Document:-
A/CN.4/3185

Summary record of the 3185th meeting

Topic:
<multiple topics>

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

ascertained customary rules and their contents based on the important resource materials available to it and thanks to the high technical expertise of its judges. While the Court's rulings pertaining to the formation of customary rules were sometimes described—including in the dissenting opinions of its own judges—as vague, inconsistent and failing to analyse extensive and convincing practice, their important contribution to the elucidation of customary law was well recognized. In several cases, notably those involving maritime delimitation, the Court's role had extended beyond merely stating customary rules to inferring general principles from them.

71. He welcomed the fact that the activities of several international courts and tribunals were to be addressed in future reports, as was the work of other bodies. All of those activities dealt with, and had an impact on, customary international law. With regard to the future programme of work, he was confident in the Special Rapporteur's ability to overcome the "serious difficulties", as the International Law Association had put it, that were inherent in setting out the rules of customary international law.[139]

The meeting rose at 1.10 p.m.

3185th MEETING

Wednesday, 24 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

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

Formation and evidence of customary international law (*continued*) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the first report of the Special Rapporteur on formation and evidence of customary international law (A/CN.4/663).

2. Mr. HUANG congratulated the Special Rapporteur on the pragmatism of his first report and the clarity of his approach. With regard to the title of the topic, in addition to the current title, the Special Rapporteur had proposed "Identification of customary international law" or "Determination of customary international law". The wording should be considered in the light of the purpose of the project. Seen from that angle, the current title and the first proposal, which were very similar, were both acceptable, although the latter had the advantage of being more concise. The third proposal, however, was not appropriate, as it might give the impression that the Commission was assuming the authority to determine what was customary international law. The outcome of the Commission's work should be a set of conclusions or guiding principles, as had been proposed by the Special Rapporteur. The guidelines should be both specific and flexible so as to maintain the discretionary power of judges who would have to apply them.

3. In taking into account possible differences in the criteria for formation and evidence of customary international law in the various branches of international law, a uniform approach should be adopted that highlighted criteria that were universally applicable to all fields of international law by all members of the intended audience, so as to avoid any further fragmentation of the law that would weaken customary international law.

4. He agreed with the opinion expressed by most members of the Commission that *jus cogens* should not be included in the scope of the topic. Indeed, as could be seen from article 53 of the 1969 Vienna Convention, *jus cogens* differed from customary international law in that it was of greater normative value and was not one of the formal sources of international law. With regard to the relationship between customary international law and other sources of international law, the role of treaties in the formation and evidence of customary international law should be considered. Could the existence of a universal rule of customary international law be inferred from a treaty, for example? That was what the Special Rapporteur seemed to imply when he suggested the need to collect cases in which a rule of customary international law had been identified without any reference to the criteria of practice and *opinio juris*.

5. Lastly, with regard to general principles of law, he noted that he, like other members, was uncomfortable with the differentiation from customary international law and that perhaps they might be considered customary rules.

6. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for the outstanding quality of his analysis and welcomed the very useful memorandum by the Secretariat (A/CN.4/659). He generally agreed with the approach to the topic adopted by the Special Rapporteur in his first report.

7. Bearing in mind the objective set for the Commission's work on the topic, it seemed appropriate not to separate the issues of identification and formation of rules of customary international law, as there were close links between identification and the method of formation. The title "Identification of customary international law" was acceptable, however. With regard to the outcome of the Commission's work, a set of conclusions with

[139] International Law Association, final report of the Committee on Formation of Customary (General) International Law, *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 713.

commentaries would certainly be appropriate, provided that they were not overly prescriptive.

8. With respect to the issue of *jus cogens*, it would admittedly be useful for the Commission to study those peremptory norms, which expressed essential values shared by the international community. As the Special Rapporteur stated in his report, however, it would be preferable not to do so as part of the current topic, although that did not mean that reference would not be made from time to time to rules of *jus cogens* in particular contexts.

9. Despite the proliferation of treaties and codification efforts undertaken in various areas of international law, customary law remained a key source of international law, especially as the original rule of customary law remained intact after codification and therefore, as stated by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, two rules with exactly the same content, one a customary rule and the other a treaty rule, could continue to exist separately (para. 178). Moreover, there was no reason why a rule of customary law could not continue to evolve. In general, the Special Rapporteur would at a later stage have to examine the interaction between customary law and treaties which, according to the International Court of Justice in the *North Sea Continental Shelf* cases, had a triple effect on customary law: declaratory, crystallizing and creating. It would be interesting to extend that analysis to a number of non-binding instruments such as certain General Assembly resolutions, as suggested by the Special Rapporteur.

