Document:-
A/CN.4/3162

Summary record of the 3162nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2013, **vol. I**

for the application of the treaty" or, as in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, by indicating that an "organ" was a body that exercised "legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[15] Failing such a modification, the sentence should be deleted.

23. The second sentence of draft conclusion 4 read as though the practice of non-State actors was a form of "subsequent practice" envisaged by article 31 of the 1969 Vienna Convention, an assertion for which there was no support—not surprisingly, given that the Convention dealt exclusively with the practice of parties to the treaty. The reference to "social practice" was driven exclusively by the jurisprudence of the European Court of Human Rights, which did not seem appropriate in a general guideline intended to assist all international courts and tribunals. If the intention of the sentence was to say "Subsequent practice by relevant State organs may be influenced by the conduct of other actors, including international organizations, non-governmental organizations and other non-State actors", then it should be put in those terms. In conclusion, he said that he was in favour of sending the draft conclusions to the Drafting Committee.

The meeting rose at 1.05 p.m.

3162nd MEETING

Friday, 10 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (A/CN.4/657,[16] sect. B, A/CN.4/662,[17] A/CN.4/L.815[18])

[Agenda item 4]

Report of the Drafting Committee

1. The CHAIRPERSON introduced the text and titles of draft articles 5 *bis*, and 12 to 15, adopted by the Drafting Committee at the sixty-fourth session, as contained in document A/CN.4/L.812.[19]

2. Following comments by Mr. FORTEAU and Mr. CANDIOTI, the CHAIRPERSON said he took it that the Commission wished to adopt the titles and texts of the draft articles, subject to editorial corrections to the French and Spanish versions.

It was so decided.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

First report of the Special Rapporteur (*continued*)

3. Mr. ŠTURMA commended the Special Rapporteur on his first report and his careful analysis of the case law of various international adjudicative bodies. Concerning methodology, there was one basic issue to be resolved: whether the draft conclusions should be considered as descriptive or prescriptive in nature. He shared the concerns expressed by other members about the risk of the latter approach.

4. He endorsed draft conclusion 1 and the first paragraph of draft conclusion 2, but thought that the insertion of the words "establishing agreement" after "subsequent practice" might be useful. As to the second paragraph of draft conclusion 2, the question of whether the term "evolutive" was more appropriate than "evolutionary" should be discussed by the Drafting Committee. On a matter of principle, however, he considered that evolutive interpretation was not another method of interpretation, but a result of the application of certain means of interpretation pursuant to the 1969 Vienna Convention. The case law of the human rights bodies mostly led to the evolutive interpretation of treaties, although it could in some cases lead to a contemporaneous interpretation.

5. With the exception of the reference to "social practice" in draft conclusion 4, he found the draft conclusions to be generally acceptable and recommended their referral to the Drafting Committee.

6. Mr. KAMTO commended the Special Rapporteur on a detailed and in some respects bold first report, which raised some serious problems.

7. Concerning methodology, he questioned the structure of the report. It would have made more sense for the chapter on the definition of subsequent agreement and subsequent practice as means of interpretation of a treaty to have preceded the chapter on the general rule and the means of interpreting a treaty, in other words, for the concepts to have been defined before the legal regime was examined. Another methodological problem was the failure to draw a distinction between subsequent agreements and subsequent practice in relation to multilateral and bilateral treaties. While for the former

[15] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 40, art. 4, para. 1. 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.

[16] Mimeographed; available from the Commission's website.

[17] Reproduced in *Yearbook … 2013*, vol. II (Part One).

[18] Mimeographed; available from the Commission's website.

[19] *Ibid.*, documents of the sixty-fourth session (2012).

they could be a means of interpretation, for the latter their effect was to modify or confirm the original intention of the parties. Admittedly, articles 31 and 32 of the 1969 Vienna Convention did not draw such a distinction, but the Commission's objective was to clarify how the different means of interpretation mentioned in those articles should be applied. As to the form of the report, the distinction drawn between a narrow and broad definition of subsequent practice in paragraphs 92 *et seq*. would have been clearer if all the decisions based on one or the other definition had been grouped together; the conclusion, in paragraphs 107 and 108, did not indicate which was the dominant trend.

8. Turning to substance, he endorsed the Special Rapporteur's statement that evolutive interpretation did not seem to be a separate method of interpretation but rather a proper application of the usual means of interpretation (para. 62) and Mr. Forteau's suggestion that that point should be explicitly made in draft conclusion 2, or at least in the commentary. He also endorsed the statement that subsequent practice must be practice "in the application of the treaty" (para. 111). However, he had serious problems with other aspects of the Special Rapporteur's analysis.

