

UNITED STATES MISSION TO THE UNITED NATIONS
NEW YORK

March 7, 2014

The United States Mission to the United Nations presents its compliments to the United Nations and has the honor to refer to the Secretariat's Note No. LA/COD/48 dated December 14, 2012, regarding a request for comments and observations on the draft articles and commentaries on the topic "Expulsion of aliens" adopted on the first reading by the International Law Commission at its sixty-fourth session. The United States hereby presents its comments and requests the Secretariat's assistance in transmitting this response to the International Law Commission.

The United States Mission avails itself of this opportunity to renew to the United Nations the assurances of its highest consideration.

Enclosure

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OLA/CODIFICATION DIVISION

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DIPLOMATIC NOTE

Comments from the United States on
I.L.C. Draft Articles on the Expulsion of Aliens
As Adopted by the Commission in 2012 on First Reading

General Observations

The United States appreciates the opportunity to provide written comments on the International Law Commission's Draft Articles on the Expulsion of Aliens, and associated Commentary, which were adopted on first reading in July 2012. These Draft Articles address an important area of international relations, one that implicates both the core sovereign prerogative of every State to control the presence of non-nationals in its territory and the protection of those persons from mistreatment in the course of carrying out removals. The United States recognizes and appreciates the efforts of the Commission, and in particular Special Rapporteur, Maurice Kamto, to take into account the views of States and divergent practices found within national legal systems.

At the same time, the United States has a number of general concerns with the Draft Articles. First, these Draft Articles do not seek merely to codify existing law, but instead are an effort by the Commission to progressively develop international law on several significant issues. Key aspects of the Draft Articles, such as their expansion of non-refoulement protections, deviate significantly from the provisions of widely-adhered-to human rights treaties and from national laws and jurisprudence. While there are a few instances in which the Commentary recognizes that aspects of the Draft Articles reflect progressive development, these are insufficient and leave the incorrect impression that all the other provisions within the Draft Articles reflect codification. The Draft Articles even risk generating confusion with respect to existing rules of law by combining in the same provision elements from existing rules with elements that reflect proposals for progressive development of the law.

Second, although there are elements within these Draft Articles to which the United States would not object, or might even support, we do not believe that, viewed as whole, they currently strike a proper balance in dealing with the competing interests in this field, especially to the extent they advocate certain protections for individuals that unduly restrain States' prerogative and responsibility to control admission to, and unlawful presence in, their territories.

Third, we remain skeptical of the wisdom and utility of seeking to augment in this manner well-settled, universal rules of law that exist in broadly ratified human rights conventions. Those existing conventions, including the various conventions containing non-refoulement provisions, already provide the legal basis for achieving key objectives of these Draft Articles. Problems of mistreatment of persons in this area largely arise not from the lack of

legal instruments, but the failure to abide by those instruments, a problem that these Draft Articles do not and cannot solve.

In light of the above concerns, the United States does not believe that this project should ultimately take the form of Draft Articles. Given that several multilateral treaties already exist in this field, we question how much support would exist for negotiating a new convention based on these Draft Articles. Therefore, we recommend the Commission consider converting these Draft Articles into another more appropriate form, such as principles or guidelines. If these do remain as Draft Articles, the United States strongly recommends that the Commentary include a clear statement at the outset that they substantially reflect proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law.

Bearing these general observations in mind, the United States provides the following comments on individual draft articles as they are currently drafted.

Part One ***General provisions***

Article 1 - Scope

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

U.S. Comments

The United States welcomes the inclusion of Draft Article 1(2).

Article 2 -Use of terms

For the purposes of the present draft articles:

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

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

U.S. Comments

The United States has significant concerns with the language in Draft Article 2(a) defining expulsion to include “conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State.” This language, as the Commentary notes, is directly related to the concept of “disguised expulsion” addressed in Draft Article 11. Our concerns with the Commission’s treatment of “disguised expulsion” are more fully addressed below in our comments to Draft Article 11. However, we note here that the language of Draft Article 2(a) is inconsistent with the language of Draft Article 11 in numerous respects, thus creating ambiguity as to whether it is intended to cover, and thereby prohibit, an even broader range of conduct.

For example, the text of Draft Article 11 includes the criterion – underscored in the Commentary as the “decisive factor” – that the State must have the “intention of provoking the departure of aliens from its territory” for such actions or omissions to constitute “disguised expulsion.” However, Draft Article 2(a) lacks any such intentionality requirement, which creates ambiguity as to whether Draft Article 2(a) is intended, or could be read, to cover a wider range of “actions or omissions” as constituting an expulsion. The plain text of Article 2(a) might suggest that a State could be held indirectly responsible for certain conduct by private actors who compel an alien to leave the country, regardless of the State’s intention. Moreover, as noted below, Draft Article 2(a) uses the phrase “compelled to leave” whereas Draft Article 11 speaks of “forcible departure,” leaving open whether there is a difference between these two concepts. Consistent with our comments on Draft Article 11, we believe the words “, or conduct consisting of an action or omission, attributable to a State” in Draft Article 2(a) should be deleted and replaced with “by a State.”