10. Although it had come in for intense criticism, Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice, which defined the two components of customary law, remained an authority. Most of the literature and the case law of the international courts and tribunals confirmed that those two elements must be present. The Special Rapporteur should take his analysis of the International Court of Justice's case law a bit further, but some important conclusions could already be drawn. With regard to the material element of customary law, it was clear that the passage of only a short period of time was not necessarily a bar to the formation of a rule of customary international law, provided that State practice during that period had been widespread (*North Sea Continental Shelf* cases). However, the Court did not refer, as had been suggested by certain legal writers, to instant custom, or to immemorial custom for that matter. In the same judgment, the Court specified that the practice must be "extensive and virtually uniform" (para. 74)—but not unanimous. The subjective element of customary law, meanwhile, appeared to be difficult to prove, particularly since, as recognized by the Court in its judgment in the case concerning *Right of Passage over Indian Territory*, it sometimes coincided with the material element. The Court sometimes referred to General Assembly resolutions to prove the existence of *opinio juris*, as in its advisory opinion on the *Western Sahara*, or relied on the response of States to a General Assembly resolution, as in the *Military and Paramilitary Activities in and against Nicaragua* case. Indeed, the Court had highlighted the normative value of those resolutions in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, noting that the resolutions "provide evidence important for establishing the existence of … *opinio juris*" (para. 70). It would be a good idea for the Commission to examine the relationship between customary law and the resolutions of international organizations.

11. In addition, it was important to make a distinction between customary international law and "the general principles of law recognized by civilized nations". As could be seen from the *travaux préparatoires* for the Statute of the International Court of Justice, those principles had been added to Article 38 to fill any gaps in the international legal order and avoid *non liquet*. Those principles of law, which were common to all national legal systems, differed from principles of international law. The International Court of Justice had made that point on several occasions, including in the *Ahmadou Sadio Diallo* case. When those general principles of law were repeatedly invoked at the international level, they became principles of customary international law. It was therefore vital to differentiate between general principles of international law derived from national systems, which were a formal source of international law, and principles of international law; in other words, between rules of customary international law and principles of international law. In that regard, it was interesting to note that article 21 of the Rome Statute of the International Criminal Court, on the law applicable by the Court, made a distinction between "principles and rules of international law", which hierarchically came before the "general principles of law derived by the Court from national laws of legal systems of the world".

12. In conclusion, he said that he supported the programme of work proposed by the Special Rapporteur, including the study of regional or local customary law that he intended to undertake.

13. Mr. SINGH congratulated the Special Rapporteur on the quality of his report and his realistic approach to the topic.

14. The topic covered both the formation and evidence of customary international law, as the two were closely related, and, regardless of the Commission's final decision on the title, the Special Rapporteur should continue using the approach outlined in paragraph 15 of his first report. He also supported the Special Rapporteur's proposal concerning the appropriate outcome for the Commission's work and agreed that *jus cogens* should not be included in the scope of the topic.

15. The relationship between customary international law and other sources of international law, including treaties, was an important aspect of the topic. The Special Rapporteur had rightly highlighted the fact that it was generally recognized that treaties could reflect existing or emerging rules of customary international law and serve as evidence of their existence. It was also true that rules of customary international law continued to govern questions not regulated by treaties as well as relations with and between non-parties. When he addressed the distinction between customary international law and general principles of law in his next report, the Special Rapporteur would have to exercise caution in order not to obscure the ultimate objective of the project.

16. The Special Rapporteur's extensive survey of the case law of the International Court of Justice and other international and national courts and tribunals indicated the consistent presence of the two elements of customary international law. However, given the criticism of the case law, the more detailed analysis proposed by the Special Rapporteur for his next report would be welcome. He agreed with the prudence advocated by the Special Rapporteur with regard to the role of domestic courts in the customary law process. With good reason, the Special Rapporteur had noted that, while the prominent role of customary international law had been widely recognized in the literature, scepticism in some quarters warranted a cautious approach.

17. In conclusion, he said that he considered the ambitious workplan set out by the Special Rapporteur to be entirely appropriate.

