United Nations A/CN.4/651

General Assembly

Distr.: General
22 March 2012
English
Original: French

International Law Commission
Sixty-fourth session
Geneva, 7 May-1 June and 2 July-3 August 2012

Eighth report on the expulsion of aliens

By Mr. Maurice Kamto, Special Rapporteur

Contents

12-27292 (E) 130412 160412

I. Introduction

1. In introducing his seventh report[1] at the sixty-third session of the International Law Commission, the Special Rapporteur on the expulsion of aliens indicated that it was his last report before the entire set of draft articles on the topic was submitted for consideration and, he hoped, adoption by the Commission.

2. However, during the discussion in the Sixth Committee at the sixty-sixth session of the General Assembly, the representatives of several States who spoke on the topic raised concerns about some matters and made comments and suggestions on others. Most of them reiterated well-known positions in the understandable belief that the Special Rapporteur had not taken their remarks into account. Others criticized the Special Rapporteur for failing to take fully into account the provisions of their domestic law or, in the case of the European Union in particular, the specificity of Community law on the expulsion of aliens who were not citizens of member States.

3. In the Special Rapporteur's view, most of these comments are a consequence of the discrepancy between the Commission's progress on the topic of the expulsion of aliens and the related information submitted to the Sixth Committee during its consideration of the Commission's annual report to the General Assembly on its work. This report will seek to dispel the misunderstandings created by the aforementioned discrepancy, respond to the comments that were doubtless prompted by insufficient clarification of the methodology followed in the treatment of the topic, and consider to what extent some of the suggestions that have not already been incorporated following the discussion in the Committee could be taken into account.

4. To that end, the report will consider first the comments made by States (sect. II) and then those of the European Union (sect. III), followed by a few final observations (sect. IV).

II. Comments by States

5. The representatives of several States spoke on the topic of the expulsion of aliens during the Sixth Committee's discussion of the report of the International Law Commission at the sixty-sixth session of the General Assembly. Most of the comments concerned the draft articles proposed by the Special Rapporteur in the second addendum to his sixth report.[2] Some statements, however, concerned the recurring issues of the feasibility of the topic, the methodology followed by the Special Rapporteur and the final form of the Commission's work on the topic.

6. In the interests of consistency, the specific comments on the draft articles will be considered first; the general comments will be addressed in the section on the final observations of the Special Rapporteur.

7. Concerning the incorporation of the non-refoulement rule into various provisions of the draft articles, the representative of the United States of America had already said that he was "troubled" by the Special Rapporteur's incorporation of

[1] A/CN.4/642.

[2] A/CN.4/625/Add.2.

the rule into "numerous provisions", including draft articles 14 and 15.[3] The Special Rapporteur replied to this concern, which had been expressed more than once, in note 8 (under draft article 14) and note 9 (under draft article 15) of a document submitted as a supplement to his fifth report.[4] In light of current international human rights law, he has nothing to add to these clarifications.

8. Concerning the return to the receiving State of the alien being expelled (draft article D1), the representative of Malaysia considered that "codification of the duty or extent of the obligation imposed on States to encourage the voluntary departure of an alien being expelled was unnecessary, in that the expulsion decision concerned would have legal force"; the alien would therefore be obliged to comply with it.[5] This is doubtless a misunderstanding since the purpose of encouraging voluntary compliance is not to give aliens a choice as to whether to leave, but to allow them to do so on their own, calmly as it were, on the understanding that they will otherwise be forced to do so by the competent authorities of the expelling State. On the other hand, several States,[6] while recognizing the value of the idea of a voluntary return, pointed out that the word "encourage" in draft article D1, paragraph 1, was vague and could pose problems of implementation in the absence of guidance as to the means of encouragement to be employed. For this reason, some States, including Hungary, Portugal and Greece, suggested that, rather than "encouraging" voluntary compliance with an expulsion order, the expelling State should "facilitate" or "promote" it.[7] The Commission ultimately came to the same conclusion in its discussion of draft article D1, paragraph 1. Thailand also suggested that the specific reference to the rules of air travel should be deleted from paragraph 2 of this draft article since sea or land transport could also be used to expel an alien.[8] This comment has already been made in the Commission[9] and taken into due account.

9. Concerning the State of destination of expelled aliens (draft article E1), the representative of Malaysia, in terms that were doubtless exaggerated, said that she found the current wording of paragraph 2 "unacceptable" because, under Malaysian law, where the State of nationality of the alien being expelled had not been identified, the alien could be returned only to his or her place of embarkation or country of birth or citizenship.[10] This is merely a variation on the list of options contained in paragraph 2; in the Special Rapporteur's view, nothing in it appears "unacceptable". It has also been suggested that consideration should be given to the question of what would happen in the event that no State was willing to admit an expelled alien.[11] In the Special Rapporteur's view, the decision in such cases should be left to the discretion of the expelling State; at present, there is no rule of

---

[3] See the statement by the representative of the United States of America on 30 October 2009 at the 21st meeting of the Sixth Committee, during the sixty-fourth session of the General Assembly, under agenda item 81 (A/C.6/64/SR.21, para. 99).

