

Provisional

For participants only

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International Law Commission

Sixty-sixth session (first part)

Provisional summary record of the 3199th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 6 May 2014, at 10 a.m.

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Present:

Chairman: Mr. Gevorgian
Members: Mr. Al-Marri
Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Hassouna
Mr. Hmoud
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Laraba
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wisnumurti

Secretariat:

Mr. Korontzis Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Expulsion of aliens (agenda item 2) (A/CN.4/670)

The Chairman invited the Special Rapporteur, Mr. Maurice Kamto, to present his ninth report on the expulsion of aliens (A/CN.4/670).

Mr. Kamto (Special Rapporteur) said that in fact no State had abided by the final date for the submission of comments on the text of the draft articles on the expulsion of aliens and the commentaries thereto, which the International Law Commission had adopted on first reading at its sixty-fourth session. He had endeavoured to reply as exhaustively as possible to all those comments in his ninth report. He had been unable to take account of the comments of the United States of America, which had reached him too late, but he would reply to them orally. He would be unable to do the same in respect of the comments of the Russian Federation, which he had received later still, with the notable exception of those relating to draft article 12, which were essentially similar to those of other States. As he would not be able to do justice to States' comments and his own replies to them if he summarized the report, he would concentrate on the comments of the United States.

As far as draft article 2 (Use of terms) was concerned, the United States had proposed the insertion in subparagraph (a) of the criterion of intention, to which reference was made in draft article 11 on the prohibition of disguised expulsion; and it had requested the harmonization of terminology in those draft articles, as draft article 2 used the word "compelled" (*contraint*) in the phrase "compelled to leave" and draft article 11 employed the term "forcible" (*forcé*) when it spoke of "forcible departure". Since in French the terms "*contraint*" and "*forcé*" were synonymous, he would prefer to retain the current wording, but if the Commission were to decide otherwise, he would not object to "compelled" being replaced with "forced". In order to incorporate the criterion of intention, he proposed the addition of the word "intentional" before "conduct" in the definition of expulsion contained in draft article 2, subparagraph (a).

The United States had proposed that draft article 3 (Right of expulsion) should be recast 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."

That suggestion which, at first sight, was apparently no more than an editorial preference, in fact sought to convey the idea that States were not strictly bound by the rules set forth in the draft articles and that they could argue that they were expelling someone on the basis of other rules of international law. He considered it inadvisable to grant that request, since it would in effect deprive the whole set of draft articles of any value.

The United States had had difficulty in understanding the exact purpose of paragraph 2 of draft article 6 (Prohibition of the expulsion of refugees), because it concerned a refugee whose application for refugee status was still pending. He drew attention to the fact that, in international refugee law and international practice in that matter, it was not the granting of refugee status by the receiving State which conferred on the beneficiary the status of refugee within the meaning of international law, but the events and circumstances which had led that person to seek refuge in the territory of a foreign State. There was therefore no inconsistency or ambiguity in that clause.

With regard to draft article 9 (Deprivation of nationality for the sole purpose of expulsion), the United States understood that the draft article was not directed at a situation where an individual voluntarily relinquished his or her nationality and believed that it

would be useful to indicate as much, possibly in paragraph 3 of the commentary. Although that point was axiomatic and that situation did not, under any circumstances, fall within the purview of draft article 9, he had no objection to the addition in the commentary of the sentence: “Similarly, draft article 9 does not refer to situations where an individual voluntarily relinquishes his or her nationality.”

In draft article 10 (Prohibition of collective expulsion), the United States had proposed that the final phrase of paragraph 3 should be amended to 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, paragraph 3”. That proposal improved the wording of the draft article and was worth keeping, subject to the amendment of the end of the phrase to read “in accordance with the provisions of article 5, paragraph 3, of these draft articles”.

With regard to draft article 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure), the United States believed that States had the prerogative “to use a wide range” of legal mechanisms to facilitate the transfer of an individual to another State where he or she was sought for criminal proceedings and that, as it stood, draft article 13 might impede the exercise of that prerogative. He considered that such a prerogative would not be diminished in any way by that provision, since it would be exercised in accordance with the law or pursuant to an obligation under international law, as was clearly indicated in the commentary to the draft article in question.

In paragraph 2 of draft article 16 (Vulnerable persons) the United States had proposed the replacement of the adjective “primary” with “significant” or of the words “primary consideration” with “given due consideration”. He pointed out that the term “primary consideration” was drawn from the case law and should therefore be retained.

As to draft article 19 (Detention conditions of an alien subject to expulsion), the United States had urged that the word “generally” should be inserted after “shall” in paragraphs 1 (b) and 2 (a). He considered that that insertion would be a source of imprecision which was inherent in the adverb in question and that it would weaken the provisions concerned. The suggestion seemed all the more unjustified in paragraph 1 (b) because it already contained a derogation clause. Similarly, there was no point to the proposal that the phrase “or is necessary on grounds of national security or public order” should be inserted at the end of paragraph 3 (b), since the whole law on the expulsion of aliens was framed without prejudice to every State’s need to safeguard its national security and public order in circumstances defined by law.

