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## Seventh report on the expulsion of aliens

By Mr. Maurice Kamto, Special Rapporteur

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## I. Introduction

1. The topic of the expulsion of aliens gave rise to much debate in the Sixth Committee during the sixty-fifth session of the General Assembly. Comments by States that spoke on the topic often went beyond the scope of the relevant portion of the report of the International Law Commission on the work of its sixty-second session and frequently covered matters that the Commission had already dealt with in its previous sessions. Thus, on many issues, there was a gap between the comments made and the current stage of work on the topic.

2. These observations, as well as several recent comments by some States, were reviewed by the Commission's secretariat and transmitted to its members.<sup>1</sup> It did not seem necessary to reproduce them here. It does, however, seem useful to provide an overview of the most important developments in the area since the close of the sixty-second session of the Commission in order to determine whether they confirm the analyses provided in the previous reports of the Special Rapporteur, and the positions taken by the Commission, on the topic or whether, on the contrary, trends or new practice can be identified.

3. Furthermore, in light of the considerable number of reports on the topic that the Special Rapporteur has already submitted and the draft articles contained therein; the various proposals for new or revised draft articles made during the Commission's discussion of previous reports; and the fact that the Drafting Committee on the topic has yet to report to the Commission as a whole, it seemed necessary to restructure the entire set of draft articles that the Special Rapporteur has proposed to date, both those that have already been discussed by the Commission and those that it has yet to consider, in order to facilitate its continued work. This restructuring proposal is, of course, without prejudice to the work that has already been done by the Drafting Committee.

4. This report will therefore be devoted, on the one hand, to a description of the principal recent developments on the issue (Section II) and, on the other, to a restructured summary of the entire set of draft articles (Section III).

## II. Principal recent developments on the issue

5. The question of the expulsion of aliens has been a key political issue in some countries, particularly in Europe, since the most recent session of the Commission; this emphasizes both the timeliness and the sensitive nature of the topic. However, the International Court of Justice judgment of 30 November 2010 in the *Ahmadou Sadio Diallo* case is of greater interest as it addresses several aspects of the issue.

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<sup>1</sup> See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session, prepared by the Secretariat (A/CN.4/638), and the comments and information received from Governments (A/CN.4/628 and Add.1).

## A. Several national developments

6. The interim period between the sixty-second and the sixty-third sessions of the Commission included both the adoption by the people and cantons of Switzerland of the people's initiative: "Expulsion of foreign criminals (the expulsion initiative)" and the French parliament's consideration of draft legislation on immigration, integration and nationality.

### 1. Adoption by the people and cantons of Switzerland of the people's initiative of 15 February 2008: "Expulsion of foreign criminals (the expulsion initiative)"

7. This initiative, which purported to modify the Swiss Constitution, was adopted by the people and cantons of Switzerland in a referendum held on 28 November 2010.<sup>2</sup> The new provision of the Constitution calls for automatic revocation of the residency permit by the competent Swiss authorities and for the expulsion from Swiss territory of aliens convicted of murder, rape, aggravated sexual assault or any other form of violence such as robbery, trafficking in persons, drug trafficking and burglary, as well as social security or social assistance fraud. In addition, the expulsion order includes a ban on entry into Switzerland for 5 to 15 years and, in the case of repeat offenders, up to 20 years. While this amendment to the Constitution has been in force since 28 November 2010, the date on which it was adopted by the people and the cantons, a transitional provision of the Constitution gave parliament five years to establish and supplement the list of relevant offences and enact criminal legislation concerning unlawful entry into Swiss territory.<sup>3</sup> The Federal

<sup>2</sup> See the 17 March 2011 decision of the Federal Council reporting on the outcome of the 28 November 2010 referendum (FF 2011 2593) ([www.admin.ch/ch/f/ff/2011/2593.pdf](http://www.admin.ch/ch/f/ff/2011/2593.pdf)). The initiative was adopted by 1,397,923 votes (15 5/2 cantons) in favour and 1,243,942 votes (5 1/2 cantons) against.

<sup>3</sup> The provision reads:

"The Constitution shall be amended as follows:

Art. 121, paragraphs 3-6 (new)

3. Irrespective of their status, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they:

- a. are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or
- b. have improperly claimed social insurance or social assistance benefits.

