Document:-
A/CN.4/2865

Summary record of the 2865th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2005, **vol. I**

in which the authors discussed the effects of the proliferation of international courts. In the article they noted that two judges of the ICJ, Judge Schwebel and Judge Guillaume, had expressed their concern that such a development might affect the unity of international law, by leading to conflicts between the Court's judgments and those of other international tribunals, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court and WTO panels.

2. However, institutional fragmentation need not affect the continuity and unity of international law. In The *Development of International Law by the International Court*, Judge Hersch Lauterpacht had pointed out that the ICJ, by its nature as a court of law, would continue to play its role through the practice of referrals to the Court, notwithstanding the provisions of article 59 of its Statute, and that, pursuant to article 38, paragraph 1 (*d*), of the Statute, the Court was also to apply judicial decisions as subsidiary means for the determination of rules of law.[2] The weight of past decisions of international courts and awards of international arbitral tribunals would constitute a bulwark of international jurisprudence in the future.

3. Mr. ECONOMIDES, speaking on a point of clarification, said he had several times been criticized for distinguishing between "good" and "bad" fragmentation. All rules of international law, whether customary, conventional or institutional, other than rules of *jus cogens*, to which *lex specialis* did not apply, could be fragmented. Such fragmentation could, in his view, be positive in cases where it strengthened an international rule, or negative, in cases where it weakened that rule.

4. Mr. KOSKENNIEMI (Chairperson of the Study Group) said that it was perhaps unnecessary to draw conclusions at the present juncture. The Bureau had thought it useful to set aside the present meeting for discussion of the topic of fragmentation, as the last opportunity at the present session for members to provide input to the study to be produced by the Study Group. As the study would be rather substantial and lengthy, and as it would not be possible for the Commission to discuss it in its entirety at the next session, he had wanted to give members a chance to address some of its aspects at the current session.

5. Members appeared broadly to have endorsed the work of the Study Group and the direction it had taken. The five studies referred to in his briefing note had not been the subject of any detailed debate; indeed, it had not been his intention to hold such a debate at the present stage.

6. As Chairperson of the Study Group, he was pleased that it would be possible to continue the preparation of the substantive study and the conclusions in the period between the two sessions, on the basis of work done to date. The necessary documents would be available at the beginning of the fifty-eighth session for perusal and comment by members, so that conclusions could be adopted as early as possible.

7. There being no need for any detailed reflection on what had after all been a rather short debate, he proposed that the meeting should be suspended to enable the Study Group to convene and spend the remainder of the meeting dealing with other matters on its agenda.

8. The CHAIRPERSON said he took it that Mr. Koskenniemi's proposal was acceptable to the Commission.

It was so agreed.

The meeting rose at 3.20 p.m.

2865th MEETING

Thursday, 4 August 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

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

Draft report of the International Law Commission on the work of its fifty-seventh session (*continued*)*

Chapter IX. *Unilateral acts of states* (*concluded*)* (A/CN.4/L.672 and Add.1–2)

B. Consideration of the topic at the present session (A/CN.4/L.672/Add.1)

1. The CHAIRPERSON invited the members of the Commission to resume consideration of chapter IX of the draft report of the Commission, on unilateral acts of States.

Paragraph 25

2. Mr. PELLET proposed adding to the word "identify" in the second sentence the phrase "the legal regime applicable to" and, in the last line, amending the word "freedoms" to read "freedom of action".

Paragraph 25, as amended, was adopted.

Paragraph 26

3. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) drew attention to the first sentence and proposed that the word "political" should be deleted and that the word "legal" should be inserted before the word "obligations".

4. Mr. PAMBOU-TCHIVOUNDA proposed that the words "enter into obligations" in the first sentence should be replaced with "undertake commitments", which would make the word "legal" unnecessary, and that the words "and their legal regime" should be added at the end of the last sentence.

[2] London, Stevens and Sons, 1958.

* Resumed from the discussions at the 2863rd meeting.

5. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) insisted that the word "legal" was important, as it made it clear that the provision did not apply to all acts. As to the second sentence, he saw no reason to add the words "and their legal regime", since there was a reference to that effect in the preceding paragraph; paragraph 26 dealt only with identification.

6. Mr. PELLET noted that, in the light of the amendment that had been made to paragraph 25, the word "freedoms" in the first sentence should be amended to read "freedom to act".

7. The CHAIRPERSON suggested that the Commission should adopt the paragraph with the first sentence amended to read: "When taking States' freedom to act into consideration, it went without saying that there were acts by which States did not intend to enter into legal obligations" and with the words "and of their regime" added at the end of the paragraph.

Paragraph 26, as amended, was adopted.

Paragraph 27

8. Mr. ECONOMIDES noted that the two sentences were contradictory and proposed that the words "most often" should be inserted before the word "resulted" in the first sentence and that the second sentence should be redrafted to read: "In fact, the 'bilateralization' of an act could in some cases have nothing to do with treaty relations."

9. Mr. PELLET said that the words "most often" reflected a statistical position that changed the meaning; he proposed that the word "resulted" should be replaced with the words "could result".

10. Mr. BROWNLIE endorsed Mr. Pellet's proposal, although he did not think it would be enough to resolve the contradiction that had been pointed out.

11. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) explained that the fact that a relationship became bilateral did not necessarily mean that it derived from a conventional act, even if the State acquired rights arising from its acceptance of the obligation; consequently, a distinction must be made between "bilateralization" and the conventional nature of an act. He proposed that the paragraph should be amended to read: "The fact that the formulation of a unilateral act established a relationship with another State or States did not mean that the act was necessarily a conventional act."

12. Mr. PAMBOU-TCHIVOUNDA proposed that the second sentence should be amended to read: "However, such 'bilateralization' of a unilateral act was not always of a conventional nature": that would highlight the difference between the two sentences.

13. Mr. GALICKI, speaking on a point of order, recalled that the conclusions were those of the Special Rapporteur, and that only he was authorized to make substantive changes.

14. Mr. BROWNLIE, supported by Mr. ECONOMIDES and Mr. CHEE, endorsed the proposal made by the Special Rapporteur.

Paragraph 27, as amended by Mr. Rodríguez Cedeño, was adopted.

Paragraph 28

15. Mr. PELLET proposed that the word "*possible*" should be replaced with the words "*préférable*" in the French version.

Paragraph 28 was adopted, with a minor drafting change to the French version.

Paragraph 29

Paragraph 29 was adopted.

Paragraph 30

16. Mr. PELLET said that the examples given in parentheses were poorly chosen, as it was important to make a distinction between obligations on the one hand and renunciation and recognition on the other. He therefore proposed that the word "obligations" should be replaced by "promises".

Paragraph 30, as amended, was adopted.

Paragraph 31

17. Mr. PELLET proposed that the word "Conventions" should be amended to "Convention" and, in the French text, the words "*au vu de*" amended to "*étant donné*".

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

18. The CHAIRPERSON invited the Commission to consider document A/CN.4/L.672/Add.2.

Paragraph 1

19. Mr. BROWNLIE asked why the composition of the Working Group was not shown in the report.

20. The CHAIRPERSON explained that the Working Group was open-ended and that there was thus no reason to list the names of those who had participated in its work.

Paragraph 1 was adopted.

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Paragraph 5

21. Mr. GAJA proposed that the words "was likely to" in the first sentence should be replaced with the word "could". He also proposed that the phrase "whatever form they might take" should be deleted or reworded, and that the second part of the sentence should be amended to read

"it was possible, although often difficult in practice, to draw a distinction between unilateral conduct and unilateral acts *stricto sensu*".

22. Mr. ECONOMIDES said that he could accept Mr. Gaja's amendments in principle; however, the way in which he had reworded the second part of the first sentence introduced a substantive change. In his view, what was important was to indicate that such a distinction was possible.

