Document:-
A/CN.4/3044

Summary record of the 3044th meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
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46. Mr. KAMTO asked why draft guideline 4.3.4 was discussed before draft guidelines 4.3.1, 4.3.2 and 4.3.3 in the Special Rapporteur's fifteenth report (A/CN.4/624 and Add.1–2). In addition, he believed that the heading of section (*c*) above paragraph 74 [364] of the report should read "Case of objections intended to produce a 'super-maximum' effect" rather than "Case of objections with 'super-maximum' effect", since the effect in question was not automatic. The objecting State did have an aim, but whether that aim was achieved depended on the subsequent reaction of the other party. Like the Special Rapporteur, he doubted that objections with a "super-maximum" effect were consistent with the Vienna Convention.

47. Turning to the draft guidelines themselves, he said that he did not fully grasp the difference between guidelines 4.3.1 and 4.3.4. Draft guideline 4.3.1 was entitled "Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of the reservation", whereas the title of draft guideline 4.3.4 referred to the non-entry into force of the treaty. The only real difference in the content of the draft guidelines was that the last phrase of draft guideline 4.3.4 spelled out the proviso "unless a contrary intention has been definitely expressed by the objecting State or organization". He wondered whether the two provisions should not be combined, since they both referred to cases where the aim of the objection was to prevent the entry into force of a treaty.

48. In draft guideline 4.3 the final phrase "unless the reservation has been established with regard to that State or international organization" seemed to mean "unless the reservation has already been accepted by that State or international organization". If that was the intended meaning, the phrase was redundant, since draft guideline 2.8.12 read "Acceptance of a reservation cannot be withdrawn or amended". The final phrase in draft guideline 4.3 should therefore be reconsidered and possibly deleted.

49. Drawing attention to the French version of draft guideline 4.4.3, he suggested that the words "*ne porte pas atteinte au*" (does not affect) should be replaced with "*n'a aucun effet sur*" (has no effect on), because that wording more clearly conveyed the idea that the reservation did not modify the provisions of a treaty, but rather the application of those provisions—in the case at hand, a treaty provision reflecting a peremptory norm of general international law.

50. He was in favour of referring draft guidelines 4.3 to 4.4.3 to the Drafting Committee.

51. Mr. PELLET (Special Rapporteur) said that he had discussed draft guideline 4.3.4 first in the fifteenth report because that guideline dealt with objections having a maximum effect, and his position *vis-à-vis* such objections was easy to explain. It had thus seemed logical to begin with those objections and then to highlight how the effect of simple objections differed. Pedagogical considerations had thus taken precedence over Cartesian logic. In the Guide to Practice, the general rule should naturally precede the special rule.

The meeting rose at 11.40 a.m.

3044th MEETING

Friday, 14 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*)* (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRPERSON invited the Commission members to resume the debate on the agenda item on expulsion of aliens.

2. Mr. NOLTE said that, although the Special Rapporteur's sixth report was rich and stimulating, he had doubts about some aspects of it. Generally speaking, the Special Rapporteur's very broad perspective of the topic took in a wide range of sources, some of which were more than a century old, and referred to specific situations in many different places. Given the factual and legal complexity of the topic, the adoption of such an approach, albeit desirable from a strictly methodological viewpoint, would make it difficult, or almost impossible, to avoid being taxed with selectivity. For example, in paragraph 215, Germany was the first country to be mentioned in the section on "Examples of detention conditions that violate the rights of aliens who are being expelled". That paragraph did not describe detention conditions in Germany after 1945, but referred to a note from a minister at the end of the nineteenth century in which the minister had proposed the setting up of an internment camp for unauthorized immigrants. The Special Rapporteur then associated those "internment ideas" with the Nazi regime and suggested that the legal texts underpinning them had remained in force long after the establishment of the Federal Republic. Although he did not wish to comment in detail on that paragraph, he personally found it selective and emphasized that in national or international discourse it was essential to ensure that any references to past Nazi crimes and their linkage to other periods or countries were appropriate. The Special Rapporteur's references to other, mostly African or European, countries, were often based on sources whose reliability he could not assess. While the treatment of aliens certainly posed serious problems in some places, if the Commission's role was to evaluate evidence of such practices, it would have to conduct a thorough investigation—and if it embarked on such an investigation, it would also have to study the history of

* Resumed from the 3041st meeting.

immigration, policy grounds and many other issues. Since it would be difficult to cover all the factual, social and political aspects of the subject, the Commission should confine its approach to the safe ground of *lex lata* which, of course, included the human rights of aliens subject to expulsion. It should likewise pay due heed to the opinions expressed by States in the Sixth Committee.

