

**Observations submitted by the European Union
on the draft articles on the expulsion of aliens adopted by the
International Law Commission on first reading**

1. Under Chapter IV on "Expulsion of Aliens", Paragraph 43 of the International Law Commission Report on the work of its sixty-fourth session (Supplement No. 10 (A/67/10)) states that "At its 3155th meeting, on 31 July 2012, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014".
2. Following its oral Statement of 1st November 2012, the European Union has the honour to hereby submit in written its observations on the draft articles.
3. The European Union notes that the International Law Commission's work on this topic is very advanced and that a set of 32 draft Articles, together with detailed comments have been adopted on first reading⁽¹⁾. It wishes to commend the Commission and the Special Rapporteur for this achievement.
4. When commenting on this topic on previous occasions the European Union has made detailed comments on areas where it felt that the Special Rapporteur had insufficiently addressed or partly misunderstood European Union law on the subject.
5. It is therefore with satisfaction that the Union notes that the Special Rapporteur has studied the contribution made by the Union and has devoted a separate section of his Eighth Report to a discussion of comments provided by the European Union. As often pointed out earlier, insofar as European Union law is concerned, the most relevant and current legislation is the EU's "Return

Directive” (2008/115/EC) adopted in December 2008. More than thirty states in Europe have provisions in their national legislation that contain standards corresponding at a minimum to the provisions of this Directive(2).

6. In the light of the existing European Union law on the subject, the Union welcomes the elaboration of the 32 draft Articles and their detailed commentaries.
7. The Union takes the view that International Law Commission's draft Articles and detailed commentaries serve to underline an objective that is also pursued by European Union law: any person who is subject to expulsion measures should be treated with respect for that person's human dignity and in accordance with agreed minimum standards, based on the rule of law.
8. The European Union would expect that European Union citizens who are subject to expulsion in a third country be treated in accordance with these standards. Equally, the promotion of these standards should be in the clear interest of all States, bearing in mind that nationals of any country may find themselves in a situation of illegal stay in another country.

9. With these preliminary comments in mind the EU is pleased to be able to accept most of the text of the Articles proposed, subject to some refinement. The EU would also submit for the International Law Commission's reflection the need for addressing the issues of promotion of voluntary departure and human and dignified detention conditions.
10. The European Union's detailed comments are as follows:
 - **Other rules specific to the expulsion of refugees and stateless persons**

11. Draft Article 8 currently provides that the draft Articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.

12. The European Union would suggest that this provision should be made more precise: the rules provided for by law to which reference is made should be those which are **more favourable** to the person subject to expulsion.

- **Discrimination on the grounds of sexual orientation**

13. With respect to draft Article 15 (obligation not to discriminate), the EU recalls that in the EU it has been considered necessary to expressly ban discrimination on the grounds of sexual orientation (see Art. 19 TFUE and 21 Charter on Fundamental Rights). The EU would therefore suggest adding an express reference to draft Article 15 paragraph 1:

“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, **sexual orientation**, or any other ground impermissible under international law” (*proposed modifications in bold*).

- **Vulnerable persons – health considerations**

14. The European Union can agree with the standards set out in Article 14 which correspond broadly to basic principles set out in legislation common to all EU Member States and listed in Articles 5 and 14 of the EU Return Directive. However, it seems to the EU that a reference to **health considerations** is lacking. The EU would therefore suggest the addition of the following consideration, for example as subpoint 3 of Article 16:

"In all actions, the state of health of the aliens who are subject to expulsion shall be taken into account".

- **Detention (conditions) of an alien subject to expulsion**

15. With respect to draft Article 19 the European Union would suggest separating the question of detention from that of detention conditions. The latter is a separate issue which merits separate treatment as was done by the 2005 Council of Europe Guidelines 10 and 11 on forced return(3) and Articles 16 and 17 of the EU Return Directive.
16. Insofar as the first is concerned, the European Union is of the view that in order to prevent arbitrary detention, some limitations should be added. Such limitations are foreseen in Article 15(1) of the EU Return Directive and in the Council of Europe Guideline 6 on forced return. It is also in line with what the International Court of Justice found in its Judgement of 30 November 2010 in the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*(4).
17. The EU is also of the view that anyone detained should be entitled to a speedy judicial review of the lawfulness of the detention. This is a basic guarantee common to all EU states, set out in Article 15(2) of the EU Return Directive and endorsed in Article 5(4) of the European Convention on Human Rights and Fundamental Freedoms as well as in Article 9(4) of the 1966 International Covenant on Civil and Political Rights.
18. On this basis, the EU would suggest the following two separate Articles. The first one on 'Detention of an alien subject to expulsion' and the second one on 'Conditions of detention of aliens subject to expulsion', as follows:

“19. Detention of an alien subject to expulsion

1. Detention may only be used if it is necessary to prepare and/or carry out the expulsion process, in particular where there is a risk of absconding or where the alien avoids or hampers expulsion. Detention may only be imposed if less coercive measures cannot be applied effectively in a specific case.
2. The detention of an alien subject to expulsion shall not be punitive in nature. (*second sentence deleted*)

3. (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 or by an administrative authority, whose decision is subjected to an effective judicial review.
4. (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 (a), detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.”

“19a. Conditions of detention of aliens subject to expulsion:

1. Aliens detained pending expulsion should normally be accommodated in facilities specifically designated for that purpose. Such facilities should provide accommodation which is clean and which offers sufficient living space for the numbers involved.
2. Detainees should not normally be held together with ordinary prisoners. Men and women should be separated from the opposite sex if they so wish; however, the principle of the family life should be respected and families should therefore be accommodated accordingly.
3. Detainees shall have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and should be able to communicate with the outside world, in accordance with the relevant national regulations.
4. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees.
5. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time, respecting the child’s best interests.
6. Children shall have a right to education and a right to engage in play and recreational activities appropriate to their age. The provision of education may be made subject to the length of their stay. Separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.”
19. Finally, and for the sake of coherence, the EU would suggest to move Article 20 before Article 19.

- **Promotion of voluntary departure**

20. The EU believes that draft Article 21 should be modified in order to promote more clearly voluntary departure, which is widely recognised as bringing advantages both for the returnee and the expelling State and fewer risks with regard to respect for human rights, over forced return. This modification would be inspired by Guideline 1 of the 2005 Council of Europe Guidelines on forced return⁽⁵⁾ even if it should be noted that Article 7 of the EU Return Directive provides more detailed and stringent standards.
21. The following drafting is suggested:

Draft Article 21

Departure to the State of destination

1. **Where there are no reasons to believe that this would undermine the purpose of an expulsion procedure, voluntary departure should be preferred over forced return and a reasonable period for voluntary departure should be granted, taking into account the specific circumstances of an individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.**
2. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.
3. 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.~~ *(proposed modifications in bold)*

- **Readmission by State of destination**

22. The draft Articles emphasize the rights and duties of the alien and the expelling State. It could be more balanced by insisting on the duties of the receiving State to readmit its citizens or aliens towards whom it has such an obligation. The EU would therefore propose the following drafting of Article 22, paragraph 1:

*"1. An alien subject to expulsion shall be expelled to **and readmitted by his or her State of nationality or any other State that has the obligation to receive the alien under international law.**" (proposed modifications in bold)*

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

23. The European Union fully agrees with the rationale behind draft Article 23. Insofar as subpoint 2 is concerned it is suggested that the provision be rendered even more precise to avoid the impression that expulsions to countries exercising the death penalty are generally banned. In line with the case law of the European Court of Human Rights pertaining to Article 3 of the European Convention on Human Rights and Fundamental Freedoms, it is suggested that what is required is an **individualised assessment** of the risk of death penalty in each case.

24. The following drafting is suggested:

"2. A State that does not apply the death penalty shall not expel an alien to a State where **the circumstances point to the probability that** the life of that alien would be threatened with the death penalty **on his or her return**, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out." *(proposed modifications in bold)*

- **Procedural rights of aliens subject to expulsion**

25. Insofar as current draft Article 26 is concerned, the European Union has two comments.

26. Firstly, the right to receive a legal notice of the expulsion decision set out in Article 26(1) (a) should be rendered more precise as the right to receive a **written** decision and a right to information about **available legal remedies**. These are standards set out in the Council of Europe Guideline No 4 as well as Article 12(1) of the EU Return Directive.