23. Mr. MANSFIELD recalled that he had been one of those who had found it very difficult to make such a distinction in practice. He proposed that vaguer wording should be adopted, with the second part of the sentence reworded to read: "it would attempt to produce provisional conclusions in relation to unilateral acts *stricto sensu*". However, the wording proposed by Mr. Gaja was entirely acceptable.

24. Mr. PELLET said that the wording proposed by Mr. Mansfield had the merit of not distorting the content of the Working Group's efforts.

25. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he would prepare draft conclusions which the Working Group could consider.

Paragraph 5, as amended, was adopted.

Paragraph 6

26. Mr. PAMBOU-TCHIVOUNDA pointed out that the paragraph referred to "these principles", when no principles had been mentioned earlier.

27. The CHAIRPERSON suggested that the word "these" should be deleted and that the word "can" should be amended to "could".

28. Mr. ECONOMIDES, returning to the question of the distinction between unilateral conduct and unilateral acts *stricto sensu*, said that he saw a way out of the Commission's deadlock. Priority should be given to unilateral acts *stricto sensu*, while indicating that the principles in question would have to do with unilateral acts.

29. The CHAIRPERSON noted that the report was that of the Working Group, and the Commission would have to limit itself to what had actually been said during the Group's debates.

30. Mr. PELLET said that ambiguity was sometimes a good thing. The Commission should be careful not to be too categorical, for while the Working Group had agreed to focus on formal acts, they should not be given priority. His preference would be to accept Mr. Mansfield's proposal, for the wording proposed by Mr. Economides was too "strong", to his way of thinking.

31. Mr. MATHESON said that Mr. Pambou-Tchivounda had been right to question the use of the word "principles". Paragraph 5 contained references to question and conclusions, but said nothing about principles. It would therefore be better to use one of those terms.

32. Mr. CHEE agreed with Mr. Pambou-Tchivounda and said that it was necessary to specify which principles were meant.

33. Mr. PELLET said that the Working Group had spoken of applicable principles and provisional conclusions. He proposed that the words "as necessary" should be inserted after the words "Special Rapporteur".

34. The CHAIRPERSON suggested that the words "these principles" should be replaced with "provisional conclusions".

It was so agreed.

Paragraph 6, as amended, was adopted.

Section B, as amended, was adopted.

Chapter IX of the report of the Commission as a whole was adopted, as amended.

Chapter X. *Reservations to treaties* (A/CN.4/L.671 and Add.1–2 and Corr.1)

35. The CHAIRPERSON invited the Commission to consider chapter X of the draft report of the Commission (A/CN.4/L.671).

A. Introduction

Paragraphs 1 to 10 were adopted.

Section A was adopted.

C. Text of draft guidelines on reservations to treaties provisionally adopted so far by the Commission

Paragraph 11

Paragraph 11 was adopted.

36. The CHAIRPERSON invited the Commission to consider document A/CN.4/L.671/Add.2.

Guideline 2.6 (Formulation of objections to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) of the commentary were adopted.

Guideline 2.6.1 (Definition of objections to reservations)

Paragraphs (1) to (9) of the commentary were adopted.

Paragraph (10)

37. Mr. GAJA said that the second part of the first sentence was awkward and should be amended. He therefore proposed that it should read: "which envisages that the author of the objection may indicate whether it opposes the entry into force of the treaty between it and the author of the reservation".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

38. Mr. PELLET (Special Rapporteur) said that the title of the study by Pierre-Henri Imbert, cited in a footnote, should be rendered in full by inserting the words "*du 30 juin 1977*" after the words "*décision arbitrale*".

Paragraph (12) was adopted, with the above-mentioned minor drafting change in the French version.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

Paragraph (15)

39. Mr. GAJA proposed that the word "reservations" in the clause in the text immediately following the footnote marker should be replaced with the word "statements".

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Paragraph (19)

40. Mr. GAJA proposed that the words "other reactions, of the same type" in the first sentence should be amended to read "reactions of the type mentioned above".

