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Expulsion of aliens

Comments and observations received from Governments

Addendum

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I. Introduction

Additional written replies, containing comments and observations on the draft articles on the expulsion of aliens, adopted on first reading by the International Law Commission at its sixty-fourth session, in 2012 (A/67/10, para. 41), were received from the Russian Federation (9 April 2014) and Denmark (on behalf of the Nordic countries) (12 June 2014).

II. Comments and observations received from Governments

A. General comments

Russian Federation

[Original: Russian]

As for general approaches to the topic, certain questions are raised by the concept inherent in the draft articles according to which the expulsion regime is proposed to extend equally to aliens residing in the territory of the State both lawfully and unlawfully. In our understanding, the legal nature of their stay in the territory of the State differs.

For example, aliens residing in the territory of the State on lawful grounds enjoy a greater degree of protection primarily in terms of procedural safeguards made available to them in the context of expulsion. That conclusion is supported by relevant universal and regional treaties,¹ according to which certain guarantees in the sphere of expulsion are extended to “lawful” aliens. As an example, we draw attention to article 1 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984, from the name and text of which it follows that the procedural safeguards relating to expulsion that are formalized in it apply solely to a clearly defined group of aliens — persons lawfully residing in the territory of a given State.

A similar approach with regard to “unlawful” aliens is not found in international law — the safeguards made available to them in this sphere are of a general nature and essentially boil down to an aspect of the protection of human rights (respect for family life in the context of expulsion, impermissibility of expulsion to a State in which the person could be subjected to persecution on the grounds of race, religion, or other affiliation, to torture or inhumane treatment, etc.).

The specifics given above, it would seem, could be reflected in the draft articles with an eye to performing a clearer demarcation in the legal situation of “lawful” and “unlawful” aliens residing in the territory of a State, primarily in the context of the procedural safeguards enumerated in draft article 26.

Based on the text of the draft articles, as well as on the comments, one can conclude that the term “competent authority” is generally used to include both the judicial and administrative bodies of authority of the expelling State. We feel such an approach reflects the current international and intra-State practices in this matter.

¹ For example, the Convention relating to the Status of Refugees of 28 July 1951, article 32; the International Covenant on Civil and Political Rights, article 13; the European Convention on Establishment, article 3; and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, article 1.

In that connection, it would seem proper to explicitly specify such an understanding of the term “competent authority” in the articles or in the comments regarding it, so as to avoid different readings.

For example, the International Court of Justice, in a judgment on the Diallo case,² having analysed the pertinent provisions of the law of the Democratic Republic of the Congo, found no discrepancies between the administrative rules prevailing in that country for decisions to expel (upon the decision of the President or Prime Minister of the Democratic Republic of the Congo, without a court hearing on the matter) and the norms of international law.

In addition to that, article 1 of the above-mentioned Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms clearly stipulates the right of the person being expelled to “be represented ... before the competent authority or a person or persons designated by that authority”. According to the explanatory report on Protocol No. 7, the competent body may be judicial or administrative. Moreover, it is acceptable for the law of the State making the expulsion to establish different procedures for that and to designate different authorities for it.³

Denmark (on behalf of the Nordic countries)

[Original: English]

We note that in general the draft articles contain a useful description of the challenges in the area of expulsion of aliens and of the different relevant bodies of international and regional laws and practices.

Furthermore, we reiterate that any convention on expulsion of aliens would only be of interest if it is based on and clearly states the basic principle that States must readmit their own nationals who do not have a legal residence in another country. The Nordic countries therefore strongly support the European Union comment on article 22, paragraph 11, which suggests adding “and readmitted by” to clarify the obligations of receiving States to readmit their own nationals. An alternative option could be to add a new separate article stating the obligations of receiving States.

Furthermore, to the Nordic countries it is a key principle that the draft articles do not apply to extradition.

It is our view that there is a need for clarification of the terminology in the draft articles. It is a necessity, with clear and consistent language throughout the draft articles.

