth session (2006), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 50.

<sup>233</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 599, para. 40.