

Document:-
A/CN.4/3173

Summary record of the 3173rd meeting

Topic:
Organization of the work of the session

Extract from the Yearbook of the International Law Commission:-
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of certain conduct to the process of treaty interpretation. Draft conclusion 5, paragraph 1, therefore referred to “any conduct ... which is attributable to a party to a treaty under international law”, without limiting such conduct to that of the organs of the State. In other words, it was intended to cover cases in which conduct that was not performed by a State organ within the meaning of article 4 of the articles on State responsibility⁵⁹ was nevertheless attributable, under international law, to a party to the treaty. By referring to “any” conduct in the application of the treaty which was attributable to a party to the treaty, paragraph 1 did not mean to suggest that such conduct necessarily constituted subsequent practice for the purpose of treaty interpretation. The use of the phrase “may consist” was intended to reflect that point, which would be also addressed in the commentary. That clarification was important in relation to the conduct of lower State organs which might not reflect, or might even contradict, the position of the organs of the State that were competent under internal law to express the position of the State in international relations with respect to a particular matter. Indeed, after an extensive discussion in the Drafting Committee as to whether that provision should specifically refer to the question of whether, or under which circumstances or conditions, the conduct of a lower organ of the State could be attributed to the State for purposes of treaty interpretation, the Committee had decided that the various complex issues and scenarios that could be envisaged would be better addressed either at a later stage of the work, or in the commentary, where concrete examples and appropriate references to relevant case law could be included.

15. Draft conclusion 5, paragraph 2, comprised two sentences. The first indicated that practice by non-State actors did not in itself constitute subsequent practice within the meaning of the 1969 Vienna Convention. The phrase “[o]ther conduct” had been introduced to clarify the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the second sentence of paragraph 2 recognized that conduct not covered by paragraph 1 might be relevant when assessing the subsequent practice of parties to a treaty. In paragraph 2, the phrase “assessing the subsequent practice” should be understood to encompass both the identification of subsequent practice and the determination of its legal significance. Appropriate explanations regarding the manner in which conduct that was not attributable to a party to the treaty might be relevant in assessing subsequent practice of the parties, as well as the possible interactions between such conduct and subsequent practice, would be provided in the commentary, together with examples and relevant case law.

16. The reference to “social practice” had been deleted because several members of the Commission had expressed concerns regarding the meaning and relevance of that term. The commentary would provide some indications as to the manner in which “social practice” had been relied upon, particularly in the case law of the European Court of Human Rights, in connection with treaty interpretation.

17. The CHAIRPERSON invited the Commission to adopt the text of draft conclusions 1 to 5, as provisionally adopted by the Drafting Committee on first reading and contained in document A/CN.4/L.813.

Draft conclusions 1 to 5 were adopted with some minor editorial corrections.

The meeting rose at 10.50 a.m.

3173rd MEETING

Tuesday, 4 June 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON drew the Commission members' attention to the programme of work for the first two weeks of the second part of the Commission's session, which would be held from Monday, 8 July to Friday, 9 August 2013.

2. On the Monday afternoon of the first week, Mr. Valencia-Ospina, the Special Rapporteur on the topic “Protection of persons in the event of disasters”, would present his sixth report (A/CN.4/662). The debate on that topic would take place on the mornings of Tuesday to Thursday. The Special Rapporteur would sum up the debate on Friday morning. On Tuesday afternoon, informal consultations would be held on the topic “Protection of the environment in relation to armed conflicts”. On Wednesday morning, the Commission would receive the visit of representatives of the Council of Europe under the agenda item entitled “Cooperation with other bodies”. The Study Group on the most-favoured-nation clause would meet on Wednesday afternoon and the Working Group on the long-term programme of work would meet on Thursday afternoon.

3. During the second week, the Drafting Committee on protection of persons in the event of disasters would meet in the afternoons, from Monday to Wednesday. During the plenary meetings on Tuesday to Thursday morning, the Commission would consider the first report of Sir Michael Wood, Special Rapporteur on the topic “Formation and evidence of customary international law” (A/CN.4/663). The Gilberto Amado Memorial Lecture would take place on Wednesday afternoon. On Thursday morning, the

⁵⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40. The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

* Resumed from the 3171st meeting.

Commission would receive the visit of the President of the International Court of Justice. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet on Thursday afternoon.

4. In accordance with the Commission's practice, the programme of work would be applied with the requisite flexibility, and any changes would be announced in advance in a plenary meeting.

The programme of work for the first two weeks of the second part of the session was adopted.

The meeting rose at 10.15 a.m.

3174th MEETING

Friday, 7 June 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*concluded*)* (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted nine meetings to its consideration of the six draft articles proposed by the Special Rapporteur and referred to it by the Commission. The Committee had provisionally adopted three draft articles, contained in document A/CN.4/L.814, which read as follows:

PART I. INTRODUCTION

Draft article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials** from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

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* Resumed from the 3170th meeting.

** The use of the term "officials" will be subject to further consideration.

PART II. IMMUNITY *RATIONE PERSONAE*

Draft article 3. Persons enjoying immunity ratione personae

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Draft article 4. Scope of immunity ratione personae

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs prior to or during their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

2. The two paragraphs of draft article 1 reflected the substance of draft articles 1 and 2, as originally proposed by the Special Rapporteur, but contained a number of modifications. In draft article 1, paragraph 1, the phrase "Without prejudice to the provisions of draft article 2" had been deleted in view of the comments made in plenary. The qualifier "certain" in reference to "State officials" had also been deleted: the question of whether certain officials or all State officials were covered would be dealt with in specific draft articles elaborating the substantive content of immunity *ratione personae* and immunity *ratione materiae*. Furthermore, it had been agreed that the use of the term "officials" would be subject to further discussions on the precise meaning of the term and how best to convey that meaning in all the official languages of the United Nations.

3. There had been a detailed discussion on whether the draft articles should apply to the immunity of State officials "from the exercise of criminal jurisdiction by another State", as proposed by the Special Rapporteur, or more simply, "from the criminal jurisdiction of another State". Some members had considered that the words "in the exercise of" were crucial, and there was some concern that their deletion might give the impression that the scope of immunity was being broadened, while others felt that the phrase might appear to limit the scope of the draft articles. Some members had considered that those aspects could be dealt with in subsequent draft articles, as they involved substantive considerations that went beyond defining the scope of the draft articles. In the end, the phrase had been deleted, and it was understood that subsequent draft articles would address the substantive and procedural aspects of the topic.

4. A long road had been travelled before the Drafting Committee had settled on the current formulation of draft article 1, paragraph 2. It had ultimately been decided to incorporate draft article 2, using a succinct formulation. The Special Rapporteur had prepared a revised text, drawing upon the language of the original draft article 2, which listed the immunities not included in the scope of the draft articles. There had been broad agreement that this included immunities established in the context of diplomatic and consular relations and special missions