[4] A/CN.4/617.

[5] A/C.6/66/SR.24, para. 103.

[6] Including Greece, the Russian Federation, Hungary and Portugal; ibid., paras. 17, 33, 56 and 62.

[7] See Greece (ibid., para. 17), Hungary (ibid., para. 56) and Portugal (ibid., para. 62). Malaysia also said that it considered the wording of draft article D1, paragraph 1, "broad" (ibid., para. 103) and that its practice was to allow "a reasonable time frame" for execution of an expulsion order (ibid., para. 104).

[8] Ibid., para. 84.

[9] A/66/10, para. 236.

[10] A/C.6/66/SR.24, para. 105.

[11] See Portugal (ibid., para. 63) and Thailand (ibid., para. 85).

international law that obliges that State to allow the alien in question to remain in its territory, and it can only expel such an alien under the conditions established in these draft articles and in other rules of international law. The most that could be done is to address this issue briefly in the commentaries. Similar treatment should be given to the question of readmission agreements since they fall within the extremely broad scope of international cooperation, in which States exercise their sovereignty in light of variable considerations that in no way lend themselves to normative standardization through codification. As for the difference between a State that has not consented to admit an expelled alien to its territory and a State that refuses to do so,[12] that issue has also been raised within the Commission[13] and will doubtless be settled by choosing one or the other of those expressions.

10. Most of the States that expressed their views on protecting the human rights of aliens subject to expulsion in the transit State (draft article F1) referred either to the bilateral agreements that they conclude with the transit State or, in a few cases, to their domestic law in addition to bilateral cooperation agreements with the transit State.[14] The Special Rapporteur considers that neither these bilateral agreements nor domestic law can contradict the relevant rules of international human rights law, from which aliens subject to expulsion must also benefit. But, as some members of the Commission rightly noted during the discussion of draft article F1,[15] and as the representative of Malaysia also noted in the Sixth Committee, the transit State "should be obliged only to observe and implement its own domestic laws and other international rules governing the human rights of aliens arising from instruments to which it was a party".[16] The Special Rapporteur endorses this view but considers it appropriate to expand the scope of the transit State's obligations to include all the rules of international human rights law to which it is subject, not merely those contained in instruments to which it is a party. The Special Rapporteur considers that draft article F1 might therefore be reworded.

11. On protecting the property of aliens facing expulsion (draft article G1), the representative of Greece stated that "the elaboration of a specific or privileged regime governing the property of expelled aliens was unnecessary in that such property was subject to protection under the general rules of international law, applicable international treaties and national legislation".[17] While that argument was relevant, *quod non*, it would apply not only to the entire set of draft articles on the expulsion of aliens but to most, if not all, of the topics under consideration by the Commission. This is because the legal sources on which the Commission typically draws for purposes of codification and progressive development are the general rules of international law, the applicable treaties and State practice. In this case, the obligation to protect the property of aliens facing expulsion does, of course arise from general rules, but these are supported by a large body of jurisprudence that justifies formulating it, clarifying it and applying it to the specific issue of the expulsion of aliens. The 2010 judgment on the merits of the International Court of

[12] Ibid., para. 63.
[13] A/66/10, para. 242.
[14] Comments and information received from Governments (2010) (A/CN.4/628). See, inter alia, Belarus, the Czech Republic, Sweden and the United States of America.
[15] A/66/10, para. 243.
[16] A/C.6/66/SR.24, para. 106.
[17] Ibid., para. 20.

Justice in the *Diallo* case[18] supports this statement. The commentary to the draft article should, however, clarify the scope of application of this rule, including by stating both that it applies without prejudice to the right of any State to expropriation or nationalization, and that confiscation may be remedied by compensation where restitution is no longer possible.

12. In any event, the representative of the Russian Federation, unlike that of Greece, considered that the rule contained in draft article G1, paragraph 1, "was a well-founded notion that deserved support".[19] The representative of Thailand suggested that, in order to overcome the problem of how to assess objectively the intention of the expelling State, the word "unlawfully" should be added to paragraph 1, which would then read: "The expulsion of an alien for the sole purpose of unlawfully confiscating his or her assets is prohibited."[20] The Special Rapporteur is not opposed to this suggestion.

