Document:-
A/CN.4/2847

Summary record of the 2847th meeting

Topic:
Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-
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whether to exercise diplomatic protection. Negotiations at the diplomatic level were the next step, and judicial remedies were available after the negotiations had been completed. However, an initial *démarche* did not in itself constitute the exercise of diplomatic protection; if the Government took the matter no further, diplomatic protection was not exercised.

37. Mr. PELLET said he took it that Mr. Economides was saying that a step taken before the exhaustion of domestic remedies did not constitute diplomatic protection, but he himself continued to believe that a *démarche* taken after that point, even informally, fell within the ambit of the topic.

38. He took issue with Mr. Brownlie for suggesting that the speakers in the debate were out of touch with reality: in fact, they had a wealth of practical experience between them. Moreover, everyone was well aware that the word "individuals" was a convenient way to refer to private individuals in general. He had himself always preferred to avoid taking examples from the field of human rights, in the belief that examples from the field of investment—the origin of diplomatic protection, after all—were more illuminating.

39. Mr. DUGARD (Special Rapporteur) said he suspected that many of the points raised in the debate would be raised again in the coming year by States and academics. He was grateful to members of the Commission for their suggestions, particularly on how to deal with the question of the payment of compensation to the injured individual. It had been a great pleasure to hear Mr. Pellet speak on behalf of the "*droits-de-l'hommiste*" school, to which he normally disclaimed any allegiance.

The meeting rose at 11.30 a.m.

2847th MEETING

Wednesday, 1 June 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Cooperation with other bodies

[Agenda item 11]

STATEMENT OF THE OBSERVER FROM THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON invited Ms. Villalta Vizcarra, Observer from the Inter-American Juridical Committee, to describe the Committee's activities.

2. Ms. VILLALTA VIZCARRA (Observer from the Inter-American Juridical Committee) retraced the history of the Inter-American Juridical Committee since its establishment in Rio de Janeiro in 1906, described its principal objectives and operating procedures and then elaborated on the topics on its agenda. The first was legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions. While States acknowledged that international decisions had a binding character, most did not possess the necessary internal mechanisms for implementing them. At the request of the General Assembly of the OAS, the Committee had drawn up a questionnaire which it had transmitted to the legal advisers of the foreign ministries of OAS member States, *inter alia*, on the following subjects: international tribunals or other comparable international bodies to whose jurisdiction the State was subject under treaties or other international instruments; constitutional and legislative provisions and administrative practices that mandated, permitted or facilitated the application of the decisions concerned; decisions, sentences and other international rulings handed down in disputes to which the State was a party, accompanied, where possible, by a summary of the main provisions; the form in which such decisions were applied, including legal texts adopted exclusively for that purpose (such as laws, decrees and administrative decisions); and, where appropriate, legal grounds for non-application. Responses had already been gathered from 11 member States and the Committee would submit its report on the matter in 2006.

3. Under the second topic on the agenda, legal aspects of inter-American security, the Committee was considering the rules applicable to OAS action in the area of international peace and security, taking into account, as the General Assembly of OAS had requested in its resolution AG/RES 2042 (XXXIV-O/04), the Declaration on Security in the Americas adopted at the Special Conference on Security held in Mexico City in October 2003 and the multidimensional nature (political, economic, social and cultural) of the issue. The Committee had concluded that the Declaration on Security in the Americas was a tangible expression of the political will of the States members of OAS to give impetus to the progressive development of international law.

4. The third topic, one of interest also to the Commission, related to the inter-American specialized conferences on private international law, which were devoted to the progressive development of international law. For the Seventh Conference the Committee, which contributed to the preparatory work for the conferences, had considered the question of the applicable law and competency of international jurisdiction in respect of non-contractual civil liability. It had concluded that favourable conditions existed for elaborating a model law or convention on non-contractual civil liability with respect to traffic accidents, based on the San Luis Protocol relating to civil responsibility resulting from traffic accidents between the States Parties of MERCOSUR, which applied to all States members of MERCOSUR, and with respect to products and transboundary environmental damage. The Seventh Inter-American Specialized Conference would also consider the issue of electronic commerce.

