International Law Commission
Sixty-sixth session (first part)
Provisional summary record of the 3203rd meeting
Held at the Palais des Nations, Geneva, on Tuesday, 13 May 2014, at 10 a.m.

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Expulsion of aliens (continued)
Present:

Chairman: Mr. Gevorgian
Members: Mr. Caflisch
        Mr. Candioti
        Mr. El-Murtadi
        Ms. Escobar Hernández
        Mr. Forteau
        Mr. Gómez-Robledo
        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. Wako
        Mr. Wisnumurti
        Sir Michael Wood

Secretariat:

Mr. Korontzis Secretary to the Commission
The meeting was called to order at 10.05 a.m.

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

The Chairman invited the Commission to continue its consideration of the Special Rapporteur’s ninth report on expulsion of aliens (A/CN.4/670).

Mr. Tladi said that, like Mr. Forteau, he considered that the final product of the Commission’s work should take the form of draft articles. With regard to draft article 1 (Scope), he noted that the United Kingdom of Great Britain and Northern Ireland had objected to the fact that the draft articles applied to all aliens, whether or not they were lawfully present in the territory of a State. Relevant as it was, that issue in fact related to applicable standards and was not a matter to be addressed in a draft article on scope. With regard to draft article 3 (Right of expulsion), he considered that the current formulation should be retained, since the new wording proposed by the United States of America was less balanced. Nevertheless, the first sentence could be modified to read: “A State may only expel an alien in accordance with its obligations under international law”.

With regard to draft article 15 (Obligation not to discriminate), he was not opposed to the proposal to include sexual orientation among the grounds for discrimination listed in paragraph 1. As to draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or cruel, inhuman or degrading treatment or punishment), the Drafting Committee would probably need to address implementation issues and to clarify what was meant by the phrase “substantial grounds for believing”. Noting that some States had rightly observed that the draft article extended the scope of the non-refoulement principle set forth in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, he stressed that such progressive development was in line with the values espoused by the vast majority of States. Lastly, he had changed his mind regarding the inclusion of refugees within the scope of the draft articles, and he agreed with Mr. Forteau that it would be preferable that they should not be included because of possible conflicts with the 1951 Convention relating to the Status of Refugees.

Mr. Park said that the Commission should take account of the often conflicting comments and observations received from States, while refraining from making any substantive changes to the draft articles already adopted on first reading. In that connection, it was important not to reject certain States’ reservations on the ground that they were based on domestic considerations rather than arguments derived from international law. With regard to draft article 1, he shared the view of the Special Rapporteur that the Commission should not revisit its approach of including in the scope of the draft articles both aliens lawfully present in the territory of a State and those unlawfully present. As to draft article 2, the Drafting Committee should take into account the amendments to subparagraphs (a) and (b) proposed by certain States. With respect to draft article 7 (Prohibition of the expulsion of stateless persons), he noted that only States that had not ratified the 1954 Convention relating to the Status of Stateless Persons had considered that article unnecessary and requested its deletion. As to draft article 10 (Prohibition of collective expulsion), which reflected article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, it was understandable that it had not been endorsed by States which had not ratified the Convention. The Drafting Committee should take account of the fact that the prohibition of collective expulsion, which was an established principle of international law, involved procedural rules of differing legal value.

The Drafting Committee should also take account of the concerns of certain States regarding the criterion for attribution of individual conduct to the State, set forth in draft article 11, paragraph 2, which was indeed broader than the criterion contained in the 2001 draft articles on the responsibility of States for internationally wrongful acts. As to draft article 14 (Obligation to respect the human dignity and human rights of aliens subject to
expulsion) and draft article 15 (Obligation not to discriminate), he considered that in view of their general character they should be included in another part of the draft articles. With regard to draft article 19 (Detention conditions of an alien subject to expulsion), he had no objection to the proposal to insert the words “or administrative” after “judicial” in paragraph 2 (b). Regarding the European Union’s observations on the draft article, the question would arise as to whether other regions of the world would be able to accept them readily.