13. Concerning draft article G1, paragraph 2, some States[21] suggested that the bracketed words "to the extent possible" should be deleted. This view had already been expressed by some members of the Commission.[22]

14. On the right of return to the expelling State (draft article H1), the Special Rapporteur showed, in the second addendum to his sixth report, that several States, including Belarus, Germany, Malaysia, Malta and the Netherlands, recognized the right of an unlawfully expelled alien to return to the expelling State. However, these countries' laws on this matter vary: some of them place restrictions on the right of return; others make it contingent on the prior possession of a re-entry permit that would be revoked by the expulsion order; while still others require that the expulsion order be annulled owing to a particularly grave or clear error.[23] In the comments and information received from Governments in 2010, the United States of America replied with extreme caution on this issue, suggesting that, under its domestic law, this was an option available to the competent immigration authorities rather than a right arising automatically from revocation of an unlawful expulsion order.[24] Similarly, although more briefly, Malta stated that expelled persons could submit a request for re-entry to the Principal Immigration Officer.[25]

15. In November 2011, during the discussion in the Sixth Committee at the sixty-sixth session of the General Assembly, the representative of Malaysia reiterated her delegation's position, which was similar: "an expelled alien should be allowed to return to the expelling State, subject to its immigration laws".[26] The representative of Greece said that the provisions of draft article H1 were "too broad". She considered that the draft article "introduced no differentiation on the basis of whether the alien being expelled was lawfully present in the expelling State, whereas the annulment of an expulsion decision could not confer a right to entry or

---

[18] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, judgment of 30 November 2010, *I.C.J. Reports* 103, 2010.

[19] A/C.6/66/SR.24, para. 34.

[20] Ibid., para. 86.

[21] See, inter alia, the Russian Federation (ibid., para. 34) and Thailand (ibid., para. 86).

[22] A/66/10, para. 246.

[23] A/CN.4/625/Add.2, paras. 153-157.

[24] A/CN.4/628, sect. II (B) (3), United States of America, first paragraph.

[25] See A/CN.4/628, sect. II (B) (3), Malta, second paragraph.

[26] A/C.6/66/SR.24, para. 108.

residence in a State on an alien whose situation had been irregular before implementation of the decision. Moreover, a potential right to return to the expelling State could be envisaged only in cases where an expulsion decision was annulled because it was contrary to a substantive rule of international law".[27] This is also the implied meaning of the aforementioned statement by the representative of Malaysia.

16. The position that a right of return to the expelling State can be envisaged only in cases where the expulsion order has been annulled owing to violation of a substantive rule of international law is shared by other States, including the Russian Federation[28] and Hungary.[29]

17. Also noteworthy is the preference of some States[30] for the term "right to re-entry" rather than "right of return", which might be confused with the recognized right of internally or externally displaced persons to return to their own country.

18. The Special Rapporteur agrees with the preceding suggestions. In fact, he proposes that in future, the term "readmission of an alien in cases of illegal expulsion" should be used in order to avoid any disagreement as to whether this is, in all cases, a right or whether the expelling State retains its power to grant or deny admission to its territory to an alien. In light of the other suggestion — that a distinction should be made between aliens who were lawfully, and those who were unlawfully, present in the territory of a State prior to the issuance of an expulsion order, the Special Rapporteur suggests that an alien who was unlawfully expelled but was lawfully present in the territory of the expelling State should have a right to readmission and that readmission should be based on the order annulling the unlawful expulsion order; the competent authorities of the expelling State should be required to carry out the readmission procedures. The readmission of aliens who were unlawfully expelled but were unlawfully present in the territory of the expelling State would be subject to the expelling State's entry and residence procedures. In either case, readmission could be denied for reasons of public policy or public safety.

19. Lastly, several States objected to the words "mistaken grounds", in paragraph 2 of this draft article, because they did not qualify as legal terminology.[31] That objection had also been made within the Commission[32] and the notion of "erroneous grounds" had then been proposed.

20. Concerning the responsibility of States in cases of unlawful expulsion (draft article I1) and diplomatic protection (draft article J1), the views expressed by States differed. The representative of Hungary did not comment on draft article I1; however, he said that consideration should be given to omitting draft article J1 on diplomatic protection because "not only did it address a controversial issue, but it was not closely related to the subject matter of the draft articles".[33] The representative of Portugal considered that the issues addressed in draft articles I1 and J1 "should be approached with caution, bearing in mind that States had domestic mechanisms available to aliens subject to expulsion that would enable them to appeal against a

[27] Ibid., para. 21.
[28] Ibid., para. 35.
[29] Ibid., para. 57.
[30] See, in this connection, the representative of Thailand (ibid., para. 87).
[31] See Chile (ibid., para. 6) and Hungary (ibid., para. 57).
[32] A/66/10, para. 248.
[33] A/C.6/66/SR.24, para. 57.

wrongful or unlawful expulsion decision or hold the expelling State responsible for such a decision (...)".[34] The representative of Greece said that her Government "attached great importance to the issue of effective remedies in the case of expulsion decisions".[35]