5. The fourth topic was legal aspects of the interdependence between democracy and economic and social development, which had been studied in the light of article 1 of the Inter-American Democratic Charter, which stated in part that "Democracy is essential for the social, political, and economic development of the peoples of the Americas." The Committee was considering the action to be taken in the event of a breach of the legal constitutional order but also measures required for economic and social development, taking account, *inter alia*, of the recommendations of the High-Level Meeting on Poverty, Equity, and Social Inclusion held from 8–10 October 2003 at Isla de Margarita (Bolivarian Republic of Venezuela), contained in the Declaration of Margarita; the Monterrey Consensus;[1] the Declarations and Plans of Action issued at the Summits of the Americas; and the objectives contained in the United Nations Millennium Declaration.[2]

6. In the context of a fifth topic, entitled "Joint efforts of the Americas in the struggle against corruption and impunity", and at the request of the General Assembly of OAS, the Inter-American Juridical Committee had conducted a study on the legal effects of giving safe haven in regional or extraregional countries to public officials and persons accused of crimes of corruption after having exercised political power, and on cases in which appealing to the principle of dual nationality could be considered a fraud or abuse of the law, corruption being viewed as an aspect of transnational organized crime. OAS had likewise requested the Committee to take account, at its annual session, of the following texts: the Inter-American Convention against Corruption, especially concerning legal aid and cooperation; the United Nations Convention against Corruption, in particular concerning international cooperation and the principle that corruption was an extraditable offence; the General Assembly resolution on efforts to combat corruption (AG/RES. 2022 (XXXIV-O/04)); international jurisprudence on "effective nationality or genuine link", especially the rulings of the ICJ in the *Nottebohm* case and the sentence of the Permanent Court of Arbitration at The Hague in the *Canevaro* case. The study was also based on the draft articles on diplomatic protection elaborated by the Commission, particularly draft articles 1 and 7,[3] which stipulated that a State had the right to determine the nationality of persons and, in the case of multiple nationality, to take into account the predominant nationality, a term also used by the Italian–United States Conciliation Commission in the *Mergé Claim*, which might be considered to be the point of departure for the development of existing customary rules.

7. Forum shopping or fraud occurred when a person who had dual nationality exploited his or her option to be governed by legislation that was more favourable than that which normally would apply. In determining the effective nationality of individuals in such cases, account was taken of the nationality that they had always used in their social, family and professional relations, as had been done in the *Nottebohm* case and the *Canevaro* claim. International law had been progressively developed in that area, so that when a claimant State demanded the extradition of a person accused of corruption who was a national of a requested State, it was the predominant nationality that was taken into account—in other words, the nationality that the person had had when he or she had committed the acts in question. The Inter-American Juridical Committee had concluded that principles on dominant nationality and the need for an effective link to determine nationality had been established within the framework of diplomatic protection as set forth by international law. It considered, however, that certain conclusions derived from diplomatic protection could be applied in the sphere of extradition, even if they did not necessarily reflect the current state of international law. Thus in the event of a conflict of nationality, if the nationality of the claimant State was the dominant or predominant nationality or represented a genuine and effective link, extradition must not be denied solely on the grounds of nationality. When nationality was acquired or invoked for the purpose of fraud or abuse of rights, extradition could not be refused solely on the grounds of nationality. The legal effect of those conclusions would be to prevent: impunity where crimes of corruption were involved; the undermining of the general objectives of international criminal justice and judicial cooperation among States; any attempt to subvert the primacy of law in international relations; and any harm to the interests of States requesting extradition. The Committee considered that those conclusions could make a contribution to the progressive development of international law and promote the achievement of objectives and the strengthening of international justice.

8. The Committee's agenda also included preparations for the commemoration of its centennial and the organization for that purpose of five meetings under the theme of "The Inter-American Juridical Committee: a Century of Contributions to International Law", which would address the main contributions made by the inter-American system in the fields of private international law, the maintenance of international peace and security, international jurisdiction and international economic law.