In addition, this definition suggests that “expulsion” would include “non-admission” of a refugee. The meaning of the term “non-admission,” as used in Draft Article 2(a), is somewhat unclear, and to our knowledge, that term is not a key operative term in any international legal instrument. In reading the Commentary, the Commission appears to be referring to the concept of “return,” which is used in Article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention), as well as Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In these instruments, “return” has a meaning distinct from expulsion; to wit, the U.S. Supreme Court, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 182-83 (1993), interpreting Article 33(1) of the Refugee Convention, stated that “‘return’ means a defensive act of resistance or exclusion at a border...” Accordingly, it is inapt to suggest that “non-admission” of a refugee would constitute an

expulsion. If a refugee is denied admission at a port of entry and removed, that act would constitute a “return” for non-refoulement purposes. *See Sale*, 509 U.S. at 182-83. The United States also understands, based on the phrase “compelled to leave the territory of that State” in Draft Article 2(a), that these Draft Articles have no application to any immigration-related procedures conducted outside a State’s territory. For these reasons, the United States suggests that the entire phrase “or the non-admission of an alien, other than a refugee” be replaced by “or the return of an alien.”

Furthermore, although the non-refoulement obligations in the Refugee Convention and the CAT also separately prohibit the return of an alien entitled to protection, these Draft Articles deal solely with expulsion. As discussed below in our comments to Draft Article 6, the United States similarly believes that the reference to “return (*refouler*)” should be deleted from Draft Article 6(3); while Draft Article 6(3) is drawn from Article 33 of the Refugee Convention, the reference to “return (*refouler*)” goes beyond the scope of these Draft Articles.

The United States welcomes in Draft Article 2(a) the exclusion from “expulsion” of extradition and of surrender to an international criminal court or tribunal.

Article 3 - Right of expulsion

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

U.S. Comments

Draft Article 3 appears to indicate that States are expected to comply with the purported requirements of these Draft Articles “and” the requirements of other applicable rules, even if these Draft Articles are not consistent with existing international treaties. One obvious example of this tension is that these Draft Articles do not explicitly provide for derogation in times of emergency, whereas many international treaties relating to this topic do provide for such derogation. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR) art. 4(1); *see also* ICCPR art. 13 (“An alien lawfully in the territory of a State Party...shall, *except where compelling reasons of national security otherwise require*, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority....”) (emphasis added). Draft Article 3 leaves unclear whether derogation is permitted, since according to this draft article both sets of rules are applicable.

At the same time, the Commentary indicates that derogation *is* permitted, meaning that the “other applicable rules” supersede these Draft Articles, at least in that respect. Draft Article 8 also addresses this issue, but only in a narrower context. To avoid confusion, Draft Article 3 should be rewritten, using the language from Draft Article 8 but in a more comprehensive manner, so as to read:

A State has the right to expel an alien from its territory. The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights.

Article 4 - Requirement for conformity with law

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

U.S. Comments

No comment.

Article 5 - Grounds for expulsion

1. *Any expulsion decision shall state the ground on which it is based.*
2. *A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.*
3. *The ground for expulsion shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question and, where relevant, the current nature of the threat to which the facts give rise.*
4. *A State shall not expel an alien on a ground that is contrary to international law.*

U.S. Comments

The United States understands that Draft Article 5 permits the expulsion of an alien on any ground that is provided for by law, including the routine removal of a person for violation of U.S. immigration law.

In Draft Article 5(3), the clauses after the word “circumstances” are unnecessary and somewhat misleading to the extent the proceeding clause already directs that *all* circumstances be considered. In particular, the clause “the current nature of the threat,” even though preceded by “where relevant,” might imply that there should be a “threat” of some nature to support a valid ground for expulsion. We recommend ending the sentence after “question” or, alternatively, inserting the words “in particular” after “including” and inserting the words “or other conditions” after “threat” to broaden the applicability of this clause.

In Draft Article 5(4), the words “its obligations under” should be inserted before “international law” to prevent any ambiguity as to the meaning of “contrary to international law.” This would be consistent with Draft Article 25, which appropriately uses the phrase “its obligations under international law.”

Part Two
Cases of prohibited expulsion

Article 6 - Prohibition of the expulsion of refugees

1. *A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.*
2. *Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State who has applied for recognition of refugee status, while such application is pending.*
3. *A State shall not expel or return (refouler) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.*

U.S. Comments

Unlike Draft Article 6(1), which restates Article 32(1) of the Refugee Convention, Draft Article 6(2) has no basis in the Refugee Convention, and its exact purpose is difficult to understand as drafted because it applies to a “refugee” whose status as a refugee is still pending. The Commentary’s explanation of this provision is not satisfactory, as it states that the provision only applies to individuals who actually meet the definition of a “refugee” under international law; however, the provision is premised on the fact that the individual’s refugee status is still in question. At the same time, any revision or expansion of this provision would need to account for

existing State practice and address concerns about abuse due to manifestly unmeritorious applications. The United States generally stays removal of aliens who have applied for asylum or withholding of removal at least until those claims have been administratively adjudicated; however, there are certain limited exceptions, *see, e.g.*, Canada – United States Safe Third Country Agreement. Accordingly, we recommend that this provision be revised to address these concerns or else deleted.