As to draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened), the Drafting Committee should take account of the fact that certain States had considered that the article extended to expelled aliens the scope of application ratione personae of the non-refoulement principle contained in article 33 of the 1951 Convention relating to the Status of Refugees, although there was no basis in international law for doing so. The Committee should also consider the proposals for clarifying the conditions for the application of the draft article. It should also not ignore the fact that certain States had considered that draft article 27 (Suspensive effect of an appeal against an expulsion decision) and draft article 29 (Readmission to the expelling State) to be unacceptable, and it would therefore have to decide whether those articles should be deleted or retained by way of progressive development.

Mr. Petrič welcomed the Special Rapporteur’s readiness to reconsider certain draft articles in the light of the observations received from Governments and expressed the hope that the Drafting Committee would have adequate time to consider them. He noted that a significant number of States had expressed their preference for a non-binding instrument, no doubt because they were concerned about the impact that the new obligations might have on the rules and practices dealing with the expulsion of aliens that they had already adopted nationally or regionally. Although the idea of adopting guidelines or guiding principles that sought to unify a wealth of diverse practice might at first sight seem attractive, it would in fact be entirely inappropriate at the current stage of work to set aside draft articles on which the Commission had been working for years, particularly given that they were without prejudice to any form that the General Assembly might wish to give them. Lastly, the Drafting Committee should give due attention to the observations of States that considered it necessary to distinguish between aliens who were lawfully present on the territory of a State and those who were unlawfully present and to treat each category differently. In that regard, the Committee should list those draft articles in which that difference could be made clearer.

Mr. Hmoud said that he wished to make a few comments on the debate that had taken place in the Sixth Committee of the General Assembly on the draft articles adopted on first reading and on the comments and observations received from Governments. States had expressed divergent views on the suitability of the topic for codification and on the need to develop general rules of international law. In that regard, it had been repeatedly emphasized that as State practice with respect to the expulsion of aliens was quite divergent, the topic was a matter for domestic law only. While it was true that there was a wealth of contradictory practice, it should be borne in mind that there were well-established principles in international law on the expulsion of aliens. The fact that some of the rules contained in the draft articles constituted progressive development was not unusual; it would be up to States to determine their legal weight once the articles had been adopted in their final form. In his opinion, those rules struck a careful balance between the rights of States and the rights of aliens subject to expulsion and they were properly based on State practice and the rulings of national and international courts that clearly demonstrated that the right to expel was no longer an absolute right.

With regard to the final form of the draft articles, he said that given that many of the principles on which the text was based were already, or would become, part of general
international law, it would be in the interest of States and the international community to adopt the draft articles in the form of a convention. Concerning the inclusion of aliens unlawfully present in a State’s territory within the scope of the draft articles, the Commission had already reacted positively by emphasizing that it would, as appropriate, provide clarification in regard to specific draft articles concerning the treatment to be given to that category of aliens. Not to include them would create inequalities in the exercise of basic rights under the draft articles and loopholes that could lead to abuse.

As for the expulsion of refugees, the Drafting Committee should consider two issues in the light of comments received from States: the exceptions contained in article 1, section F, of the 1951 Convention relating to the Status of Refugees, which in his view should be included in the body of draft article 8 (Other rules specific to the expulsion of refugees and stateless persons) rather than the commentary, and the prohibition of the expulsion of a refugee unlawfully present in the territory of the State while his application for recognition of refugee status was pending, envisaged in draft article 6, paragraph 2. Draft article 6, which also constituted progressive development, was supported by State practice and should not be altered on second reading, especially since States would subsequently be free to determine its legal value. Divergent views had also been expressed on the main consequence of unlawful expulsion, namely readmission, provided for in draft article 29 (Readmission to the expelling State). The draft article did indeed constitute progressive development and should be retained as it stood because it struck a careful balance between the legitimate interests of States and the rights of unlawfully expelled aliens by setting reasonable limitations on the obligation of readmission.

Ms. Escobar Hernández said that a number of States had objected to the Commission’s work taking the form of draft articles, which would ultimately become a convention, preferring instead draft principles or guidelines or a guide to best practice. However, the current project was too far advanced for the Commission to consider such drastic changes, which were not at all warranted. Furthermore, work on draft articles should not be likened to work on a treaty and, as experience had shown, the power to legislate ultimately rested with States alone, which would decide whether or not to confer on the draft articles the normative value of a convention – even though a convention might well be the desirable outcome in the present case.