4. The legislature shall define the offences covered by paragraph 3 in more detail. It may add additional offences.

5. Foreign nationals who lose their right of residence and all other legal rights to remain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5-15 years. In the event of reoffending, the ban on entry shall be fixed at 20 years.

6. Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offence. The legislature shall issue the relevant provisions."

...

The transitional provisions of the Constitution are amended as follows:

"Article 197, Chapter 8 (new)

8. Transitional provision to art. 121 (Residence and Permanent Settlement of Foreign Nationals)

The legislature must define and add to the offences covered by Article 121 paragraph 3 and issue the criminal provisions relating to illegal entry in accordance with Article 121, paragraph 6, within five years of the adoption of Article 121, paragraphs 3-6, by the people

Councillor who heads the Federal Department of Justice and Police subsequently established a working group, consisting of members of the initiative committee and representatives of the competent authorities of the Confederation and the cantons, which is responsible for resolving the remaining issues and drafting implementing legislation that the Department can submit to the Federal Council; the goal is to develop a proposed solution for implementation of the initiative in a manner consistent with the Constitution and with the international law by which Switzerland is bound. The working group met for the first time on 26 January 2011 and is to submit a report containing proposals by June 2011. Ultimately, however, it will be for the Swiss parliament to decide how the text of the initiative will be implemented through legislation.<sup>4</sup>

8. It should be stressed that the new provision of the Constitution purports to limit the discretionary power currently enjoyed by the competent administrative authorities by providing for automatic revocation of the residency permit of an alien convicted of any of the offences in question and for automatic expulsion as a result of the said revocation. In that connection, it will be recalled that the accessory penalty of expulsion that criminal judges were authorized to impose under article 55 of the old Penal Code — which was abolished when the new Penal Code entered into force on 1 January 2007 — was not automatic. That provision stated that any alien sentenced to penal servitude or a prison term could be expelled for a period of 3 to 15 years and that in the event of a subsequent conviction, the alien could be expelled for life; it had a particularly broad scope since it covered all custodial sentences, whatever their length. Thus, as has been noted, the great majority of the prison population was subject to an expulsion order.<sup>5</sup> However, criminal judges could order expulsion only on a case-by-case basis; the courts had limited the legal framework for expulsion by stating that it must be proportionate to the length of the original sentence and that it required a specific review of the situation of the person in question. In addition, the expulsion order had to include adequate justification and the judge had to display a degree of restraint, particularly where convicted persons were long-time residents of Switzerland, had families and no longer had close ties with their countries of origin.

9. The constitutional amendment of 28 November 2010 is therefore a step backward even by comparison with the former legislation, which, moreover, had already been criticized as establishing a “double punishment”<sup>6</sup> by combining the original penalty of imprisonment with an accessory penalty of expulsion that was sometimes even more onerous than the original sentence. It is unknown whether any other country has adopted legislation requiring the automatic expulsion of convicted aliens. It might nevertheless be wondered whether, by adding this “double punishment”, the legislation does not violate several principles of international law,

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and the cantons” (notes omitted).

See the Federal Office for Migration website ([www.bfm.admin.ch/content/bfm/fr/home.html](http://www.bfm.admin.ch/content/bfm/fr/home.html)).

<sup>4</sup> Information available on the Federal Office for Migration website ([www.bfm.admin.ch/content/bfm/fr/home.html](http://www.bfm.admin.ch/content/bfm/fr/home.html)).

<sup>5</sup> See Esther Montero-Pérez-de-Tudela, “L’expulsion judiciaire des étrangers en Suisse: La récidive et autres facteurs liés à ce phénomène”, *Crimiscope*, vol. 41, May 2009, p. 1 ([http://www.unil.ch/webdav/site/esc/shared/Crimiscope/Crimiscope\\_41F.pdf](http://www.unil.ch/webdav/site/esc/shared/Crimiscope/Crimiscope_41F.pdf)).

<sup>6</sup> See Debra Hayes and John Ransom, “Double Punishment: An Issue for Probation”, in *Probation Journal*, vol. 39, No. 4, December 1992, p. 181.

such as non-discrimination on grounds of origin or nationality or the principle of equality, including equality before criminal law, that is enshrined in both domestic and international law.