9. The Committee also intended to re-examine the inter-American conventions on private international law. It had suggested, among other things, that during the Seventh Inter-American Specialized Conference on that subject, a committee should be established to study the reasons for the decline in the number of convention ratifications and the number of States participating in the conferences, and for the failure to apply the model laws.

10. Since its previous session the Committee had contacted the Justice Studies Center of the Americas with a view to establishing cooperation in the field of the administration of justice in the Americas and, ultimately, to developing general principles of judicial ethics in order to facilitate access to justice.

11. Other services included a course on international law that the Committee had organized annually since 1974. In 2005 the course would be held from 1 to 26 August, and its main topic would be the contribution of international organizations to current international law". Every two years the Committee met with the legal advisers of

[1] Report of the International Conference on Financing for Development, Monterrey (Mexico), 18–22 March 2002 (United Nations publication, Sales No.: E.02.II.A.7), chap. I, resolution I.

[2] General Assembly resolution 55/2 of 8 September 2000.

[3] See *Yearbook … 2004*, vol. II (Part Two), chap. IV, sect. C.1, p. 18, para. 59.

the foreign ministries of OAS member States, and at the most recent meeting, in August 2003, the following issues had been considered: hemispheric security; mechanisms for rectifying and preventing grave and recurrent violations of international humanitarian law and international human rights law and the role of the International Criminal Court in that regard; the inter-American legal agenda; and legal aspects of the implementation of decisions of international tribunals or other international bodies having jurisdictional functions. Lastly, the Committee issued annual reports, which could be consulted on the OAS website (www.oas.org).

12. Mr. ECONOMIDES said he was pleased to hear that the Inter-American Juridical Committee was tackling important issues of international law, some of which were also being addressed by the Commission. He was thinking in particular of the work that the Committee was doing on enforcement of decisions of international tribunals and the legal aspects of inter-American security, the results of which he awaited with great interest.

13. He believed that cooperation between the Commission and the Inter-American Juridical Committee should go beyond a simple exchange of information to include, among other things, more active support for Commission projects. For example, the draft articles on State responsibility, which had occupied the Commission for over 50 years, had been completed in 2001, but their final form remained an open issue, since the General Assembly had decided to take a position on that question in 2007. In the area of highly legal issues like that of State responsibility, it would be useful for all international law bodies to take a more responsible stance by giving in-depth consideration to the Commission drafts and, where appropriate, expressing an opinion as to the final form they should take. Regional legal bodies were best placed to explain the issues involved to the States of their region. He was convinced that if the Inter-American Juridical Committee had taken a stance on the draft articles on State responsibility, more American States would have supported its objectives, and that would have accelerated the adoption of the instrument. The current President of the Committee, Mr. Sacasa, had participated in the preparation of the draft articles while he had been a member of the Commission, and he undoubtedly had his own views on the subject.

14. Mr. RODRÍGUEZ CEDEÑO endorsed the comments of Mr. Economides and called for more active cooperation between the Commission and the Inter-American Juridical Committee. Among the elements of the Committee's interesting programme of work he drew attention to the study on the relationship between democracy and economic and social development, which could not fail to strengthen the Inter-American Democratic Charter, adopted by OAS in 2001. Another important subject was the enforcement of decisions taken by international courts. He had no doubt that the Committee's recommendations in that regard would be extremely valuable to the States of the region, which had had to adapt their legislation following the adoption of the Rome Statute of the International Criminal Court. With regard to corruption, he asked how the Committee's work would tie in with the two inter-American instruments that already existed on that subject.

15. Mr. MATHESON said that he was particularly interested in the subject of the enforcement of decisions of international courts because there was currently a controversy in the United States as to how to ensure that state Governments, as opposed to the federal authorities, complied with binding decisions of the ICJ. He asked whether the Inter-American Juridical Committee had considered the question of the enforcement of decisions of international courts in a federal system.

16. Mr. PAMBOU-TCHIVOUNDA commended the great vitality of the Inter-American Juridical Committee, which he saw as a genuine laboratory for preparing the political action of OAS. The Committee was also the reflection of inter-American regionalism in the legal sphere, which was not new and which had made an important contribution to the question of diplomatic protection in particular. Regionalism served as a framework for promoting the elaboration of rules of law at the global level. In that sense, it acted as an intermediary, bringing certain aims to universal prominence.