Paragraph (19), as amended, was adopted.

Paragraphs (20) to (22)

Paragraphs (20) to (22) were adopted.

Paragraph (23)

41. Mr. GAJA proposed that the words "to be associated" should be replaced with the words "to enter treaty relations" and that the words "exclusion of treaty relations" should be replaced with "effect of the reservation".

Paragraph (23), as amended, was adopted.

Paragraph (24)

Paragraph (24) was adopted.

Paragraph (25)

42. Mr. ECONOMIDES noted that the Special Rapporteur reserved the position of the Commission with regard to the validity of objections producing a "super-maximum" effect; it should also reserve its position on the validity of objections producing an intermediate effect. Accordingly, he proposed that the beginning of the paragraph should be amended to read: "The Commission is aware that the validity of the objections mentioned in paragraphs 23 and 24 has sometimes been questioned".

43. Mr. PELLET (Special Rapporteur) said that he would prefer to retain the first sentence as drafted and replace the words "this 'super-maximum' effect" in the second sentence with "such intermediate or 'super-maximum' effects".

44. Mr. MATHESON proposed that the word "sometimes" should be deleted from the first sentence and that the final sentence of the first footnote should be moved to the end of the paragraph.

Paragraph (25), as amended, was adopted.

Paragraph (26)

45. Mr. GAJA proposed that the word "not" should be inserted after the words "and even" in the second sentence.

Paragraph (26), as amended, was adopted.

Paragraph (27)

Paragraph (27) was adopted.

Guideline 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Section C, as amended, was adopted.

Chapter XI. *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* (A/CN.4/ L.676 and Corr.1 and A/CN.4/L.677)

46. The CHAIRPERSON invited the Commission to consider document A/CN.4/L.677.

A. Introduction

B. Consideration of the topic at the present session

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Sections A and B were adopted.

C. Report of the Study Group (A/CN.4/676 and Corr.1)

47. Mr. ECONOMIDES said that he would like to be mentioned by name in paragraph 23 of the report of the Study Group on Fragmentation of international law, which contained a reference to "one of its members", so that no one would think that he had wished to remain anonymous.

48. Mr. MIKULKA (Secretary to the Commission) said that as the document was an informal one, it was not the practice of the Commission to mention individuals by name; however, he saw no problem in doing so if that was the wish of the Study Group.

49. Mr. KOSKENNIEMI (Chairperson of the Study Group) said that he had no set opinion on the matter.

50. The CHAIRPERSON said that Mr. Economides would be referred to by name in paragraph 23 of the report of the Study Group.

51. The CHAIRPERSON said that it was his understanding that the Commission wished to take note of the report of the Study Group on Fragmentation of international law (A/CN.4/L.676 and Corr.1).

It was so decided.

Section C, as amended, was adopted.

Chapter XI of the draft report of the Commission as a whole, as amended, was adopted.

Chapter XII. ***Other decisions and conclusions of the Commission*** **(A/CN.4/L.678)**

A. Programme, procedures and working methods of the Commission and its documentation [paras. 1–8]

B. Date and place of the fifty-eighth session of the Commission [para. 9]

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Sections A and B were adopted.

C. Cooperation with other bodies

Paragraph 10

52. Ms. ESCARAMEIA proposed that Ms. Villalta Vizcaya's title should be indicated, as had been done in the case of the other visitors mentioned in the report.

Paragraph 10, as amended, was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Paragraph 13

53. Ms. ESCARAMEIA proposed that Mr. Guy de Vel's title should be indicated.

Paragraph 13, as amended, was adopted.

Paragraph 14

54. Mr. BROWNLIE said that the word "of" should be inserted before the word "responsibility".

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

55. Mr. PELLET proposed that a new paragraph 15 *bis* should be inserted indicating that on 4 August 2005 an informal exchange of views on issues of mutual interest, and in particular on the topic "Reservations to treaties", had been held between the members of the Commission and the members of the Sub-Commission on the Promotion and Protection of Human Rights.