9. First, article 31 of the 1969 Vienna Convention listed the means of interpretation in a certain logical order, with the object and purpose of the treaty shedding light on its interpretation and consequently on the application of the means of the interpretation. Yet the first step in interpreting a treaty was to look at the "ordinary meaning" of its terms "in their context". It was not so much a question of a hierarchy but of a logical order which must be followed so as to avoid subjective interpretations based on a selective application of the means of interpretation. Draft conclusion 1, paragraph 2, which violated that logic, was unacceptable and should be redrafted.

10. Second, he expressed concern about the definition of subsequent practice in draft conclusion 3, paragraph 2, as "conduct, including pronouncements", by "one or more" parties. That might allow for the practice of one State, including one more powerful than others, to be considered a means of interpretation for multilateral treaties and was not in keeping with the 1969 Vienna Convention. He drew attention to the narrower definition provided by the World Trade Organization (WTO) Appellate Body in the *Japan–Taxes on Alcoholic Beverages* case, referred to in paragraph 92 of the report, and suggested that paragraph 2 should be reworded along those lines.

11. Third, he was not convinced by the Special Rapporteur's argument that subsequent practice should include "social practice". Although an exception might be made for the interpretation of human rights treaties, that would call for an approach based on treaty type that was not advisable. Moreover, while "social acceptance" and "social developments" were part of the case law of the European Court of Human Rights, they had no basis in any other regional or in universal case law.

12. Fourth, he endorsed Mr. Murphy's objections to mentioning non-State actors, in particular non-governmental organizations (NGOs), in connection with subsequent practice; the Special Rapporteur's explanations in that regard, in paragraphs 138 to 140 of the report, were simply too far-fetched. However, the case of the International Committee of the Red Cross (ICRC) could be considered in greater depth, given that organization's special role in international humanitarian law. Draft conclusion 4, paragraph 2, should therefore be reviewed.

13. In conclusion, he said that with the exception of draft conclusion 2, all the draft conclusions required some revision. He was confident that the task could be entrusted to the Drafting Committee, to which he was in favour of referring all the draft conclusions, and in which he would continue to argue the points he had just raised.

14. Mr. MURASE said that the report could have been submitted several years earlier if the Commission had commenced the topic under the normal procedure: by appointing a special rapporteur instead of setting up a study group, whose documents went unpublished and debates unrecorded in all of the Commission's working languages.

15. Regarding the scope of the topic as described in paragraph 4 of the report, he said that the exercise of interpretation covered not only textual but also contextual, teleological and "effectiveness-based" aspects. In its decision in 2002, the Eritrea–Ethiopia Boundary Commission found that the function of subsequent practice and conduct was not limited to treaty interpretation: it could also affect the legal relations of the parties.[20] The Special Rapporteur therefore would be well advised not to take an overly restrictive approach to the scope of the topic. He himself did not consider it necessary to make a clear demarcation between the topic under consideration and the topic "Formation and evidence of customary international law", as the Special Rapporteur did in paragraph 7 of the report. The two topics would inevitably overlap, for example in the parallel development of subsequent practice within a treaty and the formation of customary law outside the treaty. The two Special Rapporteurs could work on the same problem, but from different angles.

16. Concerning methodology, he cautioned against trying to draw common principles on treaty interpretation from the case law of different international courts and tribunals, as each body had its own constitutional apparatus, making for inherent differences in treaty interpretations. He was particularly bothered by the descriptions in paragraphs 13 and 96 of the report on the International Centre for Settlement of Investment Disputes (ICSID) arbitrations. It was improper to treat an interpretation of a specific investment agreement by an *ad hoc* tribunal as if it represented ICSID as a whole. Besides, the nature of an ICSID tribunal in which the two parties were the investor and the host State was quite different from ordinary inter-State arbitration tribunals. The ICSID tribunals could invoke the case law of international courts, but that did not mean that their decisions could be treated as precedents of international law.

[20] *Decision regarding delimitation of the border between Eritrea and Ethiopia*, decision of 13 April 2002, p. 85.

17. Turning to draft conclusion 1, he was not sure to what extent customary international law was viewed as regulating matters such as the hierarchical order of the various means of treaty interpretation and their interrelations, as was implied in the second paragraph. There were few explicit references to customary international law in the pronouncements of international courts. It might therefore be better not to mention customary international law in the draft conclusion and to transpose the remaining text to the preamble of the draft.

