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Report of the International Law Commission on the work of its Sixty-third and Sixty-fourth sessions (Agenda Item 79)

- Part I -

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(Check against delivery)

Mr Chairman,

I would like to begin by thanking the International Law Commission for providing us, once again, with such a dense report, apt to stimulate reflection on the many subjects covered. The fact that the previous session saw the completion of several works has not lessened the effort made by its members to offer us works which have seen great progress this year. I congratulate all the members for the considerable progress of certain works, which I will later have the opportunity to discuss further, as well as for the inclusion of "Formation and evidence of customary international law" in the programme of work. A Commission study appears to us to be particularly appropriate.

General observations

The programme of work for the quinquennium, firstly, seems very promising to me and requires all the work of the members and States. My delegation rather has a tendency to encourage the Commission to focus its effort on subjects already being studied and to avoid

dispersion by including new subjects on its agenda. I have a degree of concern when I see the task of the Commission grow considerably, such as through the study of certain themes regarding which its forum does not necessarily appear to be the most appropriate. This is particularly true for the subject "**The Protection of Atmosphere in International Law**" which, from our point of view, if only for its scientific and technical aspects, does not seem appropriate for such examination. This is also the case of the subject "**Protection of the environment in relation to armed conflicts**" for which work to identify the standards already regulating the issue, in various instruments, does not appear a priority at this stage; and also the examination of the rule of "**Fair and equitable treatment in international investment law**", a subject which has already been the subject of numerous rules and mechanisms. Given the significant existing legal corpus on the matter, France will follow the developments on this subject within the competent jurisdictions and ensure that existing rules are not undermined. In the field of investment, it appears preferable at this stage that the Commission deepen its work regarding the "**Most Favoured Nation Clause**" before covering other subjects. I therefore wonder whether it is opportune for the Commission to examine the different subjects I have just raised, and I admit to being rather sceptical so far regarding the inclusion of new subjects on the agenda.

I would now like to make various observations regarding some of the **current work of the Commission.**

I support the observations made during the sixty-fourth session of the Commission, according to which it is important to maintain the **separation between works concerning universal competence and those relating to "*aut dedere aut judicare*".** These are different issues. In this respect, I renew the doubts expressed last year regarding the interest of maintaining the latter subject on the agenda, a point on which the Commission will be called upon to give its view during its next session because of the doubts raised by several of its members. However, the lessons learned from the judgment of the International Court of Justice in the case regarding the *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* should be deepened, but it does not seem to us that it is in the Commission's interest to focus its work on this subject.

France takes note of the inclusion by the Commission of the "**Provisional application of treaties**" to its programme of work, although coverage of this subject by the International Law Commission is not clear given that it is particularly dependent on the internal practices of States. It congratulates Mr Juan Manuel Gómez-Robledo, who has been appointed Special Rapporteur on the subject.

France also welcomes the appointment of Mr Georg Nolte as Special Rapporteur on "**Treaties over time**", as well as the revision of the framework of his future work. The restriction of the scope to "subsequent agreements and subsequent practice in relation to the interpretation of treaties" appears widely preferable in order to focus the effort of the study group on this aspect.

We can also be proud that the subject regarding "**Formation and evidence of customary international law**" has been included in the programme of work. This is useful work to provide practical observations needed particularly by national judges to recognize the rules of customary international law more easily, without having to create them. This work will allow them to recognize such a rule more easily and better understand its workings. In this respect, as with all themes, care should be taken regarding the trend of Commission work being used to argue in support of the existence of international rules in various internal and international forums while State positions have been expressed to the contrary regarding final adopted wordings, which demonstrates the lack of consensus on the subject. This is why we consider that the work on the customary process must be part of a process to codify existing rules and not the gradual development of customary formation of international law. France has taken note of the requests for information on the State practices regarding this subject and will respond soon to the questions which have been asked.

I now come to the subject of "**Protection of persons in the event of disasters**", about which I have more substantial observations to make.

