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Summary record of the 3305th meeting

Topic:
Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-
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72. Lastly, with regard to draft conclusion 13, it was unclear why the Special Rapporteur had chosen to highlight that specific aspect of the subsequent practice of States rather than another in relation to the interpretation and application of treaties. Was the conduct of the executive branch, for instance, less important? And would it not be better to deal with the issue covered in paragraph 1 in the commentary to draft conclusion 4? Moreover, paragraph 2, which was written in a different style to that found in the rest of the draft conclusions, was incongruous. It brought together a set of guidelines for domestic courts, which was something that the Commission had never set out to do, and one might well wonder why such guidelines should be addressed only to domestic courts. As useful as it might be, the development of such guidelines was not part of the Commission's mandate, particularly in view of the fact, emphasized by several members, that the draft conclusions were supposed to be addressed to all parties involved in the application and interpretation of international instruments.

Organization of the work of the session (*continued*)*

[Agenda item 1]

73. The CHAIRPERSON invited the Chairperson of the Drafting Committee to announce the composition of the Drafting Committee on the identification of customary international law.

74. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the identification of customary international law was composed of Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Tladi, Mr. Vázquez-Bermúdez, together with Sir Michael Wood (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 1 p.m.

3305th MEETING

Thursday, 26 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

* Resumed from the 3302nd meeting.

Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVE
OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Collot, of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. COLLOT (Inter-American Juridical Committee) said that it was a pleasure to represent the Inter-American Juridical Committee before the International Law Commission for the purpose of reporting on the Committee's current activities. The IAJC served as an advisory body to the Organization of American States (OAS) on juridical matters, promoted the progressive development and codification of international law and studied juridical problems related to the integration of developing countries in the region.

3. In 2015, the IAJC had held two regular sessions at its seat in Rio de Janeiro, Brazil, at which it had adopted three reports. Two of the reports, entitled, respectively, "Privacy and data protection"¹⁸⁵ and "Guide on the protection of stateless persons"¹⁸⁶ had been prepared in response to mandates from the OAS General Assembly, while the third, entitled "Migration in bilateral relations"¹⁸⁷ had been prepared at the Committee's own initiative.

4. The report on the protection of personal data set out 12 principles, together with commentaries, on privacy and data protection, which could serve as the basis for the formulation and adoption by member States of legislation to ensure respect for people's privacy, reputation and dignity. The guide on the protection of stateless persons contained normative suggestions concerning the legislation and practices of States and also called on States that had not yet done so to ratify relevant international instruments. In addition, it recommended that States adopt measures to facilitate access to basic services for stateless persons, enabling them to enjoy fundamental human rights. The report on migration contained a series of recommendations aimed at strengthening bilateral relations in that area, particularly between States with common borders or adjacent islands.

5. At its plenary meeting in August 2015, the IAJC had decided to keep the following topics under consideration: electronic warehouse receipts for agricultural products; the law applicable to international contracts; representative democracy; and the immunity of States and international organizations.

6. The aim of the topic of electronic warehouse receipts for agricultural products was to develop a mechanism to facilitate harmonization of data in a secure computerized system, so as to enable the creation of negotiable receipts. The topic

¹⁸⁵ "Privacy and data protection" (CJI/doc.474/15 rev.2), in Organization of American States, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2015, OEA/Ser.Q, CJI/doc.495/15, 8 September 2015, pp. 55 *et seq.* Available from: <https://scm.oas.org/pdfs/2016/CP35451EREPORTCJI.pdf>.

¹⁸⁶ "Guide on the protection of stateless persons" (CJI/RES.218 (LXXXVII-O/15)), in *ibid.*, pp. 102 *et seq.*

¹⁸⁷ "Migration in bilateral relations" (CJI/doc.461/14 rev.3), in *ibid.*, pp. 47 *et seq.*

of the law applicable to international contracts was an initiative aimed at ascertaining the views of States and experts on the application of the Inter-American Convention on the Law Applicable to International Contracts in the light of a questionnaire that had been circulated to both groups. The topic of representative democracy involved the preparation of a study of the mechanisms for collective action established under the Inter-American Democratic Charter with a view to enhancing the latter's implementation and strengthening representative democracy in the Americas. The objective of the topic of jurisdictional immunities was to update the scope and validity of the jurisdictional immunities of States and international organizations by means of a study of the domestic legislation of States and international norms. A Rapporteur had been assigned for each of the topics and the responses submitted by States to an IAJC questionnaire would be taken into account in each case.

