

Document:-
A/CN.4/3158

Summary record of the 3158th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

Section J, as amended, was adopted.

The meeting rose at 4.15 p.m.

3158th MEETING

Friday, 3 August 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (concluded)

Chapter VIII. Formation and evidence of customary international law (A/CN.4/L.806)

1. The Chairperson invited the Commission to consider chapter VIII of its draft report as contained in document A/CN.4/L.806.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS NOTE

Paragraphs 5 to 13

Paragraphs 5 to 13 were adopted.

2. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 14 to 17

Paragraphs 14 to 17 were adopted.

(b) *Scope of the topic and use of terms*

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

2. Mr. NOLTE proposed to delete the word “essential” from the last sentence, as the sentence was more coherent without it.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

(c) *Methodology*

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

3. The CHAIRPERSON said that the word “the” should be inserted before “need” in the first sentence.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

(d) *Points to be covered*

Paragraphs 29 to 33

Paragraphs 29 to 33 were adopted.

Paragraph 34

4. Mr. FORTEAU proposed to delete the phrase “in which custom was purportedly formed” at the end of the last sentence, given that it added nothing and was potentially confusing.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

(e) *Final outcome of the Commission’s work on the topic*

Paragraph 36

Paragraph 36 was adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 37 to 40

Paragraphs 37 to 40 were adopted.

Paragraph 41

5. Mr. NOLTE said that the second sentence seemed to suggest that the Special Rapporteur was drawing a distinction between formation and evidence, whereas it should be made clear that that was not the case. He found the expression “information that could be used as the raw material for that purpose” to be somewhat obscure and proposed that it should be replaced with “information that could explain the formation of customary international law”.

6. Sir Michael WOOD (Special Rapporteur) proposed instead to delete the phrase “as the raw material”, since that would make it clear that the topic covered both the method for identifying a rule of customary law and the types of information that were used to do so.

Paragraph 41, as amended by the Special Rapporteur, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

7. The CHAIRPERSON proposed that in the sixth sentence, the phrase “the Commission’s eventual practical outcome” should be replaced with “the practical outcome of the Commission’s work”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 47

Paragraphs 45 to 47 were adopted.

Section B, as amended, was adopted.

Chapter VIII, as amended, was adopted.

Chapter X. Treaties over time (A/CN.4/L.808)

8. The CHAIRPERSON invited the Commission to consider chapter X of its draft report as contained in document A/CN.4/L.808.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

1. DISCUSSIONS OF THE STUDY GROUP

Paragraph 8

Paragraph 8 was adopted.

(a) Completion of the consideration of the second report by the Chairperson of the Study Group

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

(b) Consideration of the third report by the Chairperson of the Study Group

Paragraph 11

9. Mr. FORTEAU, referring to the first sentence, said that, in the French text, the words “*en marge*” should be replaced with “*en dehors*”. In the second sentence, the

word “*traité*”, before “*au sens du paragraphe 3 a*”, should be replaced with “*accord*”.

10. Mr. NOLTE (Special Rapporteur) said that he endorsed both corrections to the French text, which did not affect the English text.

Paragraph 11 was adopted with those amendments to the French text.

Paragraph 12

11. Mr. FORTEAU said that, in the French text, the terms “*irrecevabilité*” in the third sentence and “*irrévocables*” in the fourth sentence were incorrect translations of the English (“*determinacy*” and “*determinate*”, respectively): better translations should be found.

12. Mr. NOLTE (Special Rapporteur) said that he endorsed Mr. Forteau’s comments regarding both terms.

Paragraph 12 was adopted, subject to linguistic improvements in the French text.

Paragraph 13

Paragraph 13 was adopted.

(c) Modalities of the Commission’s work on the topic

Paragraphs 14 to 18

Paragraphs 14 to 18 were adopted.

2. PRELIMINARY CONCLUSIONS BY THE CHAIRPERSON OF THE STUDY GROUP, REFORMULATED IN THE LIGHT OF THE DISCUSSIONS IN THE STUDY GROUP

Paragraph 19

Paragraph 19 was adopted.

Section B, as amended, was adopted.

Chapter X, as amended, was adopted.