3. More specifically, he agreed with other speakers that draft article A on the prohibition of disguised expulsion should not lead the Commission to consider a new ground of prohibited expulsion, but should prompt it to make an attempt at defining expulsion appropriately in the light of the issue which the Special Rapporteur had addressed in that context. He was sceptical whether the Commission would be able to deal successfully with the question of incentive measures to encourage aliens to leave a country, or to define under what circumstances the offering of such incentives inevitably became a component of illegal forcible expulsion. As far as draft article 8 (Prohibition of extradition disguised as expulsion) was concerned, he endorsed the opinions expressed by Mr. Gaja and Sir Michael, who had explained why the issue of extradition should not be dealt with there. Like some other speakers, he had serious doubts about draft article 9 (Grounds for expulsion). Mr. Petrič had rightly emphasized that the distinction between legal and illegal aliens was very important in that context and he had personally not understood the Special Rapporteur's explanation at the previous meeting of why that distinction would be important only with respect to the expulsion procedure. In his opinion, States might well have valid reasons to expel illegal migrants which had nothing to do with their personal conduct. Perhaps it was worth echoing what some members had already said, namely that the case law of the European Court of Justice relating to the free movement of persons did not offer a suitable basis for identifying universal rules, because it rested on a different premise. While he concurred with the Special Rapporteur that a State's right to expel must not be exercised in an arbitrary manner, the impression should not be created that grounds for expulsion should preferably be confined to public order and public security. In short, like other speakers, he was not in favour of sending draft article 9, in particular paragraphs 2 and 4 thereof, to the Drafting Committee.

4. As far as draft article B was concerned, he agreed with the general idea that it was vital to protect human rights, but paragraph 2 (*a*) should not address, or strictly regulate, the question of the place where an alien was detained pending expulsion. It was necessary to bear in mind the possibilities open to States and the different ways of ensuring that detention did not acquire, or did not seem to acquire, a punitive character. For that reason, the Commission should limit itself to the provisions of paragraph 2 (*b*) and the nature of the place of detention should be dealt with more flexibly in the commentary by giving examples. In conclusion, he suggested that draft article A be referred to the Drafting Committee on the understanding that the purpose of that draft article was to provide a definition and not to create a new prohibition of expulsion separate from the others. He was not in favour of sending draft articles 8 and 9 to the Drafting Committee. That was particularly true of draft article 9, paragraphs 2 and 4, about which he had serious concerns. He found much of the substance of draft article B acceptable in principle, apart from paragraph 2 (*a*) but, like Sir Michael, he wondered whether its wording should be as detailed as that proposed by the Special Rapporteur.

5. Mr. HMOUD said that the sources and material presented in the Special Rapporteur's sixth report on expulsion of aliens shed light on the various issues involved, but also revealed their complexity and the divergence of State practice in that field. With regard to disguised expulsion, as several speakers had already noted, the term "disguised" might not be sufficiently precise and it encompassed expulsion practices that did not necessarily have common elements. It would be more appropriate to call some of the examples given in the report "indirect" or "*de facto*" expulsion. It might therefore be wise to reconsider the term used in draft article A. Furthermore, while the non-renewal of a residence permit might be described as indirect expulsion, other examples, such as incentives to encourage aliens to leave the country, were not always a means of expulsion. Everything depended on the circumstances of each case and on the purpose of the measures taken. It was clear from reading paragraphs 39 to 41 and 43 of the sixth report that the basis in international law for banning disguised expulsion was, at best, weak. In draft article A, the Commission could therefore start from the premise that, if the purpose of an act by a State was to initiate an expulsion procedure, that act must be treated as expulsion for the purpose of the draft articles, irrespective of the form it took.

6. International law did provide a basis for holding that the practice of extradition disguised as expulsion was prohibited but, for the reasons stated earlier by other members, draft article 8, as it stood, was problematical. Greater stress should therefore be placed on the purpose of the act and that draft article should stipulate that a State must not circumvent its obligations under domestic and international law with regard to extradition by expelling a person in order to achieve that aim. The draft article should therefore require an examination of the purpose of the expulsion and whether it was being used as a means to carry out unlawful extradition. That purpose test was based on decisions delivered by national and international courts and on jurisprudence on the matter. Furthermore, the draft article would then fall within the scope of the topic under consideration, for it would prohibit a form of expulsion carried out for reasons other than those stated and it would not deal with, or regulate, extradition, which was obviously a different subject.

