Document:-
A/CN.4/3093

Summary record of the 3093rd meeting

Topic:
Expulsion of aliens

Extract from the Yearbook of the International Law Commission:-
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result should have been expected, whereas for others, the Panel of Experts had exceeded its mandate. The latter argument had never been accepted. The Panel of Experts had in essence asserted that, in order to fulfil its mandate, namely to give the Secretary-General an opinion on the allegations formulated with regard to the events in Sri Lanka, it had had no choice but to investigate and "find facts". One of the most important questions that arose concerned the circumstances in which the Secretary-General should, or should not, establish such panels of experts.

105. With regard to Gaza, the Secretary-General had set up a panel of experts on the flotilla incident for Gaza, which was expected to submit its report shortly.[180] The report would not fail to have an important impact on the situation in the Middle East, a circumstance that had caused considerable concern.

106. The Office of Legal Affairs shared Mr. Hmoud's sentiment with respect to the Sixth Committee. As everyone knew, however, the work of the Sixth Committee, its agenda and other matters were determined by the representatives of Member States on that body. The Codification Division could hardly influence that situation; only the concerted efforts of Member States could enable progress to be made.

107. With regard to the Libyan Arab Jamahiriya and Security Council resolution 1973 (2011), she said that, prior to its adoption, it had been difficult to provide humanitarian assistance to the country, but enormous diplomatic pressure had been exerted on the United Nations for it to do so. In that connection, the Office of Legal Affairs had clearly indicated that, without the consent of the Libyan authorities, it would not be possible to provide humanitarian assistance to the population. That opinion had been respected and understood. However, in adopting resolution 1973 (2011), the Security Council had decided to authorize a humanitarian intervention, after which the consent of the Member State had no longer been required.

108. The question of the representation of the Libyan Arab Jamahiriya in the United Nations was with the Credentials Committee, which was competent to take a decision. The Office of Legal Affairs had simply informed the Secretary-General that, the Libyan authorities having annulled the credentials of their representatives in the United Nations, there had been no other choice but to comply with that decision.

109. She fully respected the view of the Commission on maintaining two-part sessions. Regardless of what action was taken, it must not undermine the Commission's work. The issue was being given all due consideration.

The meeting rose at 1.20 p.m.

[180] See footnote 178 above.

3093rd MEETING

Thursday, 26 May 2011, at 10.05 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. McRae, Mr. Melescanu, 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.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR[181] (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV [chap. III],[182] section D, to chapter VIII [chap. VII] of the sixth report on expulsion of aliens, reproduced in the second addendum (A/CN.4/625/Add.2).

2. Mr. VASCIANNIE commended the Special Rapporteur on his generally careful and systematic use of sources, in particular older sources such as the 1892 rules of the Institute of International Law,[183] referred to in paragraphs 453 [para. 51] and 467 [para. 65] of the addendum, and a United States Supreme Court ruling from 18 January 1892, referred to in paragraph 465 [para. 63] (*Nishimura Ekiu v. United States*). Such an approach was useful in providing a context for understanding more recent sources, demonstrating consistency between older and more recent ones and delineating differences among the various sources.

3. Some thought should be given to whether draft articles D1 to J1 adequately reflected the practice and *opinio juris* of countries from different regions and of States especially affected by expulsion. For those draft articles that were identified as rules of customary law, it might be tempting to limit research to those countries or regions with up-to-date reports or heavy caseloads

[181] At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook … 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2).

[182] The numbers in brackets refer to the numbering used in the mimeographed version of the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), available from the Commission's website. The chapters, paragraphs and footnotes were renumbered for publication in *Yearbook … 2010*, vol. II (Part One).

[183] "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892", *Annuaire de l'Institut de droit international*, vol. XII (1892–1894), p. 218 (available from the Institute's website at www.idi-iil.org/).

involving actual expulsions. However, the Special Rapporteur had avoided that temptation. While it was true that European approaches featured prominently in the report, there were pertinent references to multilateral human rights instruments and sources that were not Eurocentric, such as the African Charter on Human and Peoples' Rights and the American Convention on Human Rights: "Pact of San José, Costa Rica". The Special Rapporteur also relied to some degree on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, to which there were few, if any, States parties from the European Union. Where the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the European Union approach and multilateral human rights instruments pointed in the same direction, State practice in that regard might arguably serve as a fair guide in identifying rules that could gain State acceptance.