Chapter XII. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.810)

13. The CHAIRPERSON invited the Commission to consider chapter XII of its draft report as contained in document A/CN.4/L.810.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Provisional application of treaties

Paragraph 2

Paragraph 2 was adopted.

Section B was adopted.

C. Formation and evidence of customary international law

Paragraph 3

*Paragraph 3 was adopted.**Section C was adopted.***D. Treaties over time**

Paragraph 4

*Paragraph 4 was adopted.**Section D was adopted.***E. Programme, procedures and working methods of the Commission and its documentation**

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

1. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 7

Paragraph 7 was adopted.

2. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL

Paragraph 8

14. Ms. ESCOBARHERNÁNDEZ (Special Rapporteur) said that she had submitted to the Secretariat a number of amendments to the Spanish text of the Commission's work programme, subparagraph (c) of which related to the topic of immunity of State officials from foreign criminal jurisdiction. The amendments had not been incorporated, however. Under the heading "2013", the words "*del proyecto de artículos*", after "*Examen y aprobación*", should be replaced with "*de los proyectos de artículos*". The same change should be made in all subsequent uses of the identical formulation. The only exception related to the text that appeared under the heading "2016", where the current text should be retained, as it referred to the complete set of draft articles. She further proposed that all instances of the expression "possible" should be deleted.

Paragraph 8 was adopted, subject to those editorial amendments.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 66/102 OF 9 DECEMBER 2011 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

15. Mr. NOLTE proposed that the reference in paragraph 12 to "the high-level meeting" should specify which high-level meeting was meant.

Paragraph 12 was adopted, subject to its completion by the Secretariat.

Paragraph 13

16. Following an exchange of views about an aspect of English usage in which the CHAIRPERSON, Sir Michael WOOD and Mr. McRAE took part, Mr. NOLTE suggested that the words "be informed ... by" should be replaced with the phrase "take into account".

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

4. HONORARIA

Paragraph 15

Paragraph 15 was adopted.

5. DOCUMENTATION AND PUBLICATIONS

Paragraphs 16 to 21

Paragraphs 16 to 21 were adopted.

6. TRUST FUND ON THE BACKLOG RELATING TO THE YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

Paragraph 22

Paragraph 22 was adopted.

7. ASSISTANCE OF THE CODIFICATION DIVISION

Paragraph 23

Paragraph 23 was adopted.

8. WEBSITES

Paragraph 24

*Paragraph 24 was adopted.**Section E, as amended, was adopted.***F. Date and place of the sixty-fifth session of the Commission**

Paragraph 25

Paragraph 25 was adopted.

17. Mr. CANDIOTI proposed to insert a new paragraph between sections F and G that would be entitled "Tribute to the Secretary of the Commission". The paragraph would read as follows:

"At its 3158th meeting, on 3 August 2012, the Commission paid tribute to Mr. Václav Mikulka, who has acted with high distinction as Secretary of the Commission since 1999, and who will retire after the present session; expressed its gratitude for the outstanding contribution made by him to the work of the Commission and to the codification and progressive development of international law; acknowledged with appreciation his professionalism, dedication to public service and commitment to international law; and extended its very best wishes to him in his future endeavours."

*It was so decided.**Section F, as amended, was adopted.*

G. Cooperation with other bodies

Paragraphs 26 to 31

18. The CHAIRPERSON, replying to a question from Mr. PETER on what criteria had been used to determine the order in which the organizations mentioned in section G were listed, said that United Nations organizations had been listed first, regional bodies second, and the International Committee of the Red Cross, which was neither a United Nations body nor a regional body, last.

Paragraphs 26 to 31 were adopted.

Section G was adopted.

19. The CHAIRPERSON suggested that a new section should be added after section G. It would read as follows:

“H. Representation at the sixty-seventh session of the General Assembly

“The Commission decided that it should be represented at the sixty-seventh session of the General Assembly by its Chairperson, Mr. Lucius Caffisch.

“At its 3158th meeting, on 3 August 2012, the Commission requested Mr. Maurice Kamto, Special Rapporteur on the topic ‘Expulsion of aliens’, to attend the sixty-seventh session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989.