To begin with, France intends to support the response provided by the Special Rapporteur, Mr Eduardo Valencia Ospina, to the question he was asked whether the duty of States to cooperate with the affected State includes a duty to provide assistance when requested by the affected State. It is important to bear in mind that humanitarian assistance

can only be effective when provided and received willingly. As I have already recalled, the voluntary nature of aid, respect for the consent of States and taking into account the needs of the affected persons are all vital to ensure the effectiveness of the aid provided. France would simply like to recall that this work was undertaken to identify and consolidate customary rules on the matter in order to determine the consequences they have for the mechanisms put in place to deliver such assistance to affected persons. It is not a matter of creating new obligations for States, but rather to identify those which exist and to participate in their transparency and effectiveness by providing a framework for the enhancement of cooperation between the actors involved in the event of a disaster.

France takes note of the draft articles adopted by the Drafting Committee which were discussed in this forum last year, and maintains at this stage the observations expressed previously. They should be discussed again when the project is submitted for second reading. France notes the provisional adoption by this Committee of five new draft articles, which the Commission has noted.

In this respect, the **draft Articles 12, 14 and 15**, concerning respectively "**Offers of assistance**", "**Facilitation of external assistance**", and "**Termination of external assistance**" are satisfactory. The same is true of the proposed wording of **Article 12**, in that it underlines both the choice of States to offer their assistance and the possibility for the affected State to accept or refuse it; of **Article 14 §2**, which allows the affected State to lay down in its internal legal order the possibility to waive normally applicable provisions; and **Article 15**, which states that once the affected State no longer wishes to enjoy external assistance or if the assisting State wishes to terminate this assistance, this assistance must terminate according to the modalities agreed between the parties, and particularly after consultations. It is in my view essential that, in order to ensure the effectiveness of humanitarian assistance, action can unfold in agreement with the affected State, in compliance with the provisions of the applicable national and international law and taking into account the needs of the affected persons. Taking into account the needs of the affected persons is central to assistance.

Today I would also like to make a few more specific observations regarding two of the draft articles which have been provisionally adopted this year by the Commission: draft **Articles 5 *bis* and 13**.

Firstly regarding the draft **Article 5 *bis*** on "***Forms of cooperation***", France fully shares the concern of the commission to highlight the importance of this cooperation, which guarantees effective action on the ground. We believe it is preferable to refer to an indicative list of forms which the cooperation might take, in order to allow actors to adapt to the circumstances and needs of the situation. On this point, we raise a difference, a source of ambiguity, between the English and French versions, in that the "resources" mentioned in the English version do not appear in such a generic form in the French version, while conversely, the word *"notamment"* appears in the French text, applying to the whole list, which has the merit of not giving the list exhaustiveness, does not appear in the English version.
France also shares the opinion that it may be preferable to insert the provisions of this draft article into the draft of Article 5, given their great connectedness. However, this point does not need to be resolved at this stage and it could be discussed during the next reading of the work.

Next, regarding the **draft of Article 13** on "***Conditions on the provision of external assistance***". As France has already indicated regarding certain other draft articles, such as Article 11, it is important in humanitarian assistance matters to respect both the internal law of the affected State and the applicable international law. Lastly, in order to improve the effectiveness of the assistance provided, it appears indispensible that the needs of the affected State be identified clearly in advance.

Lastly, I should like to make some remarks concerning the topic of "**Immunity of State officials from foreign criminal jurisdiction**". France expresses its keen interest in such a subject. It will respond in due course to the requests for observations mentioned in the report. I particularly welcome the appointment of Ms. Concepción Escobar Hernández as Special Rapporteur on the "**Immunity of State officials from foreign criminal jurisdiction**", but also thank Mr. Roman Kolodkin for the quality of his work. We can now be pleased with the active resumption of work on the subject. My delegation would like to recall the remarks made last year.

First, we consider that the most desirable approach would be to first identify and apply the rules of positive international law before determining the extent to which the ILC should seek to develop law.

Second, on the issue of exceptions to the immunity of State officials, we have already voiced our concerns relating to several affirmations expressed in the Commission on the custom value of some exceptions, taking into account the fact that the practice is not well established.