As discussed above in our comments to Draft Article 2, the United States believes that the words “or return (*refouler*)” should be deleted from Draft Article 6(3). While Draft Article 6(3) is drawn from Article 33 of the Refugee Convention, the reference to “return” goes beyond the scope of these Draft Articles, which is otherwise strictly focused on expulsion. There is no clear reason why “return” should be included in this provision but not in Draft Article 24, given that Article 3 of the CAT also extends to “returns.” We would recommend deleting “return (*refouler*)” from Draft Article 6, as well as leaving “return” out of Draft Article 24.

Article 7 - Prohibition of the expulsion of stateless persons

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

U.S. Comments

The United States does not regard Draft Article 7 as reflecting settled law. Draft Article 7 is based on Article 31(1) of the 1954 Convention Relating to the Status of Stateless Persons. At present, fewer than 80 States are Parties to that Convention, and the practice of many non-Parties does not conform to Article 31(1). For example, the United States, a non-Party, recognizes no such prohibition in U.S. law. A stateless person who is in violation of U.S. immigration laws is subject to removal even in the absence of grounds of national security or public order. Such removal may often be impracticable, but the United States may seek to pursue removal of the stateless person to the person’s country of last habitual residence or other appropriate country in accordance with U.S. law.

Article 8 - Other rules specific to the expulsion of refugees and stateless persons

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

U.S. Comments

If Draft Article 3 is modified as the United States recommends above, then this draft article may be deleted. If Draft Article 3 is not so modified, then Draft Article 8 should be similarly broadened to read:

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights.

Article 9 - Deprivation of nationality for the sole purpose of expulsion

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

U.S. Comments

The United States understands that Draft Article 9 is not directed at a situation where an individual voluntarily and intentionally relinquishes his or her nationality, and believes it would be useful to indicate as much in the Commentary, perhaps in paragraph (3).

Article 10 - Prohibition of collective expulsion

1. *For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.*
2. *The collective expulsion of aliens, including migrant workers and members of their families, is prohibited.*
3. *A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.*
4. *The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.*

U.S. Comments

Although neither Draft Article 10, nor the Commentary, defines the term “group,” the United States understands the draft article to refer to a situation where more than one alien is

being expelled without an individualized assessment of whether each such alien merits expulsion. As such, so long as each alien within a group receives an individualized assessment, the expulsion may go forward, even if it results in the expulsion of several or a group of aliens at once.

Further, the United States understands that, pursuant to Draft Article 2(a), these Draft Articles do not address a decision by a State not to admit, or deny enter to, aliens of a certain nationality or country of origin.

The United States appreciates that the express identification of “migrant workers and members of their families” in Draft Article 10(2) is likely intended to highlight the vulnerability of that particular group. However, given that there are many different kinds of groups that might fall within the scope of these Draft Articles, all of whom presumably are entitled to the same protection, the United States suggests deleting the words “including migrant workers and members of their families” to avoid any adverse implication for other groups.

The phrase “reasonable and objective examination,” while not *per se* objectionable, introduces a standard that does not appear anywhere else in the Draft Articles. Given that Article 5(3) already sets forth similar principles applicable to the examination of any expulsion case, the Commission should consider cross-referencing that draft article, such that the phrase would read “...and on the basis of an examination of the particular case of each individual member of the group consistent with the standards reflected in draft article 5(3).”

Article 11 - Prohibition of disguised expulsion

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

U.S. Comments

As noted above, the United States has significant concerns about the concept of “disguised expulsion” as expressed in Draft Article 11. We believe that the nature and contours of “disguised expulsion” have not been sufficiently addressed and defined through existing State practice or jurisprudence for this issue to be codified as in this draft article. To the extent this

draft article instead reflects a proposal for progressive development of the law, its text is unacceptably broad and ambiguous.

The Commentary cites as its primary authority the jurisprudence of the Iran-U.S. Claims Tribunal and the Eritrea-Ethiopia Claims Commission. As the Commentary itself recognizes, there must be a “particularly high threshold” for establishing an instance of disguised expulsion, and indeed, this jurisprudence is very limited to the extent that few cases of disguised expulsion have been established. As such, important questions regarding the various elements necessary to recognize a case of disguised expulsion have yet to be thoroughly addressed by States or international tribunals.

The United States believes that Draft Article 11, even read with the Commentary, suffers from numerous flaws in light of this lack of clarity and consensus. For example, by using the phrase “actions or omissions,” as in Draft Article 2(a), this draft article appears to be drawing on principles of State responsibility. *See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2. However, because the draft article would impute State responsibility based on the actions of that State’s nationals or other persons, it raises the question, especially in the context of “omissions,” of what international obligations a State would have with respect to its nationals or other persons in the context of expulsions of aliens. Moreover, Draft Article 11 does not include a requirement of attribution to the State, although this element does appear in Draft Article 2(a) and in the Commentary. In addition, the term “tolerates” is clearly overly broad in light of the aforementioned “high threshold”; it could lead to claims of State responsibility for a wide range of actions by third parties over which it has little or no means of control. The text also does not sufficiently clarify that the critical element of intentionality applies to the State rather than to “its nationals or other persons.” Finally, as noted above, this draft article uses the term “forcible departure” whereas Draft Article 2(a) uses the different phrase “compelled to leave.”

