



**STATEMENT BY YOLANDE DWARIKA, PRINCIPAL STATE LAW ADVISER
(INTERNATIONAL LAW) TO THE SIXTH COMMITTEE OF THE GENERAL
ASSEMBLY ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION
PART 1, NEW YORK, 2 NOVEMBER 2012**

Mr Chairman,

On behalf of the Government of the Republic of the South Africa, allow me to express our sincere gratitude to the International Law Commission for the work undertaken during its Sixty-fourth Session and in particular, the Chairman of the Session, Professor Caflisch for his leadership and for presenting to the Sixth Committee the Report of the Sixty-fourth Session of the ILC. We wish to extend our gratitude to the Special Rapporteurs for their contribution to the work of the ILC and allow us at this time to also warmly welcome the newest members of the Commission.

We are grateful for the opportunity to provide a few comments on Draft Articles on the Draft Articles on Expulsion of Aliens and Protection of Persons in the Event of Disasters. We shall provide more detailed comments in writing in due course.

Mr Chairman,

We will now address the topic of Expulsion of Aliens. We wish to thank the Special Rapporteur and Chairperson of the Drafting Committee for the significant progress made on the topic. South Africa views this topic as being of crucial importance due to the ever present phenomenon of migration.

South Africa engages in the treatment of foreign nationals in accordance with our Constitution which is clear that all persons on South African territory shall be treated in accordance with and respect for their human rights. The principal legislation governing the admission and expulsion of foreign nationals from South Africa, The Immigration Act of 2002 seeks to ensure that the deportation of foreign nationals is done in accordance with their human rights, which is consistent with the South African Constitutional Court judgement which held that human rights should be applied to everyone in the territory including non-citizens. The South African Constitutional Court has held that, "the very fabric of society and the values embodied in the Constitution could be demeaned if the freedom and dignity of [illegal] foreigners are violated in the process of preserving national integrity".

South Africa is of the view that an important balance needs to be struck between the protection of State sovereignty and ensuring that the protection and promotion of both legal and illegal foreigners human rights. We believe that the ILC has made significant progress toward ensuring that the rights of the individuals are central in the process of

deporting or expelling foreign nationals and we welcome the effort of the Commission in this regard.

Mr Chairman,

We are convinced that the format of draft articles is an appropriate outcome for this topic and we support the approach of the ILC in this regard however when looking at the text in its entirety we believe that more clarity could be given to the different or differentiated rights and obligations of legal foreign nationals on the one hand and illegal foreign nationals on the other hand. While for the most part the human rights and procedural rights afforded to both legal and illegal foreign nationals is and should be the same, we believe that more reflection could be given to the possible distinctions in the Articles between legal foreign nationals and illegal foreign nationals, in particular where it relates to additional rights afforded to these groups.

In relation to the title and in particular the use of terminology expulsion of "aliens"- we have some doubts, even at this late stage, in relation to the term "alien". The term alien was used during South Africa's former dispensation and connotations to the term "alien" has contributed to, at least in South Africa it no longer being an acceptable term domestically and consequently we have amended domestic legislation to now refer to migrants or foreign nationals.

Mr Chairman,

In attempting to achieve the appropriate balance between the right of a State to deport a foreign national and the rights of that foreign national, the question of whether a foreign national could determine or make a contribution to the State of destination is important. Article 22 makes provision that, the request of the alien in question shall be taken into consideration " where appropriate". We are of the view that that the views of the alien in question where it applies to State of destination, should be taken into consideration, as far as practicably possibly.

In instances, as provided for in Article 22(2), where it has not been possible to identify either a State of nationality or a State that has the obligation to receive the alien under international law, we acknowledge the very complex circumstances which could arise practically but question whether the foreign national in question could be expelled to any State where he has a right of entry, as this may conflict with other principles, and we would therefore encourage explicit provision being made for the consent of that third State as well as the conditions in Article 6(3) , 23 and 24 be express in relation to Article 22.

We also question the utility of making specific provision to diplomatic protection and responsibility of States in cases of unlawful expulsion, in the context of these Articles. While we believe that both the issue of diplomatic protection and the responsibility of States are important considerations, we are of the view that these issues are best dealt with within the context of the specific draft articles on those topics.

Mr Chairman,

Allow us to express our heartfelt condolences to the Government and people of the countries affected in the wake of Hurricane Sandy. It could not be a more pertinent moment to discuss the issue of Protection in the Event of Disasters. To date, South Africa has been an active participant in the area of protection of persons in the event of disasters on the national, regional, continental and international planes. Its domestic legislation on disaster management, the Disaster Management Act, 2002, (“the DMA”) provides a comprehensive framework for disaster management.

On the regional level, South Africa has ratified the Southern African Development Committee’s Protocol on Politics, Defence and Security (“the SADC Protocol”) that advocates for an increase in regional disaster management capacity and coordination of international assistance. On the continental level, the Republic is a signatory to the Protocol relating to the Establishment of the Peace and Security Council of the African Union which stresses the need for Member States to provide humanitarian assistance to States affected by major natural disasters on the Continent. The AU’s Convention on the Protection and Assistance of Internally Displaced Persons in Africa (known as “the Kampala Convention”), also contains various provisions in relation to the protection of persons in the event of natural disasters.

It is important to note that the SADC Protocol on Politics, Defence and Security, the Protocol relating to the Establishment of the Peace and Security Council of the African Union, the Kampala Convention as well as the Constitutive Act of the AU, all contain clauses or articles that emphasise and stress strict adherence to respect the right of a Member State’s sovereignty and non-interference in its internal affairs. This principle is an internationally recognised one and as such, it is suggested that the draft articles on protection of persons in the event of disasters be subject to a caveat similar to the one contained in Article 5(12) of the Kampala Convention which provides that no articles shall prejudice the principles of sovereignty and territorial integrity of States.

Mr Chairman,

Allow us to briefly comment on South Africa's some of the draft articles.

Firstly, on Draft Article 12, our view it must be clearly stated that the *right* of States and others to offer assistance must not interfere in the internal affairs of the affected State. States and other role-players offering assistance must acknowledge the affected State's sovereignty and its primary duty to direct, control, coordinate and supervise relief and assistance in the event of disasters. The draft article does not make provision for instances where the affected State enjoys the discretion to reject offers of assistance in, for example, in cases where it has the capacity and resources to address the situation itself, or where, it has already accepted assistance from another State/s or actor/s other than the one offering assistance.

Draft Article 13 makes provision for affected States to impose conditions on the provision of assistance. This ought to be expanded to ensure that only conditions that are reasonable, deemed necessary in the circumstances and in compliance with its domestic law provisions, and international law may be imposed, so as to ensure the primary goal of protection of its people.

Draft article 5 bis is useful in that it lists the various forms of assistance however no reference is made to any form of consultation between the States on the type of cooperation or assistance required. In our experience, this lack of consultation may result in ineffective or inadequate assistance being rendered. It also limits the discretion of the assisting States to determine the type of assistance it is capable of providing. Internationally, it is generally accepted that there is no legal obligation on a State to provide assistance.

South Africa is of the view that that an international legal framework for the protection of

persons in the event of disasters, in the format of draft articles will ensure consistent and uniform norms that govern the protection of persons in the event of disasters in the global arena.

In conclusion we welcome the efforts of the International Law Commission and the support of States in making the International Law Seminar possible. We attach importance to the International Law Seminar which enables young lawyers to familiarize themselves with the important work on the International Law Commission.

I thank you.