The commentaries and observations of States demonstrated a tendency to polarize the two aspects of the Commission’s mandates — codification and progressive development — and largely to favour the former in some instances. However, those two aspects were inextricably linked. Although it was legitimate for States to seek to distinguish between them, and although the Commission referred in the commentary to the progressive development aspect of certain provisions, it would nonetheless be inappropriate to include in the draft articles a general statement on the respective roles of codification and progressive development. As the Commission’s particular task was to contribute to the evolution of international law, it was essential to maintain a balance between the two aspects of its mandate.

Turning to the draft articles, she said that the references to refugees in draft articles 2, 6 and 8, in particular, properly reflected the specific character of their protection regime and that therefore no substantive reworking of those articles was necessary. With regard to draft article 6, a reference to article 1, section F, of the 1951 Convention relating to the Status of Refugees should be included in the commentary in order to clarify the scope of the prohibition of expulsion, as proposed by the Special Rapporteur, and paragraph 3 should be modified in order to ensure consistency with draft articles 23, paragraph 1, and 24. It would also be a good idea for the without prejudice clause contained in draft article 8 to refer expressly to the fact that the rules concerned were those that were more favourable
to refugees and stateless persons, either in the actual text of the draft article or in the commentary, as proposed by the Special Rapporteur.

The wording of draft article 9 was satisfactory; including the expulsion of nationals would amount to exceeding the scope of the draft articles. As regards draft article 16 on vulnerable persons, the reference to “the best interests of the child” should be retained because it was a key contribution of the Convention on the Rights of the Child, which had been ratified by nearly all States.

As far as draft article 26 was concerned, the requirement for a written notification of the expulsion decision would strengthen the procedural rights of aliens subject to expulsion. As to draft article 27, several States had expressed concern that the suspensive effect of an appeal against an expulsion decision was formulated in absolute terms and thus did not accord well with the variety of legal systems that existed. In order to address those concerns, the Commission could take into account the development of international human rights law in that area, in particular the jurisprudence of the European Court of Human Rights, which, in its judgment of 22 April 2014 in A.C. and Others v. Spain, had established the idea that the guarantee of the effectiveness of appeals might involve the suspension of an expulsion decision in the light of the irreparable consequences the expulsion might have for the human rights of the person concerned. The Drafting Committee might thus rework draft article 27 so as to make the suspensive effect of the appeal subject to the irreversible nature of the violation of the alien’s rights likely to result from his expulsion if the expulsion took place before a decision had been taken on the merits of the appeal.

Mr. Hassouna said that, although the comments and observations received reflected the opinions of only a minority of States, the diversity of those opinions and the opposition to, and doubts about, the fundamental approach adopted and even the topic’s suitability for codification were understandable given its sensitivity. Although at the current stage the overall balance of the draft articles should not be questioned, some of the proposals made by States could help clarify various points. For instance, with regard to the definition of expulsion in draft article 2, he agreed with the suggestion that the same criteria of attribution should be applied as those used in the draft articles on the responsibility of States for internationally wrongful acts. As to draft article 5, he supported the proposal to make clear in the commentary that the grounds for expulsion should be considered at the time of the decision rather than at the time of removal. In relation to draft article 9, he agreed with the suggestion to recall in the commentary the principle whereby a State could not expel its own nationals. He further considered it justified to include within the scope of the draft articles, which was defined in draft article 1, both aliens lawfully present in the territory of a State and those unlawfully present, and to make a distinction between certain procedural rights of those two categories of aliens, but not between their essential rights, such as those contained in draft articles 14 and 4.

Draft article 6, paragraphs 3, 23 and 24 should be referred to the Drafting Committee, which should ensure greater consistency in their formulation. In particular, it would have to choose between “reasonable grounds for regarding”, which appeared in draft article 6, and “substantial grounds for believing”, which appeared in draft article 24. Furthermore, although draft article 6 expressly provided for an exception to the prohibition to expel refugees on grounds of national security or public order, there was no similar provision in draft articles 23 and 24, which set forth the grounds for the prohibition of expulsion of other aliens, or in the corresponding commentaries. It was therefore necessary to clarify that point on the basis of the Special Rapporteur’s proposal; that would allay the concerns of those States that considered which the draft articles placed too little emphasis on the issue of national security and public order.
In draft article 19, paragraph 2 (b), it would make sense to state, as had been proposed, that the decision to extend the duration of the detention “must be reviewable by” a court or a person authorized to exercise judicial power in order to prevent any abuse by the administrative authorities who, in some countries, were the authorities responsible for such a decision.