21. As to whether there is a relationship between, on the one hand, the expulsion of aliens and the question of the responsibility of the expelling State in cases of unlawful expulsion and, on the other hand, diplomatic protection, suffice it to recall, without insisting (since the issue was addressed in the seventh report[36]) that the 2010 judgment of the International Court of Justice in the *Diallo* case[37] marks the culmination of a tradition of an abundant arbitral jurisprudence dating from the nineteenth century, which clearly shows that these two questions have always been at the heart of international law on the expulsion of aliens. It is interesting to note the representative of Chile's statement that her delegation "supported the inclusion of both draft article I1 (The responsibility of States in cases of unlawful expulsion) and draft article J1 (Diplomatic protection), which concerned the exercise of diplomatic protection by the expelled alien's State of nationality, particularly in order to guarantee the protection of human rights in the case of unlawful expulsions".[38] As for some States' emphasis on the fact that internal mechanisms were available to aliens in cases of unlawful expulsion, it goes without saying that the exercise of diplomatic protection is subject to the exhaustion of domestic remedies. As the regime on the responsibility of States for internationally wrongful acts and the regime on diplomatic protection are quite well established in international law, the Special Rapporteur did not deem it appropriate to focus on them specifically.

22. As the Special Rapporteur wrote in his seventh report,[39] the two draft articles on, respectively, the responsibility of States for internationally wrongful acts and diplomatic protection are therefore quite appropriate for inclusion in the draft articles on the expulsion of aliens.

23. Concerning expulsion in connection with extradition (revised draft article 8),[40] the representative of the Russian Federation fully supported the Special Rapporteur: "The draft article (...) embodied a new approach meriting support, which was that the existence of an extradition request did not in itself constitute a circumstance that prevented expulsion".[41] But it should be noted that this is one of the rare examples of such clear support for the draft article. The representative of Chile said that "her Government had particular concerns stemming from the connection between the two related but different institutions of expulsion and extradition". She nevertheless suggested that the issue should be studied "with a view to harmonizing the institution of expulsion with that of extradition".[42] According to the representative of Malaysia, "the decision as to whether to exercise deportation or extradition must

---

[34] Ibid., para. 64. The representative of Malaysia also said that in her view, "a more cautious approach should be adopted" (ibid., para. 109).

[35] Ibid., para. 23.

[36] A/CN.4/642, paras. 20-42.

[37] See note 18 above.

[38] A/C.6/66/SR.24, para. 7.

[39] A/C.6/66/SR.24, para. 42.

[40] A/66/10, para. 224, note 540.

[41] A/C.6/66/SR.24, para. 36.

[42] Ibid., para. 7.

remain the sole prerogative of a sovereign State". The wording of revised draft article 8 "should (...) be re-evaluated with the aim of ensuring a clear distinction between disguised extradition and a genuine act of deportation".[43]

24. On the other hand, the United States of America[44] has always been opposed to the inclusion of such a draft article in the draft articles on the expulsion of aliens, whatever the wording proposed. Similarly, the representative of Portugal said that he was not certain whether revised draft article 8 "had a rightful place in the draft articles".[45] The representative of Thailand took a similar position on the matter.[46] The representative of Canada stated bluntly that "the draft article should be deleted on the ground of prematurity" since, in his view, "there was insufficient practice to support the conclusion on which revised draft article 8 (...) was based".[47]

25. In light of the differences of opinion on this issue and of the significant support for deletion of the current wording of revised draft article 8, the Special Rapporteur considers that the representative of Thailand's suggestion[48] — that the draft article should be replaced by a "without prejudice" clause concerning the international legal obligations regarding extradition among the States concerned — is useful.

26. Very few States replied to the question concerning appeals against an expulsion decision. In 2010, in its reply to the question put to States on this issue, Sweden stated that "an expulsion order may not be enforced until it has become final".[49] During the discussion of the report of the International Law Commission on the work of its sixty-third session in the Sixth Committee, the representative of Canada stated that "State practice did not yet appear to warrant the formulation of a provision" on the suspensive effect of such an appeal.[50] In its written reply to the questions raised by the Commission in chapter III of the report on the work of its sixty-third session (2011),[51] communicated to the secretariat of the Commission in February 2012, Germany expounded at length on its legislation in that area. It stated that section 80 (1) of its Code of Administrative Court Procedure stipulated as a general rule that "objections and recissory actions" had a suspensive effect. However, paragraph 2 of that article and various provisions of the Residence Act set out exceptions to that rule.

27. For example, under article 84 (1) of the Residence Act, an objection or legal action against the refusal of an application for a residence title (issuance or

---

[43] Ibid., para. 111.