## 2. Draft French legislation on immigration, integration and nationality

10. On 30 July 2010 in Grenoble, with emotions running high at the inauguration of the new prefect of the Department of Isère after violence had broken out in a working-class neighbourhood in July 2010, claiming casualties among the police, French President Nicolas Sarkozy declared, “We’re going to reassess the grounds for the deprivation of French nationality. I assume my responsibilities. Deprivation of nationality should be possible where anyone of foreign origin deliberately threatens the life of a police officer, a soldier, a gendarmerie officer or any other public servant. French nationality must be earned and those who hold it must show themselves worthy. Anyone who fires on a law enforcement official is no longer worthy to be French”.<sup>7</sup>

11. The aforementioned draft legislation was prepared on the basis of this statement. While the draft does not concern the expulsion of aliens as such, its relevance to the topic is evident since the sole purpose of the deprivation of nationality is to make it possible to expel the person in question. Article 3 of the draft legislation concerns the “[p]ossibility of deprivation of French nationality for the perpetrators of murder or of wilful acts of violence leading to the unintentional death of a public servant”. Under French law, deprivation of nationality is a specific type of loss of nationality, defined in articles 25 and 25-1 of the Civil Code. It is characterized by the seriousness of the grounds for, and the effects of, its imposition. Similar to an administrative penalty for defamation of or disloyalty to France, it is the inverse of the prohibition on the acquisition or reinstatement of French nationality for aliens convicted of a crime or misdemeanour that undermines the fundamental interests of the nation, or of a terrorist act.<sup>8</sup>

12. As Buffet notes in his report on the draft legislation, “In reality, deprivation of nationality is possible only in the case of foreign-born French citizens who gained French nationality by acquisition — in other words, who became French — such as naturalized aliens or persons who, having been born in France and resided there for a sufficient length of time, gained citizenship upon coming of age, as opposed to persons of French origin who were granted French nationality automatically — in other words, who were born French.<sup>9</sup> ... In principle, there can be no distinction among French citizens on grounds of origin or of the manner in which it was acquired. Article 22 of the Civil Code states that ‘[a] person who has acquired French nationality enjoys all the rights and is bound to all the duties attached to the status of French, from the day of that acquisition’. Furthermore, article 1 of the French Constitution states that “[France] ensures the equality of all citizens before the law, without distinction of origin, race or religion”.

<sup>7</sup> Quoted by Cyriel Martin, “Violences urbaines: La déchéance de la nationalité française, nouvelle arme sécuritaire de Sarkozy”, 9 August 2010 ([www.lepoint.fr/politique/violences-urbaines-la-decheance-de-la-nationalite-francaise-nouvelle-arme-securitaire-de-sarkozy-30-07-2010-1220589\\_20.php](http://www.lepoint.fr/politique/violences-urbaines-la-decheance-de-la-nationalite-francaise-nouvelle-arme-securitaire-de-sarkozy-30-07-2010-1220589_20.php)).

<sup>8</sup> See articles 21-27 of the Civil Code and the 19 January 2011 report, “Immigration, intégration et nationalité”, submitted by François-Noël Buffet on behalf of the Senate Legal Committee (<http://www.senat.fr/rap/110-239-1/110-239-11.pdf>).

<sup>9</sup> Ibid.

13. Thus, according to Buffet, “the procedure for the deprivation of nationality calls into question two constitutional principles: the principle of equality, since it provides for different treatment of French citizens depending on whether they acquired citizenship or were granted it at birth, and the principle of the necessity of punishment if the deprivation of nationality is interpreted as an administrative penalty”.<sup>10</sup> Exceptions to these principles have been made only in the context of counter-terrorism; the other cases of deprivation of nationality have concerned either persons convicted, in France or abroad, of an offence defined as a crime under French law and resulting in a sentence of at least five years’ imprisonment,<sup>11</sup> or persons convicted of an offence defined as a crime or misdemeanour that undermines the internal or external security of the State.<sup>12</sup>

14. Concerning the principle of equality, the Constitutional Council ruled that

[i]n relation to the law governing nationality, persons having acquired French nationality and persons who enjoy French nationality by birth are in the same situation; however, in view of the avowed objective of combating terrorism, it is in order to provide that for a limited period the administrative authorities may deprive a person of French nationality without the resultant difference in treatment being a violation of the principle of equality.