18. On draft conclusion 2, he recalled his strong reservation regarding evolutionary interpretation, set out in the paper on the subject he had submitted to the Study Group in 2011. That position had been generally accepted by the Study Group, and he therefore proposed that the second paragraph of draft conclusion 2 should either be deleted or redrafted along the lines suggested by Mr. Murphy. Concerning draft conclusion 4, he endorsed members' criticism of the first paragraph and the suggested deletion of the words "Subsequent practice by non-State actors, including social practice" in the second paragraph. He was nonetheless in favour of referring all the draft conclusions to the Drafting Committee.

19. Mr. WISNUMURTI said that, as the International Court of Justice and other adjudicative bodies had confirmed, the basic rule governing treaty interpretation was contained in article 31 of the 1969 Vienna Convention. For that reason, he agreed with the first paragraph of draft conclusion 1. However, since that article did not establish a hierarchy of the different means of treaty interpretation and since no consistent pattern in the use of those means could be discerned from the decisions of international adjudicative bodies and the Human Rights Committee, he had doubts about the wording of the second paragraph of the draft conclusion.

20. He had no problems with the first paragraph of draft conclusion 2, but the second paragraph was unclear and lacked the necessary parameters for guiding the application of evolutive interpretation. Such interpretation had to be treated with caution, must preserve treaty stability and must be accompanied by common subsequent practice or express subsequent agreement of the parties. In the case of multilateral treaties, it had to rest on the common understanding of all States parties.

21. In draft conclusion 3, the word "manifested" should be replaced with "expressed" in the first paragraph and the phrase "which contributes to the manifestation of an agreement of the parties regarding the interpretation of the treaty" should be added to the second paragraph. He had no difficulty with the third paragraph. The first paragraph of draft conclusion 4 was fine, but he had reservations about the second paragraph, because it was supported by very limited case law.

22. All four draft conclusions should be referred to the Drafting Committee.

23. Mr. KITTICHAISAREE said that a balance had to be maintained between the principle of *pacta sunt servanda* and the need for flexibility in treaty interpretation. Flexibility must not, however, undermine the object and purpose of a treaty or negate the intention of its drafters. The courts had not relied on subsequent agreement or subsequent practice in any consistent manner, as was shown in paragraphs 36, 40 and 41 of the report. That raised the question, with regard to the draft conclusions, of whether the use of subsequent agreements and subsequent practice could or should vary according to the nature of the subject matter—human rights, for example.

24. The first paragraph of draft conclusion 1 should refer to articles 31, 32 and 33 of the 1969 Vienna Convention, as Mr. Murphy had suggested. He himself wondered how the second paragraph would apply in practice in relation to the Charter of the United Nations, which was a classic example of a living instrument. The Special Rapporteur should have analysed subsequent agreements and subsequent practice in the context of the Charter of the United Nations before drafting his conclusions, and he should have examined in the report the issue of *de facto* amendments through subsequent practice.

25. The first paragraph of draft conclusion 3 should be amended to reflect the fact that a subsequent agreement or subsequent practice that might affect the interpretation of a multilateral treaty must include all States parties thereto, unless the effect envisaged concerned only certain States parties. He concurred with Sir Michael Wood with regard to the third paragraph of draft conclusion 3.

26. The second paragraph of draft conclusion 4 was unsubstantiated, because the practice referred to in paragraphs 136 to 140 of the report was State practice, not the practice of international organizations or NGOs. With respect to the ICRC, the so-called "interpretive guidance"[21] provided by it should be understood as being either a "supplementary means of interpretation" under article 32 of the 1969 Vienna Convention or a "special meaning" under article 31, paragraph 4, of the Convention. If the draft conclusion was to maintain the relevance of subsequent practice by non-State actors, despite the absence of its recognition in case law, it might be necessary to consider the relative weight given to different entities. For instance, more weight should be ascribed to the practice of international organizations or bodies which were given a special mandate to interpret respective treaties than to the practice of NGOs. Lastly, he agreed with Mr. Park that the text of each conclusion should have normative content expressed using legal terminology, not be too general and supplement the provisions of the 1969 Vienna Convention without modifying or contradicting them.