7. In 2015, the IAJC had on its own initiative decided to take up two new topics. The first concerned the preparation of a guide for the application of the principle of conventionality, which would involve an analysis of the incorporation into domestic law of inter-American conventions. The second was aimed at producing a compilation of topics of public and private international law of relevance to the OAS.

8. In August 2015, the IAJC had met with the OAS Secretary General to exchange ideas on the inter-American agenda with a view to establishing a medium-term programme of work that would seek to coordinate the activities of the IAJC with the agenda of OAS political organs. The Committee had also met with the legal adviser of the Ministry of Foreign Affairs of Brazil, a judge of the Inter-American Court of Human Rights and representatives of international bodies, such as the African Union Commission, the ICRC, the Office of the United Nations High Commissioner for Refugees and the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights.

9. The forty-second IAJC Course on International Law had been held from 3 to 21 August 2015. The Course, which had taken as its main theme the current inter-American legal agenda, had been attended by 31 students, 20 of whom had received OAS-funded scholarships. Lecturers had included judges from the International Court of Justice and the Inter-American Court of Human Rights, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, the President of the Paris Bar Association and the head of the law faculty of the University of Buenos Aires. Representatives of international organizations active in various fields of international law had also attended. He invited the members of the Commission to participate in the course as lecturers. The next edition would take place in Rio de Janeiro in October 2016.

10. In August 2015, the Committee had organized the First Meeting on Private International Law, a joint initiative with the American Association of Private International Law. The meeting had brought together eight members of the Association, along with IAJC members, to discuss three topics: the 1994 Inter-American Convention on the Law Applicable to International Contracts;

consumer protection and the codification of international law; and issues of interest in the field of private international law in the inter-American system. Given the success of the initiative, the Department of International Law, in its capacity as the technical secretariat of the Committee, had organized a further meeting on private international law during the IAJC working session in Washington, D.C. in April 2016. At that session, it had been decided to undertake a study on consumer protection, with four rapporteurs representing the four regional groups; the first report was expected to be ready in October 2016.

11. Turning to the reports that the IAJC had prepared for OAS political bodies in recent years, he recalled that, in 2009, the Committee had adopted a resolution that had emphasized the vital link between the effective exercise of representative democracy and the rule of law. Based on a legal analysis of inter-American agreements and declarations on democracy and human rights, the resolution recalled, *inter alia*, that “the principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the State”.¹⁸⁸ The IAJC had also indicated that risks and threats to, as well as violations and the breakdown of, the democratic order were situations that must be seen in the light of the validity of the essential elements of representative democracy and the fundamental components of its exercise. The resolution had also stressed the need to strengthen independent judicial powers that were endowed with autonomy and integrity, were professional and non-partisan and subject to a non-discriminatory regime of selection. The IAJC had indicated that democracy was not confined to electoral processes alone, but was also expressed through the legitimate exercise of power within the framework of the rule of law.

12. In 2012, the IAJC had adopted the Model Act on the Simplified Stock Corporation,¹⁸⁹ which provided for a hybrid form of corporate organization that reduced the costs and facilitated the incorporation of micro- and small businesses, making use of the experience of Colombia in that area. The IAJC considered that the inclusion of such corporate models in countries' domestic laws could contribute to the economic and social development of member States.

13. In 2013, the IAJC had adopted a Model Law on the Protection of Cultural Property in the Event of Armed Conflict,¹⁹⁰ with a view to providing States with guidance aimed at promoting the identification of cultural property

¹⁸⁸ See “The essential and fundamental elements of representative democracy and their relation to collective action within the framework of the Inter-American Democratic Charter” (CJI/RES. 159 (LXXV-O/09)), para. 3, in OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2009, OEA/Ser.Q/XIX.40, CJI/doc.338/09, 14 August 2009, pp. 44–45. Available from: www.oas.org/en/sla/iajc/docs/infoannual.cji.2009.eng.pdf.

¹⁸⁹ “Project for a Model Act on Simplified Stock Corporation” (CJI/RES. 188 (LXXX-O/12)), in OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2012, OEA/Ser.Q, CJI/doc.425/12, 10 August 2012, pp. 68 *et seq.* Available from: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2012.ENG.pdf.

¹⁹⁰ “Model legislation on protection of cultural property in the event of armed conflict” (CJI/doc.403/12 rev.5), in OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2013, OEA/Ser.Q, CJI/doc.443/13, 9 August 2013, pp. 41 *et seq.* Available from: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2013.ENG.pdf.

and its protection against theft, pillaging and vandalism, taking into account existing instruments in that area. The legislation included provisions on capacity-building, training programmes for officials and monitoring and compliance mechanisms; it also provided for the establishment of a cultural property protection fund.