Especially given the potential implications for State responsibility and a State’s obligations vis á vis the conduct of its nationals, other persons, and even sub-national governmental entities, a definitive articulation of the concept of “disguised expulsion” would need to be carefully and thoroughly considered by States before it could be accepted as a generally applicable rule of international law. Accordingly, the United States recommends that this draft article be deleted.

Article 12 - Prohibition of expulsion for purposes of confiscation of assets

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

U.S. Comments

No comment.

Article 13 - Prohibition of the resort to expulsion in order to circumvent an extradition procedure

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

U.S. Comments

The United States believes this draft article suffers from a lack of clarity on the exact harm that it seeks to prevent, especially in light of the prerogative of States to use a range of legal mechanisms to facilitate the transfer of an individual to another State where he or she is sought for criminal proceedings.

First, the United States, for purposes of analysis, assumes that the use of the term “ongoing” means this provision would not be applicable to situations where an extradition request has not been made, nor to situations after an extradition request has been denied or otherwise resolved. However, the Commission does not provide the basis for its assertion in paragraph (1) of the Commentary regarding the parameters of “ongoing” and we question whether there is an international consensus on this issue. At the very least, the title of the draft article should include the word “ongoing” to mirror the draft article’s text.

More importantly, it is fundamentally unclear what conduct the Commission would view as constituting “circumvention” of an extradition procedure. As reflected in the Commentary, a State might legitimately use a wide range of legal bases, including national security or immigration law violations, to justify the transfer of an individual sought by another State for criminal proceedings. Especially in light of increasing transnational criminal activity, the United States believes it would be essential to establish an acceptably precise meaning of the concept of “circumvention” so as not to stifle or impede cooperation between and among States in this area. Ultimately, a rule on this issue would need to be clearer about the harm it is intended to prevent, and take into account more fully States’ practices in this area.

The United States suggests that this draft article be revised to reflect these concerns or else be deleted.

Part Three
Protection of the rights of aliens subject to expulsion

Chapter I
General provisions

Article 14 - Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. *All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.*
2. *They are entitled to respect for their human rights, including those set out in the present draft articles.*

U.S. Comments

The phrase “subject to expulsion,” used in this draft article and throughout Part Three, is vague as to whether it only covers aliens who are actually in the process of being expelled, or all aliens who lack lawful immigration status or who otherwise could potentially be placed in removal proceedings. Based on the context of this section, and earlier versions of these Draft Articles, it appears that the former meaning is the one intended; however, the meaning of this phrase should be clarified in the Commentary.

Article 15 - Obligation not to discriminate

1. *The State shall exercise its right to expel aliens without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.*
2. *Such non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles.*

U.S. Comments

Further, the United States understands that, pursuant to Draft Article 2(a), these Draft Articles do not address a decision by a State not to admit, or deny enter to, aliens on the basis of, for example, nationality.

With respect to aliens who are present in the territory of a State, the breadth of Draft Article 15 is not supported by existing treaties that address expulsion or non-refoulement. While the general principle of non-discrimination does exist in human rights law, the principle is only applied to certain types of conduct by a State, not to all State conduct, and the Commentary does not establish that, under existing international law, this principle applies in particular to State conduct with respect to expulsion of aliens.

Moreover, Draft Article 15 is clearly at tension with Draft Article 3, which recognizes the broad right of a State to expel an alien for any number of reasons. For example, Draft Article 15 would appear to prohibit a State from expelling enemy aliens in time of war, since doing so would be discrimination based on nationality, even though Draft Article 10(4) appears to permit such expulsion. More broadly, U.S. immigration law and policy – which we believe to be consistent with similar approaches by other States – permits nationality-based classifications, so long as a rational basis exists for the classification. *See, e.g., Kandamar v. Gonzales*, 464 F.3d 65, 72-74 (1st Cir. 2006); *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979).

Even the prohibition of discrimination based on “property” is problematic. For example, under U.S. law, certain inadmissibility grounds in 8 U.S.C. § 1182(a), such as the public charge ground, require the government to consider an alien’s assets, resources, and financial status, in making an admissibility determination. In addition, U.S. law allows for admission of alien entrepreneurs on “conditional” permanent resident status, but these aliens may be removed for failure to meet the conditions of their status, including the investment of specified amounts of capital. *See* 8 USC § 1186b. Draft Article 15’s prohibition on discrimination based on “status” is especially problematic, given that the decision to remove an alien and the amount of process and range of potential relief from removal afforded during the expulsion process very much depend on, *e.g.*, whether the alien has been admitted to the United States or is a lawful permanent resident. These Draft Articles themselves discriminate among aliens on the basis of their “status,” according lesser rights in some instances to aliens who are unlawfully present in the territory of a State.

Finally, especially in light of the statement in paragraph (2) of the Commentary that this provision applies “both to the decision to expel and not to expel,” this draft article risks severely undermining a State’s prerogative – and need, in light of limited resources – to exercise discretion as to which expulsion cases to pursue or not pursue. Such exercises of discretion frequently involve one or more of the factors listed in this draft article, especially given the potential breadth of the term “other status.”