4. The Special Rapporteur's approach of distinguishing scrupulously between rules that amounted to codification and others that reflected progressive development seemed to imply that the Commission had greater flexibility in formulating provisions *de lege ferenda* than in adjusting agreed rules of law. If that was the Special Rapporteur's perspective concerning draft articles D1 to J1, he accepted it. It was a controversial area of the law: any substantial departure from what States clearly regarded as prevailing law could undermine the long-term viability of the Commission's final product. The Commission should remain mindful of the need to ensure a balance between States' rights and sovereign prerogatives on the one hand, and the human rights and interests of individuals on the other.

5. Turning to draft article D1 on return to the receiving State of the alien being expelled, he said he supported paragraph 1 in principle, since the voluntary approach to return of aliens avoided several problems and was clearly the path of least confrontation. Perhaps more substance could be given to the recommendation that the expelling State "shall encourage" the alien, however. What that phrase actually involved was unclear. It might be better to recommend that the expelling State "should take measures" to promote voluntary returns, a more measurable standard cited in paragraph 404 [para. 2] of the report as used by the Committee of Ministers of the Council of Europe.[184]

6. Draft article D1, paragraph 2, should be retained, but he shared Mr. Niehaus's view that the express reference to air travel was at best superfluous. There was a case for including paragraph 3, even if it was not yet a binding rule of law. As a drafting matter, however, the phrase "unless there is reason to believe" might need to be adjusted in order to make it clear that the expelling State should have a reason to believe that the alien could abscond.

7. The Special Rapporteur's treatment of the subject of appeals against the expulsion decision was problematic, particularly with respect to the suspensive effect of an appeal. It was his understanding that the Special Rapporteur shared the view of the Institute of International Law, cited in paragraph 453 [para. 51], that "expulsion may be carried out provisionally, notwithstanding an appeal".[185] However, as the Special Rapporteur noted, the practice under article 13 of the European Convention on Human Rights supported the suspensive effect of appeals. A third approach was that adopted in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provided that persons facing expulsion had the right to seek a stay of the expulsion decision. In arguing against the suspensive approach, the Special Rapporteur relied ultimately on the policy argument that most States would find it hard to accept a general rule that allowed the action of the expelling State to be blocked, particularly in those cases where the expulsion decision had been issued on grounds of public order or national security. Perhaps so, but perhaps there could be a rule allowing suspensive effects where expulsion was on grounds other than public order or public security. The policy in support of the approach adopted in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was that individuals experienced upheaval in their lives when they were expelled and, if it was possible that the expulsion decision might be overturned, they should at least be given the right to request that the decision should be suspended. Accordingly, he suggested that a provision similar to the one contained in article 22, paragraph 4, of the Convention should be included.

8. Greater clarity was needed in the discussion of the right of appeal. Draft article C1, paragraph 1 (*b*),[186] gave a person facing expulsion the right to challenge the expulsion or the expulsion decision. In addition, paragraph 1 (*c*) of that draft article gave the person facing expulsion the right to a hearing. As he understood it, such a hearing amounted to an appeal, but paragraph 452 [para. 50] of the report stated that there was no legal provision that allowed national courts to review administrative decisions to expel certain aliens from the national territory, particularly when issues of national security and public order were in question. Furthermore, the first sentence of paragraph 461 [para. 59], indicating that there was no basis in international law for establishing any rule regarding remedies against an expulsion decision, seemed to suggest an approach that was inconsistent with the right to a hearing provided for in draft article C1. The matter might have to be clarified in the commentary to the relevant articles.

9. With regard to draft article E1, paragraph 1, Mr. Vasciannie said he agreed that the State of nationality should be the destination for the expellee but saw a need for a rule or guideline concerning the burden of proof and respect for due process in determining nationality. The position of Louis B. Sohn and Thomas Buergenthal,[187] cited by the Special Rapporteur in paragraph 495 [para. 93] of the report, was a good starting point for solving a potentially difficult practical issue.

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[184] Document CM(2005)40 final, of 9 May 2005. See also the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Comments on the Twenty Guidelines on Forced Return (925th meeting), document CM(2005)40-Add.

[185] "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892" (see footnote 183 above).

[186] *Yearbook … 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

[187] L. B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington, D.C., American Society of International Law, 1992, p. 47.

10. While he supported the text of draft article E1, paragraph 3, he shared the view that paragraph 2 should be simplified. The possible destinations for the expellee were options that might or might not be open, depending on the consent of the receiving State, a point made clearly by Mr. McRae at the previous meeting.