[44] See, in particular, the position of the United States of America as reflected in, inter alia, document A/C.6/60/SR.12, para. 22; A/C.6/62/SR.20, para. 19; A/C.6/63/SR.21, para. 9; A/C.6/64/SR.21, para. 97; A/C.6/65/SR.25, para. 8; and A/C.6/66/SR.21, para. 67. See also, on this matter, the views expressed in the Sixth Committee at previous sessions of the General Assembly by China (A/C.6/65/SR.22, para. 56), France (A/C.6/65/SR.23, para. 77), Greece (A/C.6/62/SR.21, para. 49), Indonesia (A/C.6/60/SR.20, para. 7), the Netherlands (A/C.6/62/SR.20, para. 27), Sri Lanka (A/C.6/65/SR.26, para. 35), Portugal (A/C.6/65/SR.23, para. 3) and Spain (A/C.6/65/SR.24, para. 84).

[45] A/C.6/66/SR.24, para. 65.

[46] Ibid., para. 88.

[47] Ibid., para. 77.

[48] Ibid., para. 88.

[49] A/CN.4/628, sect. II (B).

[50] A/C.6/66/SR.24, para. 76.

[51] A/66/10, paras. 40-42.

extension) does not have a suspensive effect. Section 52 (1) (4) of the Residence Act, in conjunction with section 75 (2) of the Asylum Procedure Act, stipulates that no suspensive effect is attached to revocation of an alien's residence title. Section 80 (2) (4) of the Code of Administrative Court Procedure also states that there is no suspensive effect in cases in which the authority that issues the administrative act separately orders immediate execution in the public interest.

28. Even in cases where suspensive effect is granted, the Residence Act stipulates that the operative effect of an expulsion or an administrative act which terminates the lawfulness of the residence is not affected by any objection or legal action (sect. 84 (2)). Under the Code of Administrative Court Procedure, the competent administrative court can, however, grant suspensive effect by way of a court order in those cases where suspensive effect would not otherwise apply pursuant to section 80 (2).

29. As to the question of whether suspensive effect depends on the lawfulness of the alien's residence, Germany replied that it did not. In fact, the expulsion decision makes the alien's residence unlawful and obliges him or her to leave German territory.

30. On the question of whether States that have such a practice (suspensive effect) consider it to be required by international law, Germany replied that on such matters, it was mainly influenced and directed by German constitutional law.

31. Germany's practice in these matters is proof of the extreme complexity of the issue. Not only is there insufficient consistency in State practice, as noted first by the Special Rapporteur in the second addendum to his sixth report,[52] and then by the representative of Canada in his statement (see above), but it would be quite risky to propose a general rule for a question to which national legal systems provide a variety of responses, depending on the circumstances envisaged. The Special Rapporteur therefore remains uncertain as to whether there is sufficient legal basis to propose a draft article on the issue.

III. Comments by the European Union

32. Under the Treaty of Amsterdam, member States transferred competence over a broad field of "aliens law" to the European Commission. This transfer took effect in 1999 and led to the inclusion in the Treaty establishing the European Community of a separate title dealing with visas, asylum, immigration and other policies related to freedom of movement of persons (title IV). The European Community has since taken various initiatives towards a common return and readmission policy for non-nationals of its member States and has adopted several relevant directives[53] and concluded international agreements under title IV of the Treaty of Amsterdam. That title was replaced by title V of the Treaty of Lisbon, which came into effect on 1 December

[52] A/CN.4/625/Add.2, paras. 51-55.

[53] See, inter alia, Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, *Official Journal of the European Communities*, L 149/34, 2.6.2001; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union*, L 348/98, 24.12.2008; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *Official Journal of the European Union*, L 16/44, 23.1.2004; and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *Official Journal of the European Union*, L 251/12, 3.10.2003.

2009 and replaced the European Community by the European Union. Title V of the Treaty of Lisbon deals with the "area of freedom, security and justice".[54]

33. In European Union law, the term "aliens", as used by the Commission in its work on the expulsion of aliens, corresponds to "third country nationals", defined in article 2 (a) of Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals[55] as "anyone who is not a national of any of the Member States". European Union legislation uses a variety of terms to designate the concept of "expulsion", including "ending of stay", "removal" and "return".

34. The Return Directive of 16 December 2008,[56] which sets out common standards and procedures in member States for the return of illegally staying third country nationals, uses the same terminology but also refers to "voluntary return". It defines the term "return" as the process of a third country national going back — whether in voluntary compliance with an obligation to return, or enforced — to: (a) his or her country of origin; (b) a country of transit in accordance with Community or bilateral readmission agreements or other arrangements; or (c) another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

35. These provisions reflect the Special Rapporteur's comments on the issue of relations between the expelling State and the transit and receiving States in the second addendum to his sixth report,[57] which led to the formulation of draft article E1 (State of destination of expelled aliens),[58] and draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State).[59] It is true that the Special Rapporteur said nothing about readmission agreements; he acknowledged their existence but felt that they did not require codification or even progressive development insofar as they fall within the scope of international cooperation since States are free to conclude any agreements that they deem necessary in this area.