Provisional application of treaties (A/CN.4/657,[140] sect. D, A/CN.4/658,[141] A/CN.4/664[142])

[Agenda item 7]

First report of the Special Rapporteur

18. The CHAIRPERSON invited the Special Rapporteur, Mr. Gómez Robledo, to introduce his first report on the provisional application of treaties (A/CN.4/664).

19. Mr. GÓMEZ ROBLEDO (Special Rapporteur) thanked all those who had helped with the preparation of the first report on the provisional application of treaties and briefly reviewed the history of work on the topic. He recalled that, in 2011, Judge Gaja—a former member of the Commission—had presented a working paper on certain legal issues arising from the provisional application of treaties,[143] in which he had highlighted the remarkable variety of provisions on the subject, as well as the need to define the concept in order to determine its legal effects. In 2012, as soon as he had been appointed Special Rapporteur, he himself had conducted informal consultations with the members of the Commission on the issues they considered relevant to the topic. In general, the members had been of the view that the extent to which provisional application of treaties contributed to the process of identifying rules of customary international law should not be considered; that it would be premature to draw up a questionnaire for States; and that it was too soon to decide on the final form of the Commission's work. Continuing with the history of the topic, he drew the members' attention to the memorandum by the Secretariat on the provisional application of treaties (A/CN.4/658), from which a number of preliminary conclusions could be drawn. First, regardless of the modalities, the provisional application of a treaty gave rise to an obligation to implement the treaty or part thereof; second, the mechanism was quintessentially voluntary; and third, the obligation to provisionally apply the treaty came to an end when the treaty entered into force or if final entry into force was unreasonably delayed or clearly ceased to be probable.

20. The main objective of the first report on the provisional application of treaties was to highlight the usefulness of the mechanism: only by so doing would the Commission be able to promote more frequent use of the mechanism by States. The report also dealt with important terminological issues, particularly the distinction between "provisional application" and "provisional entry into force", two expressions that should definitely not be confused, as they referred to two very different legal concepts. With regard to the scope of the topic, for the time being, he had deliberately chosen not to take account of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention)—even though it contained a provision on the provisional application of treaties—as, in his view, it would be preferable to concentrate at that stage of the project on State practice and the regime established under the 1969 Vienna Convention.

21. In paragraphs 25 to 35 of his report, the Special Rapporteur had sought to demonstrate that the purpose of provisional application was to give immediate effect to all or some of the substantive provisions of a treaty without waiting for the completion and effects of the formal requirements for entry into force contained therein. That part of the report contained a list of the primary factors that led States to resort to the provisional application of treaties, namely: urgency, flexibility, precaution and transition to imminent entry into force.

22. Future reports would have to look at whether, in some cases, the legal effects of provisional application of a substantive provision had more to do with the actual content of the provision than with the provisional application mechanism itself. Article 18 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction provided for the possibility of provisionally applying article 1 of the Convention, which stipulated that each State party undertook "never under any circumstances" to use anti-personnel mines. In other words, States that provisionally applied that article undertook to comply with a series of permanent prohibitions. Consequently, the question arose of whether once such an obligation had been undertaken, the application of the treaty was still provisional in nature, or whether there were two kinds of legal effects at work—in other words, whether it was the substantive rule that determined the applicable regime and legal effects of provisional application rather than the residual or auxiliary rule set out in article 25 of the 1969 Vienna Convention. The same question arose with regard to future human rights or international humanitarian law treaties which, by their nature, created individual rights that went beyond simple obligations between parties. Furthermore, given that provisional application arose from the context for the purpose of the interpretation of a treaty, in accordance with article 31, paragraph 2, of the 1969 Vienna Convention, it would be useful to hear the views on the matter of Mr. Nolte, Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties.

23. As pointed out in paragraphs 36 to 52 of the report, provisional application clearly had legal effects; however,

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

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

[142] *Idem*.