11. He supported draft article F1, as revised. His only suggestion would be to insert the words "international law" before the word "rules" in order to make it especially clear that it was the rules of international law and human rights that were to be applied and not the rules of the transit State.

12. He also supported draft article G1 and was in favour of deleting the square brackets in paragraph 2.

13. Draft articles H1, I1 and J1 were generally acceptable, although draft article H1, especially the phrase "mistaken grounds" in the English text, might need to be redrafted for clarity. The Special Rapporteur might also wish to consider whether draft article J1 should be "without prejudice" to any other right the expellee might have in his or her individual capacity. However, the latter point could be explained in the commentary.

14. Although the revised version of draft article 8[188] was acceptable in principle, the English text might need further revision.

15. Mr. MELESCANU commended the Special Rapporteur on his well-researched report which provided a comprehensive analysis of the literature, case law and State practice on the expulsion of aliens. He was in favour of referring to the Drafting Committee draft articles D1 to J1 proposed in the last chapters of the sixth report as well as draft article 8 as revised by the Special Rapporteur at the previous session.[189] Despite the reservations expressed by some of his colleagues, the Drafting Committee would, in his view, be able to find acceptable wording to reflect the relationship between expulsion and extradition, a good starting point perhaps being the concept of "disguised extradition".

16. The question of expulsion of aliens was not only topical but also highly complex, with unavoidable political implications. State practice varied significantly from one geographical area to another. The Commission's goal should be to elaborate draft articles meant for universal application, building on the relevant European Union practice through progressive development of the law.

17. He had no problems with the first two paragraphs of draft article D1, which were based on the Convention on International Civil Aviation, the Convention on offences and certain other acts committed on board aircraft and proposals made in the Parliamentary Assembly of the Council of Europe. Despite the doubts expressed by some members concerning the legal value of such instruments, he thought the Commission could not afford to ignore them in its codification work. Paragraph 3, representing the progressive development of international law, was an important statement of the need to protect the rights of persons being expelled. However, the provision under which the alien would be given no notice to prepare for his or her departure if "there is reason to believe that the alien in question could abscond during such a period" constituted a vague and totally subjective exception and seemed to negate the first part of the paragraph. He hoped that the Drafting Committee would be able to take up that matter.

18. Draft article E1 was one of the most important provisions from the point of view of respect for the fundamental rights and freedoms of the expelled person. Paragraph 1 set out the principle whereby an alien should be expelled to his or her State of nationality, which appeared to be the natural destination and, in any event, the most common one. The duty of the State of nationality to admit its nationals had been recognized in the 1928 Convention regarding the Status of Aliens and upheld by national courts. Paragraph 2 likewise seemed well grounded in treaty provisions and State practice. It cited a number of possibilities with respect to the State of destination, but it should perhaps be reformulated to give greater priority to any request regarding the State of destination made by the alien concerned. Paragraph 3 was well drafted and a logical extension of the first two paragraphs.

19. His only comment on draft article F1 was to endorse the Special Rapporteur's proposal to replace the word "also" with the Latin expression "*mutatis mutandis*".

20. In Part Three of the addendum, on the legal consequences of expulsion, the Special Rapporteur addressed the prohibition of expulsion for the purpose of confiscation. His analysis was primarily based on the seizure of property of Germans expelled from Czechoslovakia after the Second World War but also referred to the *Nottebohm* case, the expulsion of Asians by Uganda[190] and the expulsion of British nationals from Egypt.[191]

21. The Special Rapporteur next considered the protection of property of aliens, including those who had been lawfully expelled, referring to a wide range of relevant provisions contained in various international and regional instruments and national legislation. He then engaged in a thorough analysis of property rights and similar interests, giving numerous examples of case law. The conclusions of that analysis had been incorporated in draft article G1 on protecting the property of aliens facing expulsion. The only issue he wished to raise in that connection concerned the phrase "to the extent possible" in square brackets. He was in favour of deleting it, since it undermined the obligation of the expelling State to allow an alien to dispose freely of his or her property when facing expulsion.

22. With respect to the right of return in the case of unlawful expulsion, the Special Rapporteur referred to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the legislation of certain States. Romanian legislation provided for an appeals procedure before the national courts in the event of an expulsion order. If the judges of a higher

[188] *Yearbook … 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

[189] *Ibid.*

[190] See G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 212–216.