The United States had proposed the insertion of draft article 20 (Obligation to respect the right to family life) in part three, chapter I, but he saw no reason to move it. The United States had also wondered whether the protection offered by that draft article was absolute. The Commission had already replied to that query in the negative in the commentary by making it clear that the right to family life of an alien subject to expulsion might “be subject to limitations”. The United States had further proposed replacing the verb “respect” with “give due consideration to”, which did not reflect the terminology of the international texts and pertinent case law cited in the commentary. Those legal instruments often employed the noun “interference” or the verb “interfere” and the verb “respect” conveyed the idea of prohibiting interference better than the expression “give consideration to”. Only a cursory reading could lead to a request for the deletion of paragraph 2 of draft article 20, since that paragraph introduced a derogation from the principle laid down in paragraph 1 and explained in what circumstances such a derogation could be exercised.

The United States had taken the view that the commentary to draft article 22 (State of destination of aliens subject to expulsion) “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", on the grounds that that "important principle" was codified in their national legislation. He personally was of the opinion that that proposal should not be accepted, since it would unacceptably hamper the expellee's freedom of movement and of choice of place of residence outside the territory of the expelling State in situations other than those where his or her extradition or transfer was ordered by a judicial authority.

The United States had proposed the deletion of paragraph 1 of draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened), on the grounds that the commentary provided no basis in national legislation, national case law, international case law or treaty law which would justify it. He would simply draw attention to the legal arguments set out in his fifth report should the explanations provided in the commentary prove insufficient.

As far as draft article 24 was concerned (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), the United States had criticized the expansion of the *non-refoulement* obligation found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment so as to prevent expulsion of aliens in danger of cruel, inhuman or degrading treatment or punishment on two grounds: first, because the justification for that expansion was the case law of the European Court of Human Rights and a recommendation of the Committee on the Elimination of Racial Discrimination, which they did not deem a sufficient basis for presenting that draft article as codification of existing law, which meant that in fact it clearly reflected "an effort of progressive development"; secondly, because that new *non-refoulement* obligation would not permit any exceptions or limitations. The criticism of the basis of the rule contained in the draft article was hard to understand in light of the fact that the State itself recognized a basis in treaty and case law; by so doing the United States highlighted the firmness rather than the weakness of the basis. His own approach to the expulsion of aliens was in no way different to that of the Commission in its previous codification work. A State could disagree with a proposed rule without attempting to question one of the most classic approaches. Moreover, even if the draft article were no more than an effort of progressive development, that would still be within the Commission's terms of reference. It was astonishing that, in order to justify the need for exceptions to the blanket protection offered by that draft article, the State alleged that "cruel, inhuman or degrading treatment does not rise to the level of torture and is not treated equally under the Convention against Torture". That position not only disregarded the fact that the title of the Convention implied that torture was above all cruel, inhuman or degrading treatment or punishment, it also ignored the definition of torture set forth in article 1 of the Convention; in that instrument there was no separate definition of cruel, inhuman or degrading treatment or punishment, nor were there discrete sets of rules – one for torture and the other for cruel, inhuman or degrading treatment or punishment. In that connection, it would also be instructive to refer to the findings of the International Criminal Tribunal for the former Yugoslavia in the case *Prosecutor v. Anto Furundzija* and the judgment rendered by the European Court of Human Rights in the case *Al-Adsani v. the United Kingdom*.

As the six-month period stipulated in draft article 26 (Procedural rights of aliens subject to expulsion) appeared arbitrary to some States, he proposed to speak instead of a "brief duration", as suggested by the United States, and to explain in the commentary that that term normally meant a period of six months or less.

In response to a proposal from El Salvador, he intended to explain at the end of draft article 27 (Suspensive effect of an appeal against an expulsion decision) that the appeal referred to in that context had a suspensive effect on expulsion decisions "whose effects are

potentially irreversible” to quote the terms used by the European Court of Human Rights in the judgment in the case of *Čonka v. Belgium*.

The United States considered that draft article 29 (Readmission to the expelling State) might set a precedent and that a State must maintain its sovereign prerogative to determine which aliens might be allowed to enter its territory, but those fears were unfounded, since the draft article contained an escape clause.

In conclusion, he said that the draft articles adopted on first reading rested on a balance between the right of a State to sovereignty over the admission and expulsion of aliens and the rights of the person subject to expulsion, a balance which it was eminently desirable to preserve. He hoped that the Commission would adopt the draft articles on second reading subject to the amendments which he intended to include, in particular in the commentary.