As Buffet notes, “Thus, the Constitutional Council confirmed the principle that there can be no discrimination among French citizens on the basis of the manner in which they became French and indicated that there were only two conditions under which that principle could be violated: the violation must be justified on grounds of public interest, and the period of time during which an individual who had become French may be deprived of that nationality must be time-limited”. Concerning the principle of the necessity of punishment, “the Council stressed that ‘given the serious intrinsic gravity of offences of terrorism, it is not contrary to Article 8 of the Declaration of Human and Civic Rights for the legislature to provide for such penalty’. Article 8 provides that punishment must be necessary; this limits the grounds for deprivation of nationality to the most serious forms of conduct or those which are most contrary to the allegiance to the nation that is expected of French citizens”.

15. And he continues: “These constitutional requirements are, moreover, expanded and supplemented by some of France’s international commitments.” While the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>13</sup> poses no principled obstacle in that regard,<sup>14</sup> this is not true of the European Convention on Nationality.<sup>15</sup> Of course, France is not bound by this

<sup>10</sup> The Constitution’s limitations on criminal procedure apply not only to sentences handed down by a court, but to any other penalty of a punitive nature, even where the law has entrusted a non-judicial authority with responsibility for its imposition. (Constitutional Council Decision No. 88-248 DC, 17 January 1989, paras. 35-42 (*Recueil des décisions du Conseil Constitutionnel* 1989, p. 18).

<sup>11</sup> There were 14 instances of such deprivation between 1973 and 2010 or, specifically, between 1989 and 1998 (see Buffet, note 8 above, p. 60).

<sup>12</sup> There were 7 instances of such deprivation between 1973 and 2010 or, specifically, between 1999 and 2010 (*ibid.*).

<sup>13</sup> Council of Europe, *European Treaty Series*, No. 5.

<sup>14</sup> See Council of State Decisions Nos. 301145 of 26 September 2007 (*Actualité juridique du droit administratif* (AJDA), 2007, p. 1,845) and 251299 of 18 June 2003 (AJDA, 2003, p. 2,110).

<sup>15</sup> Council of Europe, *European Treaty Series*, No. 166.

Convention since it has signed but not yet ratified it. Moreover, “in response to the European Commission against Racism and Intolerance report on France, issued on 15 June 2010, the [French] Government stated that it currently had no plans to ratify that Convention. ...<sup>16</sup> However, while it was decided to leave the question of France’s ratification open”, it should be borne in mind that although “article 7 of the Convention does not preclude the existence of a deprivation-of-nationality procedure as a penalty for ‘conduct seriously prejudicial to the vital interests of the State Party’, the explanatory report annexed to the Convention explains that that wording, taken from the 1961 Convention on the Reduction of Statelessness,<sup>17</sup> ‘notably includes treason and other activities directed against the vital interests of the State concerned (for example work for a foreign secret service) but would not include criminal offences of a general nature, however serious they might be’”.

16. Another international constraint stems from European law. While “the right to a nationality does not, in principle, fall within the competence of the European Union, (...) the Court of Justice of the European Union, in a preliminary ruling on a case brought before it by a German court, stated that in fact, ‘it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality’.<sup>18</sup> (...) [T]he European Court of Justice based its jurisdiction in the case on the fact that by granting its nationality to the person in question, the State conferred on that person the European Union citizenship enjoyed by all its nationals. By withdrawing it, the State caused the person to lose the benefit of that status as defined by article 17 of the Treaty establishing the European Community; such withdrawal must therefore respect the principles of European law:

[W]hen examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.”<sup>19</sup>

17. In short, as the Rapporteur of the Senate Legal Committee has summarized, these “various courts require that the deprivation of nationality procedure should be subject to three conditions:

- The penalty for the offences of which the person in question is guilty must be in the public interest and time-limited;
- It must be consistent with the principle of the necessity of punishment; and

<sup>16</sup> See Buffet, note 8 above.

<sup>17</sup> United Nations, *Treaty Series*, vol. 989, No. 14458, p. 175.

<sup>18</sup> Court of Justice of the European Union, judgment C-135/08, *Janko Rottmann v. Freistaat Bayern*, 2 March 2010, para. 59 (not yet published in *European Court of Justice Reports*).

<sup>19</sup> *Ibid.*, para. 56.

– It must be proportionate to the seriousness of the offence.”<sup>20</sup>

18. Murder or wilful acts of violence leading to the unintentional death of a public servant cannot be said to undermine the fundamental (or “essential”) interests of France in such a way as to justify derogation from the principle of equality that is guaranteed both by the French Constitution and by the international legal instruments to which France is a party. Similarly, with respect to the principle of the necessity of punishment, there is no justification for the claim that the penalty of deprivation of nationality, imposed in this case for the sole purpose of expulsion, is more appropriate than the penalties normally envisaged as punishment for such offences.