[191] *Ibid.*, p. 216.

court decided to revoke the order, the person concerned would remain in Romanian territory, irrespective of any decision reached as to his or her guilt. If the order was annulled or revoked after the expulsion had been carried out, the judge was competent to grant the most appropriate redress. In principle, Romanian legal practice was that in such situations, the alien concerned must be allowed entry, a practice based on the decision of the European Court of Human Rights in *Kordoghliazar v. Romania*. Although it was true that in one State, namely Malaysia, the right of return was prohibited by the law, he thought that there were sufficient arguments for introducing a provision such as that proposed by the Special Rapporteur in draft article H1. The text contained sufficient guarantees, although he proposed replacing the phrase "a threat to public order or public security" with "a threat to public order and national security", since that wording had already been accepted by the Drafting Committee. He also wished to insist on the need to include in the draft article provisions concerning the suspension of an expulsion order until the alien concerned had exhausted all remedies and the order became final. In the absence of such a provision, an alien's right of return would in many cases be seriously affected.

23. Mr. WISNUMURTI said that the second addendum to the sixth report on expulsion of aliens reflected thorough research of the issue and in-depth analysis of relevant treaty law, judicial decisions and national legislation. The seven new draft articles proposed (D1 to J1) were supported by convincing arguments.

24. With respect to procedural rules, the Special Rapporteur had focused his attention on the voluntary departure of an alien facing expulsion and on the forcible implementation of an expulsion decision. A balance had to be achieved between the State's right to expel an alien, on the one hand, and, on the other, the human rights and dignity, including during travel to the State of destination, of an alien subjected to forceful implementation of an expulsion decision. Draft article D1 had achieved that objective. Paragraphs 1 and 2 had already been codified, and paragraph 3 was part of the progressive development of international law.

25. Referring to paragraphs 434 [para. 32] and 451 [para. 49] of the report, he said that the Special Rapporteur had rightly underscored the fact that treaty law, international jurisprudence, national law and literature all recognized an alien's right to have the legality of an expulsion order reviewed by a competent independent body, which meant that that right had now acquired the force of customary law.

26. In chapter V [chap. IV], section B, concerning the impact of judicial review on expulsion decisions, the Special Rapporteur had correctly concluded that, as the suspensive effect of a remedy against an expulsion decision was not widely accepted and the formulation of a general rule on the subject would hamper the exercise of the expelling State's sovereign right of expulsion, no such general rule should be formulated. In addition, no article should be drafted on remedies against an expulsion decision, because it would be devoid of any basis in international law, and, in general, the issue fell within the scope of States' widely varying domestic legislation.

27. Concerning chapter VI [chap. V], section E, he said that since a State had no obligation to allow an alien who was about to be expelled to enter its territory, an expelling State clearly had to ensure that a State of destination other than the alien's State of nationality agreed to the expellee's entry into its territory. As indicated in paragraph 518 [para. 116] of the report, that principle was founded on a rule of international law under which each State had the sovereign power to set the conditions of entry to and exit from its territory. Draft article E1 reflected that position. Paragraph 1 of the draft article was consistent with the rule that an alien subject to expulsion should normally be expelled to his or her State of nationality; paragraph 2 set out the exception to that rule; and paragraph 3 reflected the principle that a third State had no duty to admit a person facing expulsion. Since paragraphs 1 and 3 were closely linked, it would be logical to place the latter immediately after the former.

28. Draft article F1, as revised by the Special Rapporteur, was a necessary and logical extension of other provisions safeguarding the human rights of expellees. He supported Mr. Vasciannie's proposal to insert "international law" before the word "rules".

29. Draft article G1, paragraph 1, stipulated that the expulsion of an alien for the purpose of confiscating his or her assets was prohibited. Although the obligation to protect the assets of aliens subject to expulsion was grounded in international law, as demonstrated in paragraph 552 [para. 150] of the report, it was doubtful whether international law prohibited expulsion in cases where it was presumed that the expulsion decision was driven by a desire to confiscate the alien's assets. That presumption was mentioned all too briefly in paragraph 532 [para. 130]. Since it was difficult to assess an expelling State's underlying motives objectively, paragraph 1 of the draft article should perhaps not be retained. After all, paragraph 2 clearly established the expelling State's obligation to protect the assets of the alien subject to expulsion. If the Commission were to maintain paragraph 1, with the necessary drafting improvements, the order of the two paragraphs should be reversed and the bracketed phrase "to the extent possible" deleted from paragraph 1. If, however, the Commission considered that such a qualifying phrase should be retained, in order to reflect certain eventualities, then it should be better worded.