7. The report extensively covered State practice and national and international courts' rulings on the grounds for expulsion. It thus showed that some grounds were given greater recognition than others and that State practice varied significantly. Nevertheless, the draft articles should endeavour to regulate those grounds and to set limitations on and conditions for them. Both literature and precedent suggested that a distinction should be made between aliens legally present in the territory of the expelling State and illegal aliens. The illegal presence of an alien in the territory of the State was a sufficient ground for the State to expel that person, as long as the expulsion procedure provided the requisite guarantees of the individual's rights under national and international law.

The second issue was whether the Commission should enumerate the lawful grounds for expulsion in the draft article. The report made it plain that that would be a difficult exercise because views diverged on the recognized grounds for expulsion. While public order and public security were widely accepted grounds and might be highlighted in draft article 9, other grounds existed independently, overlapped with public security and public order, or had different terminology and content, depending on States' legislation. It would therefore be prudent to require that those grounds must not contradict international law. The conditions set out in the draft article were obviously drawn from jurisprudence concerning public order and public security, but it was uncertain whether they constituted a criterion for examining all the grounds for expulsion and whether they established defensible limitations on the grounds used by States. A State should nonetheless act in good faith, weigh the grounds for expulsion against the rights of the individual to be expelled and respect due process of law.

8. With regard to the conditions of pre-expulsion detention, the report clearly showed that the test which should be applied was that of whether the detention process was carried out in a humane manner which respected the dignity and human rights of the person concerned and was in accordance with minimum international standards of detention. If the Commission adopted a draft article stipulating that the person being expelled must be treated humanely and with respect for their dignity and their human rights, draft article B, as amended by the Special Rapporteur, was acceptable. It set out generally recognized standards for the protection of detainees and did not place an unreasonable or undue burden on the State in question. He recommended that the draft articles contained in the sixth report be referred to the Drafting Committee and hoped that his comments on them would be taken into consideration.

9. Mr. VÁZQUEZ-BERMÚDEZ said that the sixth report on the expulsion of aliens would enable the Commission to make substantial progress in its work on the subject, for it contained a thorough analysis of case law, national legislation, practice, jurisprudence and applicable international standards.

10. The Special Rapporteur revisited draft article 7 on the prohibition of collective expulsion, which had been provisionally approved by the Drafting Committee, in order to demonstrate that there was no incompatibility between paragraph 3 of that draft article and international humanitarian law. His analysis was correct. He then proposed draft article A on the prohibition of "disguised" expulsion, which he defined as "the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory". However, in the light of draft article 2, which had likewise been provisionally approved by the Drafting Committee, it had to be found that "disguised" expulsion was no more than expulsion pure and simple. It was, however, useful to explain in a separate article that any act or omission attributable to the State which was aimed at obliging an alien to leave the country was unlawful in the absence of a decision taken by the competent legal or administrative authority in compliance with the applicable procedural and substantive guarantees.

11. Draft article 8 referred to a situation where a person was subject to both an expulsion decision and an extradition request. The initial version proposed by the Special Rapporteur was unconvincing because an extradition request should not in itself prevent expulsion in conformity with the requisite conditions and international law. But other factors might need to be taken into account, for example whether expulsion would expose the person concerned to criminal proceedings in which his or her fundamental rights were likely to be breached. The amended version of draft article 8[100], entitled "Expulsion in connection with extradition", constituted a firmer basis for the Drafting Committee.

12. Draft article 9 on grounds for expulsion was a vital provision and the exhaustive analysis which had been provided by the Special Rapporteur when he presented his proposal was particularly welcome, since expulsion was a measure which had substantial consequences for the person concerned and it therefore had to rest on grounds which were not arbitrary or contrary to international law. In its resolution 30/81, adopted in the *Carlos Stetter* case, the Inter-American Commission on Human Rights emphasized that a State must provide sound reasons for any expulsion decision and not content itself with vague accusations that the person concerned was a "foreign undesirable" or that he had "violated the laws of the country", without stipulating which laws and in what context. While, as the Special Rapporteur had explained, it would certainly be difficult to draw up an exhaustive list of acceptable grounds for expulsion, an indicative list would be helpful.

13. Draft article B, as amended, was also appropriate, because it was essential to spell out the minimum standards for the treatment and detention of persons being expelled by which a State must abide.

14. In conclusion, he was of the opinion that the draft articles could be referred to the Drafting Committee for the incorporation of the comments made.