The United States believes that this draft article is not grounded in existing international law or practice, is poorly conceived as a form of progressive development, and therefore should be deleted. If it is retained, the draft article should be focused on a particular aspect of the

expulsion process where discrimination is to be avoided, such as in the accordance of procedural rights reflected in Draft Article 26.

Article 16 - Vulnerable persons

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

U.S. Comments

The United States does provide extraordinary protections and care for children in removal proceedings, especially unaccompanied alien children. *See, e.g.*, 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C) (asylum), 1232 (screening, care, and custody); *see also* U.S. Dep't of Justice, Exec. Office for Immigration Review, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), *available at* <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>. At the same time, in matters related to expulsion, U.S. law does not compel primacy of the child's "best interests." As such, the United States suggests that the term "primary" be replaced by "significant," or else that the words "a primary consideration" be replaced by "given due consideration."

Chapter II

Protection required in the expelling State

Article 17 - Obligation to protect the right to life of an alien subject to expulsion

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

U.S. Comments

Given the location of Draft Article 17 in Part Three, Chapter II, the United States understands that this draft article is focused on the protection of the alien while he or she is in the expelling State, whereas issues relating to the treatment of the alien in the State of destination are addressed in Part Three, Chapter III.

Article 18 - Prohibition of torture or cruel, inhuman or degrading treatment or punishment

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

U.S. Comments

No comment.

Article 19- Detention conditions of an alien subject to expulsion

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

U.S. Comments

The United States believes that the standards in Draft Article 19 are generally reasonable, although we would propose some modifications. As a general matter, the United States is committed to safe, humane and appropriate detention of individuals when their detention is necessary for reasons relating to their removal from the United States. The Department of Homeland Security is charged with managing the detention of aliens (other than unaccompanied alien children) who are subject to expulsion, including the conditions of detention, access to legal representation, and safe and secure operations across its detention facilities nationwide. If an alien, through the administrative process, is found to be in violation of the immigration laws of the United States and subject to a final removal order, he or she may be detained until removed, which generally should occur within ninety days of the final completion of the administrative process. *See* 8 U.S.C. § 1231(a)(1)(A), (2). Post-order detention of such aliens for 180 days, however, is presumptively reasonable. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

In Draft Article 19(1)(a), the words “for this reason alone” should be inserted after “not” to account for aliens subject to expulsion who are concurrently being incarcerated punitively as criminals.

The United States finds the language of Draft Article 19(1)(b) unclear, i.e. whether it is intended to preclude aliens subject to immigration detention from being detained in criminal detention facilities, or to require separation of noncriminal aliens and criminal aliens in an immigration detention facility. The Commentary states that aliens may be detained in criminal facilities and that noncriminal aliens subject to expulsion may be detained in the same facility as criminal aliens subject to expulsion. This provision should be revised to be more specifically tailored to the harm that it is seeking to prevent and make clear that aliens detained for the purpose of removal, whether criminal aliens or noncriminal aliens, may be detained in the same facilities as individuals detained under the criminal laws of the State.

With respect to Draft Article 19, paragraph 2(b), not all extensions of immigration detention need be decided by a judicial authority, especially if they are short-term. Under U.S. law, for example, the Executive Office for Immigration Review in the U.S. Department of Justice reviews custody determinations in certain situations, such as for persons who are not subject to mandatory detention. *See* 8 U.S.C. § 1226; 8 C.F.R. § 1003.19. Accordingly, the United States recommends either changing “judicial” to “such,” or else replacing the phrase “may be decided upon only” with “must be reviewable by.” If necessary, an additional sentence might be added along the lines of: “Prolonged detention after the alien has been ordered removed shall be subject to judicial review.”

U.S. law permits continued detention of removable aliens in “special circumstances” (e.g., highly contagious disease, terrorism or other security concerns, special danger to the public). *See* 8 C.F.R. § 241.14; *see also* 8 U.S.C. § 1226A. Accordingly, the United States urges that in 19(1)(b) and 19(2)(a), the word “generally” be inserted after “shall,” and in 19(3)(b), the clause “or is necessary on grounds of national security or public order” be inserted at the end of this provision.

Article 20- Obligation to respect the right to family life

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

U.S. Comments

As a threshold matter, the United States does not believe that Draft Article 20 properly belongs in Part Three, Chapter II, given that the title of the chapter and the substance of the other draft articles in this chapter address standards related to the treatment of an alien subject to expulsion rather than standards related to the grounds of expulsion. Draft Article 20, however, by its plain text and as noted in the Commentary, addresses the right to family life as it relates both to the treatment of an alien subject to expulsion and to the grounds of expulsion. This dual purpose risks conceptually blurring the scope of the other draft articles in Part Three, Chapter II, which is of particular concern to the United States with respect to Draft Article 17, per our comments above. Accordingly, Draft Article 20 would be more appropriately placed following Draft Article 15 in Part Three, Chapter I.