30. He agreed with the Special Rapporteur that if an expulsion decision was annulled, the expelled alien should be able to benefit from the right to return to the expelling State. He was consequently in favour of draft article H1, which provided for that right. The text was balanced in that it expressly stated that an expelled alien had the right to return to the expelling State on the basis of the annulment of the expulsion decision, while at the same time making it clear that the expelling State was under no obligation to readmit the expelled alien to its territory if his or her return constituted a threat to public order or to public safety. As noted in paragraph 562 [para. 160] of the report, not all grounds for annulment of an expulsion decision conferred the right of re-entry: the annulment must be based on substantive and justifiable reasons, not on procedural errors. The need for substantive grounds for an annulment must therefore be reflected in the draft article's wording.

31. He welcomed draft articles I1 on the responsibility of States in cases of unlawful expulsion and J1 on diplomatic protection since, as the Special Rapporteur pointed out in paragraph 608 [para. 206] of the report, the general regime of State responsibility for internationally wrongful acts was applicable to the unlawful expulsion of aliens. In such cases, however, the State of nationality could exercise diplomatic protection, as the ICJ had recently found in the case concerning *Ahmadou Sadio Diallo*.

32. In conclusion, he said that he was in favour of referring to the Drafting Committee the draft articles proposed in the second addendum to the sixth report.

33. Mr. SABOIA said that he agreed with most of the proposals made in the clearly reasoned second addendum to the sixth report. In chapter IV [chap. III], section D, the Special Rapporteur mentioned several cases where the human rights of persons being expelled had been seriously violated. While he approved of the general thrust of draft article D1, he thought it would be advisable to include in paragraph 2 of that text an express reference to respect for human rights and human dignity. He concurred with Mr. Niehaus that paragraph 1 should be reworded to ensure that it did not appear to induce the expelling State to exercise undue pressure to depart voluntarily on the person being expelled.

34. Like Mr. McRae, he thought that if, as stated in paragraph 451 [para. 49] of the report, the right of appeal of a person subject to expulsion had the force of customary law, then a draft article should be proposed in order to reflect that finding.

35. As far as the suspensive effect of appeals was concerned, it was plain that an appeal was useless if it had no such effect. He therefore endorsed Mr. Candioti's suggestion that a draft article should be formulated to make provision for the suspensive effect of an appeal, except in cases of serious threats to public security.

36. His only comment with regard to chapter VI [chap. V] on relations between the expelling State and the transit and receiving States was that it was vital to respect the right of any person to return to his or her State of nationality. In the event of expulsion, priority should go to returning a person to the State of nationality, apart from in cases where expulsion to that State entailed a risk of torture. He agreed with draft articles E1 and F1, as revised by the Special Rapporteur.

37. The reasoning behind chapter VII [chap. VI] was interesting. He supported draft article G1, provided that the phrase "to the extent possible" was deleted, as he endorsed Mr. Niehaus's comment that this expression would weaken the right to the protection of property. If property had been destroyed, looted or lost, the other forms of reparation provided for in the articles on State responsibility would apply.

38. He was in favour of draft articles H1, I1 and J1 and the revised version of draft article 8,[192] and he recommended that they all be sent to the Drafting Committee.

[192] See footnote 188 above.

39. Mr. FOMBA, clarifying his position with regard to the revised version of draft article 8, said that the justification for that provision should not be called into question, because the situation it was intended to cover was not merely hypothetical. The revised version was an improvement that should make it relatively easy to achieve consensus. Its wording seemed *prima facie* to be appropriate because, when expulsion was carried out in connection with extradition, certain conditions of expulsion had to be met.

40. As far as the legal basis for those conditions was concerned, the point at issue was whether it would be better to simply say "in accordance with international law" or to append to that phrase the words "or with the provisions of the present draft article". The wording "in accordance with international law" might be ambiguous in the specific context of expulsion. In principle, he had no firm preference; either formulation could be used but, in order to facilitate interpretation, it might be best to include the expression "or with the provisions of the present draft article". He would not oppose any consensus reached on other wording, however.

41. In any case, revised draft article 8 should be sent to the Drafting Committee.

42. Mr. DUGARD said that he was not convinced of the wisdom of Mr. McRae's suggestion that, instead of attempting to formulate articles, the Commission should be satisfied with developing guidelines. The natural course of the Commission's work led it to prepare draft articles on a particular topic. Although the Sixth Committee might decide not to convert those draft articles into a treaty, or might delay that process, as it had done with the articles on State responsibility for internationally wrongful acts[193] and on diplomatic protection,[194] it would probably be very helpful if the Commission did endeavour to prepare draft articles on the expulsion of aliens, currently a subject of great importance.