19. Thus, in light of the foregoing analysis, the French Senate rightly refused, on 3 February 2011, to extend the penalty of deprivation of French nationality to include citizens who had been naturalized for less than 10 years and had caused the death of a public servant.

## **B. Judgment of the International Court of Justice of 30 November 2010 in the *Ahmadou Sadio Diallo* case**

20. The judgment rendered by the International Court of Justice on 30 November 2010 in the case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*) is a milestone not merely for its juridical quality — which is, when all is said and done, remarkable, despite the arguability of one of its most important aspects — but above all because it is the very first decision of the Court that deals with the issue of the expulsion of aliens. Its importance for that topic, which the Commission has been considering for the past five years, is clear since it addresses no fewer than seven legal questions raised by the issue of the expulsion of aliens: the notion of conformity with the law; the obligation to inform aliens detained pending expulsion of the reasons for their arrest; the obligation to inform aliens subject to expulsion of the grounds for that expulsion; prohibition of the mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to alert, without delay, the consular authorities of the State of origin to the detention of their national; the property rights of aliens subject to expulsion; and recognition of the responsibility of the expelling State and its provision of compensation.

21. The Special Rapporteur has addressed all these questions in his various reports. In light of the judgment of 30 November 2010, it appears that on all these points, the Court confirms the analyses made in the context of the Commission’s work on the topic.

### **1. Conformity with the law<sup>21</sup>**

22. On this issue, Guinea alleged that there had been a breach of article 13 of the International Covenant on Civil and Political Rights<sup>22</sup> and of article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights.<sup>23</sup> The Court stated:

<sup>20</sup> See Buffet, note 8 above, pp. 59-60.

<sup>21</sup> See A/CN.4/625/Add.1, paras. 55-64.

<sup>22</sup> See General Assembly resolution 2200 A (XXI), annex.



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>24</sup>

## **2. Obligation to inform aliens detained pending expulsion of the reasons for their arrest<sup>25</sup>**

23. On this point, Guinea argued that at the time of his arrests, particularly in 1995 and 1996, Mr. Diallo had not been informed of the reasons for those arrests or of the charges against him, omissions that in its view constituted a violation of Article 9, paragraph 2, of the Covenant.

24. The Court makes the general observation that this obligation to inform, which arises from the provisions of article 9, paragraphs 1 and 2, of the Covenant and of article 6 of the African Charter, applies

in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (...). The scope of these provisions is not, therefore, 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. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an “expulsion” or a “refoulement”.<sup>26</sup>

25. In short, the Democratic Republic of the Congo failed in its obligation to inform Mr. Diallo of the expulsion decree issued against him. Moreover, on the day on which he was actually expelled, “he was given the incorrect information that he was the subject of a ‘*refoulement*’ on account of his ‘illegal residence’”, which confirms that “the requirement for him to be informed, laid down by Article 9, paragraph 2, of the Covenant, was not complied with on that occasion”.<sup>27</sup>

## **3. Obligation to provide grounds for the expulsion<sup>28</sup>**

26. While the Court considers that “an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as

<sup>23</sup> United Nations, *Treaty Series*, vol. 1001, No. 14691.

<sup>24</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 65. On the two important issues — 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 was not decided in accordance with law” (para. 73).

<sup>25</sup> See A/CN.4/625/Add.1, paras. 69-80.

<sup>26</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 77. On this point, the Court refers, with regard to the Covenant, to the Human Rights Committee’s general comment No. 8 of 30 June 1982 on the right to liberty and security of person.

<sup>27</sup> *Ibid.*, para. 85.

<sup>28</sup> See A/CN.4/625, paras. 75-210.