[143] *Yearbook … 2011*, vol. II (Part Two), annex III.

in view of the in-depth consideration it warranted, he proposed that the subject should be dealt with at a later stage. Nevertheless, the Commission could begin right away to study the legal consequences of the violation of obligations undertaken by virtue of provisional application and, if it deemed it relevant, it could also study the international responsibility of States. Should it decide to do so, it would have to give due regard to the views of two Special Rapporteurs on the law of treaties, Mr. Fitzmaurice and Mr. Waldock, who had considered that provisional entry into force had full legal effects. The Commission would have to recall that provisional application came under the scope of article 23 of its draft articles on the law of treaties, as adopted in 1966, which set out the principle of *pacta sunt servanda*.[144] The Commission must also emphasize that provisional application created obligations that went beyond the obligation not to defeat the object and purpose of a treaty prior to its entry into force, as laid out in article 18 of the 1969 Vienna Convention. Obligations arising from provisional application could continue even after the entry into force of a treaty whose ratification had been delayed if the State did not wish to invoke article 25, paragraph 2, of the 1969 Vienna Convention. There was no question about that, and it was particularly true when governments found it difficult to obtain ratification of a treaty by their legislative bodies. Certainly, those were problems of domestic law that, in principle, were of no concern to the Commission, unless its objective was to encourage the use of the provisional application mechanism among States. He would be interested to hear the views of Commission members on that point.

24. The last part of the report contained a list of the various issues that would be addressed in future reports. He had noted with interest the suggestions made by Commission members on the final outcome of the project. He himself still believed that a set of guidelines would better serve the needs of users—governments—than model clauses, which would not be able to give full account of the increasingly diverse range of situations in which States had recourse to the provisional application of treaties.

25. Mr. MURASE said that he was unclear about the purpose of the work on the provisional application of treaties. Was it to supplement the provisions of article 25 of the 1969 Vienna Convention, to elucidate its interpretation or, as seemed more likely, to clarify the potential usefulness of provisional application?

26. The need for provisional application of a treaty in certain circumstances was not disputed. Provisional application was often used to address urgent situations, to deal with legal gaps created by successive treaty regimes or to strengthen transparency and build trust among signatory States. States were therefore aware of the procedure and of its utility in certain exceptional cases. The question that arose was whether the Special Rapporteur intended to promote provisional application in *other* situations. Furthermore, irrespective of its utility, the reasonableness of the provisional application regime should be considered, bearing in mind the specific problems it might cause in relation to domestic law and parliamentary processes in certain countries.

27. The option of provisional application might actually discourage ratification of a given treaty, as had been the case with the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part. Provisional application could give rise to disputes as to the binding nature of the obligations arising from the treaty, as had been observed in the *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case under the Energy Charter Treaty. In any event, if provisional application did not create binding obligations, States would be able to enjoy the benefits of a treaty without incurring the obligations that would arise upon ratification. As the name indicated, provisional application must be an interim measure pending formal ratification of a treaty. It might therefore be more reasonable to encourage ratification of the treaty rather than allowing provisional application to persist. One solution might be to set a limited period for provisional application or to restrict it to certain exceptional situations.

28. While it might be necessary and reasonable to promote the provisional application of treaties, questions arose as to the Commission's role in that regard. Provisional application should be discussed during the actual treaty negotiation process. It was a highly political issue, as illustrated by the refusal of the Conference of the Parties to the United Nations Framework Convention on Climate Change to provisionally apply the revised Kyoto Protocol to the United Nations Framework Convention on Climate Change in order to fill the gap between two commitment periods. Accordingly, there seemed to be little that the Commission could do in that area, especially as article 25 of the 1969 Vienna Convention already provided sufficiently clear and flexible guidelines to States.

29. Turning to the conclusions enumerated in paragraph 53 of the report, he said that in his view, State practice did not suggest that States were unaware of the mechanism of provisional application, which was used extensively, nor did that practice demonstrate the usefulness of provisional application of treaties. The usefulness of the mechanism should be assessed according to the desired benefits in each case; for example, if the purpose was simply to delay ratification, that would amount to an abuse of the procedure. It might be worthwhile to differentiate between bilateral treaties of a contractual nature and multilateral treaties with law-making objectives. It would be difficult to identify the most common systems of domestic law in matters relating to provisional application, as proposed by the Special Rapporteur. The Commission could perhaps conduct a comparative study of domestic constitutional systems relating to provisional application. It would also be difficult to generalize about the procedural requirements for the provisional application of treaties, which depended on the specific nature of the agreement that incorporated provisional application and were therefore very diverse. The relationship between the regime established under article 25 of the 1969 Vienna Convention and other provisions of international law was not entirely clear. Article 18 of the Convention might be relevant if the Commission was to consider the legal effect of non-ratified treaties, but it did not seem a good idea to extend the scope of the topic to include that. The legal effects of the provisional application

[144] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 210–211.

of treaties and, thus, the legal consequences of a violation of the obligations created by provisional application could only be determined on a case-by-case basis.