The draft articles set out to apply to expulsion by a State of an alien and in the commentary it is stated that the term “expulsion” is used because it is sufficiently broad and covers any phase of the expulsion process.

However, the definition in article 2 (a) only seems to relate to the expulsion decision and not the subsequent implementation of this decision involving voluntary

² Case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, Judgment, I.C.J. Reports 2010.

³ Under Russian law, for example, there exist both judicial (administrative expulsion) and non-judicial (deportation) procedures for expelling aliens.

or forced return. The Nordic countries therefore suggest that the term “expulsion” is used for the decision to expel an alien. As for the subsequent forcible implementation of this decision, it is suggested that the term “removal” is used. This is the term consistently used in the European Union return directive (2008/115/EC), where it means the enforcement of the obligation to return, namely the physical transportation out of the member State. The current draft articles seem to use different terms for this phase as the use of, for example, “return”, “departure” and “forcible implementation of an expulsion decision” in articles 6 and 21 shows.

B. Final form of the draft articles

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries have in recent years commented on this topic in the Committee and have with consistency argued that the topic of expulsion of aliens does not lend itself to incorporation into a convention. Expulsion of aliens is an area of law with significant and detailed regional rules, and it is therefore our view that the ongoing work in the International Law Commission should rather focus on transforming the draft articles into framework principles or general guidelines.

C. Specific comments on the draft articles

Part one

General provisions

1. Article 1

Scope

Russian Federation

[See the comment made above under general comments.]

2. Article 2

Use of terms

Denmark (on behalf of the Nordic countries)

[See the comment made above under general comments.]

3. Article 4

Requirement for conformity with law

Russian Federation

[Original: Russian]

We support the requirement stipulated in draft article 4 on the permissibility of expelling an alien solely on the basis of a decision made in accordance with the law.

At the same time, we note the following legal position set forth by the International Court in the judgment on the Diallo case: "... it is clear that while 'accordance with the law' as thus defined is a necessary condition for compliance with the above-mentioned provisions, *it is not the sufficient condition*". Developing that idea, the Court later said this: "first, the applicable domestic law must itself be *compatible with the requirements of the Covenant and the African Charter*; second, *an expulsion must not be arbitrary in nature*, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights ..." (*our italics*).

Thus, in the opinion of the Court, the law of the State on whose grounds the judgement to expel an alien is being handed down must meet certain criteria: (1) it must comply with the norms of international law that are applicable with respect to the State (in the Diallo case, those norms were the above-mentioned International Covenant on Civil and Political Rights and the Charter of the African Union) and (2) it must provide sufficient safeguards against arbitrary treatment on the part of the authorities.

In our view, however, the above legal position of the International Court does not find proper reflection in the comments on the draft articles. Overall, its analysis, primarily in the context of the obligation specified by draft article 4, could be of interest to the Commission (its results could later be reflected in the comments). On our part, within the framework of the question, we have directed attention to the practice of the European Court of Human Rights in the context of which the phrase "in accordance with the law" has been given a detailed interpretation.

For example, in its case law, the Strasbourg Court proceeds from the fact that the expression "in accordance with the law" used in the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols to it not only requires that certain measures undertaken by the State against a person be based on the rules of the law, but also presumes "quality of the law" (in that sense, the practice of the European Court of Human Rights is consonant with the above legal position of the International Court in the Diallo case). Thus, in the case of *Khlyustov v. Russia*, the European Court of Human Rights, referring to its case law,⁴ said: "... the expression 'in accordance with the law' not only requires that the impugned measures should have some basis in domestic law, but also refers to the quality of the law in question. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct ...".

Apart from that, in its practice, the European Court of Human Rights proceeds from the fact that "standard quality of the law" presumes that it must specify limits on broad interpretation when it is applied, as well as the possibility of the review of prior decisions in one form or another.⁵

⁴ See the cases *The Sunday Times v. the United Kingdom* (No. 1), 26 April 1979, paras. 47-49; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [Grand Chamber], No. 38433/09, paras. 140-141, European Court of Human Rights, 2012.