Protection of persons in the event of disasters (agenda item 4) (*continued*) (A/CN.4/668 and Add.1)

Mr. Park approved of draft article 14 *bis* on the protection of relief personnel, equipment and goods, since that duty was a logical consequence of an affected State’s consent to receive external assistance. In some extreme circumstances, however, the affected State might be unable to take all the necessary measures, in which case it should be exempt from responsibility under draft article 14 *bis*. It would be preferable to allow for greater flexibility by speaking not of “necessary measures” but rather of “all appropriate measures”, the expression found in the Convention on the Safety of United Nations and Associated Personnel, or by employing the phrase “all means reasonably available to them” used by the International Court of Justice in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, or by stating that the State must take steps “to the extent of its capabilities”, a phrase borrowed from the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. The purpose of the Commission’s work was to draft a universal legal instrument containing minimum standards concerning States’ rights and obligations in disaster situations; two States could commit themselves to a stricter obligation through a bilateral treaty, for example, by undertaking to adopt “all necessary measures”.

Draft article 17 concerning the relationship with special rules of international law raised the issue of the hierarchy of successive treaties. In that respect, the Commission could choose either to establish a relationship between the current set of draft articles and other treaties or opt for the solution of giving precedence to treaties or other rules of international law with a more specific scope. For example, it could echo the terms of the ASEAN Agreement cited in paragraph 62 of the report, or those of article 311, paragraph 2, of the United Nations Convention on the Law of the Sea.

In draft article 3 *bis* on the use of terms, in subparagraph (a) mention should be made of the environment, since it would be affected as much as persons and goods in the event of a disaster, and the phrase “or otherwise under the jurisdiction or control” should be added after “the State upon whose territory”, for a State could, for example, need external assistance in its exclusive economic zone. He wondered whether it was necessary to define “relevant non-governmental organization” and he proposed the addition of “subject to the direction and control of the affected State” at the end of the definition of “relief personnel” for the sake of greater clarity. Lastly, he was unsure whether “risk of disasters” also included risks related to climate change because, if that were the case, that definition might raise complex legal, political and economic questions.

Mr. Nolte agreed that the duty to protect relief personnel, equipment and goods was an obligation of conduct and not of result and he therefore wondered whether it was wise that the text of draft article 14 *bis* established a strict obligation on the part of the affected State to “take all necessary measures”. His suggestion was therefore to use the terminology of most universal and regional treaties and to say that the State “shall ensure” that protection, or to speak of “appropriate measures”.

In draft article 17, it might be possible to go further and to state that the draft articles “may, if appropriate, be taken into account in the interpretation of special rules of international law”. He took it that draft article 18 was supposed to allow room for the formulation of customary rules on disaster management and wondered what its relationship was with draft article 17.

In draft article 3 *bis*, the Commission should consider adding the phrase “under whose jurisdiction” to the definition of the affected State, in order to convey the idea that States could be affected by a disaster not only when they exercised their territorial sovereignty, but also when they exercised their jurisdiction over a given territory. In his opinion, the definition of equipment and goods should not be restricted to those which were “necessary” for the provision of disaster relief but, on the contrary, the phrase “and other objects at the disposal of the assisting States or other assisting actors for the purpose of the provision of disaster relief assistance” should be added to the end of the list. In the definition of “relevant non-governmental organization” the phrases “working impartially and with strictly humanitarian motives” and “because of its nature, location and expertise” should be deleted in order to prevent any abuse of the definition, and the commentary should make it clear that an affected State could revoke the right of an NGO to enter its territory, if the organization was not working impartially. With regard to the definition of relief personnel, such persons did not need to be “specialized”. He did not see the point of the phrase “having at their disposal the necessary equipment and goods”. Lastly, he wondered whether the word “probability” was an apt definition of the risk of disasters.

Mr. Forteau supported draft article 14 *bis* (Protection of relief personnel, equipment and goods), which reflected sufficiently solid practice, even though in some respects it merely restated something which had been set out in more general terms in draft article 9. While those two provisions certainly did not have the same field of application, or necessarily the same scope, they nevertheless overlapped substantially. It would therefore be necessary to explain, at least in the commentary, how they tied in with one another. The duty to protect, if indeed it existed, was certainly an obligation of conduct and not of result. In addition, the court decisions cited in paragraph 41 seemed to reflect the view that that duty was accompanied by a margin of appreciation which varied from one sphere to another. It was therefore necessary to provide some clarification in that respect, either in the body of draft article 14 *bis* or in the commentary thereto. In the subject matter under consideration States must have an extensive margin of appreciation.