Third, the fundamental distinction between immunity *ratione personae* and immunity *ratione materiae* must be maintained and refined. Concerning immunity *ratione personae* in particular, and in the light of International Court of Justice judgments, the Commission should endeavour to identify the criteria for determining which officials, other than those comprising the "troika", would be liable to enjoy that type of immunity under the law as it stands.

Lastly, my delegation looks favourably on the Commission's inclusion of the question of the inviolability of State officials in the scope of the study, given the close links between inviolability and immunity.

"Expulsion of aliens"

Mr. Chairman,

On the topic "**Expulsion of aliens**", France thanks the Commission's members for their work, and especially the Special Rapporteur, Mr. Kamto, who has laboured unremittingly on this sensitive subject since 2004, identifying existing practice and also proposing adjustments in response to States' comments. The outcome of that contribution, adopted by the Commission on first reading, revolves around 32 draft articles with regard to which my delegation will produce detailed written observations within the given time limit. Even at this stage, however, I should already like to make various observations that may be presented in five points.

Firstly, I believe it is helpful to recall that the aim of this enterprise is not to create norms that would not reflect either States' practice or their intention. More broadly, I would recall that attention must be paid to the progressive development of law by the Commission. While its work is built on solid thinking of great quality, such an approach may nevertheless have far-reaching effects. Of course, there is no reason to draw back as soon as a few States demonstrate their opposition to certain drafts, but as long as no consensus manages to emerge

on fundamental issues, I believe that caution is needed with regard to what must be ultimately adopted in order not to go beyond what States can accept and apply.

On that point, I should like to express my delegation's satisfaction with regard to several of the draft articles submitted, insofar as they reflect the consideration given to doubts or observations issued by States and favourably address certain questions we have raised in previous years. This is the case in particular with **draft article 3** (the new wording clearly reflecting the fact that the *right to expel an alien* is a right of the State arising from its sovereignty in accordance with international law) and **draft article 10** (the current draft relating to the *prohibition of collective expulsion* taking account of the commentaries expressed and drawing inspiration from the position of the European Court of Human Rights). That is also the case for the provisions, now split, on the preservation of human dignity throughout the procedure (**draft article 14**) and those that relate to the detention of an alien subject to expulsion (**draft article 19**). We believe that the current wording of these draft articles accurately reflects the state of law on the subject. It is fortunate that the commentaries provided by States to that effect have been consistent with the Commission's thinking.

I come now to a crucial issue for my delegation, namely our disagreement with some of the draft articles as adopted by the Commission on first reading. We will expand our observations in writing, but it is important for us, now, to alert the Commission and the delegations present to the consequences that would arise from adoption of some of the draft articles submitted.

Firstly, the question of the ***definition of expulsion*** has to be expressly decided. The issue concerns several draft articles. We have already pointed out that extending the definition of "expulsion" to a State's conduct and not merely to the formal act is unclear and, above all, from our standpoint irrelevant, especially as the definition formulated in **draft article 2** is contradictory with **draft articles 4 and 26**. Thus, it is incompatible with the requirement that "an alien may be expelled only in pursuance of a decision reached in accordance with law" (**draft article 4**), and with the requirement that the alien "enjoys [...] the right to receive notice of the expulsion decision" (**draft article 26.1(a)**). If expulsion may consist in conduct unsupported by a specific formal act, as **draft article 2** currently provides, then the requirement of a legal and notified decision [articles 4 and 26] is incoherent. The

commentaries of the Commission itself concerning **draft article 4** expressly acknowledge this point. Thus, it is explained that "the requirement that an expulsion decision must be made has, first of all, the effect of prohibiting a State from engaging in conduct intended to compel an alien to leave its territory without notifying the alien of a formal decision in that regard" (cf. p. 23 of the 2012 report, A/67/10). Although we consider that the appearance of this new article and the goal it pursues are indeed desirable, we do not think that conduct should be included as a self-sufficient element in the definition of expulsion as stated in **draft article 2**. It is an issue that concerns the coherence of the whole set of draft articles.