However, in draft article 27, it would be inappropriate to limit the suspensive effect of the appeal only to cases where the expulsion would result in “irreparable harm”, because even though the Commission must strike a more equitable balance between the interests of States and those of aliens subject to expulsion, the inclusion of that condition would undermine the very purpose of that draft article, which was, as the commentary made clear, to address the obstacles likely to cause an appeal to fail once the alien had been expelled.

It remained for the Drafting Committee to address the issues of substance, language and terminology that had been raised, taking account of the observations of States and Commission members. As to the final form of the draft articles, that was a matter for the General Assembly to decide.

Mr. Štúrma said that transforming the draft articles into draft principles, as certain States wished, involved much more than a simple change of name. As form and content were inextricably linked, any such change would mean revisiting the whole topic. States should certainly have their say on methodology but not after nearly a decade of work. Once the draft articles had been adopted on second reading, States would be able to decide whether or not they wished to elaborate a binding instrument.

The scope defined in draft article 1 should of course cover all aliens, whether lawfully or unlawfully present in the territory, even though differential treatment might be applied where appropriate with regard to certain procedural rights. As to the prohibition of the expulsion of refugees, the subject of draft article 6, it should be made clear, in the commentary at least, that the article did not amend in any way the 1951 Convention. It would also be useful to clarify, as the European Union had recommended, that the other rules specific to the expulsion of refugees and stateless persons referred to in draft article 8 were those that were the most favourable to persons subject to expulsion. The prohibition of the resort to expulsion in order to circumvent an extradition procedure, provided for in draft article 13, should not preclude flexibility in cooperation between sovereign States. The obligation to respect the human dignity and human rights of aliens subject to expulsion set out in draft article 14 was self-evident, but should be accompanied by a derogation clause, as was the case with other human rights instruments. As to the obligation not to discriminate, provided for by draft article 15, it should cover only discrimination that was not justified by reasonable and objective grounds. Lastly, the suspensive effect of an appeal against an expulsion decision envisaged in draft article 27 should apply only “where execution of the decision could cause irreparable harm”.

Mr. Saboia said that although the comments of States on the draft articles, by reason of their number and geographical origin, were not representative of the international community as a whole, they should nonetheless be taken into consideration, if only out of respect for the States which had taken the trouble to make them. Even if the draft articles did not become a convention, as recommended by the Special Rapporteur, their provisions would acquire increasing legal force as international courts referred to them as constituting codification or progressive development of international law.

With respect to the ninth report, he welcomed the Special Rapporteur’s emphasis in paragraph 19 on the importance of regional law, not only European law, but also the law of other regions of the world, in particular Latin America, whose Cartagena Declaration on Refugees deserved mention. Universal treaties were also part of general international law, on the same basis as customary law, as paragraph 21 made clear. The inclusion of aliens in
an irregular situation within the scope of the draft articles was necessary because the articles would be of limited use if they did not apply to persons who were not only those most at risk of expulsion, but also the most numerous and the most vulnerable at a time of increasing globalization. The Commission had managed to strike a balance between the sovereign right of States to regulate the presence of aliens on their territories and the need to protect the fundamental rights of aliens, including the rights of aliens in an irregular situation; it could still make some amendments to the draft articles to reflect the concerns of certain States in that regard, while nonetheless maintaining that “spirit of enlightened modernism” mentioned in paragraph 76. Lastly, he stressed the importance of referring to stateless persons and to collective expulsion, the prohibition of which was a principle of international law, and of extending the non-refoulement obligation to the risk of cruel, inhuman or degrading treatment or punishment, even though those acts were not defined in the Convention against Torture.

Mr. El-Murtadi recalled that the Commission worked for the benefit of States and that it should therefore take account of their comments and wishes. However, it was also governed by a mandate that States themselves had defined and which they in turn should take into account, bearing in mind that it consisted of two aspects — codification and progressive development of international law — even though it was not always easy to distinguish between the two. It was quite difficult to draw general conclusions about the comments as a whole, especially since some were based on purely national considerations that disregarded positive law and State practice.