⁵ Case of *Malone v. the United Kingdom*, 2 August 1984, para. 67.

Part two

Cases of prohibited expulsion

4. Article 6

Prohibition of the expulsion of refugees

Denmark (on behalf of the Nordic countries)

[Original: English]

It is important to uphold the possibility to carry out an expulsion decision in certain cases even though an appeal has been lodged, for example, when an application for asylum is manifestly unfounded.

A mandatory suspension of all expulsion decisions until a final decision has been made on the appeal (and not only until a court or tribunal has decided whether the appeal should have suspensive effect) would give rise to an increased risk of abuse and undermine the legitimacy of the European Union-member States' asylum systems, since all third-country nationals who have applied for asylum in a member State are regarded as staying lawfully on the territory of that member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker, has entered into force (see the ninth preambular paragraph of Directive 2008/115/EC of the European Parliament and the Council of the European Union of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals).

[See also the comment made above under general comments.]

5. Article 12

Prohibition of expulsion for purposes of confiscation of assets

Russian Federation

[Original: Russian]

Certain doubts remain with regard to draft article 12 (prohibition of expulsion for purposes of confiscation of assets).

First, although the idea itself that underlies it deserves support, one cannot help but note that evaluating the goals and intentions of States can, in practice, be a very complex task. Also, in our view, there may very well be situations in which the acts committed by a person in a given State, when taken together, will, under the law of that State, result in both expulsion and confiscation as separate penalties. The failure to apply the provisions on confiscation solely on the grounds that the person is also subject to expulsion would hardly be justified. In such a case, the aliens could be in a more privileged position than nationals of the State, against whom confiscation would still be applied for the same acts.

Second, the current language of draft article 12 would seem to require more nuance.

On one hand, the prohibition called for here should perhaps extend only to actions that lead to the wrongful deprivation of an alien of his property. This

approach finds reflection in the commentary, in which it is correctly pointed out that “draft article 12 sets out the prohibition of confiscatory expulsions ... with the aim of unlawfully depriving an alien of his or her assets”. At the same time, it follows from the existing language of that article that the prohibition of the expulsion is absolute, that is, it also extends to cases in which expulsion and confiscation are necessary in the interests of national security or public order, when the confiscation involves unlawfully acquired property, etc.

On the other hand, this article must ensure an adequate level of protection of the property rights of aliens being expelled, inasmuch as the language used in this draft article — “confiscation of assets” — raises some questions (the term “*собственность*” [“property”], by the way, is used in the translation of the draft articles into Russian instead of the term “*активы*” [“assets”]; that, in all likelihood, also requires correction). Although the language, as far as one can tell, was borrowed from article 9 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live of 13 December 1985,⁶ it does not, in textual terms, cover the actions of the State that are not directly related to the confiscation itself, but nonetheless does lead to a restriction of certain property rights of an alien who is being expelled.

In that context, we once again call attention to the Diallo case, within the framework of which Guinea filed claims against the Democratic Republic of the Congo in connection with, among other things, the fact that the expulsion violated the rights of Mr. Diallo to control and manage the commercial companies Africom-Zaire and Africontainers-Zaire and, as a result, caused injury to the companies and to Mr. Diallo himself as their owner. In other words, the wrongful, in the opinion of Guinea, actions of the Democratic Republic of the Congo were not directly associated with the “confiscation of property” (“assets”) in the sense of draft article 12. That claim of the Guinea party was ultimately denied by the International Court, because it found no grounds to assert that the expulsion per se created actual impediments to Mr. Diallo’s management from abroad of the companies belonging to him. At the same time, in our understanding, it follows from the logic of that judgment that if the expulsion, for one reason or other, were to have created such impediments, the matter at hand would involve the Democratic Republic of the Congo’s violation of its international obligations.

