

Document:-
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Summary record of the 3309th meeting

Topic:
Identification of customary international law

Extract from the Yearbook of the International Law Commission:-
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(<http://legal.un.org/ilc/>)*

Charter of the United Nations,²⁴⁹ which were not always very precisely defined. That did not exclude, of course, that general principles should be formulated prudently so as not to produce unintended effects or overburden a law with expectations that it could not fulfil.

84. Concerning draft guideline 4, he was impressed by the analysis provided in the third report, but was not sure that it supported the broad formulation of the proposed draft guideline. After all, an environmental impact assessment made sense only for projects whose potential impact on the atmosphere as a whole could be measured. In that respect, he tended to agree with Mr. Forteau that draft guideline 4 was formulated too broadly.

85. With regard to draft guideline 5, he had no objection in principle to its underlying idea. While it might be true, in a formal sense, that the atmosphere was technically not finite, as Mr. Murphy had stated, he thought that it was finite in terms of its essential function for humankind and all States, as noted by Mr. Peter. That point could be clarified in the commentaries. On the other hand, he doubted that the expression “emerging principle under customary international law” was appropriate to describe the draft guideline. Like Mr. Tladi, he thought that the Commission should distinguish as clearly as possible between *lex lata* and *lex ferenda*, and not try to establish a legal definition of an “emerging principle”. It would therefore seem preferable to replace the expression “is required under international law” in subparagraph 2 with a more cautious formulation, like the one used in subparagraph 1 of draft guideline 5.

86. Lastly, like other members, he was not sure that the Commission should explicitly address geoengineering in a guideline, and he supported the comments made by Mr. Murphy, who had cautioned against what the draft guideline implicitly permitted. Should the Commission wish to retain draft guideline 7, he would propose the deletion of the term “geo-engineering”, since the essence of the text would remain. In substance, however, he thought that the scope of the draft guideline should be restricted to “activities intended to modify atmospheric conditions” that “could affect the atmosphere as a whole”. That could be the “threshold” that Sir Michael had identified as lacking.

87. To conclude, he supported the referral of draft guidelines 3, 4, 5 and 7, and draft preambular paragraph 4, to the Drafting Committee, subject to the comments that he had made about their substance and to their compatibility with the 2013 understanding.

88. Mr. KAMTO said he was concerned that the issue of the conditions under which the Commission had agreed to study the topic in 2013 would arise every time that the Commission examined a report by the Special Rapporteur, who thus found himself somewhat trapped. He considered that the best solution to the issue was the one advocated by Mr. Forteau in his statement at the current meeting, which he fully endorsed. Indeed, it was in terms of their compliance with international law, and not with the 2013 understanding, that one should assess the legal validity of

the draft guidelines proposed by the Special Rapporteur. If the draft guidelines were grounded in international law and sufficiently established in practice or, if necessary, by international custom, there was no reason to reject them and not to refer them to the Drafting Committee.

89. The CHAIRPERSON, speaking as a member of the Commission, said that the 2013 understanding had been adopted by consensus by all the members of the Commission, even though the relevant *travaux préparatoires* had been carried out by only a group of them. In addition, he had always considered that the adoption of the understanding had simply been a way for the Commission to define the scope of the topic, in the same way as it defined the scope of other topics.

90. Mr. HMOUD said that, according to the 2013 understanding, the topic should not deal with the precautionary principle, but it seemed to him to be debatable whether one could disregard the principle, which underpinned three or four of the proposed draft guidelines, when addressing the protection of the atmosphere.

91. Mr. KITTICHAISAREE said that, to end the debate over the 2013 understanding, the Commission could perhaps give the Special Rapporteur the benefit of the doubt and believe that the draft guidelines that he proposed complied with the understanding, with the proviso that the Drafting Committee should change them as appropriate if it considered that they did not.

The meeting rose at 1 p.m.