Furthermore, my delegation cannot be satisfied with the current wording of **draft article 5**. We would point out that unlawful presence is also an authorised ground for expulsion, as clearly transpires from the draft articles as a whole. **Draft article 5**, on account of the grounds it sets out, may be read as excluding this particular instance. Likewise, **paragraph 3** of the draft article, requiring that the gravity of the facts be taken into account, would gain from the additional qualification that "the ground for expulsion, where it is founded on a ground of national security or public order, [...]", provided that such a requirement does not concern expulsions of aliens unlawfully present. Lastly, the mention of a "ground that is contrary to international law" in **paragraph 4** is too imprecise and too susceptible of extensive and indeterminate assertion to remain as it stands. Unless helpful refinements are made on this point, we consider it preferable to remove **paragraph 4** altogether.

I turn now to the difficulties raised by **draft article 26**. Apart from the issue already mentioned of the lack of coherence with the possible inclusion of conduct in the definition of expulsion, the overall construction of this draft article poses a problem. Its present structure does not allow for a difference to be made, among the procedural rights enjoyed by an alien, between those relating to the administrative phase and those relating to the jurisdictional phase of expulsion. The procedural rights relating to the two phases are not identical. The draft article cannot therefore conflate the procedural requirements relating to each one. Thus, we cannot support the recognition in **paragraph 1(c)** of a "right to be heard" without stipulating which phase it concerns. The confusion is maintained by the fact that the notion of "competent authority" makes it first appearance at this stage and, furthermore, is associated

initially with an indefinite article in (c) ("*an* authority"), then with a definite article in (e) and (f) ("*the* authority").

While we are satisfied with the new wording of **draft article 26, paragraph 3**, that is far from being the case with **paragraph 4**. This clause raises real difficulties. We can see no reason for its inclusion. Although the Commission admits that it has acted here in the name of the progressive development of law, out of a concern for realism, acknowledging that there is no convergence of practice in the matter, the clause seems above all to nullify most of the interest of the preceding paragraphs of the draft article. It is unacceptable that an alien unlawfully present in a territory for six months – a period set without criterion – should not enjoy any procedural rights. At the very least, the expelling State must respect certain procedural rights, whatever the alien's situation, insofar as the draft articles claim to apply as much to aliens lawfully present as to those unlawfully present.

We are also firmly opposed to **draft article 27** on account of its general nature. Suspensive effect cannot be allowed systematically to all appeals in the matter, whatever their nature. Such a right cannot apply to certain highly sensitive situations, especially where expulsion is justified on a ground of national security. The Commission justifies inclusion of this clause on the basis of the progressive development of law. It may be pointed out in this regard that the Special Rapporteur himself was reluctant to include such an effect attaching systematically to all appeals, in all defined cases, and that the recent appearance of the clause did not allow the States to discuss it, even though it is not consistent with their practice.

I should next like to mention a concern about coherence between **draft article 6** (on the protection of refugees) and **draft article 23.1** (prohibiting the expulsion of an alien to a State where his or her life or freedom would be threatened). It would be desirable to harmonise these two drafts in order to take account, in all cases, of the prohibition on expelling an alien to a State where his or her life would be threatened.

To conclude our misgivings, we regret the disappearance of the principle whereby a State cannot expel its own nationals. Explicitly asserted in former **draft article 5**, its disappearance undermines **draft article 9** (on deprivation of nationality). The prohibition of deprivation of nationality for the purpose of expulsion loses some of its scope if the expelling

State is no longer prohibited from expelling its nationals. The upshot is an incoherence that we believe needs to be corrected.

I would also inform you that my delegation intends to propose new wordings for certain articles in order to better reflect the state of international law and the concerns that should guide the framing of such a project. Our proposals will be submitted in writing and will seek to clarify certain provisions. At this point I would merely indicate that they will concern **draft articles 14, 19, 21** and **29**.

I shall conclude by stating that certain other draft articles raise questions, and in some cases give rise to a certain perplexity, leading us to seek clarification. I will expand on this point at a later date, but I can already mention the new wording of **draft article 25**, for example, which in our view does not sufficiently identify what should be understood by the term "transit State".

Mr. Chairman, as I have said, we will be submitting written observations that will expand on my oral remarks.

Thank you./.