17. Inter-American regionalism could be viewed from a continental perspective, since OAS brought together all the States of the continent, but also from a transcontinental perspective, as embodied in such entities as the International Organisation of La Francophonie, of which a number of States in the Americas were members. The transcontinental perspective provided an additional impetus that in no way contradicted the continental dimension.

18. The Inter-American Juridical Committee was interested in the question of security in a regional context. Yet according to the latest thinking, security was no longer just a state of non-war, but also implied such elements as democracy, living standards and so forth. Thus the question was also related to the interdependence of democracy and socio-economic development, which had been talked about ever since the major international financial organizations such as the World Bank and the IMF had realized that structural adjustment plans, which instead of leading to development had exacerbated extreme poverty, were a failure. It was now a known fact that there could be no development without democracy, and efforts were focused above all on promoting democratization. He was pleased to learn that the Inter-American Juridical Committee was dealing with that issue, and he looked forward to seeing how it would tackle it and what suggestions it would make.

19. Mr. CHEE asked Ms. Villalta Vizcarra whether, with regard to the *Canevaro* case, to which she had referred in her statement, the Inter-American Juridical Committee was in a position to assist the Peruvian Government in extraditing Fujimori, who had also been implicated in a corruption case.

20. He also enquired how the Inter-American Juridical Committee's work on the definition of security tied in with Article 51 of the Charter of the United Nations, which concerned self-defence and armed attack.

21. Lastly, citing the example of the European Union, which had gradually developed a system of Community law, he asked why, given the close ties that existed among

Latin American countries, the jurists of those countries had not created the conditions necessary for the emergence of a body of Latin American law.

22. Mr. CANDIOTI, associating himself with the remarks made by Mr. Economides, called for increased cooperation between the Inter-American Juridical Committee and the International Law Commission. It would be particularly useful for the Committee to consider the work of the Commission and then convey to the Commission its comments and reactions. He noted with satisfaction that the Inter-American Juridical Committee did not hesitate to tackle topical issues, such as international and regional security, the interdependence of democracy and economic and social development, and the fight against corruption. He was also pleased that the Committee took account of the work of the Commission, particularly in the areas of diplomatic protection and nationality.

23. He was particularly interested in the conclusions that the Committee might reach in its study of the trend towards non-ratification of international legal instruments by States. He also wondered whether the Committee's documents were accessible online, as were the documents of the Commission.

24. Ms. ESCARAMEIA asked Ms. Villalta Vizcarra how the States of the region reacted to the work of the Inter-American Juridical Committee. She also wished to know what relations the Committee had with bodies in other parts of the world, such as the Council of Europe and the International Law Institute, and whether those relations consisted solely of information exchanges or whether they led to joint activities. She supported the suggestion by Mr. Economides that closer relations between the Committee and the Commission should be promoted.

25. The CHAIRPERSON, speaking in his capacity as member of the Commission, said that he wished to know what role the Inter-American Juridical Committee played in harmonizing the legislation of OAS member States, particularly in the areas of pardon, statutory limitation on crimes, and amnesty.

26. Ms. VILLALTA VIZCARRA (Observer from the Inter-American Juridical Committee), replying to Commission members' questions, said that the Committee was trying to clarify the concept of the legal aspects of inter-American security in the light of the conclusions contained in the Declaration on Security in the Americas, adopted by the Special Conference on Security held in 2003 in Mexico City. The Committee was studying in particular the possibility of reforming the OAS Charter in order to incorporate the question of the multidimensional nature of security, which was currently lacking.

27. With regard to the enforcement of the decisions of international courts, the Inter-American Juridical Committee considered reports submitted to it by OAS member States. That question raised a problem of harmonization, because some legal systems in the Americas were based on common law and others on Roman law. Thus, in some States the enforcement of decisions was a matter for the executive branch, whereas in others the legislative and judicial branches were also involved. Accordingly, the Committee had to receive and consider all State reports before formulating recommendations and determining, in collaboration with the international courts, the best way of enforcing their decisions. She added that the Statute of the Central American Court of Justice stipulated that that Court's decisions were to be enforced in the same manner as those of domestic courts.