‘arbitrary’ within the meaning of the [provisions of the Covenant and the African Charter]”,<sup>29</sup> it can

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>30</sup>

27. Having recognized that Guinea was justified “in arguing that Mr. Diallo’s right to be ‘informed, at the time of arrest, of the reasons for his arrest’ — a right guaranteed in all cases, irrespective of the grounds for the arrest — was breached”, the Court added,<sup>31</sup>

The Democratic Republic of the Congo has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo’s arrest would have informed him sufficiently of the reasons for that arrest for the purposes of Article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. However, no information of this kind was provided to him; the Democratic Republic of the Congo, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.<sup>32</sup>

#### **4. Prohibition of mistreatment of aliens subject to expulsion<sup>33</sup>**

28. Guinea maintained that the prohibition of ill-treatment of any detainee had been violated, invoking the provisions of article 7 and of article 10, paragraph 1, of the Covenant and of article 5 of the African Charter. Without siding with this party to the dispute, since Guinea had failed “to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention”,<sup>34</sup> the Court affirmed that “[t]here is no doubt (...) that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on all States in all circumstances, even apart from any treaty commitments”.<sup>35</sup>

<sup>29</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 81.

<sup>30</sup> *Ibid.*, para. 82.

<sup>31</sup> *Ibid.*, para. 84.

<sup>32</sup> *Ibid.*

<sup>33</sup> See A/CN.4/611, para. 101-120.

<sup>34</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 88.

<sup>35</sup> *Ibid.*, para. 87.

**5. Obligation to alert, without delay, the consular authorities of the State of origin of aliens being detained pending expulsion<sup>36</sup>**

29. According to Guinea, the provisions of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations,<sup>37</sup> which requires the competent authorities of the alien's State of residence, if the alien so requests, to "inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner", had nonetheless been ignored when Mr. Diallo was arrested in November 1995 and January 1996, since he was not informed "without delay" of his right to seek assistance from the consular authorities of his country.<sup>38</sup>

30. The Democratic Republic of the Congo denied these allegations, arguing that first, "Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation"; second, that "the Guinean Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention"; and, third, that Mr. Diallo had been "orally informed ... immediately after his detention of the possibility of seeking consular assistance from his State".<sup>39</sup>

31. However, citing its precedent in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*,<sup>40</sup> the Court noted that it was for the authorities of the State that 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>41</sup>

32. Moreover, as for its assertion that Mr. Diallo had been orally informed of his rights, the Democratic Republic of the Congo had not presented the "slightest piece of evidence to corroborate it. (...) Consequently, the Court finds that there was a violation by the DRC of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations".<sup>42</sup>

**6. Obligation to respect the property rights of aliens subject to expulsion<sup>43</sup>**

33. This issue has been the subject of long, careful consideration by the Court, and with reason; it was at the heart of the dispute. Nonetheless, the Court's ruling is not above criticism on this point.

<sup>36</sup> See A/CN.4/625/Add.1, paras. 97-102.

<sup>37</sup> United Nations, *Treaty Series*, vol. 596, No. 8638.

<sup>38</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 92.

<sup>39</sup> *Ibid.*, paras. 93 and 94.

<sup>40</sup> Judgment of 31 March 2004, *I.C.J. Reports 2004* (I), para. 76.

<sup>41</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 95.

<sup>42</sup> *Ibid.*, paras. 96 and 97.

<sup>43</sup> See A/CN.4/625/Add.2, paras. 119-150.

34. “Guinea has further contended that Mr. Diallo’s expulsion, given the circumstances in which it was carried out, violated his right to property, guaranteed by Article 14 of the African Charter, because he had to leave behind most of his assets when he was forced to leave the Congo”.<sup>44</sup> “Specifically, Guinea contended that the DRC had breached its international obligations by:

‘depriving [Mr. Diallo] of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole *associé*; [by] preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; and [by] expropriating *de facto* Mr. Diallo’s property’.”<sup>45</sup>

35. We will not consider the complaints based on the alleged violation of the rights relating to the *gérance*, the right to oversee and monitor the management and the right to property of Mr. Diallo over his *parts sociales* in his companies, which the Court easily dismissed on the basis — partial in the case of the last of these rights — of its 1970 judgment in the *Barcelona Traction* case.<sup>46</sup>

36. “As mentioned by the Court in its Judgment of 24 May 2007, Guinea maintains that ‘in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies’ (*I.C.J. Reports 2007* (II), p. 604, para. 56)”.<sup>47</sup>

37. After carefully considering these arguments, the Court did, in fact, conclude that “Mr. Diallo was, ... directly or indirectly, fully in charge and in control”<sup>48</sup> of his companies and that he was “the only *gérant* acting for either of the companies, both at the time of Mr. Diallo’s detentions and after his expulsion”.<sup>49</sup> But it indicated, as it had done in its judgment of 24 May 2007, that