Turning to the substance, an alien's family ties both inside and outside the United States are factors that are routinely considered by the United States in determining an alien's eligibility for discretionary immigration relief. *See* 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal), 1182(h) (waiver of inadmissibility), and 1255 (adjustment of status to lawful permanent residence). U.S. immigration authorities also often give due consideration to family life in the exercise of prosecutorial discretion on a case-by-case basis. Yet, consideration of family unity does not always outweigh other factors in a particular case. For example, the United States may remove an alien who commits an aggravated felony in the United States regardless of his or her family ties. *See, e.g., Payne-Barahona v. Gonzales*, 474 F.3d 1 (1st Cir. 2007); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121(2d Cir. 2005).

Draft Article 20(1) reads as though the right to family life is absolute in the context of an expulsion, such that it is the paramount factor. Yet the Commentary to Draft Article 20, at paragraph (1), indicates that the support in the legislation and case law of States is not so absolute, and instead only supports "the need to take into account family considerations as a limiting factor in the expulsion of aliens." Consequently, Draft Article 20(1) should be brought into line with the legislation and case law indicated in the Commentary, by replacing "respect" with "give due consideration to."

Similarly, Draft Article 20(2) should be deleted as it just largely restates the general principle of Draft Article 20(1) but with more specificity, while introducing a principle of "fair balance" that is neither sufficiently grounded in existing law and practice, nor desirable as a matter of progressive development. Again, U.S. immigration law requires consideration of family ties in many circumstances but does not require a court or other decision-maker to "balance" those ties against the interests of the state. Especially if edited as the United States

suggests, Draft Article 20(1) would sufficiently express the relevant standard on this topic, making Draft Article 20(2) superfluous.

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.*

U.S. Comments

Draft Article 21(1) provides that an “expelling State shall take *appropriate* measures to facilitate the voluntary departure of an alien subject to expulsion” (emphasis added). U.S. law provides appropriate measures to facilitate the voluntary departure of aliens in administrative removal procedures. *See, e.g.*, 8 U.S.C. § 1225(a)(4) (permission to withdraw application for admission), 1229c (voluntary departure). However, the United States reads “appropriate measures” to permit reasonable limitations on the availability of such discretionary relief. In other words, there will be circumstances where voluntary departure is *not* appropriate and expulsion measures must be forcibly implemented, as recognized in Draft Article 21(2).

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.

U.S. Comments

The United States believes that Draft Article 22(1) appropriately focuses on the State of nationality as the primary destination country, or alternatively another State willing to accept the alien, including upon request of the alien concerned. However, in addressing other options, Draft Article 22(2) fails to recognize the possibility of expelling an alien to a State of prior residence, or the State where he or she was born. Such possibilities are contemplated in the Commentary to Draft Article 22, at paragraph (2), and in the laws of many States, *see, e.g.*, 8 U.S.C. § 1231(b)(2)(E), but do not appear in the text of Draft Article 22(2) itself. Moreover, depending on the circumstances, the alien may have closer family or financial ties to one State than to others, or may face a greater hardship in travelling to one State than to others, and the expelling State should have the discretion in any given case to take such factors into account. Consequently, Draft Article 22(2) should be revised to read “An alien also may be expelled to any State where he or she has a right of entry or stay, where he or she resided or was born, or, where applicable, to the State from where he or she entered the expelling State.”

In addition, it is important in this context to limit the ability of successor States to bar the return of aliens born in States that no longer exist, or in territories over which sovereignty has changed since the alien departed. U.S. immigration law accounts for these scenarios by permitting removal to “[t]he country that had sovereignty over the alien’s birthplace when the alien was born,” or to “[t]he country in which the alien’s birthplace is located when the alien is ordered removed.” *See* 8 U.S.C. § 1231(b)(2)(E)(v) and (vi). The United States suggests inserting language to this effect in the text of Draft Article 22 or else clarifying the application of the draft article to these scenarios within the Commentary.

Finally, the Commentary to Draft Article 22 should note that an expelling State retains the right to deny an alien’s request to be expelled to a particular State when the expelling State decides that sending the alien to the designated State is prejudicial to the expelling State’s interests. This important principle is codified in U.S. immigration law. *See* 8 U.S.C. § 1231(b)(2)(C)(iv).

Article 23 - Obligation not to expel an alien to a State where his or her life or freedom would be threatened

1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other

opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. *A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.*

U.S. Comments

Draft Article 23 purports to recognize what would be a dramatic expansion of the non-refoulement provisions in existing human rights treaties, in a manner that discards the language carefully crafted by States for those regimes. As such, this draft article should be deleted or at least significantly redrafted.

Draft Article 23(1) purports to be “correspond[ing] 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*).” *See* Commentary, at paragraph (1). Yet Draft Article 23(1) dramatically departs from the text of Article 33 of the Refugee Convention, as well as the settled and widely-adhered-to State practice associated with Article 33 over the past 60 years.

Article 33(1) of the Refugee Convention prohibits expulsion of a refugee “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” By contrast, Draft Article 23(1) would expand the provision to prevent expulsion where life or freedom is threatened on *any* ground, “such as” the additional categories of colour, sex, language, non-political opinion, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law. Moreover, the category of “membership of a particular social group” was also not expressly included; to the extent “social origin” is intended as a replacement it does not clearly have the same meaning.