15. Mr. KAMTO (Special Rapporteur) emphasized that the debate should be based on the amended version of draft article 8, which took account of members' comments.

16. The CHAIRPERSON, speaking as a member of the Commission, said that the sixth report addressed three extremely important aspects of expulsion: prohibited practices, grounds for expulsion and detention conditions. The Special Rapporteur began with an examination of disguised expulsion. Relying on numerous examples, he drew attention to the fact that, although a State had the sovereign right

[100] The amended version of draft article 8 reads as follows:

"*Expulsion in connection with extradition*

"Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article]." (Session document ILC(LXII)/EA/CRP.2; distribution limited to the members of the Commission.)

to expel an alien from its territory, that right was not unlimited or unconfined under international law. Draft article A did not, however, adequately distinguish between what was permissible and what was prohibited by international law. The term "forcible departure" seemed to exclude the possibility that lawful expulsion might also be compulsory and accompanied by enforcement measures under certain circumstances. The term "actions and omissions of the State" might require complex interpretation. Furthermore, individual acts that provoked the involuntary departure of an alien should likewise be regarded as omissions on the part of the State, and the latter should offer appropriate remedies to redress such a situation, or intervene actively, depending on the circumstances. It would therefore be preferable to speak of acts "not in conformity with the relevant laws and legal procedure".

17. In the event of disguised extradition, the legal implications were more complex, as it involved the much wider field of mutual judicial assistance, which was not confined to extradition. Many other legitimate measures of judicial cooperation, such as the transfer of prisoners or the handing over of fugitives, did not require the consent of the person concerned. The new version of draft article 8, which made no reference to consent, was welcome. As in draft article A, it was, however, necessary to make it clear what acts were prohibited by international law when a State was trying to remove an alien from its territory as part of international cooperation in combating terrorism.

18. The Special Rapporteur had made a thorough examination of State practice and legislation with regard to grounds for expulsion, the subject of draft article 9. A State could rely on various grounds in order to expel an alien. The most frequently used ground was a threat to public order and public security, but some practices had become obsolete and others tended to be regional. In any event, a distinction should be drawn between an alien holding a residence permit and an alien who was unlawfully present in the territory of a State. Expulsion as a criminal penalty was lawful and many countries had recourse to it; the problem was that the procedure was not always accompanied by the requisite guarantees. The Special Rapporteur had rightly drawn attention to the fact that begging, vagrancy, debauchery and disorderliness should not constitute grounds for expulsion; if they were very serious in nature they might be qualified as a breach of public order. As for economic grounds, it was hard to see what professional restrictions on foreign nationals had to do with expulsion. A State could reserve the exercise of certain professions for its nationals and refuse to grant visas to foreign nationals who wished to work in such protected sectors, but if an alien who had found a job in that sector then had his or her lawful residence permit taken away, that should be regarded as disguised expulsion.

19. Draft article B on detention conditions was very important. The examples given amply demonstrated that it was necessary to remind States of their obligation to respect the dignity and human rights of detained aliens. The draft article seemed to refer mainly to cases of illegal immigration. That should be explained in the commentary.

20. In conclusion, she was of the opinion that the four draft articles could be sent to the Drafting Committee so that it might improve their wording. Speaking as the Chairperson, she announced that the Commission would pursue its debate on the expulsion of aliens during the second part of the session.

The meeting rose at 10.50 a.m.

3045th MEETING

Monday, 17 May 2010, at 3.10 p.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*)* (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR[101] (*concluded*)*

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the draft guidelines relating to the effects of an established reservation (4.2.1 to 4.2.7) contained in the fourteenth report of the Special Rapporteur.

2. Mr. PELLET (Special Rapporteur) said that while the draft guidelines had elicited some interesting comments, there had been no objections to their referral to the Drafting Committee. Nevertheless, it was important to decide what guidance the Drafting Committee should be given on the wording of draft guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty). As he had observed in paragraphs 246 to 248 of his fourteenth report, the practice of the Secretary-General of the United Nations and other depositaries seemed to conflict with article 20, paragraphs 4 (*c*) and 5, of the 1969 and 1986 Vienna Conventions. Further research done by Mr. Nolte had confirmed that the prevailing practice seemed to be for the immediate inclusion of a reserving State when the treaty required acceptance by a minimum number of States or international organizations for its entry into force.

3. Many Commission members had expressed their views on whether it was advisable to confirm that practice in the Guide to Practice or to abide by the clear but

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* Resumed from the 3043rd meeting.

[101] See footnote 9 above.