“The Commission wishes that the former Special Rapporteur on the topic ‘Reservations to treaties’, Mr. Alain Pellet, be invited by the Sixth Committee of the General Assembly in order to attend the debate in the Sixth Committee on the chapter of the 2011 report³⁷⁷ of the Commission that relates to this topic.”

It was so decided.

Section H was adopted.

Chapter XII, as amended, was adopted.

Chapter II. Summary of the work of the Commission at its sixty-fourth session (A/CN.4/L.800)

20. The CHAIRPERSON invited the Commission to consider chapter II of its draft report as contained in document A/CN.4/L.800.

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

21. Mr. FORTEAU said that, in the French version, at the end of the penultimate sentence, the words “*en marge*” should be replaced with “*en dehors*”. The English version would remain unchanged.

With that amendment to the French text, paragraph 9 was adopted.

Paragraphs 10 to 15

Paragraphs 10 to 15 were adopted.

Chapter II, as amended, was adopted.

Chapter III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.801)

22. The CHAIRPERSON invited the Commission to consider chapter III of its draft report as contained in document A/CN.4/L.801.

B. Formation and evidence of customary international law

Paragraph 1

23. Mr. McRAE drew attention to the phrase “such practice might include” and said that in order to elicit a more focused response from States, it would be better to be more specific. The phrase should therefore be replaced with the words “in respect of”.

24. Sir Michael WOOD (Special Rapporteur) supported that proposal.

Paragraph 1, as amended, was adopted.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 2

25. Mr. FORTEAU said that, in the French version of the final sentence of subparagraph (b), the phrase “*tout acte de pratique étatique*” should be replaced with “*tout élément de pratique étatique*”. The English version would remain unchanged.

It was so decided.

26. Mr. MURPHY expressed concern over the fact that, as currently worded, paragraph 2 gave the impression that the Commission was asking States for information for the purpose of creating a legal regime. The Special Rapporteur had agreed, however, that in the first instance, the intention was simply to look at the laws that currently existed. The Commission should thus ask States about their own national practice and request information on how their national courts addressed the issue of immunity when exercising criminal jurisdiction over State officials. To that end, he proposed the following new wording for paragraph 2: “The Commission requests States to provide information on their national law or practice on immunity of foreign State officials from criminal jurisdiction, in particular on: (a) whether there is a distinction between immunity *ratione personae* and immunity *ratione materiae*; and (b) if immunity *ratione personae* exists, which persons are covered by such immunity?”

27. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, while she understood the concern expressed by Mr. Murphy, she in turn was concerned that his proposal questioned the very existence of a distinction between immunity *ratione personae* and immunity *ratione materiae*, a distinction that had been widely accepted, both in the Commission and in the Sixth Committee. Posing the question in the terms suggested by Mr. Murphy would

³⁷⁷ Yearbook ... 2011, vol. II (Part Three).

amount to making the Commission start its work all over again. In her view, it was not the right time to question whether there was a distinction between immunity *ratione personae* and immunity *ratione materiae*.

28. A related issue—on which information had been included in her preliminary report—was that, given that there was a distinction between immunity *ratione personae* and immunity *ratione materiae*, it should have consequences for the regime applicable to the type of immunity. The primary aim of the questions in paragraph 2 was to obtain information, from the discussion within the Sixth Committee, that could be used when drafting the next report on the topic. In order to solve the problem raised by Mr. Murphy, she would accept the deletion in subparagraph (a) of the word “legal” before both occurrences of the word “regime”. The final sentence in subparagraph (b) could be replaced with the following new sentence: “Furthermore, the Commission requests States to provide information on their national legislation or practice as regards immunity of State officials from foreign criminal jurisdiction.”

29. Mr. MURPHY said that he remained concerned: the wording suggested by the Special Rapporteur still seemed to invite States to indicate whether they thought a regime for immunity should be established. He understood the Special Rapporteur’s concern about his own proposal, but its purpose was not to question the distinction between immunity *ratione personae* and immunity *ratione materiae*; rather, it was simply meant to ask States whether such a distinction existed in their national practice and, if so, what were the consequences.