‘Congolese law accords an SPRL independent legal personality distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company’s debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the *Barcelona Traction* case: “So long as the company is in existence the shareholder has no right to the corporate assets.” (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for an SPRL or for a public limited company.’ (*I.C.J. Reports 2007* (II), p. 606, para. 63).<sup>50</sup>

38. Having reached the foregoing conclusion, the Court recalled that “claims relating to rights which are not direct rights held by Mr. Diallo as *associé* have been declared inadmissible by the Judgment of 24 May 2007; they can therefore no longer be entertained”. The Court therefore maintained “the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the

<sup>44</sup> See the judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 98.

<sup>45</sup> *Ibid.*, para. 101.

<sup>46</sup> *Ibid.*, paras. 156-159.

<sup>47</sup> *Ibid.*, para. 103.

<sup>48</sup> *Ibid.*, para. 110.

<sup>49</sup> *Ibid.*, para. 112.

<sup>50</sup> *Ibid.*, para. 105.

alleged infringements of Mr. Diallo's direct rights as *associé* of these latter (see *I.C.J. Reports 2007* (II), pp. 605-606, paras. 62-63). The Court understands that such a distinction could appear artificial. ... It is nonetheless well-founded."<sup>51</sup> Based on this distinction, with respect to Mr. Diallo's right to take part in general meetings and to vote, it concluded, astonishingly, even after recalling that Congolese Legislative Order No. 66-341 of 7 June 1966 obliged corporations having their administrative seat in the Democratic Republic of the Congo to hold their general meetings on Congolese territory, that "no evidence has 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>52</sup>

39. This argument is specious and, in any case, unconvincing<sup>53</sup> since the Court itself had recalled the conditions of Mr. Diallo's expulsion from the Democratic Republic of the Congo. Of what use would it have been for Mr. Diallo to convene from abroad a general meeting that would have to be held on Congolese territory in the knowledge that he could not reside in the country and would therefore be unable to take part in person in that meeting? Moreover, the Court admitted, at a later point in its judgment, that "[t]he DRC, in expelling Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the Court, such hindrance does not amount to a deprivation of his right to take part and vote in general meetings".<sup>54</sup> Here, the argument is that Mr. Diallo could have been represented at such meetings. But how could he seriously do so when he was "directly or indirectly, fully in charge and in control" of his companies, of which, as the Court itself acknowledged, he was the "only *gérant*"?

40. Regardless of the Court's reasoning on this matter, it appears to assume, at least implicitly, that an expelled alien's property rights must be protected by the expelling State.

## 7. Recognition of responsibility and compensation<sup>55</sup>

41. The Court recognized, on several points, the responsibility of the Democratic Republic of the Congo for internationally wrongful acts related to the expulsion of Mr. Diallo from that country. It stated:

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>56</sup>

<sup>51</sup> Ibid., paras. 114-115.

<sup>52</sup> Ibid., para. 121.

<sup>53</sup> There was no consensus within the Court as to whether the Democratic Republic of the Congo had violated Mr. Diallo's own rights as an *associé* of Africom-Zaïre and Africontainers-Zaïre. Its decision was taken by 9 votes in favour and 5 against (ibid., para. 165 (6)).

<sup>54</sup> Ibid., para. 126.

<sup>55</sup> See A/CN.4/625/Add.2, paras. 161-169.

<sup>56</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 160.

And after recalling the legal regime on compensation, based on the distinction between the principle, established in the *Factory at Chorzów* case, that “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>57</sup> and the principle, recently recalled in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, that reparation may take “the form of compensation or satisfaction, or even both”,<sup>58</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>59</sup>

42. Thus, this judgment of 30 November 2010 supports, with the force of the authority attached to the decisions of the International Court of Justice, the legal bases of the draft articles proposed by the Special Rapporteur in his third, fifth and sixth reports and in the two addendums to the sixth report.

