

Document:-
A/CN.4/3063

Summary record of the 3063rd meeting

Topic:
Expulsion of aliens

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provided to indigent persons under the legislation of most States. Lastly, as in the case of the right to legal aid, European Union law and most national legislation provided for the right to translation and interpretation, as shown by the examples cited in paragraph 391 [para. 115] of the report. That was clearly a principle of procedural law recognized by all nations and, unlike legal aid, on which national legislation sometimes differed or contained gaps, there was a general trend in the large majority of cases to recognize that right. If the concept of “the general principles of law recognized by civilized nations” set forth in Article 38 of the Statute of the International Court of Justice had meaning in international law, the right to translation and interpretation could be recognized in that context.

59. In the light of the analysis which he had briefly introduced, he proposed draft article C1 (Procedural rights of aliens facing expulsion), which read:

“1. An alien facing expulsion enjoys the following procedural rights:

“(a) the right to receive notice of the expulsion decision;

“(b) the right to challenge the expulsion [the expulsion decision];

“(c) the right to a hearing;

“(d) the right of access to effective remedies to challenge the expulsion decision without discrimination;

“(e) the right to consular protection;

“(f) the right to counsel;

“(g) the right to legal aid;

“(h) the right to interpretation and translation into a language he or she understands.

“2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.”

60. He had considered inserting the words “in particular” after “enjoys” in the *chapeau* of paragraph 1 to make it clear that the list of rights in question was not exhaustive and that other procedural rights which were not taken into account in the draft article could also be recognized. However, a consideration of the available international legal instruments had shown him that, in reality, only those rights which were enumerated were formally recognized at the current time or were likely to be recognized as part of progressive development. That said, he would have no objection if the Commission introduced the words “in particular” if it wished to specify that the list was not exhaustive.

The meeting rose at 12.35 p.m.

3063rd MEETING

Tuesday, 13 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, 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 to resume its consideration of the sixth report on expulsion of aliens and the addenda thereto (A/CN.4/625 and Add.1–2).

2. Mr. GAJA said that in this part, the Special Rapporteur viewed procedural guarantees as applying exclusively to regular or lawful aliens. The distinction between regular aliens and irregular or unlawful aliens was of undeniable importance when examining procedural issues. Many instruments were based on that distinction: article 13 of the International Covenant on Civil and Political Rights, for example, provided specific protection for aliens who were “lawfully” within the territory of the expelling State. To leave irregular aliens without any procedural protection, however, might jeopardize some of the substantive requirements that applied to them as well. Irregular aliens included millions of people with significant ties to an expelling State, which might be aware of and tolerate their presence without recognizing them as having lawful status until, because of a change in policy or for other reasons, it decided to target a given group or individual.

3. According to draft article A1, paragraph 2, a State “may also apply” to the expulsion of irregular aliens the procedural rules that protected regular aliens. It was obvious that a State was entitled to give irregular aliens all the protection it wished, but the question was whether it had any obligation to do so. One could argue that the expelling State was required to apply its law, a requirement based not necessarily on a kind of estoppel, as suggested in paragraph 338 [para. 62] of this second part of the report, but rather on the prohibition against the taking of arbitrary measures.

4. One could take the procedural protection of irregular aliens one step further and argue that, although expulsion was generally not characterized as a criminal sanction, it was a harsh measure to which one could apply by analogy the rule concerning the right to a fair trial in order to assert a right to a fair assessment of the conditions for expulsion.

5. Draft article C1 contained a long list of procedural guarantees for regular aliens, among which the right to be informed and the right to have the decision on expulsion reviewed by an independent body were essential. Another important right, which was not specified, was the right to have the execution of expulsion deferred until the review decision was handed down. That right, which might be subject to some conditions, was very important in practice, because most aliens would face great difficulties in returning once they had been sent back to a distant country. Article 13 of the International Covenant on Civil and Political Rights might provide an argument in favour of the existence of that right. It gave an alien the right to have his or her case reviewed and to be represented for that purpose before the competent authority unless there were “compelling reasons of national security”. The reference to national security could only be understood as relating to the presence of the alien on the expelling State’s territory; it followed that if the alien’s presence did not threaten national security, expulsion should be suspended until the review was completed.

6. State practice cited in support of the procedural guarantees listed in draft article C1 was not always relevant. The practice of States members of the European Union analysed in paragraphs 394 to 401 [paras. 118–125], in particular, was of little significance. European Union rules concerning aliens from third countries were certainly pertinent, but those that concerned the free movement of persons inside the European Union and gave rights to European Union nationals hardly seemed relevant when trying to establish a rule under international law. That remark applied for instance to the *Pecastaing* case, mentioned in paragraph 397 [para. 121], in which the Court of Justice of the European Communities had been confronted with a clash between the principle, always viewed in a positive light, of free movement of nationals of member States on the one hand, and a negative appraisal of the purpose of that movement in the case in hand.

7. In conclusion, he said that he had no objection to referring the three draft articles for further analysis to the Drafting Committee, provided that an additional text was drafted to give irregular aliens certain procedural guarantees.

The meeting rose at 10.15 a.m.

3064th MEETING

Wednesday, 14 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute)

[Agenda item 2]

1. The CHAIRPERSON said that the Commission was required to fill a casual vacancy. The election would take place, as was customary, in a private meeting.

The meeting was suspended at 10.05 a.m. and resumed at 10.15 a.m.

2. The CHAIRPERSON announced that the Commission had elected Mr. Huikang Huang (China) to fill the casual vacancy occasioned by the resignation of Ms. Xue.

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*)

3. The CHAIRPERSON invited the Commission to resume its consideration of the second part of the sixth report on expulsion of aliens (A/CN.4/625 and Add.1–2).

4. Mr. PERERA said that he wished to thank the Special Rapporteur for the second part to his sixth report on expulsion of aliens pertaining to expulsion procedures, which contained three draft articles, and for the useful introductory statement he had made the previous week. Before commenting on the draft articles, he had a few general observations on the approach that should be adopted in relation to expulsion procedures. Throughout the consideration of the topic, the Special Rapporteur had taken into account the fact that the conditions of entry, residence and expulsion of aliens were the sovereign prerogative of the State. The Commission’s task was to strike an appropriate balance between the State’s prerogatives in matters of expulsion and respect for due process *vis-à-vis* the alien subject to expulsion, so that minimum international standards were preserved in the exercise of such prerogatives.

5. Such considerations were particularly crucial with regard to expulsion procedures, a matter that was eminently within the domain of domestic legislation. In that regard, the Special Rapporteur very pertinently stated in paragraph 315 [39] of the addendum that

as the rules on the conditions of entry and residence of aliens are a matter of State sovereignty, it is legally and practically appropriate to leave the establishment of such rules up to the legislation of each State. With regard to the procedure for expelling aliens, we believe that the exercise of codification, possibly even the progressive development of international law, should be limited to the formulation of rules that are established indisputably in international law and international practice, or that derive from the clearly dominant trend of State practice.

6. Thus, the draft articles relating to expulsion procedures posed a critical challenge for the Commission, namely, on the one hand, to identify which general principles were “established indisputably” in international law and international practice and, on the other hand, to determine which rules, if any, were derived from “the clearly