30. Sir Michael WOOD said that he shared the concerns of both Mr. Murphy and the Special Rapporteur. In order to address them, he proposed that the chapeau of the paragraph should read as follows: “With respect to the topic ‘Immunity of State officials from foreign criminal jurisdiction’, the Commission requests States to provide information on their national legislation or practice as regards the following questions.” The two particular questions on which the Commission wanted information would be set out in subparagraphs (a) and (b). It was important to ask States for information, rather than ask them for their views as to what the law should be, which was really the task of the Commission.

31. Mr. NOLTE said that he agreed with Sir Michael and shared Mr. Murphy’s concerns. It was not for the Commission to ask States a legal policy question about its future work on the topic. It should instead elaborate draft articles or proposals and elicit reactions from States. He supported the proposals made in order to orient the questions to actual State practice and national legislation. He suggested that, in subparagraph (a), the first word “Should” should be changed to “Does”. The second sentence of subparagraph (a) should read as follows: “In such a case, which aspects are treated differently?”

32. The CHAIRPERSON said that he was in favour of the proposal by Sir Michael.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that if the majority of Commission

members were not in favour of her proposals, she would not press for their adoption. She wished to note, however, that the role of Special Rapporteur was to drive the work of the Commission forward. With regard to the point made by Mr. Nolte, she had no intention of saying to the Sixth Committee that they should tell the Commission what to do; the Commission was, or should be, a body of independent experts and would decide on its legislative policy objectives. However, the Commission was a subsidiary body of the General Assembly and should respond to the needs of States, as expressed by States themselves.

34. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to adopt the following text for paragraph 2, incorporating the amendments proposed by Mr. Murphy, Sir Michael and Mr. Nolte:

“With respect to the topic ‘Immunity of State officials from foreign criminal jurisdiction’, the Commission requests States to provide information on their national law and practice on the following questions:

“(a) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?

“(b) What criteria are used in identifying the persons covered by immunity *ratione personae*?”

It was so decided.

Chapter III, as amended, was adopted.

Chapter I. Organization of the session (A/CN.4/L.799 and Corr.1)

35. The CHAIRPERSON invited the Commission to consider chapter I of its draft report as contained in document A/CN.4/L.799 and Corr.1.

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

36. Mr. VALENCIA-OSPINA drew attention to the fact that Mr. Vasciannie had resigned as a member of the Commission during the course of the current session. He wondered how that fact would be recorded.

37. The CHAIRPERSON explained that his resignation would be recorded in a footnote.

Paragraph 2 was adopted, subject to that editorial adjustment.

B. Officers and the Enlarged Bureau

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

C. Drafting Committee

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

D. Working groups and study groups

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

E. Secretariat

Paragraph 11

Paragraph 11 was adopted.

F. Agenda

Paragraph 12

38. The CHAIRPERSON drew attention to a corrected version of paragraph 12 contained in document A/CN.4/L.799/Corr.1.

Paragraph 12 was adopted.

Chapter I, as amended, was adopted.

The report of the International Law Commission, as a whole, as amended, was adopted.

Chairperson's concluding remarks

39. The CHAIRPERSON thanked all the members of the Commission for their contribution to the work of the sixty-fourth session and for the very fruitful debates on the various topics on the agenda. He was grateful

for the efficient assistance of the Secretariat. On behalf of the Commission, he also thanked the members of conference services, interpreters and précis-writers for their cooperation and assistance.

40. As it was the last session that Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, would attend as Secretary of the Commission, he wished to thank him for all that he had done for the Commission. The Commission had been very lucky to be able to call on the services of such an eminent researcher and practitioner of international law. Between 1992 and 1998, Mr. Mikulka had been a member of the Commission and Special Rapporteur on nationality of natural persons in relation to the succession of States.³⁷⁸ From 1999 to 2006 and from 2009 to 2012, he had been the Secretary of the Commission. His familiarity with its traditions and deep knowledge of its topics had made him an invaluable guide of its members and chairpersons.

Closure of the session

41. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-fourth session of the International Law Commission closed.

The meeting rose at 12.05 p.m.

³⁷⁸ The text of the draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48. The General Assembly took note of the articles on nationality of natural persons in relation to the succession of States, presented by the Commission in the form of a declaration, the text of which was annexed to its resolution 55/153 of 12 December 2000.