With regard to the actual content of the duty to protect, the Special Rapporteur had been right to opt for a precise definition of what was expected of the affected State, but he had failed to explain why he had confined his choice of adjective to “necessary” when in the practice and the case law to which he referred the measures to be taken were also qualified as “appropriate”. In addition to the fact that that wording was ambiguous, that choice was inconsistent with draft article 16 concerning the duty to reduce the risk of disasters. The Special Rapporteur seemed to be suggesting that the conduct of relief personnel might in some situations exempt the affected State from its duty to protect. One question which arose was whether the State supplying the assistance was also bound by a duty of care towards its personnel, as paragraph 45 of the report seemed to suggest and, if so, how that duty tied in with the affected State’s duty of care.

The wording of draft article 17 (Relationship with special rules of international law) might lead to confusion. It should be aligned with that generally used by the Commission in its without prejudice clauses – for example, article 55 of the draft articles on responsibility of States for internationally wrongful acts adopted in 2001. Draft article 18 (Matters related to disaster situations not regulated by the present draft articles) seemed to be superfluous: either it referred to treaty law and therefore duplicated draft article 17, or it referred to customary law, in which case it would be surprising if the Commission, in an exercise of codifying and progressively developing general international law, were to state that its draft articles were incomplete and that other customary rules might exist elsewhere. Draft article 19 (Relationship to the Charter of the United Nations) did not seem necessary either; first, since the principles mentioned by the Special Rapporteur had become part of customary law, and it was not simply because they were enshrined in the Charter that they should not apply at all times and, secondly, since some of those principles had already been incorporated in other draft articles.

Draft article 3 *bis* (Use of terms) was useful and necessary and could contain other terms which were also worth defining, such as “person”, or it could even include the definition of the term “disaster”, which formed the subject of draft article 3. The definition set out in draft article 3 *bis*, subparagraph (a), should encompass a reference to the environment and the excessively restrictive criterion of “territory” should be replaced with “territorial control”. Subparagraph (d) should refer to essential needs, as draft article 2 did. It was hard to see why the notion of goods indispensable for survival should be mentioned in subparagraph (e) when it did not appear in draft article 2. In subparagraph (g), the criterion of being engaged in the provision of disaster relief assistance “on behalf of” an assisting State required clarification, because it did not in any way match the criteria for attribution of conduct applicable under the law of international responsibility. It would also be necessary to explain its link with the criterion of control stemming from draft article 9, or at all events to draw a clearer distinction between control over persons by the sending State or organization, and control over the relief operation by the affected State.

Mr. Tladi, noting that the Special Rapporteur justified the duty set forth in draft article 14 *bis* by reference to a number of treaties and instruments which imposed a similar duty, underscored the need also to take account of the various treaty contexts in which that duty was laid down. Treaties containing such a duty to protect were based on the understanding that there must be cooperation between the affected and the assisting State, where the unqualified consent of the former was the precondition of that duty. Even though the Special Rapporteur held that that was the approach taken in the draft articles, it was questionable whether that was really the case. Admittedly he mentioned the notions of consent, sovereignty and non-intervention, but it must not be forgotten that the Commission had decided, rightly or wrongly, not to rule out the possibility of overriding those principles in circumstances which were ill defined. Quite apart from the crucial question of who decided whether the affected State had arbitrarily refused assistance, or whether it had the capacity to respond to a disaster, in view of the inseparable link between consent and the duty mentioned in article 14 *bis*, it was worth asking whether it would be logical to impose a duty to protect relief personnel, equipment and goods when external assistance was given after consent had been withheld in what was deemed to be an arbitrary manner. As with other provisions, that example illustrated the futility of a rights-based approach as opposed to an approach based on cooperation, especially as the latter was consistent with international law and State practice.

While he was not against the referral of draft article 14 *bis* to the Drafting Committee, he would prefer the draft article to speak of “reasonable”, “practical” or “appropriate” rather than “necessary” measures. He also supported the referral of draft article 17, but considered that draft articles 18 and 19 were superfluous.

Mr. Petrič was pleased that a balance had been kept between the sovereignty of a State affected by a disaster — from which its consent to assistance flowed — and the obligation to cooperate, meaning that the affected State could not refuse such assistance arbitrarily when it did not have the capacity to cope with a disaster. Although he supported the referral of all the proposed draft articles to the Drafting Committee, he considered that draft article 14 *bis* should be recast to make the duty it contained less rigid, that draft article 19 was not absolutely necessary and that a definition of “disaster prevention” could be added to draft article 3 *bis*.

Organization of the work of the session (agenda item 1) (*continued*)

The Working Group on the Obligation to extradite or prosecute consisted of: Mr. Kittichaisaree (Chairman), Mr. El-Murtadi, Ms. Escobar Hernández, Mr. Forteau, Mr. Laraba, Mr. Murphy, Mr. Park, Mr. Šturma, Mr. Vázquez-Bermúdez and Mr. Tladi (*ex officio*).

The Planning Group consisted of: Mr. Murase (Chairman), Mr. Caflisch, Mr. Comissário Afonso, Mr. El-Murtadi, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 1.05 p.m.