Turning to the draft articles, he said that in the scope as defined in draft article 1, no distinction should be made between aliens in a regular situation and those in an irregular situation, since what was under discussion was fundamental rights. The obligation not to discriminate already existed in positive international law and draft article 15 did not therefore introduce anything new, as the Special Rapporteur had underlined. The suspensive effect of an appeal against an expulsion decision, provided for in draft article 27, was indispensable, but the reason why it had given rise to so many reservations by States was probably due to its being presented in the commentary as constituting progressive development of international law, whereas it should perhaps come under the protection and promotion of aliens’ rights. As to the final form of the draft articles, the prevailing view seemed to favour a non-binding document, but it was not necessary for the Commission to consider that issue at the present stage.

Mr. Kittichaisaree said that it was necessary to reach a balance based on State practice and international jurisprudence so as to reconcile the position of those States who considered that the draft articles established a level of protection lower than what they themselves provided to aliens subject to expulsion, and those who considered that the draft articles went beyond the regime provided for by their legislation and the treaties to which they were party. As to the final form of the work, even if the draft articles did not become a convention, their legal force would increase as courts increasingly referred to them in order to interpret international law.

The inclusion of aliens unlawfully present in a State’s territory within the scope of the draft articles was necessary because those persons obviously had the same fundamental rights as those lawfully present; it should be borne in mind, however, that a separate status with regard to immigration regulations entailed separate safeguards and that differences in treatment were therefore acceptable if they were reasonable and proportional. However, the inclusion of refugees and stateless persons was perhaps not warranted, as Mr. Forteau and Mr. Murphy had observed, because draft articles 6, 7 and 8 added nothing to what was already provided for by the 1951 and 1954 Conventions.

Draft articles 23 and 24 were fundamental inasmuch as they confirmed that the non-refoulement principle was absolute and applied to any person regardless of his migratory
status. No derogation was permitted from that principle on the basis of such considerations as national security or an alien’s situation with regard to criminal law. Similarly, the existence of a distinction between the risk of torture and the risk of cruel, inhuman or degrading treatment or punishment had not been confirmed by international jurisprudence.

He shared the Special Rapporteur’s view regarding the usefulness of recalling, at least in the commentary to draft article 9, the principle whereby a State could not expel its own nationals. He also agreed with the idea of splitting draft article 19, since, like Mr. Forteau, he considered that recourse to detention and the conditions of detention should be dealt with in separate articles. Emphasis should also be placed on the fact that detention must on no account be arbitrary. In paragraph 2 (a), the words “excessive duration” were too vague and the phrase “reasonably necessary” should be defined in the commentary. With regard to paragraph 3 (b), in order to avoid creating legal uncertainty, it should be made clear that the attribution to the alien of the reasons preventing his expulsion must be objective and that the length of the continued duration must be commensurate with those reasons. With regard to the rights set forth in draft article 26, the European Union’s proposal to notify the alien in writing of the expulsion decision and of the remedies available warranted consideration. Lastly, rather than making the suspensive effect of an appeal provided for in draft article 27 subject to the existence of a risk of irreparable harm, as had been proposed, he suggested adding a paragraph to the draft article in order to grant the alien the right to request provisional measures when the implementation of the expulsion decision might entail irreparable harm and when no effective remedy was available.

Mr. Vázquez-Bermúdez said that, at the stage of second reading, it was important to preserve the balance that the Commission had struck, after lengthy debate, between the rights of sovereign States and those of aliens subject to expulsion. The observations of States should be reflected in the commentary or through drafting amendments so that that balance would not be significantly disrupted. Similarly, at the current stage, the text should keep the form of draft articles, irrespective of what the General Assembly might decide subsequently. As with all the Commission’s previous work and in accordance with its mandate, the draft articles on expulsion of aliens constituted both codification and progressive development of international law, even though it was indeed not always possible to distinguish between the two aspects.

With regard to the draft articles themselves, he wished to mention a terminology issue. The distinction made in draft article 1 between aliens who were lawfully present in the territory of a State and those who were unlawfully present was crucial, but it was more appropriate to refer to “regular” or “irregular” presence rather than “lawful” or “unlawful” presence.

In conclusion, he noted that a large number of States had welcomed the draft articles, whose adoption would represent an important step towards the humanization of international law, which had been ongoing for half a century.

The meeting rose at 1.05 p.m.