27. Mr. HMOUD said that, as the articles of the 1969 Vienna Convention on the interpretation of treaties had stemmed from a compromise between various doctrinal approaches to treaty interpretation, they had left a margin of appreciation not conducive to legal certainty. Treaty interpretation under the Vienna regime was an inherently flexible operation which not infrequently led legal practitioners to reach different conclusions on an ambiguous text. Hence the international law community

[21] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009.

needed guidance from the Commission on treaty interpretation. The purpose of treaty interpretation was to clarify ambiguity, not to amend the treaty. Even when a text was ambiguous, it could be amended only through the formal methods specified in the 1969 Vienna Convention.

28. Article 31 of the Convention did not lay down a hierarchy of the means of treaty interpretation. While different courts and tribunals might place more emphasis on some elements than on others, no interpretation could run counter to the object and purpose of a treaty or void a treaty provision of its content. In reality, depending on the tribunal and the case, the supplementary means of interpretation referred to in article 32 might be as pertinent as the "authentic elements" of article 31.

29. For a subsequent agreement to have authoritative value for the purposes of interpretation, it had to be an agreement between all the parties to a treaty. Similarly, for subsequent practice to be an authentic element of interpretation, that had to be agreed on by all the parties to the treaty. It would be helpful if the Commission could explain the various conditions that had to be met for subsequent agreements and subsequent practice to be authentic elements or means of interpretation. While subsequent practice that did not evidence an agreement between the parties was not without merit for the purpose of interpretation, its value was limited. It was doubtful whether practice engaged in by a limited number of parties and on which other parties remained silent could be said to establish the agreement of the parties within the meaning of article 31, paragraph 3 (*b*). Courts and tribunals that had resorted to a broad definition of subsequent practice had plainly struggled to be consistent. It was important for dispute settlement bodies to adopt a uniform, predictable approach, otherwise they would only add to judicial and legal uncertainty.

30. While he agreed with the Special Rapporteur that subsequent practice by a State organ entrusted with the application of a treaty, or internationally regarded as such, might be attributed to the State, he was doubtful that social developments within States and the practice of non-State actors could be deemed relevant for the purpose of attributing subsequent practice to the State.

31. He was in favour of sending the draft conclusions to the Drafting Committee.

32. Ms. ESCOBAR HERNÁNDEZ, referring to the Special Rapporteur's methodology, said that some aspects of the draft conclusions might need to be revised in the light of additional elements of practice, particularly that of national courts, that the Special Rapporteur intended to address in future. The excellent substantive content of the report had unfortunately not been fully reflected in the draft conclusions. She was especially concerned at the ambiguity in the way in which the limits of the system of interpretation set up under the Vienna regime were defined. The danger was that the process of interpretation might be construed as something other than a single combined operation, or that the means of interpretation set out in article 31 might be seen as interrelated in hierarchical, as opposed to logical, terms. The Commission had already taken a position on many such issues, and it was neither reasonable nor desirable for it to reconsider that position in general, although it obviously had to do so in respect of the specific means of interpretation, subsequent agreements and subsequent practice, which were the subject of the topic.

33. Turning to the draft conclusions, she noted that the word "emphasis" in draft conclusion 1, paragraph 2, could give rise to confusion, since it might be construed to refer to a normative or hierarchical emphasis—something that the Commission had clearly excluded in its 1966 commentaries.[22] Secondly, the use of the expression "on the text of the treaty or on its object and purpose", with reference to the two means of interpretation that could be emphasized, was incompatible with the single combined operation stipulated in the 1966 commentaries.[23] Thirdly, the means of interpretation provided for in articles 31 and 32 could not be placed on an equal footing, since each relied on distinct mechanisms, rules and conditions. Lastly, given the role of paragraph 2 as the frame of reference for the remaining draft conclusions, it should expressly refer to "subsequent agreements and subsequent practice".

34. As to draft conclusion 2, she had serious reservations about the lack of clarity in the use of the terms "subsequent agreements" and "subsequent practice", for they did not constitute authentic means of interpretation in all instances. Further, the text should include a reference to article 31, paragraph 3, the absence of which was all the more noticeable as none was made in draft conclusion 1 either. The draft conclusion should also state that subsequent agreements and subsequent practice could guide a contemporaneous interpretation of a treaty, not just an evolutive one.

35. Draft conclusion 3 was a key provision because it defined the two categories on which the Commission's work focused. Since the term "*manifestado*" in Spanish was unclear and appeared in neither the 1969 Vienna Convention nor the Commission's 1966 commentaries, she would appreciate an explanation of its intended purpose. The definition in paragraph 1 should provide practical elements to help determine whether a particular subsequent agreement was included within the meaning of article 31, paragraph 3 (*a*), especially given the wide variety of agreements encountered in practice.