The European Court of Human Rights has more than once enunciated a complex legal position in its judgements.⁷

Based on the above, we feel that the final language of draft article 12 should find a balance between the interests of the State, on one hand, and the interests associated with the protection of the property rights of aliens being expelled, on the other. In addition, we are proceeding from the fact that draft article 12 needs to be scrutinized in conjunction with draft article 30, which makes provision for guarantees of the protection of the property interests of aliens in the expelling State, including on the basis of the understanding that, in a globalized world, the fact that an alien finds himself outside a State need not be regarded as an impediment to his exercise of his property rights in that State.

⁶ Adopted by the General Assembly in its resolution [40/144](#).

⁷ See, for example, the cases of *Kopecky v. Slovakia*, 28 September 2004, para. 35, and *Slivenko and others v. Latvia*, 9 October 2003, para. 121.

Part three
Protection of the rights of aliens subject to expulsion

Chapter I
General provisions

6. Article 15
Obligation not to discriminate

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries fully support the European Union comment on the inclusion of sexual orientation in article 15.

Chapter II
Protection required in the expelling State

7. Article 19
Detention conditions of an alien subject to expulsion

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries support the European Union comments on article 19.

In addition, as for the separation of aliens subject to expulsion from persons sentenced to penalties involving the deprivation of liberty, we hold the view that it should be possible to detain aliens, who are expelled because of crime and who have served a prison sentence, in the prison where they have served their sentence.

Chapter III
Protection in relation to the State of destination

8. Article 21
Departure to the State of destination

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries find that voluntary return is to be preferred over forced removals and thus should be promoted and facilitated. At the same time it is important to reserve the possibility to enforce an obligation to return if it is deemed necessary.

[See also the comment made above under general comments.]

9. Article 22
State of destination of aliens subject to expulsion

Denmark (on behalf of the Nordic countries)

[See the comment made above under general comments.]

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

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries support the European Union comment on article 23 (2) and further hold the opinion that sexual orientation should be included in article 23 (1) in line with the suggestion to include sexual orientation in article 15.

Furthermore, article 23 (1) should be more aligned with article 33 of the 1951 Convention relating to the Status of Refugees, in order to exclude cases where, for example, there is a threat against a person's freedom because of a crime that has been committed (which is not related to the grounds for persecution in the 1951 Convention).

Part four
Specific procedural rules

11. Article 26
Procedural rights of aliens subject to expulsion

Russian Federation

[See the comment made above under general comments.]

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries also hold the view expressed by the European Union that the right to receive a legal notice of the expulsion decision should render a right to receive a written decision and a right to receive information about the legal remedies available.

As to the limitation set out in subparagraph 4, allowing States to exclude from the scope of the procedural rights aliens who have been unlawfully present for less than six months, we hold the view that this risks undermining the minimum standards set out in the draft articles. We therefore support the drafting suggested by the European Union.

Furthermore, the Nordic countries wish to clarify that the right to be represented before the competent authority should not entail an obligation on the States to provide free legal assistance to all aliens subject to expulsion.

[See also the comment made above under article 6.]

12. Article 27
Suspensive effect of an appeal against an expulsion decision

Denmark (on behalf of the Nordic countries)

[Original: English]

The Nordic countries support the comments made by the European Union on this article.

Part five
Legal consequences of expulsion

13. Article 29
Readmission to the expelling State

Russian Federation

[Original: Russian]

Within the framework of the topic as a whole, we would like also to call attention to the institution of readmission. As we know, readmission, like expulsion, presumes the movement of foreign nationals and stateless persons outside the territory of the State, regardless of their will. At the same time, readmission is a separate legal institution, based primarily on the norms themselves of international law, because, unlike expulsion, it presumes not only the right of one State to expel a person, but also the obligation of another State to accept that person. In addition, in the current wording of the draft articles, only draft article 29, which affects only one of the aspects of that legal institution — the obligation of the expelling State to take back the foreign national in the event of the absence of lawful grounds to expel (so-called erroneous readmission) — is devoted to the subject of readmission.

We feel that it would make sense for the Commission to elucidate other aspects of that institution in the draft articles.

[See also the comment made above under general comments.]