### **III. Restructured summary of the draft articles**

#### **I. General provisions**

Draft article 1: Scope of application

- see draft article 1 (A/CN.5/573, para. 122)

Draft article 2: Definitions

- see draft article 2 (A/CN.5/573, para. 194)

Draft article 3: Right of expulsion

- see draft article 3 (A/CN.5/581, para. 23)

Draft article 4: Grounds for expulsion

- see draft article 9 (A/CN.4/625, para. 210)

#### **II. Cases of prohibited or conditional expulsion**

Draft article 5: Non-expulsion of a national

- see draft article 4 (A/CN.5/581, para. 57)

Draft article 6: Non-expulsion of refugees

- see draft article 5 (A/CN.4/581, para. 81)

Draft article 7: Non-expulsion of stateless persons

- see draft article 6 (A/CN.4/581, para. 96)

<sup>57</sup> Judgment No. 13 (The Merits), *P.C.I.J.*, Series A, 1928, No. 17, p. 47.

<sup>58</sup> Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 273.

<sup>59</sup> Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 161.

Draft article 8: Prohibition of collective expulsion

- see draft article 7 (A/CN.4/581, para. 135)

Draft article 9: Prohibition of disguised expulsion

- see draft article A (A/CN.4/625, para. 42)

Draft article 10: Expulsion in connection with extradition

- see draft article 8 (A/CN.4/625, para. 72); and
- new proposal by the Special Rapporteur (A/65/10, note 1268)

### **III. Fundamental rights of persons subject to expulsion**

#### **A. General provisions**

Draft article 11: Respect for the dignity and human rights of aliens subject to expulsion

- see draft articles 8 and 10 (A/CN.4/611, para. 50) and the revised version thereof as reflected in draft articles 8 and 9, reproduced in document A/CN.4/617
- see also draft article B (A/CN.4/625, para. 276) and the revised version thereof (A/65/10, note 1260)

Draft article 12: Non-discrimination

- see draft article 14 (A/CN.4/611, para. 156) and the revised version thereof as reflected in draft article 10, reproduced in document A/CN.4/617

Draft article 13: Vulnerable persons

- see draft article 12 (A/CN.4/611, para. 127) and the revised version thereof as reflected in draft article 13, reproduced in document A/CN.4/617

#### **B. Protection required in the expelling State**

Draft article 14: Protection of the lives of aliens subject to expulsion

- see draft article 9 (A/CN.4/611, para. 67) and the revised version thereof as reflected in draft article 11, reproduced in document A/CN.4/617

Draft article 15: Respect for the right to family life

- see draft article 13 (A/CN.4/611, para. 147) and the revised version thereof as reflected in draft article 12, reproduced in document A/CN.4/617

#### **C. Protection in relation to the receiving State**

Draft article 16: Return to the receiving State of the alien being expelled

- see draft article D1 (A/CN.4/625/Add.2, para. 14)

Draft article 17: State of destination of expelled aliens

- see draft article E1 (A/CN.4/625/Add.2, para. 116)

Draft article 18: Ensuring respect for the right to life and personal liberty in the receiving State of aliens subject to expulsion

- see draft article 9, paragraph 1 (A/CN.4/611, para. 67) and the revised version thereof as reflected in draft article 14, reproduced in document A/CN.4/617

Draft article 19: Protection of aliens subject to expulsion from torture and inhuman or degrading treatment in the receiving State

- see draft article 11 (A/CN.4/611, para. 120) and the revised version thereof as reflected in draft article 15, reproduced in document A/CN.4/617

#### **D. Protection in the transit State**

Draft article 20: Protection of the human rights of aliens subject to expulsion in the transit State

- see draft article 16 (A/CN.4/617)
- see draft article 18 (A/CN.4/618)
- see draft article F1 (A/CN.4/625/Add.2, para. 118)

### **IV. Procedural rules**

Draft article 21: Scope of the present rules of procedure

- see draft article A1 (A/CN.4/625/Add.1, para. 40) and the revised version (A/65/10, note 1269)

Draft article 22: Conformity with the law

- see draft article B1 (A/CN.4/625/Add.1, para. 64)

Draft article 23: Procedural rights of aliens facing expulsion

- see draft article C1 (A/CN.4/625/Add.1, para. 126)

### **V. Legal implications of expulsion**

Draft article 24: Right of return of unlawfully expelled aliens

- see draft article H1 (A/CN.4/625/Add.2, para. 159)

Draft article 25: Protecting the property of aliens facing expulsion

- see draft article G1 (A/CN.4/625/Add.2, para. 150)

Draft article 26: Responsibility of the expelling State

- see draft article I1 (A/CN.4/625/Add.2, para. 206)

Draft article 27: Diplomatic protection

- see draft article J1 (A/CN.4/625/Add.2, para. 206)