43. Concerning draft article D1, he said that he agreed that aliens should be encouraged to leave voluntarily. Consideration should be given to Mr. Vasciannie's suggestion that the State should "take measures" to encourage voluntary departure. The Commission should also address the cost of transportation—in the commentary, if not in the draft article itself—because in many instances aliens were unable to leave voluntarily for financial reasons. In paragraph 2, a reference to human rights should be included after the words "air travel", in order to emphasize the importance of the human rights dimension.

44. Like many other members of the Commission, he had reservations about the Special Rapporteur's position on an alien's right of appeal against an expulsion decision. The Special Rapporteur apparently believed that the rule set forth in draft article C1[195] covered such

[193] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[194] *Yearbook … 2006*, vol. II (Part Two), p. 24, para. 49.

[195] See footnote 186 above.

appeals adequately. Although he acknowledged that European law did recognize the right of appeal, his conclusion in paragraph 461 [para. 59] of the report was based largely on the fact that there was no agreement as to the suspensive effect of such an appeal. He personally agreed with Mr. Vasciannie that the Commission should be guided, not by the 1892 resolution of the International Law Institute,[196] but by more recent instruments such as the European Convention on Human Rights and, possibly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In any event, the Special Rapporteur should give further consideration to the subject and perhaps formulate a provision dealing with the right of appeal and the possible suspensive effect of such an appeal against an expulsion order, since more clarity on the subject was certainly needed.

45. While he agreed completely with draft article E1, paragraph 1, he was troubled by paragraph 2, because it suggested that if the alien's State of nationality had not been identified, or if he or she was likely to be tortured there, the alien could be expelled to a number of other States. Although the Special Rapporteur's philosophy was apparently to ensure that a person was expelled to somewhere where he or she would be well treated and safe, it was uncertain that the draft article would necessarily achieve that aim: in the other States to which the person might be expelled, he or she might still be subjected to torture or inhuman and degrading treatment. It was therefore necessary to make it clear that the qualification relating to torture or inhuman and degrading treatment applied to those States as well.

46. Revised draft article 8 on the prohibition of expulsion in connection with extradition needed more careful examination. It might well be that if the Commission paid sufficient attention to the question of torture or inhuman and degrading treatment in draft article E1, paragraph 2, the bracketed phrase "or with the provisions of the present draft article" could be retained in draft article 8.

47. Draft article H1 provided that where a person had been expelled on mistaken grounds, he or she had a right of return, "save where his or her return constitutes a threat to public order or public security". That phrase needed further drafting work to ensure that the State concerned could not refuse to allow the person to return on purely arbitrary grounds.

48. He agreed with Mr. McRae that draft article J1 was unnecessary. Draft article 19 of the draft articles on diplomatic protection recommended that the State of nationality be under an obligation to grant diplomatic protection in certain circumstances, and as draft article J1 obviously disregarded that recommendation, it might be best to delete it.

49. He proposed that draft articles D1 to J1 contained in the second addendum to the sixth report should be referred to the Drafting Committee.

[196] "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892" (see footnote 183 above).

50. Mr. CANDIOTI, referring to draft article G1 on protecting the property of aliens facing expulsion, said that Mr. Wisnumurti was quite right in contending that paragraph 2 established adequate protection of property and other pecuniary interests of aliens subject to expulsion, even if the bracketed text was deleted. He could support paragraph 1 of the draft article, although it could perhaps go into greater detail. It would, however, be better placed in the section of the text dealing with the prohibition of certain types of expulsion such as collective expulsion and disguised expulsion.

The meeting rose at 11.15 a.m.

3094th MEETING

Friday, 27 May 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Later: Mr. Bernd H. NIEHAUS (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, 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.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

Sixth report of the Special Rapporteur[197] (*concluded*)

Ms. Jacobsson (Vice-Chairperson) took the Chair.

1. The CHAIRPERSON invited the Commission to resume its consideration of the second addendum to the sixth report by the Special Rapporteur on the expulsion of aliens.

2. Ms. ESCOBAR HERNÁNDEZ said that draft article D1 (Return to the receiving State of the alien being expelled) was well balanced, as she saw it. She endorsed the idea of placing emphasis, in paragraph 1, on voluntary compliance with the expulsion decision, in order to ensure the greatest possible respect for the wishes of the alien affected. However, she shared the view of previous speakers that the use of the word "encourage" before the phrase "to comply with the expulsion decision

[197] At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook … 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2).