36. With regard to the specific issues on which States were requested to submit information about their practice, the European Union provided the explanations set out in the following paragraphs.

37. Concerning the grounds for expulsion provided for in national legislation, the principles of European Union law require member State authorities to adopt an individualized approach to expulsion, including for public policy or security considerations. This approach must take into account the likely danger emanating from

---

[54] Explanations contained in a letter dated 22 February 2010 from the Director-General of the European Commission's Legal Service, addressed to the Secretary-General of the United Nations in response to the request for specific comments on the issues relating to the topic of the expulsion of aliens, set out in chapter III, paragraph 29, of the report of the International Law Commission on the work of its sixty-first session (2009) (A/64/10).

[55] *Official Journal of the European Communities*, L 149/34, 2.6.2001.

[56] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union*, L 348/98, 24.12.2008, article 3 (2). The member States of the European Union associated with the Schengen Agreement were required to bring their national legislation into line with the Directive by 24 December 2010.

[57] A/CN.4/625/Add.2, paras. 60-118.

[58] Ibid., para. 116.

[59] Ibid., para. 118.

the person concerned, the severity and type of offence committed, the duration of stay in member States, the age of the person concerned, the consequences of expulsion for that person and for his or her family members, the links with the country of residence and/or the absence of links with the country of origin. There is therefore no fixed list of concrete grounds for expulsion for public policy or security considerations.[60]

38. With regard to the conditions and duration of "detention for the purpose of removal", the 2008 Return Directive contains detailed provisions setting out minimum standards for duration of detention (article 15), general conditions of detention (article 16) and specific provisions for detention of minors (article 17).

39. With respect to detention, article 15 provides that an alien who is "the subject of return procedures" may only be kept in detention when (a) "there is a risk of absconding", or (b) the alien concerned "avoids or hampers the preparation of return or the removal process". In any event, "[a]ny detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence".

40. With regard to "conditions of detention", article 16 provides that "detention shall take place as a rule in specialized detention facilities". Where detention takes place in a prison, the alien concerned must be kept separated from ordinary prisoners. The alien must be allowed — on request — to establish "in due time" contact with legal representatives, family members and competent consular authorities. Paragraph 3 of the article establishes the obligation to pay "particular attention" to the situation of vulnerable persons and to provide "emergency medical care and essential treatment of illness". Paragraph 4 states that relevant and competent national, international and non-governmental organizations and bodies have the possibility to visit detention facilities and that such visits may be subject to authorization. Paragraph 5 provides that aliens kept in detention must be "systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations".

41. Article 17 provides that minors and families shall only be detained "as a measure of last resort and for the shortest appropriate period of time". The article then sets out various rights enjoyed by these groups and other protective measures to which they are entitled: the right to separate accommodation guaranteeing adequate privacy; the possibility for minors to engage in leisure activities; and the provision, as far as possible, of accommodation in institutions with adapted personnel and facilities. Lastly, "the best interests of the child shall be a primary consideration in the context of the detention of minors pending removal" (article 17 (5)).

42. The issues covered by articles 15, 16 and 17 of the 2008 Return Directive were addressed by the Special Rapporteur in his sixth report.[61] It should be acknowledged, however, that the Directive contains extremely progressive provisions on such matters that are far more advanced than the norms found in other regions of the world. Although these provisions are applicable in some 27 States, it appears difficult to establish them as universal norms, particularly since some States[62] have not hesitated to

---

[60] See note 54 above on the letter from the Director-General of the European Commission's Legal Service.

[61] A/CN.4/625, paras. 211-276, and draft article B.

[62] See, inter alia, the statement of the representative of the United States of America in the Sixth Committee at the sixty-fourth session of the General Assembly (A/C.6/64/SR.21, para. 97).

criticize the Special Rapporteur for codifying European Union law, and even the jurisprudence of the human rights treaty bodies. At a minimum, it should be noted that the principal norms contained in these provisions are generally accepted in the practice of most States and are, moreover, universal in nature in that they are found, inter alia, in General Assembly resolution 43/173 of 9 December 1988, which the Special Rapporteur highlighted in paragraph 245 of his sixth report. The discussions within the Commission showed that there was no consensus on, for example, the conditions for detaining an alien who is the subject of expulsion, covered by article 15.

43. One issue of terminology is worth addressing. The French text of the Return Directive refers to *rétention*, while both the Special Rapporteur and the Commission use the term *détention*. While it might be tempting to adopt the Directive's terminology, it does not seem necessary to do so. First, the term *détention* is all-encompassing. In this connection, the French title of the aforementioned resolution 43/173 is significant: […] *la protection de toutes les personnes soumises à une quelconque forme de détention ou d'emprisonnement* ([…] Protection of All Persons under Any Form of Detention or Imprisonment). Second, since article 15 (2) of the Directive provides that "[d]etention shall be ordered by administrative or judicial authorities", it does not seem relevant to distinguish between detentions ordered by the same administrative or judicial authorities for offences that, while they may be different, produce the same consequences in terms of deprivation of liberty.