14. In 2014, the IAJC had adopted a report on corporate social responsibility in the area of human rights and the environment in the Americas that had examined national legislation and corporate practice in the region and proposed a set of guidelines on the topic.¹⁹¹ The guidelines set forth a system of shared responsibility in which States and enterprises were called upon to comply with specific obligations; the system also involved the participation in that effort of other actors, including universities, NGOs, unions, the media and churches.

15. The aforementioned topics had dealt with areas of particular importance to member States and had resulted in reports containing specific proposals and recommendations of considerable interest both to States and their citizens. To the extent possible, the IAJC endeavoured to meet and even exceed the expectations of the OAS General Assembly in relation to the development, codification, harmonization and standardization of law in the region. As well as carrying out projects requested by the Assembly, the IAJC was developing its capacity to take up topics on its own initiative. Details of its activities, including its annual reports from the past 20 years, could be consulted on its website. He invited the Commission to send a representative to participate in the the next IAJC regular session in Rio de Janeiro in October 2016.

16. Mr. VÁZQUEZ-BERMÚDEZ, noting that the Inter-American Democratic Charter provided for the adoption of measures by the OAS Permanent Council in the event of an unconstitutional alteration of the constitutional regime that seriously impaired the democratic order in a member State, asked Mr. Collot what his understanding was of the scope of the notion of “alteration of the constitutional regime” in that context and whether he could cite any examples thereof, in the light of the practice or opinions of States or academic opinions. He observed that, while some provisions of the Charter made express mention of the need for the consent of the Government concerned prior to the adoption of certain specific measures, others did not – which could be interpreted as meaning that State consent was not required in all such situations. He asked whether the Charter, which was not a treaty, was legally binding nonetheless or, as some States asserted, purely a political instrument and whether, as might be inferred from its preamble, it could be understood as a subsequent agreement of member States in relation to the interpretation of provisions on democracy in the Charter of the Organization of American States, in the context of article 31 of the 1969 Vienna Convention.

17. Mr. COLLOT (Inter-American Juridical Committee) said that there was no clear-cut answer to the question

¹⁹¹ “Corporate social responsibility in the area of human rights and the environment in the Americas” (CJI/RES.2005 (LXXXIV-O/14), in OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2014, OEA/Ser.Q, CJI/doc.472/14, 25 September 2014, pp. 58 *et seq.* Available from: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2014.ENG.pdf.

of the legal status of the Inter-American Democratic Charter. As it had never been ratified by member States, it could not be considered to be an international treaty within the traditional meaning of that term; however, like certain other texts, such as model laws, it could be regarded as an international legal instrument understood in a broad sense. It had a certain referential value, inasmuch as all current reflection on representative democracy in the region was undertaken with reference to it. It had, for example, inspired a number of practices that were key to guaranteeing representative democracy, such as the deployment of electoral observation missions.

18. As to the unconstitutional alteration of the constitutional regime, an example of such a situation would be where a democratically elected head of State subsequently established, on the basis of his popularity, a sort of popular dictatorship which engaged in conduct – for example, the systematic violation of citizens’ rights and the mismanagement of State resources – that constituted a form of governance no longer capable of being characterized as representative of the general interests of the country. Thus, although the manner of the head of State’s election had been democratic, it had ultimately resulted in a *de facto* situation in which the democratic order had been impaired.

19. Mr. GÓMEZ ROBLEDO said that instruments produced within the inter-American system in the 1990s with a view to preventing and repressing the sort of the military *coups d’état* that had occurred in the preceding three decades did not take into account the infinitely more sophisticated alterations of representative democracy that currently existed. Although the Inter-American Democratic Charter sought to address those new threats, the procedure it had established, based on the cooperation of the Government concerned, had been criticized as ineffective. He asked whether the current IAJC study on representative democracy was being undertaken with a view to proposing to the OAS General Assembly amendments to the Charter or its transformation into a fully-fledged treaty.

20. Mr. COLLOT (Inter-American Juridical Committee) said that the two main approaches being considered by the IAJC in its study were precisely the transformation of the Inter-American Democratic Charter into an inter-American convention and the establishment of effective observance mechanisms. That said, it was still possible, as had been done in the past, to use the Charter in its present form as a basis for developing new mechanisms aimed at promoting representative democracy. Consideration should be given, for example, to ways of ensuring that sanctions directed against those responsible for political crises did not penalize the population at large.