30. In conclusion, he stressed the need to encourage the ratification of treaties rather than their provisional application.

31. Mr. KITTICHAISAREE congratulated the Special Rapporteur on his first report and welcomed the memorandum by the Secretariat on the negotiating history of article 25 of the 1969 Vienna Convention.

32. The Special Rapporteur should have provided more detailed explanations on the potential conflict between international law and constitutional law in relation to provisional application of treaties (para. 35 of the report). The statement in paragraph 44 that "in principle, domestic law does not constitute a barrier to provisional application" was contradicted when one took the example of the Constitution of Thailand, which stipulated that a number of internal formalities had to be carried out prior to the conclusion of certain types of treaties, thus posing an obstacle to their provisional application. The concerns raised by some States at the United Nations Conference on the Law of Treaties with regard to respect for their domestic law were still valid today. The guidelines or model clauses that the Special Rapporteur would like the Commission to develop would not be used by States until that conflict was resolved. In that regard, it would be a good idea, as proposed in subparagraph 53 (*c*) of the report, to conduct an in-depth analysis of the relevant State practice and to suggest solutions to the conflict.

33. With respect to the legal effects of the provisional application of treaties, mentioned in subparagraph 53 (*f*) of the report, it would be appropriate to differentiate between the provisional entry into force of a treaty and its provisional application; to draw a distinction between provisional application of a treaty and provisional or interim agreements; to see whether the legal effects of the provisional application of treaties were based on the nature of the collateral agreement between the parties; and to explore the legal relationship between parties that had accepted the provisional application of a treaty or part thereof and third parties.

34. Mr. PETRIČ said that the new topic was both problematic and broad in scope. Provisional application of treaties in itself was a useful procedure when used as an exception. No rules could be derived from it, as that would be contrary to certain fundamental values of the contemporary democratic world. The Commission's objective should therefore be to gain a better understanding of the procedure and to elucidate it, possibly in the form of conclusions with commentaries, but certainly not to promote the practice.

35. There were two important elements at the centre of the topic: the impact of the provisional application of treaties on legal certainty and the relationship of provisional application with domestic constitutional systems. Provisional application of treaties was often used as a means of avoiding war, as had been the case with the Trieste conflict, provisionally regulated in 1954 by a Memorandum of Understanding that had been applied until the Treaty of Osimo was adopted in 1975.[145] However, it was conceivable that, without that treaty, the provisional arrangement, which dealt only with boundary issues and not with sovereignty, could have continued to be applied until 1991, at which point Italy, in the face of the breakup of Yugoslavia, could have imposed its unilateral vision of sovereignty over Zone B of the territory. The provisional application of treaties was thus closely linked to legal certainty. It also overlapped with constitutional law, as had already been mentioned by other members. The case of Thailand had been cited, but in Slovenia, too, provisional application of a treaty raised issues of constitutional compliance.

36. Turning his attention to the content of the Special Rapporteur's first report, he said that while the analysis of practice could certainly be brief initially, in its later work, the Commission would have to rely much more on practice than on the literature. In particular, it would have to address the practice of the European Union, given the complexity of applying treaties in 28 States, and look at the work of the Council of Europe. Although the distinction between "provisional application" and "provisional entry into force" was important, it was particularly important not to deal with provisional application that was not provided for in the treaty itself or in a subsequent agreement, and to always bear in mind, as stated by the Special Rapporteur, that it was a "transitory mechanism". The purposes of provisional application of treaties listed in paragraphs 25 to 35 of the report were appropriate, with the possible exception of giving greater flexibility to the treaty regime (paras. 28–30). The question arose whether it was right that the provisional application of a treaty enabled constitutional rules to be sidestepped or the treaty to be modified without following the necessary procedure. Caution would need to be exercised on that point. Paragraphs 36 to 52, on the legal regime of provisional application, were also apposite, if only because, contrary to what was stated by the Special Rapporteur in paragraph 44, the issue of domestic law would have to be taken into consideration.

The meeting rose at 1 p.m.

3186th MEETING

Thursday, 25 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia,

[145] Treaty between Italy and Yugoslavia on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947, signed at Osimo, Ancona, on 10 November 1975 (United Nations, *Treaty Series*, vol. 1466, No. 24848, p. 25).