44. On the other hand, it may be necessary to amend draft article B (3) (b),[63] which provides that "[t]he extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power", along the lines of article 15 (2) of the Directive. This provision of the draft article, which is based on jurisprudence, gives the administrative authorities no power to extend the duration of detention, even though they have the power to order the detention itself. Apart from being illogical, such an approach could create practical difficulties for States since, in certain emergency situations, it is impossible to await the conclusion of judicial proceedings, which are generally slower in such cases, than administrative proceedings.

45. The Return Directive does not deal directly with the right of an unlawfully expelled alien to return to the expelling State. It might be inferred from article 11 (1) of the Directive (Entry ban) that the right of return to the expelling State may be set aside in certain cases, for example, where the expulsion order is accompanied by an entry ban if no period for voluntary departure has been granted, or if the obligation to return has not been complied with. Member States are, however, allowed to refrain from issuing an entry ban for humanitarian reasons, including where victims of human trafficking, asylum-seekers or persons who are in need of international protection are involved.

46. It should also be noted that article 13 of the Directive provides for the right to appeal against an expulsion order, including for cases in which an entry ban has been imposed. The consequences of a successful appeal are to be determined in each individual case by the appeals body. In short, European Union law has no specific, explicit rule concerning the return of an expelled person to the expelling State.

47. This observation on the common practice of 27 European States confirms to the Special Rapporteur that there is no general rule or uniform practice on the topic

[63] See note 61 above.

and that the rule set out in draft article H1, contained in the second addendum to his sixth report,[64] is indeed part of the progressive development of international law and is relevant since it is a rule *a contrario*, a logical rule formulated as a legally necessary consequence of violation of a rule of international law.

48. The European Union directives do not deal explicitly with the nature of relations between the expelling State and the transit State, although this issue is addressed in a number of readmission agreements concluded between the European Union and non-member States. However, this is an area of bilateral cooperation, where States are free to exercise their sovereign right to agree on the rules that they intend to apply in their mutual relations, provided that those rules do not violate the objective norms of international law or *erga omnes* obligations. For this reason, the Special Rapporteur feels that consideration of this issue should be limited to established practice in general international law, which is what draft article F1, proposed in the second addendum to the sixth report[65] and amended during the Commission's plenary debates thereon,[66] attempts to do.

IV. Final observations of the Special Rapporteur

49. In these final observations, the Special Rapporteur will first make some remarks concerning States' comments on specific draft articles. He will then focus on some aspects of his working methodology, on progress in the Commission's work on the topic of the expulsion of aliens, and on the final form of that work.

A. Specific comments on various draft articles

50. The Special Rapporteur welcomed the comments and suggestions made by States in relation to specific draft articles. As indicated above, he believes that the Commission might adopt some proposals when it finalizes the draft articles on first reading. Where applicable, he will endeavour to formulate such proposals.

B. Specific comments on several methodological questions

51. Some States have made sometimes-contradictory comments on the approach followed by the Special Rapporteur with a view to formulation of the draft articles. The United States of America, for instance, criticized him for codifying the jurisprudence of regional human rights courts, such as the European Court of Human Rights, and of the monitoring bodies for the primary international human rights treaties.[67] On the other hand, the European Union has criticized him for ignoring or taking insufficient account of its law,[68] while Germany criticized him for relying on outdated sources.[69]

---

[64] A/CN.4/625/Add.2, para. 160.
[65] Ibid., paras. 117 and 118.
[66] A/66/10, para. 219, note 534.
[67] See, inter alia, its representative's statement to the Sixth Committee at the sixty-fourth session of the General Assembly (A/C.6/64/SR.21, para. 97).
[68] A/C.6/66/SR.21, para. 45.
[69] A/C.6/66/SR.23, para. 26.

52. Without repeating in detail his replies on these matters during the discussion in the Sixth Committee in November 2011,[70] the Special Rapporteur will simply recall a strong statement on the question made by one member of the Commission[71] during the plenary debate on the second addendum to the sixth report on the expulsion of aliens. That member commended the Special Rapporteur on his attempt to assemble the widest possible range of sources from all regions of the world and on the manner in which he used those sources, comparing them and putting them in historical context, as seen from the various reports on the expulsion of aliens. It is possible that, in the case of a particular country, the presentation of certain events may have given the erroneous impression that the Special Rapporteur was dwelling on the past. However, this should simply be seen as his attempt to use as many historical examples as possible in order to establish a more solid foundation for his proposed draft articles, without passing judgement on the events themselves or on the circumstances surrounding them. At no time did the Special Rapporteur intend to harm any State or to pass judgement on its history or its recent practice.