3309th MEETING

Thursday, 2 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

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

Identification of customary international law (concluded)* (A/CN.4/689, Part II, sect. B, A/CN.4/691, A/CN.4/695 and Add.1, A/CN.4/872)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee

²⁴⁹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

* Resumed from the 3303rd meeting.

on the topic of the identification of customary law (A/CN.4/L.872), said that the report should be read together with the interim report²⁵⁰ that the Chairperson of the Drafting Committee had presented at the Commission's meeting on 7 August 2014²⁵¹ and the report²⁵² that the Chairperson of the Drafting Committee had presented at the Commission's meeting on 29 July 2015,²⁵³ which described the work of the Drafting Committee on the topic at the sixty-sixth and sixty-seventh sessions of the Commission, respectively. It would be recalled that the Drafting Committee had provisionally adopted a set of 16 draft conclusions in 2014 and 2015, of which the Commission had taken note at its previous session.²⁵⁴ The current report reproduced the text of all the draft conclusions that had been provisionally adopted by the Drafting Committee.

2. At the present session, the Drafting Committee had devoted one meeting, on 27 May 2016, to its consideration of the draft conclusions on the topic. It had considered the amendments to the draft conclusions which had been proposed by the Special Rapporteur in his fourth report (A/CN.4/695), in light of the suggestions and reformulations made by the Special Rapporteur. In order to respond to suggestions made, or concerns raised, in the plenary debate, the Special Rapporteur had suggested that the Drafting Committee confine itself to the changes proposed in the fourth report that were uncontroversial, since a number of other proposals might need more thorough discussion and would be best addressed at the second reading stage.

3. The only amendments made by the Drafting Committee at the current session to the draft conclusions provisionally adopted by the Committee in 2014 and 2015 concerned draft conclusion 3, paragraph 2, as well as the title of that draft conclusion. Draft conclusion 3, paragraph 2, now read: "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element." The text of draft conclusion 3, paragraph 2, as provisionally adopted in 2014, had referred to "Each element", while the text now adopted by the Drafting Committee referred to "Each of the two constituent elements". The change was of a purely editorial character and did not affect the substance of that provision. The purpose of referring to "[e]ach of the two constituent elements" was to clarify the link between draft conclusions 2 and 3. The same amendment had been made in the title of draft conclusion 3, which accordingly read: "Assessment of evidence for the two constituent elements".

4. He sincerely hoped that the Commission would be in a position to adopt the draft conclusions on first reading, as set out in document A/CN.4/L.872.

²⁵⁰ The interim report of the Drafting Committee is available in the Analytical Guide to the Work of the International Law Commission, from: https://legal.un.org/ilc/guide/1_13.shtml.

²⁵¹ See *Yearbook ... 2014*, vol. I, 3242nd meeting, pp. 217–218, paras. 36–47.

²⁵² Document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.

²⁵³ See *Yearbook ... 2015*, vol. I, 3280th meeting, pp. 277–284, paras. 1–51.

²⁵⁴ See *ibid.*, vol. II (Part Two), pp. 27–28, para. 60.

Draft conclusions 1 to 16

5. The CHAIRPERSON said that he took it that the Commission wished to adopt the draft conclusions on the identification of customary international law, as a whole, as contained in document A/CN.4/L.872

It was so decided.

Draft conclusions 1 to 16 were adopted.

6. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries for inclusion in the report of the Commission on the work of its sixty-eighth session.

The meeting rose at 10.20 a.m.

3310th MEETING

Friday, 3 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (concluded)* (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Drafting Committee on "Protection of persons in the event of disasters" (A/CN.4/L.871).

2. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that he wished to pay tribute to the Special Rapporteur, whose constructive approach, flexibility and patience had once again greatly facilitated the work of the Drafting Committee, and to thank the other members of the Drafting Committee, as well as the secretariat and the interpreters, for their valuable assistance.

3. The Drafting Committee had held 10 meetings from 11 to 24 May 2016. It had considered the revised draft articles, prepared by the Special Rapporteur, taking into account the comments and suggestions made in plenary.

* Resumed from the 3296th meeting.