28. The Inter-American Juridical Committee believed that it would be useful to enhance cooperation between the various organizations working on the question of State responsibility, given the complementarity of regional systems with the universal system. In the three regions of the Americas, namely North America, South America and the Caribbean, one of the Committee's tasks was to improve the harmonization of legal systems. In that connection, she pointed out that the 11 jurists who made up the Committee came from all those regions. Currently the Committee was working to develop a framework anti-terrorism law.

29. The task of the rapporteur on democracy and socio-economic development was primarily to coordinate the literature on the topic. The Inter-American Juridical Committee had played an active part in the drafting of the Inter-American Democratic Charter, adopted in 2001 in Peru, and it was studying the possibility of giving that text binding force. Nicaragua had been the first State to request enforcement of the Charter as a preventive measure, and OAS had sent a mission to that country to study that issue.

30. In the area of corruption and impunity, the Inter-American Juridical Committee was currently endeavouring to improve the Inter-American Convention on extradition. It was also considering ways of promoting mutual legal assistance in criminal matters and legal cooperation, particularly with regard to transnational crime. OAS had also asked the Committee to take up the question of corruption and to produce a form for requests for mutual legal assistance. A Committee mechanism monitored implementation of the Inter-American Convention against Corruption (MESICIC). Another of the Committee's study topics was combating international organized crime.

31. While most of the decisions by the Inter-American Court of Human Rights had been accepted by the States members of OAS that had recognized the Court's competence, those States were experiencing practical problems in enforcing those decisions. Accordingly, the Committee provided them with guidance in that regard.

32. Concerning relations with other bodies and organizations, she said that the Inter-American Juridical Committee had working relations with a variety of entities, in particular universities, and that it would like to conclude a cooperation convention with the Justice Studies Center of the Americas on the administration of justice.

33. Replying to the question raised by the Chairperson, she said that the Committee sought to coordinate the legislation of the countries of the region in the three areas to which he had referred. It also addressed problems that might arise for those Latin American States that had abolished the death penalty and wished to reintroduce it, given

the ban on that punishment in the American Convention on Human Rights, as well as questions raised by the incompatibility of the ban on life imprisonment, which was established in the constitutions of some States, with the Rome Statute of the International Criminal Court.

34. In closing, she said that the Inter-American Juridical Committee's annual report, Statute and Rules of Procedure, as well as information on the courses on international law that the Committee organized, could be consulted on the OAS website (www.oas.org).

The meeting rose at 11.50 a.m.

2848th MEETING

Friday, 3 June 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Responsibility of international organizations (*concluded*)* (A/CN.4/549 and Add.1, sect. A, A/CN.4/547, A/CN.4/553, A/CN.4/556, A/CN.4/L.666/Rev.1)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MANSFIELD (Chairperson of the Drafting Committee), introducing the titles and texts of the draft articles adopted by the Drafting Committee on 27 May 2005, as contained in document A/CN.4/L.666/Rev.1, said that the Drafting Committee had held four meetings on the topic, on 25, 26 and 27 May 2005. The Drafting Committee had considered draft articles 8 to 16 referred to it by the Commission in plenary at its present session, and had also considered and was recommending a structure for the draft articles so far adopted. He would first introduce the draft articles, before going on to explain the structure.

2. The titles and texts of the draft articles read:

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INTRODUCTION

[Articles 1, 2 and 3[1]]

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

[Articles 4, 5, 6 and 7[2]]

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 8

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Article 9

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 10

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 11

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

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* Resumed from the 2844th meeting.

[1] For the text of these draft articles and the commentaries thereto, provisionally adopted by the Commission, see *Yearbook … 2003*, vol. II (Part Two), chap. IV, sect. C.2, para. 54.

[2] For the text of these draft articles and the commentaries thereto, provisionally adopted by the Commission, see *Yearbook … 2004*, vol. II (Part Two), chap. V, sect. C.2, para. 72.