53. It was in that spirit that he discussed, in his seventh report,[72] the amendment to the Swiss Constitution concerning the expulsion of foreign criminals, adopted by the people and cantons of Switzerland in November 2010. The report noted that, as was its practice, the Swiss Government would adapt the amendment through the adoption of implementing legislation. In the same vein, he discussed, again in the seventh report,[73] the 2011 draft French legislation on immigration, integration and nationality, which concerned the expulsion of aliens indirectly as it provided for deprivation of nationality followed by expulsion. The Special Rapporteur notes that the aspects of that draft legislation which were relevant to the question of the expulsion of aliens were deleted from the final draft that was adopted by the French parliament.

54. Lastly, consideration of the topic of the expulsion of aliens by the Sixth Committee of the General Assembly suffered from the discrepancy between the Commission's progress on the topic and the information contained in the reports submitted for consideration by States in the Sixth Committee on the basis of the Special Rapporteur's original reports. The work of the Commission on the expulsion of aliens was always more advanced than the reports on the topic that were submitted to the General Assembly. The draft articles that were first discussed in plenary within the Commission and then transmitted to and considered by the Drafting Committee, often after the Special Rapporteur had submitted new drafting proposals, were not immediately relayed to the Sixth Committee because the Drafting Committee had decided not to take a decision on a few initial draft articles concerning, inter alia, the scope of the draft articles and certain key definitions before seeing the rest of the draft articles. This resulted in a discrepancy between the actual progress in the Commission's work on the topic and the documents submitted to States within the Sixth Committee and made dialogue between the two bodies somewhat difficult since they did not have the same amount of information on progress in the work on the topic. It is hoped that submission of all the draft articles adopted by the Commission, with the commentaries thereto, will bring this situation to an end.

---

[70] A/C.6/66/SR.25, paras. 46-54.

[71] A/CN.4/SR.3093 (statement by Mr. Vasciannie).

[72] A/CN.4/642, paras. 7-9.

[73] Ibid., paras. 10-19.

C. Specific comments on the final form of the work of the International Law Commission on the topic

55. Some States have felt that the topic of the expulsion of aliens was not suitable for codification[74] or that the final outcome of the Commission's work on the topic should, at most, take the form of "fundamental guiding principles, standards and guidelines"[75] or "guidelines or guiding principles"[76] rather than "draft articles".[77] Some States expressed similar views during the discussion in the Sixth Committee of the General Assembly; such opinions were also expressed within the Commission[78] itself. This is a thorny question.

56. At this juncture, the Special Rapporteur will simply recall briefly his replies on the question at the sixty-third session of the Commission[79] and in November 2011, during the discussion in the Sixth Committee of the General Assembly.[80] Apart from the topic of State responsibility for internationally wrongful acts and, to a certain extent, that of diplomatic immunity, on which, moreover, the codification work drew extensively on international jurisprudence on the expulsion of aliens, no other topic on the Commission's agenda for the past three quinquenniums has had a richer and more solid foundation for codification than the expulsion of aliens: a considerable body of international legal instruments, international jurisprudence from a wide variety of sources, an abundance of national legislation and jurisprudence, and well-developed doctrine. Several of the topics that have been considered by the Commission and have resulted in draft articles rather than directives, guidelines or principles, were not based on such abundant legal material.

57. It is doubtless premature to decide on the final form of the Commission's work on the topic of the expulsion of aliens. However, since this topic appears to be a source of concern for some States, the Special Rapporteur is convinced that, once the drafting of the draft articles and the commentaries thereto is completed, the consistency and soundness of the work will become more evident than at present and some of the concerns regarding the topic will be allayed. He therefore hopes that at the appropriate time, the Commission will elect to transmit the outcome of its work to the General Assembly as draft articles so that the Assembly can take an informed decision on their final form.

---

[74] See, in particular, the position of the United Kingdom (A/C.6/66/SR.23, para. 46). See also the position of the Nordic countries as stated by Finland (A/C.6/66/SR.21, para. 59).

[75] Greece (A/C.6/66/SR.24, para. 16).

[76] Thailand (ibid., para. 88).

[77] See, inter alia, the positions expressed by the representatives of Hungary (A/C.6/60/SR.13, para. 9), Israel (A/C.6/60/SR.16, para. 58), Portugal (A/C.6/60/SR.12, para. 38; A/C.6/62/SR.19, para. 85), Slovenia (A/C.6/64/SR.21, para. 65) and the United Kingdom (A/C.6/62/SR.19, paras. 45-46).

[78] See, inter alia, A/66/10, paras. 229-233.

[79] Ibid., para. 258.

[80] A/C.6/66/SR.25, paras. 46-54.