The Commentary provides no basis in national legislation, national case law, international case law, or treaty law for such changes. In fact, most national laws on expulsion, deportation, or removal focus on five enumerated groups of individuals who fear persecution or have suffered persecution, specifically on account of race, religion, nationality, membership of a particular social group, or political opinion. *See, e.g.*, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A). The only explanation provided in the Commentary is that Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) contains such categories, with the implication that Article 2(1) applies to a State’s obligations under ICCPR Article 13 with respect to expulsion. Yet, while these non-discrimination principles may be relevant to the treatment of aliens within a State and the process afforded aliens during expulsion

proceedings, they would not all be relevant in determining whether non-refoulement obligations would preclude expulsion.

Another significant departure from settled and widely-adhered-to State practice concerns the selective incorporation of the non-refoulement-related provisions in the Refugee Convention. Draft Article 23(1) does not “correspond” to the content of Article 33 of the Refugee Convention since it does not incorporate the substance of Article 33(2), which reads:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Similarly, the draft article does not account for the exclusion grounds contained in Article 1(F) of the Refugee Convention. The Commentary provides no explanation for why these provisions, which have fully operated as a part of State practice in the field of refugee law for the past 60 years, should be discarded.

The United States recommends that Draft Article 23(1) be deleted or else redrafted to follow the language of Article 33 of the Refugee Convention.

The United States also has concerns regarding Draft Article 23(2), which would purport to recognize another significant non-refoulement obligation that does not currently exist under international law. The Commentary does not sufficiently establish that the core principle underpinning this provision is grounded in existing jurisprudence and state practice, other than by citing to a single Human Rights Committee decision on an individual communication. There are principled reasons to question the Committee’s conclusion that a State that has voluntarily abolished the death penalty when not obligated to do so under international law nonetheless thereby assumes an international legal obligation not to expel an alien to a State that has lawfully sentenced that alien to death. Moreover, as the Commentary admits, Draft Article 23(2) goes further than even this limited precedent by (1) expanding this principle to States that have not even formally abolished the death penalty and (2) expanding the non-refoulement obligation to circumstances in which the individual has not yet been sentenced to death. Such extensions only further erode the grounding of Draft Article 23(2) in law or principle.

While this provision would not restrict the United States’ right, prerogative or authority to expel aliens from the United States, we have serious concerns regarding the adverse impact that such a proposed restriction would have on international cooperation with respect to law enforcement and criminal justice.

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.

U.S. Comments

The United States has no objection to the aspect of Draft Article 24 pertaining to torture to the extent this restates the non-refoulement obligation in Article 3 of the CAT. Article 3 of the CAT provides that a person shall not be expelled “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The United States understands that phrase to mean “if it is more likely than not” that such person would be tortured.

Draft Article 24, however, would purport to expand the non-refoulement obligation found in the CAT so as to prevent expulsion of aliens in danger of “cruel, inhuman or degrading treatment or punishment” (CIDTP). The primary justification for this expansion is jurisprudence of the European Court of Human Rights and a recommendation of the Committee on the Elimination of Racial Discrimination. These examples and some isolated instances of state practice are not a sufficient basis for presenting this draft article as codification of existing law; it clearly reflects an effort of progressive development.

One important substantive issue that the Commentary does not address is why this new non-refoulement obligation should not permit any exceptions or limitations. The existing non-refoulement obligation in Article 3 of the CAT does not allow such exceptions, which corresponds with the peremptory prohibition against torture. CIDTP, however, does not rise to the level of torture and is not treated equally under the CAT. Yet neither the draft article nor the Commentary considers whether a non-refoulement obligation with respect to CIDTP should permit exceptions on, for example, national security or criminal grounds, as is the case with respect to the non-refoulement obligation in the Refugee Convention. As the Secretariat’s Memorandum notes, where States have adopted domestic laws that protect aliens against expulsion to States where they would be at risk of mistreatment, these laws frequently contain exceptions, e.g. where the alien has committed certain types of criminal acts, threatens the interests of the expelling State, threatens that State’s *ordre public* or national security, or has violated international law. *See* A/CN.4/565 at para 574.

Recognizing an unconditional non-refoulement obligation with respect to CIDTP would raise additional issues not fully explored or addressed by the Commentary. For example, uncertainty regarding what actions are encompassed by CIDTP would complicate States' efforts to meet effectively this non-refoulement obligation. An unconditional non-refoulement obligation with respect to CIDTP could be used to support arguments against expelling any alien to a given country based on general conditions there, such as poor prison conditions. Moreover, whereas torture as defined in the CAT necessarily involves state action, CIDTP does not. Thus, States seeking to comply with this obligation would need to consider the likelihood that anyone at all in the country to which the person would be sent – regardless of their affiliation with the State – would take action against that individual that could be considered CIDTP.

The United States believes that such a new non-refoulement obligation with respect to CIDTP would need to be carefully and thoroughly considered by States before it could be accepted as a generally applicable rule of international law. Accordingly, the United States recommends deleting this provision or else revising it to mirror the language of Article 3 of the CAT.