21. Mr. KITTICHAISAREE said that the best way forward might be to identify any remaining gaps in the existing inter-American human rights regime and to seek to close them by, for instance, adopting additional protocols where appropriate. As to Governments that came to power irregularly, for example by a *coup d’état*, the matter should perhaps be dealt with as a question of the recognition of States under international law rather than within the framework of a particular treaty. He would be interested to know the extent to which the IAJC took account of the work of the Commission in its deliberations.

22. Mr. COLLOT (Inter-American Juridical Committee) said that the most important task in relation to the Inter-American Democratic Charter was to ensure its relevance for OAS member States and the achievement of its stated objectives. Any gaps in the Charter could be filled by drawing on existing provisions contained in the various international human rights treaties.

23. Mr. PARK, noting that only one State in the Latin American and Caribbean region had ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, said that he would be interested to know what approach the IAJC was planning to take in the area of State immunity. He wondered whether, for example, it was preparing a new regional convention or guidelines or considering promoting the ratification of the Convention among OAS member States with a view to enabling it to enter into force.

24. Mr. COLLOT (Inter-American Juridical Committee) said that it was important to reflect on the various aspects of the topic of State immunity, in anticipation of the Convention's entry into force and implementation.

25. Mr. MURPHY said that it was very interesting for the Commission to hear about the work of the IAJC and thereby further understand how laws and practices were developed within the inter-American system. Likewise, the Commission was working on a number of projects that were likely to be of interest to the IAJC, such as those on the protection of persons in the event of disasters and the identification of customary international law. Its work on the latter project concerned, among other things, regional customary international law, the possible existence of special custom between a small number of States and the persistent objector rule. He would welcome any observations on those matters, based on the work of the IAJC as a whole or Mr. Collot's own reflections.

26. Mr. KITTICHAISAREE, referring to the ruling of the International Court of Justice in the *Colombian-Peruvian asylum case*, in which the Court had found that no regional custom existed among Latin American States relating to the granting of asylum, asked whether there had been any change in that situation.

27. Mr. COLLOT (Inter-American Juridical Committee) said that there was indeed a body of customary international law in the region, especially the body of customary rules in the area of trade law that were commonly referred to as *lex mercatoria*. An important example of regional customary law was the Code of Private International Law (Bustamante Code),¹⁹² which was applied by States that had not signed or ratified it. Despite its subsequent amendment, some of the practices stemming from the Code still persisted in the region, and he would tend to consider those practices as regional customary rules.

28. Mr. CANDIOTI said that he would like to urge the IAJC to recommend OAS member States to ratify the United Nations Convention on Jurisdictional Immunities of States and Their Property, which represented a major advance in the law on immunity, with a view to its entry into force. It would be interesting to know whether the

IAJC had had the opportunity to examine the Commission's work; if so, he would welcome the comments of the IAJC thereon. The Commission would also welcome suggestions on new topics for inclusion in its long-term programme of work.

29. Mr. COLLOT (Inter-American Juridical Committee) said that the fact that the IAJC was conducting a survey among States to ascertain whether or not they had ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property served as encouragement in that regard. Nevertheless, he agreed that it was necessary to urge States to do so more directly.

30. As to interaction between the two bodies, he said that the bridge between the IAJC and the Commission had been set up so that each could benefit from the other's reflections and enrich their respective programmes of work. In that connection, the Commission's work on the protection of persons in the event of disasters was of particular interest to the IAJC.

31. The CHAIRPERSON thanked Mr. Collot for his valuable comments and observations.

The meeting rose at 11.35 a.m.

3306th MEETING

Friday, 27 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

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

Protection of the atmosphere¹⁹³ (A/CN.4/689, Part II, sect. A,¹⁹⁴ A/CN.4/692,¹⁹⁵ A/CN.4/L.875¹⁹⁶)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPporteur

1. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on the protection of the environment (A/CN.4/692).

¹⁹³ At its sixty-fifth session (2013), la Commission decided to include the topic in its programme of work and appointed Mr. Shinya Murase as Special Rapporteur for the topic (*Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168). At its sixty-seventh session (2015), the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, and the commentaries thereto (*Yearbook ... 2015*, vol. II (Part Two), pp. 19 *et seq.*, para. 54).

¹⁹⁴ Available from the Commission's website, documents of the sixty-eighth session.

¹⁹⁵ Reproduced in *Yearbook ... 2016*, vol. II (Part One).

¹⁹⁶ Available from the Commission's website, documents of the sixty-eighth session.

¹⁹² The Bustamante Code is annexed to the Convention on Private International Law, signed at Havana, 20 February 1928.