New paragraph 15 bis *was adopted.*

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

56. The CHAIRPERSON said he would take it that the Commission wished to adopt paragraph 17 with the text completed to read: "Moreover, at its 2865th meeting, on 4 August 2005, the Commission requested Mr. Brownlie, Special Rapporteur on the topic 'Effects of armed conflicts on treaties', to attend the sixtieth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35."

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 30

Paragraphs 18 to 30 were adopted.

Section C, as amended, was adopted.

Chapter XII of the draft report of the Commission as a whole was adopted.

Chapter I. ***Introduction*** **(A/CN.4/L.673)**

57. The CHAIRPERSON invited the Commission to consider chapter I of the draft report of the Commission (A/CN.4/L.673).

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Chapter I as a whole was adopted.

Chapter II. ***Summary of the work of the Commission at its fifty-seventh session*** **(A/CN.4/L.679)**

58. The CHAIRPERSON invited the Commission to consider chapter II of the draft report of the Commission

Paragraph 1

59. Mr. GAJA said that a sentence should be added at the end of the paragraph to indicate what the Working Group had actually done during the session.

60. The CHAIRPERSON said that the Commission secretariat would attend to the matter.

Paragraph 1 was adopted.

Paragraph 2

61. Mr. PELLET said that the last sentence of the paragraph was not consistent with the facts: the Commission had not approved the Special Rapporteur's proposal to prepare a questionnaire for circulation to Member States.

62. Mr. BROWNLIE (Special Rapporteur on the topic of Effects of armed conflicts on treaties) said that it was not a questionnaire that was involved, but a written request for information; he believed that the problem was one of translation.

63. The CHAIRPERSON said that the French and Spanish versions would be aligned with the English text.

Paragraph 2 was adopted.

Paragraph 3

64. Mr. PELLET said that the words "and the commentaries thereto" should be inserted after the words "nine draft articles" and also after the words "two draft guidelines" in paragraph 7.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

65. Mr. PELLET said that the words "part of" should be inserted after the word "considered" in the first sentence.

Paragraph 7, as amended, was adopted.

Paragraph 8

66. Mr. KOSKENNIEMI (Chairperson of the Study Group on Fragmentation of international law) said that the words "preliminary reports" in the second sentence should be replaced with the words "final report" and that a full stop should be inserted after the words "conflict rules" in the same sentence. The following sentence should be amended to begin: "The Study Group also received the final report on the Study concerning the modification …". In addition, he proposed that a sentence should be added at the end of the paragraph, which would read: "The Study Group decided to submit a consolidated study and a set of conclusions, guidelines or principles to the fifty-eighth session of the Commission (2006)."

67. Mr. GAJA asked whether it was wise to announce so categorically what the Study Group intended to do the following year.

68. Mr. MANSFIELD, addressing Mr. Gaja's comment, suggested that the wording proposed by Mr. Koskenniemi should be reworded to read: "The Study Group considered that it would be in a position to submit a consolidated study …".

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

69. Mr. ECONOMIDES said that for the sake of clarity the words "of the Council of Europe" should be inserted after the words "Public International Law".

Paragraph 10, as amended, was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Chapter II as a whole was adopted, as amended.

The meeting rose at 1.05 p.m.

2866th MEETING

Friday, 5 August 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

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

Draft report of the Commission on the work of its fifty-seventh session (*concluded*)

Chapter X. *Reservations to treaties* (*concluded*) (A/CN.4/L.671 and Add.1–2 and Corr.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter X of the draft report and drew attention in that connection to the portion of the chapter contained in document A/CN.4/L.671/Add.1.

B. Consideration of the topic at the current session

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

1. Introduction by the Special Rapporteur of his tenth report

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

2. Mr. PAMBOU-TCHIVOUNDA drew attention to the French text and said that the words "*Se tournant vers*" in the first sentence should be modified.

Paragraph 11 was adopted.

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.