36. Concerning paragraph 2, she objected to the use of the phrase "by one or more parties" since, in keeping with article 31, paragraph 3 (*b*), subsequent practice could never be unilateral but had rather to consist of conduct, including pronouncements, by all parties to the treaty. Moreover, paragraph 2 did not take into account the special nature of the subsequent practice defined in article 31, paragraph 3 (*b*), and its special relationship to the existence of an agreement between the parties, nor did it take sufficient account of the variety of acts that could constitute such practice.

37. With regard to paragraph 3, it was not desirable to link two separate categories of subsequent practice—those

[22] *Yearbook … 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 187 *et seq*.; see, in particular, pp. 219–220, para. (8).

[23] *Ibid*.

referred to in article 31, paragraph 3 (*b*), and in article 32—in the same draft conclusion, since doing so could mislead the reader about the nature of such practice and its validity as a means of authentic interpretation. If the reference to "Other subsequent practice" was maintained, the paragraph should clearly specify the conditions in which recourse could be had to such practice. To have that phrase relate exclusively to article 32 was too restrictive, since it could just as easily refer to article 31, paragraph 1.

38. Draft conclusion 4 left open a number of gaps. It did not provide helpful elements for identifying the State organs whose subsequent practice could be taken into account for the purpose of treaty interpretation. It failed to address the authorship or attribution to the State of subsequent agreements, which was necessary since the notion of agreement expressed in article 31, paragraph 3 (*a*), was not limited to formal agreements such as treaties. The point made in paragraph 2 should be made more explicit, and the use of the expression "social practice" merited further consideration.

39. With those comments, she was in favour of referring the draft conclusions to the Drafting Committee.

40. Ms. JACOBSSON said that, owing to the nature of the topic, it was of the utmost importance to focus on State practice and to see how States interpreted the consequences of their action. Much State practice in the interpretation of treaties worked smoothly, causing no major conflicts, and it should be regarded as equally important as was the interpretation of treaties that sparked controversy. This was particularly relevant in situations where bilateral and regional treaties were applicable.

41. With regard to draft conclusion 1, she shared the view of other Commission members that it should state that article 32 of the 1969 Vienna Convention, like article 31, was to be considered as a rule of customary law: the risk of an *a contrario* interpretation should be averted. Equally important was the fact that international tribunals such as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea had taken the position that articles 31 to 33 of the Convention were to be considered as reflecting customary law. Paragraph 1 should be moved to a separate draft conclusion and a distinction made between article 31, as a general rule of interpretation, and article 32, as a supplementary means of interpretation.

42. As to draft conclusion 2, paragraph 1, it should specify that it was only "together with the context" that subsequent agreements and subsequent practice were to be regarded as authentic means of interpretation. Although paragraph 2 was the most controversial part of the draft, it was far too early to dismiss it at the current stage, since there were convincing examples of case law, particularly in the field of human rights, which could not be disregarded. She endorsed the proposal to include a reference to contemporaneous interpretation. Paragraph 2 should also reflect the notion that a distinction had to be made between treaties of various types—bilateral and multilateral, for example. The interpretation of treaties that established rights for other States or actors, to which reference was made in the penultimate footnote to paragraph 30 of the report, required further discussion.

43. With regard to draft conclusion 3, paragraph 1, she was not convinced of the need for the word "manifested". Concerning paragraph 2, she endorsed Mr. Kamto's proposal to reword it in line with the narrower definition of subsequent practice given by the WTO Appellate Body and concurred with Ms. Escobar Hernández about the need for the references to articles 31 and 32 to be in separate paragraphs.

44. In draft conclusion 4, paragraph 1, the current wording did not seem adequate to address the complicated issue of the conduct of State organs that could be attributed to the State. It was important to elaborate on what was meant by attribution in that context, as distinct from in the articles on responsibility of States for internationally wrongful acts.[24]

45. She was in favour of referring all four draft conclusions to the Drafting Committee.

The meeting rose at 1.05 p.m.

3163rd MEETING

Tuesday, 14 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

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

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

First report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the Special Rapporteur's first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/660).

2. Mr. HASSOUNA said that it was vital not to amend or contradict the fundamental rules governing treaty interpretation set forth in the 1969 Vienna Convention. The prime purpose of subsequent agreements and subsequent practice was to contextualize the terms of a treaty, since they had to be interpreted in the light of their context, provided that the resultant interpretation did not

[24] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. 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.