27. The following drafting is suggested:

"(a) the right to receive **written** notice of the expulsion decision **and information about the available legal remedies**" (*proposed modifications in bold*)

28. Secondly, the European Union fears that the limitation set out in Article 26(4) which would allow States to exclude from the scope of procedural rights aliens who have been unlawfully present for less than six months, risks undermining in practice the minimum standards offered by the draft Article. The EU suggests to limit the possible derogation to "border cases" as was done in Article 2(2)(a) of the EU Return Directive, taking into account the scope of application of the draft Articles.

29. The following drafting is suggested:

" 4. The procedural rights provided for in this Article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who **were apprehended in connection with irregular border crossing**." (*proposed modifications in bold*)

- **Suspensive effect of an appeal against an expulsion order**

30. Current draft Article 27 provides that 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.

31. This standard is currently not reflected in European Union law as a minimum standard(6). As set out in the European Union's statement made before the 6th Committee's 66th session in 2011, insofar as 'aliens' are concerned, Article 13 of the EU return Directive provides that third-country nationals shall be afforded an **effective remedy** to appeal against or seek review of decisions related to return. Furthermore, according to these provisions, the appeals body shall have the **power to review** decisions related to return, including the **possibility of temporarily suspending their enforcement**. This EU law standard follows Guideline No 5 of the Council of Europe's Guidelines on

Forced Return which does not include a mandatory suspension but refers to the need for an effective remedy before a competent authority or body which shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

32. The Commission's approach proposed in draft Article 27 raises, in the EU's views, justified doubts. Recognition of a suspensive effect of an appeal lodged against an expulsion decision could indeed be seen as an incitement to abusing appeal procedures to the detriment of its genuine purpose.

- **Readmission to the expelling State**

33. The final detailed comment by the European Union is in relation to current draft Article 29(1). To avoid misunderstanding, the following clarification is suggested:

“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 **of that State** 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”. (*proposed modifications in bold*)

34. This concludes the detailed comments of the European Union in regard to the draft Articles on Expulsion of Aliens adopted on first reading by the International Law Commission.
35. There is one final issue to which the EU wishes to contribute. During this year's session several members of the ILC have suggested that the International Law Commission should not adopt formal 'draft Articles' but should adopt 'guidelines' or 'best practice' regarding the topic of expulsion of aliens instead.
36. The EU is attached to the main object of the ILC which is to codify existing rules of international law. However, with respect to the other important object of the ILC relating to progressive development of international law, the EU considers necessary to reflect in the present case on the appropriateness for the ILC to adopt Draft Articles. Should the ILC were to adopt Draft Articles, it would be useful that the ILC makes it clearer what, in its view, comes within codification of international law and what merely comes within progressive development of international law.

Endnotes

(1) See ILC Report on the work of its Sixty-fourth Session (7 May to 1 June and 2 July to 3 August 2012), Suppl. No. 10 (A/67/10) - <http://untreaty.un.org/ilc/reports/2012/2012report.htm>.

(2) The Directive currently binds 26 EU Member States. The United Kingdom and Ireland have decided not to opt-in and are therefore not bound by this Directive. Denmark has decided to implement the Directive in its national law. Further, Norway, Iceland, Switzerland and Liechtenstein are associated with the implementation of the Directive in accordance with the bilateral agreements concluded with the EU on the Schengen Acquis. Moreover, as it forms part of the EU acquis, states that are or will be negotiating their accession to the EU will have to incorporate the provisions of this Directive in their national law as well. Hence the Directive is of relevance for Turkey, FYROM, Montenegro and Serbia as well.

(3) http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Force_d_Return_en.pdf

(4) <http://www.icj-cij.org/docket/files/103/16245.pdf>, para. 77-79.

(5) *“Guideline 1. Promotion of voluntary return: The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.”*

(6) Even for EU citizens and their family members there are exceptions to the suspensive effect of expulsion decisions. Article 31(2) of the relevant EU Directive provides also in principle for suspensive effect, but provides for an exception (no automatic suspensive effect): - where the expulsion decision is based on a previous judicial decision; or – where the persons concerned have had previous access to judicial review; or – where the expulsion decision is based on imperative grounds of public security (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Official Journal of the European Union, L 158/77 of 30 April 2004).

(7) See para. 43 of Chapter IV of the ILC’s Report : “At its 3155th meeting, on 31 July 2012, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles (...), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014”.