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.

U.S. Comments:

No comment.

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;*
 - (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 draft article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.*

U.S. Comments

Although the United States views the procedural rights enumerated in Draft Article 26 as generally appropriate, we do have several concerns with the draft article as written. First, it fails to acknowledge established limitations on these procedural rights, *see, e.g.*, ICCPR art. 13 (“An alien lawfully in the territory of a State Party . . . shall, *except where compelling reasons of national security otherwise require*, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority...”) (emphasis added).

Second, Draft Article 26(1)(d) uses vague and confusing terminology, especially when compared with (1)(b). Consequently, the United States recommends that (1)(d) be redrafted to provide: “the right to an appropriate and effective review process.”

Third, the Commentary to Draft Article 26(1)(e) should clarify that the State does not have an obligation to provide such representation to the alien at the State’s expense.

Fourth, Draft Article 26(3) should be redrafted to reflect that this principle is an obligation of States, rather than a right of individuals, consistent with the Vienna Convention on Consular Relations. For example, it could be revised to read: “The expelling state must allow an alien subject to expulsion to seek consular assistance.”

Finally, while the reference to a six-month limit in Draft Article 26(4) would not conflict with U.S. law, this time period might appear to be arbitrary as a purported rule of international law. The standard also is likely to be difficult to administer as a practical matter; it is not always feasible to determine exactly how long an unlawful alien has been present in a State’s territory.

The United States recommends using more generic language here, e.g. “unlawfully present in its territory for a brief duration,” and then explaining in the Commentary that State practice suggests that a “brief duration” generally means around six months or less.

Article 27 - Suspensive effect of an appeal against an expulsion decision

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

U.S. Comments

In line with the concerns expressed by several other countries, the United States does not think that this draft article reflects current State practice, and is not well crafted as a purported rule of international law. First, it is overly broad to the extent it could be read to apply to every kind of appeal lodged by an alien during expulsion proceedings. Under U.S. immigration law, an alien subject to a final order of removal generally has the potential for several levels of appeal, although there are some exceptions, e.g., expedited removal procedures under 8 U.S.C. § 1225(b). A direct appeal of the removal order to the Board of Immigration Appeals has an automatic suspensive effect; further appeals would need to be accompanied by a separate request for a stay pending appeal.

The United States believes that Draft Article 26(1), which describes a right to challenge the expulsion decision through an effective review process, adequately and appropriately addresses the underlying concern motivating this draft article. States should have flexibility, within the context of their particular immigration systems and review processes, to determine whether particular kinds of petitions or appeals should have automatic suspensive effect or should allow for discretionary stays, as long as aliens ultimately have access to an effective review process. This draft article does not take into account the reasonable variations among States’ practices on this issue.

The United States believes this draft article should be redrafted to address these concerns or else deleted.

Article 28 - Procedures for individual recourse

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

U.S. Comments

Especially given the wording of the phrase “any available procedure,” the United States understands this provision to recognize only an obligation by a State to permit aliens subject to expulsion to pursue individual recourse to a competent international body where such a procedure is already generally available within, or with respect to, that State.

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.*

U.S. Comments

Although the United States appreciates the principles of fairness motivating this Draft Article, we have serious concerns to the extent it would purport to recognize an unprecedented individual “right” to be admitted by a State. In no other context does an alien possess a right to be admitted to a State; even though this draft article addresses very narrow circumstances, it would set an unacceptable precedent in this regard. The State, even in sympathetic circumstances such as those addressed by this draft article, does, and should, maintain its sovereign prerogative to determine which aliens may be allowed to enter and under what conditions. *See Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (“In accord with ancient principles of the international law of nation-states, . . . the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers . . .”) (quotation marks omitted); *see also* 1 H. Lauterpacht, *Oppenheim’s International Law* 675-76 (8th ed. 1955). Moreover, by addressing admission, this draft article goes beyond the scope of the topic of “expulsion.”

The United States believes this draft article should be redrafted to address these concerns or else deleted.

Article 30 - Protection of the property of an alien subject to expulsion

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

U.S. Comments

The United States reads the term “appropriate” to afford States flexibility in the treatment of certain types of property, including property acquired by the alien through criminal means. In particular, as paragraph (4) of the Commentary notes, the language “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.” Thus, in certain circumstances the State is entitled to take possession of the property of an alien subject to expulsion for purposes of forfeiture. Moreover, the United States reads “appropriate measures” to mean that the State is not under an absolute obligation to protect the assets of an alien subject to expulsion.

Article 31 - Responsibility of States in cases of unlawful expulsion

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

U.S. Comments:

The United States has several drafting suggestions to improve the clarity of this provision. The words “the expelling State’s” should be inserted before “international obligations”; the word “under” should be replaced by “as reflected in”; the word “under” should be inserted before “any”; the word “applicable” should be inserted before “rule”; and the words “the expelling” should be replaced by “that.” As edited, the draft article would read:

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

Article 32 - Diplomatic protection

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

U.S. Comments

The United States would emphasize that, as suggested in the Commentary, nothing in this draft article is intended to alter the normal application of the general rules on diplomatic protection under international law.